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constitutional clauses relating to arms from the thirty-seven states which have such constitutional language are as follows:

Alabama: That every citizen has a right to bear arms in defense of himself and the state. ALA. CONST. art I, §26.

Alaska: 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. ALASKA CONST. art. I, § 19.

Arizona: The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. ARIZ. CONST. art. II, § 26.

Arkansas: The citizens of this State shall have the right to keep and bear arms for their common defense. ARK. CONST. art. II, § 5.

Colorado: The right of no person to keep and bear arms in defense of his home person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons. COLO. CONST. art. II, § 13.

Connecticut: Every citizen has a right to bear arms in defense of himself and the state. CONN. CONST. art. I, § 15.

Florida: The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law. FLA. CONST. art. I, § 8.

Georgia: The right of the people to keep and bear arms, shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne. GA. CONST. art I, § 1.

Hawaii: 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. HAWAII CONST. art I, § 15.

Idaho: The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation

providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms, except those actually used in the commission of a felony. IDAHO CONST. art. I, § 11.

Illinois: Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed. ILL. CONST. art. I, § 22.

Indiana: The people shall have a right to bear arms, for the defense of themselves and the State. IND. CONST. art I, § 32.

Kansas: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power. KAN. CONST., Bill of Rights, § 4.

Kentucky: All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: ...The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons. KY. CONST. § 1.

Louisiana: The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person. LA. CONST. art. I, § 4.

Maine: Every citizen has the right to keep and bear arms for the common defense; and this right shall never be questioned. ME. CONST. artl, § 16.

Massachusetts: The people have a right to keep and bear arms for the common defence. And as, in times 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. pt. 1, art. 17.

Michigan: Every person has a right to keep and bear arms for the defense of himself and the state. MICH. CONST. art I, § 6.

Mississippi: The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power where thereto legally summoned, shall not be called question, but the legislature may regulate or forbid carrying concealed weapons. MISS. CONST. art. III, § 12.

Missouri: That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons. MO. CONST. art I, § 23.

Montana: The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons. MONT. CONST. art II, § 12.

New Mexico: No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreation use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. N.M. CONST. art. II, § 6.

North Carolina: 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; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice. N.C. CONST. art. I, § 30.

Ohio: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power. OHIO CONST. art I, § 4.

Oklahoma: The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons. OKLA. CONST. art. II, § 26.

Oregon: The people shall have the right to bear arms for the defense of themselves, and the State, but the Military shall be kept in strict subordination to the civil power. OR. CONST. art. I, § 27.

Pennsylvania: The right of the citizens to bear arms in defence of themselves and the State shall not be questioned. PA. CONST. art. I, § 22.

South Carolina: 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. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner not in time of war but in the manner prescribed by law. S.C. CONST. art I, § 20.

South Dakota: The right of the citizens to bear arms in defense of themselves and the state shall not be denied. S.D. CONST. art. VI, § 24.

Tennessee: That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime. TENN. CONST. art. I, § 26.

Texas: Every citizen shall have the right to keep and bear arms in the lawful defence of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime. TEX. CONST. art. I, § 23.

Utah: The people have the right to bear arms for their security and defense, but the Legislature may regulate the exercise of this right by law. UTAH CONST. art. I, § 6.

Vermont: That the people have a right to bear arms for the defence of themselves and the State-and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should b kept under strict subordination to and governed by the civil power. VT. CONST. ch. 1, art. 16.

Virginia: 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, therefore, the right of the

people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that all cases the military should be under strict subordination to, and governed by, the civil power. VA. CONST. art. I, § 13.

Washington: The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. WASH. CONST. art. I, § 24.

Wyoming: The right of citizens to bear arms in defense of themselves and of the state shall not be denied. WYO. CONST. art I, § 24.

In addition, thirteen states do not have express constitutional provisions related to the right to keep and bear arms.

I would be happy to discuss this matter with you in more detail.

Sincerely,

Norman C. Gorsuch
Attorney General

NCG:ml

Distribution of
identical letter: The Honorable Jalmar M. Kerttula
Alaska State Senate

The Honorable Rick Halford
Alaska State Senate

The Honorable Don Bennett
Alaska State Senate

STATE OF ALASKA
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MAR 26 1986
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Administration

March 26, 1986

The Honorable Vic Fischer
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: S.J.R. 39

Dear Senator Fischer:

You have asked for the Department of Law's comments upon the current language of S.J.R. 39, a resolution proposing an amendment to Article I, sec. 19 of the state constitution, relating to a citizen's right to keep and bear arms. As I understand it, S.J.R. 39, as amended on the Senate floor yesterday, provides that art. I, sec. 19 of the Alaska Constitution will be amended to read:

> SECTION 19. RIGHT TO KEEP AND BEAR ARMS. The [A WELL-REGULATED MILITIA BEING NECESSARY TO THE SECURITY OF A FREE STATE, THE] right of each citizen of the state [THE PEOPLE] to keep and bear arms for lawful defense of self, family, property, and the state and for lawful hunting, recreation, and other lawful purposes, shall not be infringed by a state or by a borough or city of the state.

We are concerned that the language presently contained in S.J.R 39 might allow later constitutional challenge to some existing state statutes. Present law, for example, prohibits a convicted felon from possessing a concealable firearm, prohibits possession of certain weapons such as bombs, hand grenades, silencers, and sawed-off shot guns, prohibits possession of a firearm while intoxicated, or the discharge of a firearm from, on, or across a highway, the carrying of a concealed weapon, possession of a loaded firearm on licensed premises, or possession of a firearm by a minor without parental consent. (See AS 11.61.200-.220.)

These statutes serve an important public safety function by carefully regulating the possession of especially dangerous weapons or weapons carried in an especially dangerous manner or place. If the legislature does not intend to render

those statutes unenforceable, nor to foreclose a future legislature from adopting similar provisions (prohibiting possession of loaded firearms in a church or on school grounds, for example), than the legislature's intent to continue to allow reasonable regulation by law should be made clear. The possibility that the language proposed in S.J.R. 39 could be interpreted as invalidating some portions of Alaska's present criminal code is a real one. See, for example, State v. Kassler, 614 P.2d 94 (Ore. 1980), and State v. Delgado, 692 P.2d 610 (Ore. 1984).

We believe that any possible ambiguity could be eliminated by the addition, at the end of the current language, of the phrase "except that the manner of keeping and bearing arms may be regulated by law." This suggested language is based upon similar provisions in the constitutions of several other states, including Florida (art. I, sec. 8), Georgia (art. I, sec. 1), and Utah (art. I, sec. 6). The addition of this clause would make it clear that, although a citizen's basic right to keep and bear arms may not be infringed, reasonable and appropriate regulation of the manner in which arms are kept or borne (i.e., possession by felons, by minors, in a bar, while intoxicated, etc.) is not an infringement on an individual's constitutional right. Mr. Rupe Andrews, Alaska Field Representative for the National Rifle Association, has indicated that his organization would not object to the inclusion of this additional language in S.J.R. 39. I also suggest that you consider retaining the language in the present constitutional provision "the people," rather than change it to "each citizen of the state." State constitutional provisions have traditionally recognized the equal rights of all residents of the state, regardless of the resident's national origin.

A carefully drafted amendment would minimize the possibility that, should the proposed constitutional amendment be adopted, a criminal defendant would later be able to argue that a criminal weapons misconduct statute is unconstitutional because it violates his right to keep and bear arms under art. I, sec. 19 of the state constitution.

Sincerely,

Harold M. Brown
Attorney General

HMB:GAR:gb-13

SJR 15

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Bill Sheffield, Governor

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

May 8, 1986

The Honorable M. Mike Miller
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Representative Miller:

You have asked this office to comment upon the effect of "legislative intent" language currently contained in a resolution now under consideration by the House Judiciary Committee: CS SJR 39 (Jud) am. This resolution, if passed, would place a proposed constitutional amendment before the voters at the next general election. The resolution contains an amendment to art. I, sec. 19 of the state constitution, relating to a citizen's right to keep and bear arms. The stated purpose of the proposed amendment is to establish that the right to keep and bear arms under the state constitution is an individual right, rather than a collective one.

The proposed constitutional amendment now states that a citizen's right to keep and bear arms "shall not be infringed by the state or by a borough or city of the state." During consideration of CS SJR 39 (Jud) am on the Senate floor Senator Vic Fischer proposed an amendment which would have added the phrase "except that the manner of keeping and bearing arms may be regulated by law." This proposed amendment was rejected by the Senate on a vote of 16 to 2. See Senate Journal, March 26, 1986, at pp. 2166-2167. The Judiciary Committee version of the resolution, adopted with amendment by the Senate, contains a section entitled "legislative intent." Section 2 of CS SJR 39 (Jud) am now provides, in part, that the proposed constitutional amendment "should not be construed to preclude the regulation of the manner in which arms may be borne, carried, or used."

We are concerned that the language presently contained in CS SJR 39 (Jud) am might allow later constitutional challenge to some existing state statutes. Present law, for example, prohibits a convicted felon from possessing a concealable firearm, prohibits possession of certain weapons such as bombs, hand grenades, silencers, and sawed-off shot guns, prohibits possession of a firearm while intoxicated, the discharge of a firearm from, on, or across a highway, the carrying of a concealed weapon, possession of a loaded firearm

on licensed premises, or possession of a firearm by a minor without parental consent. (See AS 11.61.200-11.61.220.)

These statutes serve an important public safety function by restricting the possession of especially dangerous weapons or weapons carried in an especially dangerous manner or place. If the legislature does not intend that the proposed amendment of art. I, sec. 19 would render these statutes unenforceable, nor foreclose a future legislature from adopting similar provisions (prohibiting possession of loaded firearms in a church or on school grounds, for example), then the legislature's intent to continue to allow reasonable regulation by law should be made clear.

It may be that the Senate, in rejecting the amendment proposed by Senator Fischer but adopting section 2 of CS SJR 39 (Jud) am, believed that it was not necessary to explicitly state in the proposed constitutional provision that regulation of firearms by law is allowed, as this point is included in their "legislative intent" language. As a general rule, however, a measure will be enforced according to the plain meaning of the language on its face. 2A C. Sands, Sutherland Statutory Construction § 45.02 at 4 (4th ed. 1984); Wilson v. Municipality of Anchorage, 669 P.2d 569, 571 (Alaska 1983). It is a "fundamental principle of statutory interpretation ... that a statute means what its language reasonably conveys to others..." North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534, 540 (Alaska 1978); South Central Health Planning v. Commissioner, Dept. of Administration, 628 P.2d 551, 553 (Alaska 1981). 1/

While the courts in Alaska may consider a measure's legislative history to the extent it may assist the court in correctly interpreting the measure, a legislative committee report or formal statement of legislative intent may not be used to give the statute a meaning not fairly contained within its words. Chicago, M., St. P. & P. R. Co. v. Acme Fast Freight, 336 U.S. 465, 93 L.Ed.2d 817, 69 S.Ct. 692 (1949); North Slope Borough, 585 P.2d at 540.

1/ Although general rules of legal interpretation are most often expressed in the context of statutory interpretation, the same rules apply to the interpretation of legislative resolutions and constitutional amendments. 1A C. Sands, Sutherland Statutory Construction § 29.08 at 500 (4th ed. 1985).

When a reviewing court decides that it must consider the legislature's intent in order to construe a provision, the text of the measure itself is still considered the best evidence of legislative intent. See 2A C. Sands, Sutherland Statutory Construction § 46.03 at 82 (4th ed. 1984) and the cases cited there. Where the terms of a provision are clear and straightforward, the intent of the legislature will be based on those terms, even if the apparent intent conflicts with a statement of legislative intent or a committee report. See Caminetti v. United States, 242 U.S. 470, 61 L.Ed. 442, 37 S.Ct. 192 (1917) and 2A C. Sands, Sutherland Statutory Construction § 48.06 at 308 (4th ed. 1984).

In Commercial Fisheries Entry Commission v. Apokedak, 680 P.2d 486 (Alaska 1984) Apokedak, relying upon legislative intent language contained in the "preamble" to the Limited Entry Act, urged the state supreme court not to adopt a literal construction of the act. The court refused to adopt the interpretation suggested by Apokedak, stating: "a statutory preamble ... can neither restrain nor extend the meaning of an unambiguous statute; nor can it be used to create doubt or uncertainty which does not otherwise exist." 680 P.2d at 488, n.3. Thus, to the extent that language contained in the "legislative intent" section of CS SJR 39 (Jud) am conflicts with the plain meaning of the terms of the constitutional provision, it is the constitutional language which will control.

The courts may also consider the history of legislative action taken on a given measure when determining legislative intent. Generally, the rejection of a proposed amendment indicates that the legislature did not intend the bill to include the provisions embodied in the rejected amendment. Lapina v. Williams, 232 U.S. 78, 58 L.Ed. 515, 34 S.Ct. 196 (1914); United States v. Great Northern Railway Co., 287 U.S. 144, 155, 77 L.Ed. 223, 53 S.Ct. 28 (1932); 2A C. Sands, Sutherland Statutory Construction § 48.04 at 302, § 48.18 at 341 (4th ed. 1984). Thus, a reviewing court may well conclude that if the legislature had intended to allow the continued regulation by law of some aspects of a person's right to possess arms it would have adopted the language proposed by Senator Fischer during the Senate's consideration of the resolution. See, e.g., North Slope Borough, 585 P.2d at 541; Wilson, 669 P.2d at 571.

Perhaps the most important consideration here is that in the case of a measure (such as this one) which is to be decided by a vote of the electorate, descriptive statements accompanying the proposition are an important source of

guidance for interpretation. 2A C. Sands, Sutherland Statutory Construction § 48.04 at 301, § 48.19 at 345 (4th ed. 1984); State v. Lewis, 559 P.2d 630, 637-638 (Alaska 1977), cert. denied, 97 S.Ct. 2943, 432 U.S. 901, 53 L.Ed.2d 1073.

Under art. XIII, sec. 1 of the Alaska Constitution, the lieutenant governor is required to prepare a ballot title and a summary of the proposed constitutional amendment. The election pamphlet prepared pursuant to AS 15.58.010 must contain: 1) the text of the proposed constitutional amendment, 2) the ballot title and summary prepared by the lieutenant governor, 3) "a neutral summary" of the proposition prepared by the Legislative Affairs Agency, and 4) advocatory statements for and against the proposed amendment. AS 15.58.020(6). Thus, although the resolution directs the Legislative Affairs Agency to "consider" the statement contained in section 2 of CS SJR 39 (Jud) am when preparing its neutral summary for the ballot, this language will not appear on the ballot, and may well not appear in the elections pamphlet. Since, in the final instance, a reviewing court will look to the intent in the minds of the voters who voted to adopt the constitutional amendment, the legislature's statement of its intent when placing the measure on the ballot has limited significance. Lewis, 559 P.2d at 637-638.

One of the main purposes of a constitution is to limit legislative power. Ordinary acts of the legislature (i.e., statutes), whether adopted before or after a given constitutional provision, cannot be given effect if the statute conflicts with a substantive provision in the constitution. Thus, an amendment to the constitution may expressly, or by implication, repeal existing legislative enactments. Rhode Island v. Palmer, 253 U.S. 350, 64 L.Ed. 946, 40 S.Ct. 486 (1919); 1A C. Sands, Sutherland Statutory Construction § 23.20 at 387 (4th ed. 1985). The possibility that the language proposed in SJR 39 could be interpreted as invalidating some portions of Alaska's present criminal code is a real one, as this has occurred in similar circumstances in other states. See, for example, State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980) and State v. Delgado, 298 Or. 395, 692 P.2d 610 (1984).

Principals of both common sense and responsible draftsmanship dictate that a well-drafted statute or constitutional provision should reduce the need for disputes about interpretation. 2A C. Sands, Sutherland Statutory Construction § 45.02 at 5 (4th ed. 1984). Statements of "legislative intent" are not an adequate substitute for clear, unambiguous language in the proposed constitutional amendment. A more precisely drafted amendment would minimize the

possibility that, should the proposed constitutional amendment be adopted, a criminal defendant would later be able to argue that a criminal weapons misconduct statute is unconstitutional because it violates his right to keep and bear arms under art. I, sec. 19 of the state constitution.

Sincerely,

Harold M. Brown
Attorney General

97th Congress
2d Session } COMMITTEE PRINT

THE RIGHT TO KEEP AND BEAR ARMS

REPORT

OF THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

FEBRUARY 1982

Printed for the use of the Committee on the Judiciary

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PREFACE

"To preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them." (Richard Henry Lee, Virginia delegate to the Continental Congress, initiator of the Declaration of Independence, and member of the first Senate, which passed the Bill of Rights.)

"The great object is that every man be armed . . . Everyone who is able may have a gun." (Patrick Henry, in the Virginia Convention on the ratification of the Constitution.)

"The advantage of being armed . . . the Americans possess over the people of all other nations . . . 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." (James Madison, author of the Bill of Rights, in his Federalist Paper No. 26.)

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." (Second Amendment to the Constitution.)

In my studies as an attorney and as a United States Senator, I have constantly been amazed by the indifference or even hostility shown the Second Amendment by courts, legislatures, and commentators. James Madison would be startled to hear that his recognition of a right to keep and bear arms, which passed the House by a voice vote without objection and hardly a debate, has since been construed in but a single, and most ambiguous, Supreme Court decision, whereas his proposals for freedom of religion, which he made reluctantly out of fear that they would be rejected or narrowed beyond use, and those for freedom of assembly, which passed only after a lengthy and bitter debate, are the subject of scores of detailed and favorable decisions. Thomas Jefferson, who kept a veritable armory of pistols, rifles and shotguns at Monticello, and advised his nephew to forsake other sports in favor of hunting, would be astounded to hear supposed civil libertarians claim firearm ownerhsip should be restricted. Samuel Adams, a handgun owner who pressed for an amendment stating that the "Constitution shall never be construed . . . to prevent the people of the United States who are peaceable citizens from keeping their own arms," would be shocked to hear that his native state today imposes a year's sentence, without probation or parole, for carrying a firearm without a police permit.

CORRECTION

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02–576(2/77)

97th Congress
2d Session

COMMITTEE PRINT

THE RIGHT TO KEEP AND BEAR ARMS

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PREFACE

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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." (Second Amendment to the Constitution.)

In my studies as an attorney and as a United States Senator, I have constantly been amazed by the indifference or even hostility shown the Second Amendment by courts, legislatures, and commentators. James Madison would be startled to hear that his recognition of a right to keep and bear arms, which passed the House by a voice vote without objection and hardly a debate, has since been construed in but a single, and most ambiguous, Supreme Court decision, whereas his proposals for freedom of religion, which he made reluctantly out of fear that they would be rejected or narrowed beyond use, and those for freedom of assembly, which passed only after a lengthy and bitter debate, are the subject of scores of detailed and favorable decisions. Thomas Jefferson, who kept a veritable armory of pistols, rifles and shotguns at Monticello, and advised his nephew to forsake other sports in favor of hunting, would be astounded to hear supposed civil libertarians claim firearm ownerhsip should be restricted. Samuel Adams, a handgun owner who pressed for an amendment stating that the "Constitution shall never be construed . . . to prevent the people of the United States who are peaceable citizens from keeping their own arms," would be shocked to hear that his native state today imposes a year's sentence, without probation or parole, for carrying a firearm without a police permit.

This is not to imply that courts have totally ignored the impact of the Second Amendment in the Bill of Rights. No fewer than twenty-one decisions by the courts of our states have recognized an individual right to keep and bear arms, and a majority of these have not only recognized the right but invalidated laws or regulations which abridged it. Yet in all too many instances, courts or commentators have sought, for reasons only tangentially related to constitutional history, to construe this right out of existence. They argue that the Second Amendment's words "right of the people" mean "a right of the state"—apparently overlooking the impact of those same words when used in the First and Fourth Amendments. The "right of the people" to assemble or to be free from unreasonable searches and seizures is not contested as an individual guarantee. Still they ignore consistency and claim that the right to "bear arms" relates only to military uses. This not only violates a consistent constitutional reading of "right of the people" but also ignores that the second amendment protects a right to "keep" arms. These commentators contend instead that the amendment's preamble regarding the necessity of a "well regulated militia . . . to a free state" means that the right to keep and bear arms applies only to a National Guard. Such a reading fails to note that the Framers used the term "militia" to relate to every citizen capable of bearing arms, and that Congress has established the present National Guard under its power to raise armies, expressly stating that it was not doing so under its power to organize and arm the militia.

When the first Congress convened for the purpose of drafting a Bill of Rights, it delegated the task to James Madison. Madison did not write upon a blank tablet. Instead, he obtained a pamphlet listing the State proposals for a bill of rights and sought to produce a briefer version incorporating all the vital proposals of these. His purpose was to incorporate, not distinguish by technical changes, proposals such as that of the Pennsylvania minority, Sam Adams, or the New Hampshire delegates. Madison proposed among other rights that "That 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." In the House, this was initially modified so that the militia clause came before the proposal recognizing the right. The proposals for the Bill of Rights were then trimmed in the interests of brevity. The conscientious objector clause was removed following objections by Elbridge Gerry, who complained that future Congresses might abuse the exemption to excuse everyone from military service.

The proposal finally passed the House in its present form: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.:" In this form it was submitted into the Senate, which passed it the following day. The Senate in the process indicated its intent that the right be an individual one, for private purposes, by rejecting an amendment which would have limited the keeping and bearing of arms to bearing "For the common defense".

The earliest American constitutional commentators concurred in giving this broad reading to the amendment. When St. George

Tucker, later Chief Justice of the Virginia Supreme Court, in 1803 published an edition of Blackstone annotated to American law, he followed Blackstone's citation of the right of the subject "of having arms suitable to their condition and degree, and such as are allowed by law" with a citation to the Second Amendment, "And this without any qualification as to their condition or degree, as is the case in the British government." William Rawle's "View of the Constitution" published in Philadelphia in 1825 noted that under the Second Amendment: "The prohibition is general. No clause in the Constitution could by a 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 blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both." The Jefferson papers in the Library of Congress show that both Tucker and Rawle were friends of, and corresponded with, Thomas Jefferson. Their views are those of contemporaries of Jefferson, Madison and others, and are entitled to special weight. A few years later, Joseph Story in his "Commentaries on the Constitution" considered the right to keep and bear arms as "the palladium of the liberties of the republic", which deterred tyranny and enabled the citizenry at large to overthrow it should it come to pass.

Subsequent legislation in the second Congress likewise supports the interpretation of the Second Amendment that creates an individual right. In the Militia Act of 1792, the second Congress defined "militia of the United States" to include almost every free adult male in the United States. These persons were obligated by law to possess a firearm and a minimum supply of ammunition and military equipment. This statute, incidentally, remained in effect into the early years of the present century as a legal requirement of gun ownership for most of the population of the United States. There can be little doubt from this that when the Congress and the people spoke of a "militia", they had reference to the traditional concept of the entire populace capable of bearing arms, and not to any formal group such as what is today called the National Guard. The purpose was to create an armed citizenry, which the political theorists at the time considered essential to ward off tyranny. From this militia, appropriate measures might create a "well regulated militia" of individuals trained in their duties and responsibilities as citizens and owners of firearms.

If gun laws in fact worked, the sponsors of this type of legislation should have no difficulty drawing upon long lists of examples of crime rates reduced by such legislation. That they cannot do so after a century and a half of trying—that they must sweep under the rug the southern attempts at gun control in the 1870–1910 period, the northeastern attempts in the 1920–1939 period, the attempts at both Federal and State levels in 1965–1976—establishes the repeated, complete and inevitable failure of gun laws to control serious crime.

Immediately upon assuming chairmanship of the Subcommittee on the Constitution, I sponsored the report which follows as an effort to study, rather than ignore, the history of the controversy over the right to keep and bear arms. Utilizing the research capa-

bilities of the Subcommittee on the Constitution, the resources of the Library of Congress, and the assistance of constitutional scholars such as Mary Kaaren Jolly, Steven Halbrook, and David T. Hardy, the subcommittee has managed to uncover information on the right to keep and bear arms which documents quite clearly its status as a major individual right of American citizens. We did not guess at the purpose of the British 1689 Declaration of Rights; we located the Journals of the House of Commons and private notes of the Declaration's sponsors, now dead for two centuries. We did not make suppositions as to colonial interpretations of that Declaration's right to keep arms; we examined colonial newspapers which discussed it. We did not speculate as to the intent of the framers of the second amendment; we examined James Madison's drafts for it, his handwritten outlines of speeches upon the Bill of Rights, and discussions of the second amendment by early scholars who were personal friends of Madison, Jefferson, and Washington and wrote while these still lived. What the Subcommittee on the Constitution uncovered was clear—and long-lost—proof that the second amendment to our Constitution was intended as an individual right of the American citizen to keep and carry arms in a peaceful manner, for protection of himself, his family, and his freedoms. The summary of our research and findings forms the first portion of this report.

In the interest of fairness and the presentation of a complete picture, we also invited groups which were likely to oppose this recognition of freedoms to submit their views. The statements of two associations who replied are reproduced here following the report of the Subcommittee. The Subcommittee also invited statements by Messrs. Halbrook and Hardy, and by the National Rifle Association, whose statements likewise follow our report.

When I became chairman of the Subcommittee on the Constitution, I hoped that I would be able to assist in the protection of the constitutional rights of American citizens, rights which have too often been eroded in the belief that government could be relied upon for quick solutions to difficult problems.

Both as an American citizen and as a United States Senator I repudiate this view. I likewise repudiate the approach of those who believe to solve American problems you simply become something other than American. To my mind, the uniqueness of our free institutions, the fact that an American citizen can boast freedoms unknown in any other land, is all the more reason to resist any erosion of our individual rights. When our ancestors forged a land "conceived in liberty", they did so with musket and rifle. When they reacted to attempts to dissolve their free institutions, and established their identity as a free nation, they did so as a nation of armed freemen. When they sought to record forever a guarantee of their rights, they devoted one full amendment out of ten to nothing but the protection of their right to keep and bear arms against government interference. Under my chairmanship the Subcommittee on the Constitution will concern itself with a proper recognition of, and respect for, this right most valued by free men.

ORRIN G. HATCH,
Chairman,
Subcommittee on the Constitution.

JANUARY 20, 1982.

The right to bear arms is a tradition with deep roots in American society. Thomas Jefferson proposed that "no free man shall ever be debarred the use of arms," and Samuel Adams called for an amendment banning any law "to prevent the people of the United States who are peaceable citizens from keeping their own arms." The Constitution of the State of Arizona, for example, recognizes the "right of an individual citizen to bear arms in defense of himself or the State."

Even though the tradition has deep roots, its application to modern America is the subject of intense controversy. Indeed, it is a controversy into which the Congress is beginning, once again, to immerse itself. I have personally been disappointed that so important an issue should have generally been so thinly researched and so minimally debated both in Congress and the courts. Our Supreme Court has but once touched on its meaning at the Federal level and that decision, now nearly a half-century old, is so ambiguous that any school of thought can find some support in it. All Supreme Court decisions on the second amendment's application to the States came in the last century, when constitutional law was far different than it is today. As ranking minority member of the Subcommittee on the Constitution, I, therefore, welcome the effort which led to this report—a report based not only upon the independent research of the subcommittee staff, but also upon full and fair presentation of the cases by all interested groups and individual scholars.

I personally believe that it is necessary for the Congress to amend the Gun Control Act of 1968. I welcome the opportunity to introduce this discussion of how best these amendments might be made.

The Constitution subcommittee staff has prepared this monograph bringing together proponents of both sides of the debate over the 1968 Act. I believe that the statements contained herein present the arguments fairly and thoroughly. I commend Senator Hatch, chairman of the subcommittee, for having this excellent reference work prepared. I am sure that it will be of great assistance to the Congress as it debates the second amendment and considers legislation to amend the Gun Control Act.

DENNIS DECONCINI,
Ranking Minority Member,
Subcommittee on the Constitution.

JANUARY 20, 1982.

History: Second Amendment Right To "Keep and Bear Arms"

The right to keep and bear arms as a part of English and American law antedates not only the Constitution, but also the discovery of firearms. Under the laws of Alfred the Great, whose reign began in 872 A.D., all English citizens from the nobility to the peasants were obliged to privately purchase weapons and be available for military duty.[1] This was in sharp contrast to the feudal system as it evolved in Europe, under which armament and military duties were concentrated in the nobility. The body of armed citizens were known as the "fyrd".

While a great many of the Saxon rights were abridged following the Norman conquest, the right and duty of arms possession was retained. Under the Assize of Arms of 1181, "the whole community of freemen" between the ages of 15 and 40 were required by law to possess certain arms, which were arranged in proportion to their possessions.[2] They were required twice a year to demonstrate to Royal officials that they were appropriately armed. In 1253, another Assize of Arms expanded the duty of armament to include not only freemen, but also villeins, who were the English equivalent of serfs. Now all "citizens, burgesses, free tenants, villeins and others from 15 to 60 years of age" were obliged to be armed.[3] While on the Continent the villeins were regarded as little more than animals hungering for rebellion, the English legal system not only permitted, but affirmatively required them, to be armed.

The thirteenth century saw further definitions of this right as the long bow, a formidable armor-piercing weapon, became increasingly the mainstay of British national policy. In 1285, Edward I commanded that all persons comply with the earlier Assizes and added that "anyone else who can afford them shall keep bows and arrows".[4] The right of armament was subject only to narrow limitations. In 1279, it was ordered that those appearing in Parliament or other public assemblies "shall come without all force and armor, well and peaceably".[5] In 1328, the statute of Northampton ordered that no one use their arms in "affray of the peace, nor to go nor ride armed by day or by night in fairs, markets, nor in the presence of the justices or other ministers".[6] English courts construed this ban consistently with the general right of private armament as applying only to wearing of arms "accompanied with such circumstances as are apt to terrify the people".[7] In 1369, the King ordered that the sheriffs of London require all citizens "at leisure time on holidays" to "use in their recreation bowes and arrows" and to stop all other games which might distract them from this practice.[8]

The Tudor kings experimented with limits upon specialized weapons—mainly crossbows and the then-new firearms. These measures were not intended to disarm the citizenry, but on the contrary, to prevent their being diverted from longbow practice by

sport with other weapons which were considered less effective. Even these narrow measures were shortlived. In 1503, Henry VII limited shooting (but not possession) of crossbows to those with land worth 200 marks annual rental, but provided an exception for those who "shote owt of a howse for the lawefull defens of the same".[9] In 1511, Henry VIII increased the property requirement to 300 marks. He also expanded the requirement of longbow ownership, requiring all citizens to "use and exercyse shootyng in longbowes, and also have a bowe and arrowes contynually" in the house.[10] Fathers were required by law to purchase bows and arrows for their sons between the age of 7 and 14 and to train them in longbow use.

In 1514 the ban on crossbows was extended to include firearms.[11] But in 1533, Henry reduced the property qualification to 100 pounds per year; in 1541 he limited it to possession of small firearms ("of the length of one hole yard" for some firearms and "thre quarters of a yarde" for others)[12] and eventually he repealed the entire statute by proclamation.[13] The later Tudor monarchs continued the system and Elizabeth added to it by creating what came to be known as "train bands", selected portions of the citizenry chosen for special training. These trained bands were distinguished from the "militia", which term was first used during the Spanish Armada crisis to designate the entire of the armed citizenry.[14]

The militia continued to be a pivotal force in the English political system. The British historian Charles Oman considers the existence of the armed citizenry to be a major reason for the moderation of monarchical rule in Great Britain; "More than once he [Henry VIII] had to restrain himself, when he discovered that the general feeling of his subjects was against him. . . . His 'gentlemen pensioners' and his yeomen of the guard were but a handful, and bills or bows were in every farm and cottage".[15]

When civil war broke out in 1642, the critical issue was whether the King or Parliament had the right to control the militia.[16] The aftermath of the civil war saw England in temporary control of a military government, which repeatedly dissolved Parliament and authorized its officers to "search for, and seize all arms" owned by Catholics, opponents of the government, "or any other person whom the commissioners had judged dangerous to the peace of this Commonwealth".[17]

The military government ended with the restoration of Charles II. Charles in turn opened his reign with a variety of repressive legislation, expanding the definition of treason, establishing press censorship and ordering his supporters to form their own troops, "the officers to be numerous, disaffected persons watched and not allowed to assemble, and their arms seized".[18] In 1662, a Militia Act was enacted empowering officials "to search for and seize all arms in the custody or possession of any person or persons whom the said lieutenants or any two or more of their deputies shall judge dangerous to the peace of the kingdom".[19] Gunsmiths were ordered to deliver to the government lists of all purchasers.[20] These confiscations were continued under James II, who directed them particularly against the Irish population: "Although the

country was infested by predatory bands, a Protestant gentleman could scarcely obtain permission to keep a brace of pistols."[21]

In 1668, the government of James was overturned in a peaceful uprising which came to be known as "The Glorious Revolution". Parliament resolved that James had abdicated and promulgated a Declaration of Rights, later enacted as the Bill of Rights. Before coronation, his successor William of Orange, was required to swear to respect these rights. The debates in the House of Commons over this Declaration of Rights focused largely upon the disarmament under the 1662 Militia Act. One member complained that "an act of Parliament was made to disarm all Englishmen, who the lieutenant should suspect, by day or night, by force or otherwise—this was done in Ireland for the sake of putting arms into Irish hands." The speech of another is summarized as "militia bill—power to disarm all England—now done in Ireland." A third complained "Arbitrary power exercised by the ministry. . . . Militia—imprisoning without reason; disarming—himself disarmed." Yet another summarized his complaints "Militia Act—an abominable thing to disarm the nation. . . ."[22]

The Bill of Rights, as drafted in the House of Commons, simply provided that "the acts concerning the militia are grievous to the subject" and that "it is necessary for the public Safety that the Subjects, which are Protestants, should provide and keep arms for the common defense; And that the Arms which have been seized, and taken from them, be restored."[23] The House of Lords changed this to make it a more positive declaration of an individual right under English law: "That the subjects which are Protestant may have arms for their defense suitable to their conditions and as allowed by law."[24] The only limitation was on ownership by Catholics, who at that time composed only a few percent of the British population and were subject to a wide variety of punitive legislation. The Parliament subsequently made clear what it meant by "suitable to their conditions and as allowed by law". The poorer citizens had been restricted from owning firearms, as well as traps and other commodities useful for hunting, by the 1671 Game Act. Following the Bill of Rights, Parliament reenacted that statute, leaving its operative parts unchanged with one exception—which removed the word "guns" from the list of items forbidden to the poorer citizens.[25] The right to keep and bear arms would henceforth belong to all English subjects, rich and poor alike.

In the colonies, availability of hunting and need for defense led to armament statutes comparable to those of the early Saxon times. In 1623, Virginia forbade its colonists to travel unless they were "well armed"; in 1631 it required colonists to engage in target practice on Sunday and to "bring their peeces to church."[26] In 1658 it required every householder to have a functioning firearm within his house and in 1673 its laws provided that a citizen who claimed he was too poor to purchase a firearm would have one purchased for him by the government, which would then require him to pay a reasonable price when able to do so.[27] In Massachusetts, the first session of the legislature ordered that not only freemen, but also indentured servants own firearms and in 1644 it imposed a stern 6 shilling fine upon any citizen who was not armed.[28]

When the British government began to increase its military presence in the colonies in the mid-eighteenth century, Massachusetts responded by calling upon its citizens to arm themselves in defense. One colonial newspaper argued that it was impossible to complain that his act was illegal since they were "British subjects, to whom the privilege of possessing arms is expressly recognized by the Bill of Rights" while another argued that this "is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defense".[29] The newspaper cited Blackstone's commentaries on the laws of England, which had listed the "having and using arms for self preservation and defense" among the "absolute rights of individuals." The colonists felt they had an absolute right at common law to own firearms.

Together with freedom of the press, the right to keep and bear arms became one of the individual rights most prized by the colonists. When British troops seized a militia arsenal in September, 1774, and incorrect rumors that colonists had been killed spread through Massachusetts, 60,000 citizens took up arms.[30] A few months later, when Patrick Henry delivered his famed "Give me liberty or give me death" speech, he spoke in support of a proposition "that a well regulated militia, composed of gentlemen and freemen, is the natural strength and only security of a free government. . . ." Throughout the following revolution, formal and informal units of armed citizens obstructed British communication, cut off foraging parties, and harassed the thinly stretched regular forces. When seven states adopted state "bills of rights" following the Declaration of Independence, each of those bills of rights provided either for protection of the concept of a militia or for an express right to keep and bear arms.[31]

Following the revolution but previous to the adoption of the Constitution, debates over militia proposals occupied a large part of the policital scene. A variety of plans were put forth by figures ranging from George Washington to Baron von Steuben.[32] All of the proposals called for a general duty of all citizens to be armed, although some proposals (most notably von Steuben's) also emphasized a "select militia" which would be paid for its services and given special training. In this respect, this "select militia" was the successor of the "trained bands" and the predecessor of what is today the "national guard". In the debates over the Constitution, von Steuben's proposals were criticized as undemocratic. In Connecticut one writer complained of a proposal that "this looks too much like Baron von Steuben's militia, by which a standing army was meant and intended."[33] In Pennsylvania, a delegate argued "Congress may give us a select militia which will, in fact, be a standing army—or Congress, afraid of a general militia, may say there will be no militia at all. When a select militia is formed, the people in general may be disarmed."[34] Richard Henry Lee, in his widely read pamphlet "Letters from the Federal Farmer to the Republican" worried that the people might be disarmed "by modeling the militia. Should one fifth or one eighth part of the people capable of bearing arms be made into a select militia, as has been proposed, and those the young and ardent parts of the community, possessed of little or no property, the former will answer all the purposes of an army, while the latter will be defenseless." He

proposed that "the Constitution ought to secure a genuine, and guard against a select militia," adding that "to preserve liberty, it is essential that the whole body of the people always possess arms and be taught alike, especially when young, how to use them."[35]

The suspicion of select militia units expressed in these passages is a clear indication that the framers of the Constitution did not seek to guarantee a State right to maintain formed groups similar to the National Guard, but rather to protect the right of individual citizens to keep and bear arms. Lee, in particular, sat in the Senate which approved the Bill of Rights. He would hardly have meant the second amendment to apply only to the select militias he so feared and disliked.

Other figures of the period were of like mind. In the Virginia convention, George Mason, drafter of the Virginia Bill of Rights, accused the British of having plotted "to disarm the people—that was the best and most effective way to enslave them", while Patrick Henry oberved that "The great object is that every man be armed" and "everyone who is able may have a gun".[36]

Nor were the antifederalist, to whom we owe credit for a Bill of Rights, alone on this account. Federalist arguments also provide a source of support for an individual rights view. Their arguments in favor of the proposed Constitution also relied heavily upon universal armament. The proposed Constitution had been heavily criticized for its failure to ban or even limit standing armies. Unable to deny this omission, the Constitution's supporters frequently argued to the people that the universal armament of Americans made such limitations unnecessary. A pamphlet written by Noah Webster, aimed at swaying Pennsylvania toward ratification, observed

> Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword, because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretense, raised in the United States.[37]

In the Masssachusetts convention, Sedgwick echoed the same thought, rhetorically asking if an oppressive army could be formed or "if raised, whether they could subdue a Nation of freemen, who know how to prize liberty, and who have arms in their hands?"[38] In Federalist Paper 46, Madison, later author of the Second Amendment, mentioned "The advantage of being armed, which the Americans possess over the people of all other countries" and that "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."

A third and even more compelling case for an individual rights perspective on the Second Amendment comes from the State demands for a bill of rights. Numerous state ratifications called for adoption of a Bill of Rights as a part of the Constitution. The first such call came from a group of Pennsylvania delegates. Their proposals, which were not adopted but had a critical effect on future debates, proposed among other rights that "the people have

a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or a real danger of public injury from individuals."[39] In Massachusetts, Sam Adams unsuccessfully pushed for a ratification conditioned on adoption of a Bill of Rights, beginning with a guarantee "That the said Constitution shall never be construed to authorize Congress to infringe the just liberty of the press or the rights of conscience; or to prevent the people of the United States who are peaceable citizens from keeping their own arms. . . ."[40] When New Hampshire gave the Constitution the ninth vote needed for its passing into effect, it called for adoption of a Bill of Rights which included the provision that "Congress shall never disarm any citizen unless such as are or have been in actual rebellion".[41] Virginia and North Carolina thereafter called for a provision "that the people have the right to keep and bear arms; 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."[42]

When the first Congress convened for the purpose of drafting a Bill of Rights, it delegated the task to James Madison. Madison did not write upon a blank tablet. Instead, he obtained a pamphlet listing the State proposals for a Bill of Rights and sought to produce a briefer version incorporating all the vital proposals of these. His purpose was to incorporate, not distinguish by technical changes, proposals such as that of the Pennsylvania minority, Sam Adams, and the New Hampshire delegates. Madison proposed among other rights that:

> "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."[43]

In the House, this was initially modified so that the militia clause came before the proposal recognizing the right. The proposals for the Bill of Rights were then trimmed in the interests of brevity. The conscientious objector clause was removed following objections by Elbridge Gerry, who complained that future Congresses might abuse the exemption for the scrupulous to excuse everyone from militia service.

The proposal finally passed the House in its present form: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." In this form it was submitted into the Senate, which passed it the following day. The Senate in the process indicated its intent that the right be an individual one, for private purposes, by rejecting an amendment which would have limited the keeping and bearing of arms to bearing "for the common defense".

The earliest American constitutional commentators concurred in giving this broad reading to the amendment. When St. George Tucker, later Chief Justice of the Virginia Supreme Court, in 1803 published an edition of Blackstone annotated to American law, he followed Blackstone's citation of the right of the subject "of having

arms suitable to their condition and degree, and such as are allowed by law" with a citation to the Second Amendment, "And this without any qualification as to their condition or degree, as is the case in the British government".[44] William Rawle's "View of the Constitution" published in Philadelphia in 1825 noted that under the Second Amendment

> The prohibition is general. No clause in the Constitution could by a rule of constuction 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 blind pursuit of [illegible]ordinate power, either should attempt it, this amendment may be appealed to as a restraint on both."[45]

The Jefferson papers in the Library of Congress show that both Tucker and Rawle were friends of, and corresponded with Thomas Jefferson. This suggests that their assessment, as contemporaries of the Constitution's drafters, should be afforded special consideration.

Later commentators agreed with Tucker and Rawle. For instance, Joseph Story in his "Commentaries on the Constitution" considered the right to keep and bear arms as "the palladium of the liberties of the republic", which deterred tyranny and enabled the citizenry at large to overthrow it should it come to pass.[46]

Subsequent legislation in the Second Congress likewise supports the interpretation of the second amendment that creates an individual right. In the Militia Act of 1792, the second Congress defined "militia of the United States" to include almost every free adult male in the United States. These persons were obligated by law to possess a firearm and a minimum supply of ammunition and military equipment.[47] This statute, incidentally remained in effect into the early years of the present century as a legal requirement of gun ownership for most of the population of the United States. There can be little doubt from this that when the Congress and the people spoke of a "militia", they had reference to the traditional concept of the entire populace capable of bearing arms, and not to any formal group such as what is today called the National Guard. The purpose was to create an armed citizenry, such as the political theorists at the time considered essential to ward off tyranny. From this militia, appropriate measures might create a "well regulated militia" of individuals trained in their duties and responsibilities as citizens and owners of firearms.

The Second Amendment as such was rarely litigated prior to the passage of the Fourteenth Amendment. Prior to that time, most courts accepted that the commands of the federal Bill of Rights did not apply to the states. Since there was no federal firearms legislation at this time, there was no legislation which was directly subject to the Second Amendment, if the accepted interpretations were followed. However, a broad variety of state legislation was struck down under state guarantees of the right to keep and bear arms and even in a few cases, under the Second Amendment, when it came before courts which considered the federal protections applicable to the states. Kentucky in 1813 enacted the first carrying concealed weapon statute in the United States; in 1822, the Ken-

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tucky Court of Appeals struck down the law as a violation of the state constitutional protection of the right to keep and bear arms: "And can there be entertained a reasonable doubt but the provisions of that act import a restraint on the right of the citizen to bear arms? The court apprehends it not. The right existed at the adoption of the Constitution; it then had no limit short of the moral power of the citizens to exercise it, and in fact consisted of nothing else but the liberty of the citizen to bear arms."[48] On the other hand, a similar measure was sustained in Indiana, not upon the grounds that a right to keep and bear arms did not apply, but rather upon the notion that a statute banning only concealed carrying still permitted the carrying of arms and merely regulated one possible way of carrying them.[49] A few years later, the Supreme Court of Alabama upheld a similar statute but added "We do not desire to be understood as maintaining, that in regulating the manner of wearing arms, the legislature has no other limit than its own discretion. A statute which, under the pretense of regulation, amounts to a destruction of that right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional."[50] When the Arkansas Supreme Court in 1842 upheld a carrying concealed weapons statute, the chief justice explained that the statute would not "detract anything from the power of the people to defend their free state and the established institutions of the country. It prohibits only the wearing of certain arms concealed. This is simply a regulation as to the manner of bearing such arms as are specified", while the dissenting justice proclaimed "I deny that any just or free government upon earth has the power to disarm its citizens".[51]

Sometimes courts went farther. When in 1837, Georgia totally banned the sale of pistols (excepting the larger pistols "known and used as horsemen's pistols") and other weapons, the Georgia Supreme Court in *Nunn* v. *State* held the statute unconstitutional under the Second Amendment to the federal Constitution. The court held that the Bill of Rights protected natural rights which were fully as capable of infringement by states as by the federal government and that the Second Amendment provided "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 merely such as are used by the militia, shall not be infringed, curtailed, or broken in on, in the slightest degree; and all this for the important end to be attained: the rearing up and qualifying of a well regulated militia, so vitally necessary to the security of a free state."[52] Prior to the Civil War, the Supreme Court of the United States likewise indicated that the privileges of citizenship included the individual right to own and carry firearms. In the notorious *Dred Scott* case, the court held that black Americans were not citizens and could not be made such by any state. This decision, which by striking down the Missouri Compromise did so much to bring on the Civil War, listed what the Supreme Court considered the rights of American citizens by way of illustrating what rights would have to be given to black Americans if the Court were to recognize them as full fledged citizens:

> It would give to persons of the negro race, who are recognized as citizens in any one state of the Union, the right to enter every other state, whenever they pleased. . . . and it would give them full liberty of speech in public and in private upon all subjects upon which its own citizens might meet; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.[53]

Following the Civil War, the legislative efforts which gave us three amendments to the Constitution and our earliest civil rights acts likewise recognized the right to keep and bear arms as an existing constitutional right of the individual citizen and as a right specifically singled out as one protected by the civil rights acts and by the Fourteenth Amendment to the Constitution, against infringement by state authorities. Much of the reconstruction effort in the South had been hinged upon the creation of "black militias" composed of the armed and newly freed blacks, officered largely by black veterans of the Union Army. In the months after the Civil War, the existing southern governments struck at these units with the enactment of "black codes" which either outlawed gun ownership by blacks entirely, or imposed permit systems for them, and permitted the confiscation of firearms owned by blacks. When the Civil Rights Act of 1866 was debated members both of the Senate and the House referred to the disarmament of blacks as a major consideration.[54] Senator Trumbull cited provisions outlawing ownership of arms by blacks as among those which the Civil Rights Act would prevent;[55] Senator Sulsbury complained on the other hand that if the act were to be passed it would prevent his own state from enforcing a law banning gun ownership by individual free blacks.[56] Similar arguments were advanced during the debates over the "anti-KKK act"; its sponsor at one point explained that a section making it a federal crime to deprive a person of "arms or weapons he may have in his house or possession for the defense of his person, family or property" was "intended to enforce the well-known constitutional provisions guaranteeing the right in the citizen to 'keep and bear arms'."[57] Likewise, the debates over the Fourteenth Amendment Congress frequently referred to the Second Amendment as one of the rights which it intended to guarantee against state action.[58]

Following adoption of the Fourteenth Amendment, however, the Supreme Court held that that Amendment's prohibition against states depriving any persons of their federal "privileges and immunities" was to be given a narrow construction. In particular, the "privileges and immunities" under the Constitution would refer only to those rights which were not felt to exist as a process of natural right, but which were created solely by the Constitution. These might refer to rights such as voting in federal elections and of interstate travel, which would clearly not exist except by virtue of the existence of a federal government and which could not be said to be "natural rights".[59] This paradoxically meant that the rights which most persons would accept as the most important—those flowing from concepts of natural justice—were devalued at the expense of more technical rights. Thus when individuals were charged with having deprived black citizens of their right to free-

dom of assembly and to keep and bear arms, by violently breaking up a peaceable assembly of black citizens, the Supreme Court in *United States* v. *Cruikshank* [60] held that no indictment could be properly brought since the right "of bearing arms for a lawful purpose" is "not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." Nor, in the view of the Court, was the right to peacefully assemble a right protected by the Fourteenth Amendment: "The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is and has always been one of the attributes of citizenship under a free government. . . . It was not, therefore, a right granted to the people by the Constitution." Thus the very importance of the rights protected by the First and Second Amendment was used as the basis for the argument that they did not apply to the states under the Fourteenth Amendment. In later opinions, chiefly *Presser* v. *Illinois* [61] and *Miller* v. *Texas*, [62] the Supreme Court adhered to the view. *Cruikshank* has clearly been superseded by twentieth century opinions which hold that portions of the Bill of Rights—and in particular the right to assembly with which *Cruikshank* dealt in addition to the Second Amendment—are binding upon the state governments. Given the legislative history of the Civil Rights Acts and the Fourteenth Amendment, and the more expanded views of incorporation which have become accepted in our own century, it is clear that the right to keep and bear arms was meant to be and should be protected under the civil rights statutes and the Fourteenth Amendment against infringement by officials acting under color of state law.

Within our own century, the only occasion upon which the Second Amendment has reached the Supreme Court came in *United States* v. *Miller*. [63] There, a prosecution for carrying a sawed off shotgun was dismissed before trial on Second Amendment grounds. In doing so, the court took no evidence as to the nature of the firearm or indeed any other factual matter. The Supreme Court reversed on procedural grounds, holding that the trial court could not take judicial notice of the relationship between a firearm and the Second Amendment, but must receive some manner of evidence. It did not formulate a test nor state precisely what relationship might be required. The court's statement that the amendment was adopted "to assure the continuation and render possible the effectiveness of such [militia] forces" and "must be interpreted and applied with that end in view", when combined with the court's statement that all constitutional sources "show plainly enough that the militia comprised all males physically capable of acting in concert for the common defense. . . . these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time," [64] suggests that at the very least private ownership by a person capable of self defense and using an ordinary privately owned firearm must be protected by the Second Amendment. What the Court did not do in Miller is even more striking: It did not suggest that the lower court take evidence on whether Miller belonged to the National Guard or a similar group. The hearing was to be on the nature of the

firearm, not on the nature of its use; nor is there a single suggestion that National Guard status is relevant to the case.

The Second Amendment right to keep and bear arms therefore, is a right of the individual citizen to privately possess and carry in a peaceful manner firearms and similar arms. Such an "individual rights" interpretation is in full accord with the history of the right to keep and bear arms, as previously discussed. It is moreover in accord with contemporaneous statements and formulations of the right by such founders of this nation as Thomas Jefferson and Samuel Adams, and accurately reflects the majority of the proposals which led up to the Bill of Rights itself. A number of state constitutions, adopted prior to or contemporaneously with the federal Constitution and Bill of Rights, similarly provided for a right of the people to keep and bear arms. If in fact this language creates a right protecting the states only, there might be a reason for it to be inserted in the federal Constitution but no reason for it to be inserted in state constitutions. State bills of rights necessarily protect only against action by the state, and by definition a state cannot infringe its own rights; to attempt to protect a right belonging to the state by inserting it in a limitation of the state's own powers would create an absurdity. The fact that the contemporaries of the framers did insert these words into several state constitutions would indicate clearly that they viewed the right as belonging to the individual citizen, thereby making it a right which could be infringed either by state or federal government and which must be protected against infringement by both.

Finally, the individual rights interpretation gives full meaning to the words chosen by the first Congress to reflect the right to keep and bear arms. The framers of the Bill of Rights consistently used the words "right of the people" to reflect individual rights—as when these words were used to recognize the "right of the people" to peaceably assemble, and the "right of the people" against unreasonable searches and seizures. They distinguished between the rights of the people and of the state in the Tenth Amendment. As discussed earlier, the "militia" itself referred to a concept of a universally armed people, not to any specifically organized unit. When the framers referred to the equivalent of our National Guard, they uniformly used the term "select militia" and distinguished this from "militia". Indeed, the debates over the Constitution constantly referred to organized militia units as a threat to freedom comparable to that of a standing army, and stressed that such organized units did not constitute, and indeed were philosophically opposed to, the concept of a militia.

That the National Guard is not the "Militia" referred to in the second amendment is even clearer today. Congress has organized the National Guard under its power to "raise and support armies" and not its power to "Provide for organizing, arming and disciplining the Militia".[65] This Congress chose to do in the interests of organizing reserve military units which were not limited in deployment by the strictures of our power over the constitutional militia, which can be called forth only "to execute the laws of the Union, suppress insurrections and repel invasions." The modern National Guard was specifically intended to avoid status as the constitutional militia, a distinction recognized by 10 U.S.C. §311(a).

The conclusion is thus inescapable that the history, concept, and wording of the second amendment to the Constitution of the United States, as well as its interpretation by every major commentator and court in the first half-century after its ratification, indicates that what is protected is an individual right of a private citizen to own and carry firearms in a peaceful manner.

REFERENCES

1. Charles Hollister, Anglo-Saxon Military Institutions 11–12 (Oxford University Press 1962); Francis Grose, Military Antiquities Respecting a History of the British Army, Vol. I at 1–2 (London, 1812).
2. Grose, supra, at 9–11; Bruce Lyon, A Constitutional and Legal History of Medieval England 273 (2d. ed. New York 1980).
3. J. J. Bagley and P. B. Rowley, A Documentary History of England 1066–1540, Vol. 1 at 155–56 (New York 1965).
4. Statute of Winchester (13 Edw. I c. 6). See Also Bagley and Rowley, supra at 158.
5. 7 Ed. I c. 2 (1279).
6. Statute of Northampton (2 Edw. III c. 3).
7. Rex v. Knight, 90 Eng. Rep. 330; 87 Eng. Rep. 75 (King's Bench, 1686).
8. E. G. Heath, The Grey Goose Wing 109 (London, 1971).
9. 19 Hen. VII c. 4 (1503).
10. 3 Hen. VIII c. 13 (1511).
11. 64 Hen. VIII c. 13 (1514).
12. 33 Hen. VIII c. 6 (1514).
13. Noel Perrin, Giving Up the Gun 59–60 (Boston, 1979).
14. Jim Hill, The Minuteman in War and Peace 26–27 (Harrisburg, 1968).
15. Charles Oman, A History of the Art of War in the Sixteenth Century 288 (New York, 1937).
16. William Blackstone, Commentaries, Vol. 2 at 412 (St. George Tucker, ed., Philadelphia 1803).
17. "An Act for Settling the Militia," Ordinances and Acts of the Interregnum, Vol. 2 1320 (London, HMSO 1911).
18. 8 Calendar of State Papers (Domestic), Charles II, No. 188, p. 150.
19. 14 Car. II c. 3 (1662).
20. Joyce Malcolm, Disarmed: The Loss of the Right to Bear Arms in Restoration England, at 11 (Mary Ingraham Bunting Institute, Radcliffe College 1980).
21. Thomas Macaulay, The History of England from the Accession of Charles II, Vol. II at 137 (London, 1856).
22. Phillip, Earl of Hardwicke, Miscellaneous State Papers from 1501–1726, vol. 2 at 407–17 (London, 1778).
23. J. R. Western, Monarchy and Revolution: The English State in the 1680's, at 339 (Totowa, N.J., 1972).
24. Journal of the House of Commons from December 26, 1688, to October 26, 1693, at 29. (London, 1742). The Bill of Rights was ultimately enacted in this form. 1 Gul. and Mar., Sess. 2, c. 2 (1689).
25. Joyce Malcolm, supra, at 16.
26. William Hening, The Statutes at Large: Being a Collection of All the Laws of Virginia from the First Session of the Legislature in 1619, at pp. 127, 173–74 (New York, 1823).
27. Id.
28. William Brigham, The Compact with the Charter and Laws of the Colony of New Plymouth, 31, 76 (Boston, 1836).
29. Oliver Dickerson, ed., Boston Under Military Rule, 61, 79, (Boston, 1936).
30. Steven Patterson, Political Parties in Revolutionary Massachusetts, at 103 (Univ. of Wisconsin Press, 1973).
31. See Sprecher, The Lost Amendment, 51 A.B.A.J. 554, 665 (1965).
32. The most extensive studies of these militia proposals are John McAuley Palmer, Washington, Lincoln, Wilson: Three War Statesmen (New York, 1930); Frederick Stern, Citizen Army (New York, 1957); John Mahon, The American Militia: Decade of Decision 1789–1800 (Univ. of Florida, 1960).
33. Merrill Jensen, ed., The Documentary of History of the Ratification of the Constitution, vol. 3 at 378 (Madison, Wisc.).
34. Id., vol. 2 at 508.

35. Walter Bennett, ed., Letters from the Federal Farmer to the Republican, at 21, 22, 124 (Univ. of Alabama Press, 1975).
36. Debates and other Proceedings of the Convention of Virginia, . . . taken in shorthand by David Robertson of Petersburg, at 271, 275 (2d ed. Richmond, 1805).
37. Noah Webster, "An Examination into the Leading Principles of the Federal Constitution . . .", in Paul Ford, ed., Pamphlets on the Constitution of the United States, at 56 (New York, 1888).
38. Johnathan Elliott, ed., Debates in the Several State Conventions on the Adoption of the Federal Constitution, vol. 2 at 97 (2d ed., 1888).
39. Merrill Jensen, supra, vol. 2 at 597–98.
40. Debates and Proceedings in the Convention of the Commonwealth of Massachusetts, at 86–87 (Peirce & Hale, eds., Boston, 1850); 2 B. Schwartz, The Bill of Rights 675 (1971).
41. Documents Illustrative of the Formation of the Union of the American States, at 1026 (Washington, D.C.: GPO, 1927).
42. Id. at 1030.
43. Annals of Congress 434 (1789).
44. St. George Tucker, ed., Blackstone's Commentaries, Volume 1 at 143 n. 40, 41 (Philadelphia, 1803).
45. William Rawle, A View of the Constitution 125–6 (2d ed., Philadelphia, 1803).
46. Joseph Story, Commentaries on the Constitution, vol. 2 at 746 (1833).
47. Act of May 8, 1792; Second Cong., First Session, ch. 33.
48. Bliss v. Commonwealth, 12 Ken. (2 Litt.) 90, 92 (1822).
49. State v. Mitchell, (3 Black.) 229.
50. State v. Reid, 1 Ala. 612, 35 Am. Dec. 44 (1840).
51. State v. Buzzard, 4 Ark. 18, 27, 36 (1842). The Arkansas Constitutional provision at issue was narrower than the second amendment, as it protected keeping and bearing arms "for the common defense." Id. at 34.
52. Nunn v. State, 1 Ga. 243, 251 (1846).
53. Dred Scott v. Sandford, 60 U.S. 691, 705.
54. The most comprehensive work in this field of constitutional law is Steven Halbrook, the Jurisprudence of the Second and Fourteenth Amendments (Institute for Humane Studies, Menlo Park, California, 1979), reprinted in 4 George Mason L. Rev. 1 (1981).
55. Cong. Globe, 39th Congress, 1st Sess., pt. 1, p. 474 (Jan. 9, 1866).
56. Id. at 478.
57. H.R. Rep. No. 37, 41st Cong., 3d sess., p. 3 (1871).
58. See generally Halbrook, supra, at 42–62.
59. Slaughterhouse Cases, 83 U.S. 36 (1873).
60. United States v. Cruikshank, 92 U.S. 542 (1876).
61. Presser v. Illinois, 116 U.S. 252 (1886).
62. Miller v. Texas, 153 U.S. 535 (1894).
63. United States v. Miller, 307 U.S. 175 (1939).
64. Id. at 178, 179.
65. H.R. Report No. 141, 73d Cong., 1st sess. at 2–5 (1933).

APPENDIX

CASE LAW

The United States Supreme Court has only three times commented upon the meaning of the second amendment to our constitution. The first comment, in *Dred Scott*, indicated strongly that the right to keep and bear arms was an individual right; the Court noted that, were it to hold free blacks to be entitled to equality of citizenship, they would be entitled to keep and carry arms wherever they went. The second, in *Miller*, indicated that a court cannot take judicial notice that a short-barrelled shotgun is covered by the second amendment—but the Court did not indicate that National Guard status is in any way required for protection by that amendment, and indeed defined "militia" to include all citizens able to bear arms. The third, a footnote in *Lewis* v. *United States*, indicated only that "these legislative restrictions on the use of firearms"—a ban on possession by felons—were permissable. But since felons may constitutionally be deprived of many of the rights of citizens, including that of voting, this dicta reveals little. These three comments constitute all significant explanations of the scope of the second amendment advanced by our Supreme Court. The case of *Adam* v. *Williams* has been cited as contrary to the principle that the second amendment is an individual right. In fact, that reading of the opinion comes only in Justice Douglas's dissent from the majority ruling of the Court.

The appendix which follows represents a listing of twenty-one American decisions, spanning the period from 1822 to 1981, which have analysed right to keep and bear arms provisions in the light of statutes ranging from complete bans on handgun sales to bans on carrying of weapons to regulation of carrying by permit systems. Those decisions not only explained the nature of such a right, but also struck down legislative restrictions as violative of it, are designated by asterisks.

20th century cases

1. * *State* v. *Blocker*, 291 Or. 255, ——— P.2d ——— (1981).

"The statute is written as a total proscription of the mere possession of certain weapons, and that mere possession, insofar as a billy is concerned, is constitutionally protected."

"In these circumstances, we conclude that it is proper for us to consider defendant's 'overbreadth' attack to mean that the statute swept so broadly as to infringe rights that it could not reach, which in this setting means the right to possess arms guaranteed by § 27."

2. * *State* v. *Kessler*, 289 Or. 359, 614 P.2d 94, at 95, at 98 (1980).

"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 a 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."

"Therefore, the term 'arms' as used by the drafters of the constitutions probably was intended to include those weapons used by settlers for both personal and military defense. The term 'arms' was not limited to firearms, but included several handcarried weapons commonly used for defense. The term 'arms' would not have included cannon or other heavy ordnance not kept by militiamen or private citizens."

3. *Motley* v. *Kellogg*, 409 N.E.2d 1207, at 1210 (Ind. App. 1980) (motion to transfer denied 1-27-1981).

"[N]ot making applications available at the chief's office effectively denied members of the community the opportunity to obtain a gun permit and bear arms for their self-defense."

4. *Schubert* v. *DeBard*, 398 N.E.2d 1339, at 1341 (Ind. App. 1980) (motion to transfer denied 8-28-1980).

"We think it clear that our constitution provides our citizenry the right to bear arms for their self-defense."

5. *Taylor* v. *McNeal*, 523 S.W.2d 148, at 150 (Mo. App. 1975).

"The pistols in question are not contraband. * * * Under Art. I, § 23, Mo. Const. 1945, V.A.M.S., every citizen has the right to keep and bear arms in defense of his home, person and property, with the limitation that this section shall not justify the wearing of concealed arms."

6. * *City of Lakewood* v. *Pillow*, 180 Colo. 20, 501 P.2d 744, at 745 (en banc 1972).

"As an example, we note that this ordinance would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on a substantial part of their business. Also, the ordinance appears to prohibit individuals from transporting guns to and from such places of business. Furthermore, it makes it unlawful for a person to possess a firearm in a vehicle or in a place of business for the purpose of self-defense. Several of these activities are constitutionally protected. Colo. Const. art. II, § 13."

7. * *City of Las Vegas* v. *Moberg*, 82 N.M. 626, 485 P.2d 737, at 738 (N.M. App. 1971).

"It is our opinion that an ordinance may not deny the people the constitutionally guaranteed right to bear arms, and to that extent the ordinance under consideration is void."

8. *State* v. *Nickerson*, 126 Mt. 157, 247 P.2d 188, at 192 (1952).

"The law of this jurisdiction accords to the defendant the right to keep and bear arms and to use same in defense of his own home, his person and property."

9. *People* v. *Liss*, 406 Ill. 419, 94 N.E. 2d 320, at 323 (1950).

"The second amendment to the constitution of the United States provides the right of the people to keep and bear arms shall not be infringed. This, of course, does not prevent the enactment of a law against carrying concealed weapons, but it does indicate it should be kept in mind, in the construction of a statute of such character, 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."

10. **People* v. *Nakamura*, 99 Colo. 262, at 264, 62 P.2d 246 (en banc 1936).

"It is equally clear that the act wholly disarms aliens for all purposes. The state . . . cannot disarm any class of persons or deprive them of the right guaranteed under section 13, article II of the Constitution, to bear arms in defense of home, person and property. The guaranty thus extended is meaningless if any person is denied the right to posses arms for such protection."

11. **Glasscock* v. *City of Chattanooga*, 157 Tenn. 518, at 520, 11 S.W. 2d 678 (1928).

"There is no qualifications of the prohibition against the carrying of a pistol in the city ordinance before us but it is made unlawful 'to carry on or about the person any pistol,' that is, any sort of pistol in any sort of manner. *** [W]e must accordingly hold the provision of this ordinance as to the carrying of a pistol invalid."

12. **People* v. *Zerillo*, 219 Mich. 635, 189 N.W. 927, at 928 (1922).

"The provision in the Constitution granting the right to all persons to bear arms is a limitation upon the power of the Legislature to enact any law to the contrary. The exercise of a right guaranteed by the Constitution cannot be made subject to the will of the sheriff."

13. **State* v. *Kerner*, 181 N.C. 574, 107 S.E. 222, at 224 (1921).

"We are of the opinion, however, that 'pistol' ex vi termini is properly included within the word 'arms,' and that the right to bear such arms cannot be infringed. The historical use of pistols as 'arms' of offense and defense is beyond controversy."

"The maintenance of the right to bear arms is a most essential one to every free people and should not be whittled down by technical constructions."

14. **State* v. *Rosenthal*, 75 VT. 295, 55 A. 610, at 611 (1903).

"The people of the state have a right to bear arms for the defense of themselves and the state. *** The result is that Ordinance No. 10, so far as it relates to the carrying of a pistol, is inconsistent with and repugnant to the Constitution and the laws of the state, and it is therefore to that extent, void."

15. *In re *Brickey*, 8 Ida. 597, at 598–99, 70 p. 609 (1902).

"The second amendment to the federal constitution is in the following language: 'A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.' The language of section 11, article I of the constitution of Idaho, is as follows: 'The people have the right to bear arms for their security and defense, but the legislature shall regulate the exercise of this right by law.' Under these constitutional provisions, the legislature has no power to prohibit a citizen from bearing arms in any portion of the state of Idaho, whether within or without the corporate limits of cities, towns, and villages."

19th century cases

16. **Wilson* v. *State*, 33 Ark. 557, at 560, 34 Am. Rep. 52, at 54 (1878).

"If cowardly and dishonorable men sometimes shoot unarmed men with army pistols or guns, the evil must be prevented by the

penitentiary and gallows, and not by a general deprivation of constitutional privilege."

17. *Jennings* v. *State*, 5 Tex. Crim. App. 298, at 300-01 (1878).

"We believe that portion of the act which provides that, in case of conviction, the defendant shall forfeit to the county the weapon or weapons so found on or about his person is not within the scope of legislative authority. * * * One of his most sacred rights is that of having arms for his own defence and that of the State. This right is one of the surest safeguards of liberty and self-preservation."

18. *Andrews* v. *State*, 50 Tenn. 165, 8 Am. Rep. 8, at 17 (1871).

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

19. *Nunn* v. *State*, 1 Ga. (1 Kel.) 243, at 251 (1846).

" '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."

20. *Simpson* v. *State*, 13 Tenn. 356, at 359-60 (1833).

"But suppose it to be assumed on any ground, that our ancestors adopted and brought over with them this English statute, [the statute of Northampton,] or portion of the common law, our constitution has completely abrogated it; it says, 'that the freemen of this State have a right to keep and bear arms for their common defence.' Article II, sec. 26. * * * 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 defence, without any qualification whatever as to their kind or nature; and it is conceived, that it would be going much too far, to impair by construction or abridgement a constitutional privilege, which is so declared; neither, after so solumn an instrument hath said the people may carry arms, can we be permitted to impute to the acts thus licensed, such a necessarily consequent operation as terror to the people to be incurred thereby; we must attribute to the framers of it, the absence of such a view."

21. *Bliss* v. *Commonwealth*, 12 Ky. (2 Litt.) 90, at 92, and 93, 13 Am. Dec. 251 (1822).

"For, in principle, there is no difference between a law prohibiting the wearing concealed arms, and a law forbidding the wearing such as are exposed; and if the former be unconstitutional, the latter must be so likewise."

"But it should not be forgotten, that it is not only a part of the right that is secured by the constitution; it is the right entire and complete, as it existed at the adoption of the constitution; and if any portion of that right be impaired, immaterial how small the part may be, and immaterial the order of time at which it be done, it is equally forbidden by the constitution."

The following represents a list of twelve scholarly articles which have dealt with the subject of the right to keep and bear arms as reflected in the second amendment to the Constitution of the United States. The scholars who have undertaken this research range from professors of law, history and philosophy to a United States Senator. All have concluded that the second amendment is an individual right protecting American citizens in their peaceful use of firearms.

BIBLIOGRAPHY

Hays, THE RIGHT TO BEAR ARMS, A STUDY IN JUDICIAL MISINTERPRETATION, 2 Wm. & Mary L. R. 381 (1960)

Sprecher, THE LOST AMENDMENT, 51 Am. Bar Assn. J. 554 & 665 (2 parts) (1965)

Comment, THE RIGHT TO KEEP AND BEAR ARMS: A NECESSARY CONSTITUTIONAL GUARANTEE OR AN OUTMODED PROVISION OF THE BILL OF RIGHTS? 31 Albany L. R. 74 (1967)

Levine & Saxe, THE SECOND AMENDMENT: THE RIGHT TO BEAR ARMS, 7 Houston L. R. 1 (1969)

McClure, FIREARMS AND FEDERALISM, 7 Idaho L. R. 197 (1970)

Hardy & Stompoly, OF ARMS AND THE LAW, 51 Chi.-Kent L. R. 62 (1974)

Weiss, A REPLY TO ADVOCATES OF GUN CONTROL LAW, 52 Jour. Urban Law 577 (1974)

Whisker, HISTORICAL DEVELOPMENT AND SUBSEQUENT EROSION OF THE RIGHT TO KEEP AND BEAR ARMS, 78 W. Va. L. R. 171 (1976)

Caplan, RESTORING THE BALANCE: THE SECOND AMENDMENT REVISITED, 5 Fordham Urban L. J. 31 (1976)

Caplan, HANDGUN CONTROL: CONSTITUTIONAL OR UNCONSTITUTIONAL?, 10 N.C. Central L. J. 53 (1979)

Cantrell, THE RIGHT TO BEAR ARMS, 53 Wis. Bar Bull. 21 (Oct. 1980)

Halbrook, THE JURISPRUDENCE OF THE SECOND AND FOURTEENTH AMENDMENTS, 4 Geo. Mason L. Rev. 1 (1981)

Enforcement of Federal Firearms Laws From the Perspective of the Second Amendment

Federal involvement in firearms possession and transfer was not significant prior to 1934, when the National Firearms Act was adopted. The National Firearms Act as adopted covered only fully automatic weapons (machine guns and submachine guns) and rifles and shotguns whose barrel length or overall length fell below certain limits. Since the Act was adopted under the revenue power, sale of these firearms was not made subject to a ban or permit system. Instead, each transfer was made subject to a $200 excise tax, which must be paid prior to transfer; the identification of the parties to the transfer indirectly accomplished a registration purpose.

The 1934 Act was followed by the Federal Firearms Act of 1938, which placed some limitations upon sale of ordinary firearms. Persons engaged in the business of selling those firearms in interstate commerce were required to obtain a Federal Firearms License, at an annual cost of $1, and to maintain records of the name and address of persons to whom they sold firearms. Sales to persons convicted of violent felonies were prohibited, as were interstate shipments to persons who lacked the permit required by the law of their state.

Thirty years after adoption of the Federal Firearms Act, the Gun Control Act of 1968 worked a major revision of federal law. The Gun Control Act was actually a composite of two statutes. The first of these, adopted as portions of the Omnibus Crime and Safe Streets Act, imposed limitations upon imported firearms, expanded the requirement of dealer licensing to cover anyone "engaged in the business of dealing" in firearms, whether in interstate or local commerce, and expanded the recordkeeping obligations for dealers. It also imposed a variety of direct limitations upon sales of handguns. No transfers were to be permitted between residents of different states (unless the recipient was a federally licensed dealer), even where the transfer was by gift rather than sale and even where the recipient was subject to no state law which could have been evaded. The category of persons to whom dealers could not sell was expanded to cover persons convicted of any felony (other than certain business-related felonies such as antitrust violations), persons subject to a mental commitment order or finding of mental incompetence, persons who were users of marijuana and other drugs, and a number of other categories. Another title of the Act defined persons who were banned from possessing firearms. Paradoxically, these classes were not identical with the list of classes prohibited from purchasing or receiving firearms.

The Omnibus Crime and Safe Streets Act was passed on June 5, 1968, and set to take effect in December of that year. Barely two weeks after its passage, Senator Robert F. Kennedy was assassinated while campaigning for the presidency. Less than a week after

his death, the second bill which would form part of the Gun Control Act of 1968 was introduced in the House. It was reported out of Judiciary ten days later, out of Rules Committee two weeks after that, and was on the floor barely a month after its introduction. The second bill worked a variety of changes upon the original Gun Control Act. Most significantly, it extended to rifles and shotguns the controls which had been imposed solely on handguns, extended the class of persons prohibited from possessing firearms to include those who were users of marijuana and certain other drugs, expanded judicial review of dealer license revocations by mandating a de novo hearing once an appeal was taken, and permitted interstate sales of rifles and shotguns only where the parties resided in contiguous states, both of which had enacted legislation permitting such sales. Similar legislation was passed by the Senate and a conference of the Houses produced a bill which was essentially a modification of the House statute. This became law before the Omnibus Crime Control and Safe Streets Act, and was therefore set for the same effective date.

Enforcement of the 1968 Act was delegated to the Department of the Treasury, which had been responsible for enforcing the earlier gun legislation. This responsibility was in turn given to the Alcohol and Tobacco Tax Division of the Internal Revenue Service. This division had traditionally devoted itself to the pursuit of illegal producers of alcohol; at the time of enactment of the Gun Control Act, only 8.3 percent of its arrests were for firearms violations. Following enactment of the Gun Control Act the Alcohol and Tobacco Tax Division was retitled the Alcohol, Tobacco and Firearms Division of the IRS. By July, 1972 it had nearly doubled in size and became a complete Treasury bureau under the name of Bureau of Alcohol, Tobacco and Firearms.

The mid-1970's saw rapid increases in sugar prices, and these in turn drove the bulk of the "moonshiners" out of business. Over 15,000 illegal distilleries had been raided in 1956; but by 1976 this had fallen to a mere 609. The BATF thus began to devote the bulk of its efforts to the area of firearms law enforcement.

Complaints regarding the techniques used by the Bureau in an effort to generate firearm cases led to hearings before the Subcommittee on Treasury, Post Office, and General Appropriations of the Senate Appropriations Committee in July 1979 and April 1980, and before the Subcommittee on the Constitution of the Senate Judiciary Committee in October 1980. At these hearings evidence was received from various citizens who had been charged by BATF, from experts who had studied the BATF, and from officials of the Bureau itself.

Based upon these hearings it is apparent that enforcement tactics made possible by current federal firearms laws are constitutionally, legally, and practically reprehensible. Although Congress adopted the Gun Control Act with the primary object of limiting access of felons and high-risk groups to firearms, the overbreadth of the law has led to neglect of precisely this area of enforcement. For example the Subcommittee on the Constitution received correspondence from two members of the Illinois Judiciary, dated in 1980, indicating that they had been totally unable to persuade BATF to accept cases against felons who were in possession of

firearms including sawed-off shotguns. The Bureau's own figures demonstrate that in recent years the percentage of its arrests devoted to felons in possession and persons knowingly selling to them have dropped from 14 percent down to 10 percent of their firearms cases. To be sure, genuine criminals are sometimes prosecuted under other sections of the law. Yet, subsequent to these hearings, BATF stated that 55 percent of its gun law prosecutions overall involve persons with no record of a felony conviction, and a third involve citizens with no prior police contact at all.

The Subcommittee received evidence that BATF has primarily devoted its firearms enforcement efforts to the apprehension, upon technical malum prohibitum charges, of individuals who lack all criminal intent and knowledge. Agents anxious to generate an impressive arrest and gun confiscation quota have repeatedly enticed gun collectors into making a small number of sales—often as few as four—from their personal collections. Although each of the sales was completely legal under state and federal law, the agents then charged the collector with having "engaged in the business" of dealing in guns without the required license. Since existing law permits a felony conviction upon these charges even where the individual has no criminal knowledge or intent numerous collectors have been ruined by a felony record carrying a potential sentence of five years in federal prison. Even in cases where the collectors secured acquittal, or grand juries failed to indict, or prosecutors refused to file criminal charges, agents of the Bureau have generally confiscated the entire collection of the potential defendant upon the ground that he intended to use it in that violation of the law. In several cases, the agents have refused to return the collection even after acquittal by jury.

The defendant, under existing law is not entitled to an award of attorney's fees, therefore, should he secure return of his collection, an individual who has already spent thousands of dollars establishing his innocence of the criminal charges is required to spend thousands more to civilly prove his innocence of the same acts, without hope of securing any redress. This, of course, has given the enforcing agency enormous bargaining power in refusing to return confiscated firearms. Evidence received by the Subcommittee on the Constitution demonstrated that Bureau agents have tended to concentrate upon collector's items rather than "criminal street guns". One witness appearing before the Subcommittee related the confiscation of a shotgun valued at $7,000. Even the Bureau's own valuations indicate that the value of firearms confiscated by their agents is over twice the value which the Bureau has claimed is typical of "street guns" used in crime. In recent months, the average value has increased rather than decreased, indicating that the reforms announced by the Bureau have not in fact redirected their agents away from collector's items and toward guns used in crime.

The Subcommittee on the Constitution has also obtained evidence of a variety of other misdirected conduct by agents and supervisors of the Bureau. In several cases, the Bureau has sought conviction for supposed technical violations based upon policies and interpretations of law which the Bureau had not published in the Federal Register, as required by 5 U.S.C. § 552. For instance, beginning in 1975, Bureau officials apparently reached a judgment that

a dealer who sells to a legitimate purchaser may nonetheless be subject to prosecution or license revocation if he knows that that individual intends to transfer the firearm to a nonresident or other unqualified purchaser. This position was never published in the Federal Register and is indeed contrary to indications which Bureau officials had given Congress, that such sales were not in violation of existing law. Moreover, BATF had informed dealers that an adult purchaser could legally buy for a minor, barred by his age from purchasing a gun on his own. BATF made no effort to suggest that this was applicable only where the barrier was one of age. Rather than informing the dealers of this distinction, Bureau agents set out to produce mass arrests upon these "straw man" sale charges, sending out undercover agents to entice dealers into transfers of this type. The first major use of these charges, in South Carolina in 1975, led to 37 dealers being driven from business, many convicted on felony charges. When one of the judges informed Bureau officials that he felt dealers had not been fairly treated and given information of the policies they were expected to follow, and refused to permit further prosecutions until they were informed, Bureau officials were careful to inform only the dealers in that one state and even then complained in internal memoranda that this was interfering with the creation of the cases. When BATF was later requested to place a warning to dealers on the front of the Form 4473, which each dealer executes when a sale is made, it instead chose to place the warning in fine print upon the back of the form, thus further concealing it from the dealer's sight.

The Constitution Subcommittee also received evidence that the Bureau has formulated a requirement, of which dealers were not informed that requires a dealer to keep official records of sales even from his private collection. BATF has gone farther than merely failing to publish this requirement. At one point, even as it was prosecuting a dealer on this charge (admitting that he had no criminal intent), the Director of the Bureau wrote Senator S. I. Hayakawa to indicate that there was no such legal requirement and it was completely lawful for a dealer to sell from his collection without recording it. Since that date, the Director of the Bureau has stated that that is not the Bureau's position and that such sales are completely illegal; after making that statement, however, he was quoted in an interview for a magazine read primarily by licensed firearms dealers as stating that such sales were in fact legal and permitted by the Bureau. In these and similar areas, the Bureau has violated not only the dictates of common sense, but of 5 U.S.C. § 552, which was intended to prevent "secret lawmaking" by administrative bodies.

These practices, amply documented in hearings before this Subcommittee, leave little doubt that the Bureau has disregarded rights guaranteed by the constitution and laws of the United States.

It has trampled upon the second amendment by chilling exercise of the right to keep and bear arms by law-abiding citizens.

It has offended the fourth amendment by unreasonably searching and seizing private property.

It has ignored the Fifth Amendment by taking private property without just compensation and by entrapping honest citizens without regard for their right to due process of law.

The rebuttal presented to the Subcommittee by the Bureau was utterly unconvincing. Richard Davis, speaking on behalf of the Treasury Department, asserted vaguely that the Bureau's priorities were aimed at prosecuting willful violators, particularly felons illegally in possession, and at confiscating only guns actually likely to be used in crime. He also asserted that the Bureau has recently made great strides toward achieving these priorities. No documentation was offered for either of these assertions. In hearings before BATF's Appropriations Subcommittee, however, expert evidence was submitted establishing that approximately 75 percent of BATF gun prosecutions were aimed at ordinary citizens who had neither criminal intent nor knowledge, but were enticed by agents into unknowing technical violations. (In one case, in fact, the individual was being prosecuted for an act which the Bureau's acting director had stated was perfectly lawful.) In those hearings, moreover, BATF conceded that in fact (1) only 9.8 percent of their firearm arrests were brought on felons in illicit possession charges; (2) the average value of guns seized was $116, whereas BATF had claimed that "crime guns" were priced at less than half that figure; (3) in the months following the announcement of their new "priorities", the percentage of gun prosecutions aimed at felons had in fact fallen by a third, and the value of confiscated guns had risen. All this indicates that the Bureau's vague claims, both of focus upon gun-using criminals and of recent reforms, are empty words.

In light of this evidence, reform of federal firearm laws is necessary to protect the most vital rights of American citizens. Such legislation is embodied in S. 1030. That legislation would require proof of a willful violation as an element of a federal gun prosecution, forcing enforcing agencies to ignore the easier technical cases and aim solely at the intentional breaches. It would restrict confiscation of firearms to those actually used in an offense, and require their return should the owner be acquitted of the charges. By providing for award of attorney's fees in confiscation cases, or in other cases if the judge finds charges were brought without just basis or from improper motives, this proposal would be largely self-enforcing. S. 1030 would enhance vital protection of constitutional and civil liberties of those Americans who choose to exercise their Second Amendment right to keep and bear arms.

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OTHER VIEWS OF THE SECOND AMENDMENT

Does the Second Amendment Mean What It Says?

by DAVID J. STEINBERG
Executive Director
National Council for a Responsible Firearms Policy

"A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

- Second Amendment, the U.S. Constitution

The "right of the people to keep and bear arms" is part of the Bill of Rights. It stands alongside the First Amendment's rights of freedom of speech, press, religion, and assembly. Opponents of strict or any regulation of private possession of firearms regard the Second Amendment as no less important than the First, indeed as a defense against a tyrannical government that would deprive the people of the basic rights for which a revolution was fought and an independent nation founded. Regardless of the degree of gun control any of us may prefer, it is essential that the meaning and intent of the Second Amendment be clearly understood, and its mandate carried out.

106 Years of Court Decisions

Although a lively debate has raged over the purpose of the Second Amendment, the nation's courts—federal and state alike—have been in basic agreement on this subject for as long as judicial judgments have been made on contentions that the Second Amendment establishes a personal right to have firearms, free from government regulation. Such decisions go back more than 100 years. The

Supreme Court's first decision in this field was in 1875 in *United States v. Cruikshank*. Here the Court found that the right to keep and bear arms was not a right granted by the Constitution, was not dependent on the Constitution for its existence, was protected only against infringement by the federal government, and in any case its application to personal rights was only in the context of the freedom of the states to have their own militias. That is, the right of the individual to have firearms was given constitutional protection only to the extent that the right of the particular individual to have a gun was essential to the ability of the state to have an effective militia.

The significance of this relationship of the individual to the organized militia is better understood when one recalls the nature of the armed forces

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(i.e., the land forces) in the early years of the nation's history.

Bone and Muscle of the Infantry

There was no national standing army at the time the Second Amendment became law (1791) and there would be none of any consequence for over 100 years. The state militias were the bone and muscle of the nation's infantry both during and after the Revolution. Fear of a national standing army with any real strength permeated attention to the military powers of the national government and the various state governments. The basic Constitution, in Article I, Section 8, empowered Congress to provide for "calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions," and for "organizing, arming, and disciplining the militia." The state militias were by no means regarded as the sole instrument of national defense. They were, however, regarded, not only as a vital national resource, but as the sole defense of the states against national encroachment.

At that time, and for about another hundred years, the firearms used in the state militias were mostly those brought into such service by the citizen soldiers themselves. If these men didn't have guns, the militias could hardly be effective. Thus, the "right of the people to keep and bear arms" was essential to the viability of the "well-regulated militia," which in turn was "necessary to the security of a free state."

Those who interpret the Second Amendment as providing only for a state's right to have a militia see only half the picture, omitting the Amendment's implication that private possession of guns is basic to the existence of such militias (at the time the Amendment was adopted and for many years thereafter). Those who interpret the Second Amendment as providing or protecting the individual's personal right to have firearms see only the other half of the picture,

omitting the component that the individual's right to have a gun must be shown to be essential to the formation of an effective militia.

If, as now and indeed ever since Congress in 1903 established state militias known as the National Guard, the arms used by the state militias are entirely provided by the government, the right of the people to keep and bear arms appears to lose whatever meaning it once had as an individual right protected by the Constitution. The 1903 act also provided for a reserve militia consisting of all able-bodied men between 18 and 45 who were not members of the organized militia. But no firearms were issued to t..em in this reserve status. Nor are reservists expected or required to have and bring their own.

Title 10, Section 311

Many opponents of gun control make much, in fact too much, of Title 10, Section 311 of the United States

Code in their attempt to prove that the militia is not limited to the National Guard—namely, that there is an "unorganized militia" and that under the Second Amendment every member of it has a constitutional right to have firearms. Title 10, Section 311, states that "the militia of the United States consists of all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States."

Those who cite that regulation in the debate on gun control interpret it to mean that every such person, in fact every adult citizen, has a Second Amendment right to a gun to protect himself or herself against violent harm to themselves, their families and their communities. The police, they contend, are not always available. When widespread violence occurs, the National Guard and other military forces may be preoccupied elsewhere. In this light, the National Rifle Association sees the armed citizen as "a potential community stabilizer" whether as a civilian member of an organized posse or simply as a member of the "unorganized militia." In some renditions of the right to keep and bear arms, the armed citizen is seen as "a vital last line of defense against crime, federal tyranny, and foreign invasion"—the people's "ultimate check against abuses by their government," including abuse of power by a militia.

"Well Regulated" Militia

Whatever the merits of such notions about personal and national security (they are, to say the least, highly questionable in this day and age), it is important to note that the only kind of militia the Second Amendment expressly regards as consistent with security is a "well-regulated" militia. One may rationally and reasonably conclude that this applies both to an organized militia and an unorganized one. Otherwise, an armed citizenry consisting of men and women using guns for presumed high purpose according to their respective dictates of personal whim and political fancy is the stuff from which anarchy could result, and in turn the tyranny against which the private possession of guns is supposed to protect Americans.

The right to keep and bear arms (a term that connotes a military purpose) stems from the English common law right of self-defense. However, the possession of guns in the mother country of the common law was never an absolute right. Various conditions were imposed. Britain today has one of the strictest gun laws in the world.

There is nothing absolute about the freedoms in our own Bill of Rights. Freedom of speech is not freedom to shout "fire" in a crowded theater. Freedom of religion is not freedom to have multiple spouses, or sacrifice a lamb in the local park, as religiously sanctioned practices. Similarly, whatever right the Second Amendment protects regarding the private possession of guns, for whatever definition of "militia," is not an absolute right. It must serve the overall public interest, including (from the preamble of the US Constitution) the need to "insure domestic tranquility, provide for the common defense and promote the general welfare." Whatever right there is to possess firearms is no less important than the right of every American, gun owners included, to protection against the possession of guns by persons who by any reasonable standard lack the crucial credentials for responsible gun ownership. ■

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national coalition to ban handguns

JUNE 26, 1981

NATIONAL COALITION TO BAN HANDGUNS

STATEMENT

ON THE

SECOND AMENDMENT

By: Michael K. Beard,
Executive Director

and

Samuel S. Fields,
Legal Affairs
Coordinator

American Civil Liberties Union
American Ethical Union
Americans for Democratic Action
American Jewish Congress
American Psychiatric Association
American Public Health Association
Black Women's Community Development Foundation
B'nai B'rith Women
Board of Church & Society, United Methodist Church
Career for Social Action, United Church of Christ
Church of the Brethren Washington Office
Disarm Educational Fund
Friends Committee on National Legislation
International Ladies' Garment Workers Union
Jesuit Conference—Office of Social Ministries
National Alliance for Safer Cities
National Association of Social Workers
National Council of Jewish Women, Inc.
National Council of Negro Women
National Jewish Welfare Board
Political Action Committee Women's Political Democratic Club
The Program Agency, United Presbyterian Church in the U.S.A.
Union of American Hebrew Congregations
Unitarian Universalist Association
United States Conference of Mayors
United States National Student Association
United Synagogue of America
Women's Division, Board of Global Ministries, United Methodist Church
Women's League for Conservative Judaism
Young Women's Christian Association of the U.S.A. National Board
(partial listing)

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

1975 American Bar Association Gun Control Policy

Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment

Gun Control Legislation
By The Committee on Federal Legislation

N.C.B.H. STATEMENT

There is probably less agreement, more misinformation, and less understanding of the right to keep and bear arms than any other current controversial constitutional issue. The crux of the controversy is the construction of the Second Amendment to the Constitution, which reads: "A well-regulated militia, being necessary to the security of a free State, the right to keep and bear arms shall not be infringed." In addition to the five decisions in which the Supreme Court has construed the Amendment, every Federal court decision involving the Amendment has given the Amendment a collective, militia interpretation and/or held that firearms control laws enacted under a state's police power are constitutional. Thus arguments premised upon the Federal Second Amendment, or the similar provisions in the thirty-seven state constitutions, have never prevented regulation of firearms.

--American Bar Association
Background Report on
Firearms Control

The Union agrees with the Supreme Court's long-standing interpretation of the Second Amendment that the individual's right to keep and bear arms applies only to the preservation or efficiency of a "well-regulated militia." Except for lawful police and military purposes, the possession of weapons by individuals is not constiutionally protected.

--American Civil Liberties
Union
Policy 143

N.C.B.H. STATEMENT

The Second Amendment to the United States Constitution says: "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." While NRA takes the firm stand that law-abiding Americans are constitutionally entitled to the legal ownership and use of firearms, the Second Amendment has not prevented firearms regulation on national and state levels. Also, the few federal court decisions involving the Second Amendment have largely given the Amendment a collective, militia interpretation and have limited the application of the Amendment to the Federal Government.

--National Rifle Association
"NRA Fact Book on Firearms Control"

N.C.B.H. STATEMENT

YOU DO NOT HAVE A CONSTITUTIONAL RIGHT TO OWN A HANDGUN.

Tha Second Amendment to the U.S. Constitution states: "A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." Some people claim that this amendment prohibits the federal government from interfering with their private "right to bear arms." However, in every instance where the Supreme Court has ruled on the Second Amendment or discussed it in a footnote or dicta their position has been uniformly in favor of interpreting the Second Amendment as a collective right of the several states and not as an individual right.

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. This duty was limited, however, by the colonial governments in order to prevent the use of fire rms for harmful purposes. To prevent civil disturbances the colonial governments were careful to keep arms from falling into the "wrong hands" and passed regulations concerning the conditions under which arms could be used.

Following the revolution the founders of the nation lacked confidence in the newly formed federation. Having just waged a revolution against an oppressive colonial ruler, they felt the need to protect their collective right to rise up and defend themselves against the new federal government. The founding fathers wanted to be sure than a people's militia could

continue to exist in case the states needed to protect themselves from abuses by the new federal government.

Records of the debates over the passage of the Second Amendment clearly show that the intent of Congress was to prevent the federal government from destroying the state militias. The "right to bear arms" was a corporate right used to insure that a balance between liberty and authority within the union would be maintained. Personal self-protection was not the issue. While some attempts were made to include a personal right to have arms in the Bill of Rights, these provisions were never adopted.

Many court decisions and virtually every leading legal scholar and constitutional expert in the country agree that the intent, wording and meaning of the Second Amendment in its full context, refer only to the people's collective right to bear arms as members of a well-regulated and authorized militia. Moreover, no serious student of law believes that the amendment prevents the reasonable regulation of firearms. This is evidenced by the many unchallenged laws on the books which require licenses and permits or prohibit the carrying of concealed weapons.

While the Second Amendment does not guarantee an individual a right to bear arms, the rights and responsibilities of self-protection are implicit in much of the constitution and in the vast body of law that rules our political and social life. Members of the pro-handgun lobby sometimes cite common

law to support their arguments against handgun control. According to these arguments the individual has a Common Law right to keep and bear arms for self-defense and to defend one's country. It should be noted, however, that England, the country which is the source of all U.S. Common Law, has enacted some of the most stringent handgun control laws in the world and thus does not feel that they are in violation of Common Law rights.

Attached to this submission are four scholarly articles on the origins and meaning of the Second Amendment. An analysis by the U.S. Federal Courts follows immediately.

What the Courts Say

The "right to bear arms" question has been brought into the courts many times since the Constitution was written. The courts have consistently ruled that the Second Amendment does not guarantee a personal right to own firearms.

Supreme Court decisions on the "right to bear arms" have repeatedly stated that the Second Amendment was conceived of as a restraint on the power of the federal government over the state militias. In U.S. v. Cruickshank, 95 U.S. 542 (1874), the Court held that, while there may be an individual right to possess arms, it existed independently of the Second Amendment.

Subsequent decisions elaborated on the scope of the Second Amendment's guarantee. In Presser v. Illinois, 116 U.S. 252 (1886), the Court upheld an Illinois statute forbidding bodies of men to associate in military organizations or to drill or parade with arms in cities or towns. The court also ruled

that the states had the power to regulated firearms as was necessary for the common good.

The third and least important of the Second Amendment cases was Miller v. Texas, 153 U.S. 535 (1894), in which a con icted murderer asserted that the state had violated his Second and Fourth Amendment rights. The Supreme Court unanimously dismissed the claim saying that the Second Amendment did not apply to the states citing, Cruickshank and other cases.

The most frequently discussed case on the issue of the Second Amendment is U.S. v. Miller 307 U.S. 174, 59 S. Ct. 816, 83 L.Ed. 1206 (1939). At issue is the so-called "ordinary military equipment" question. Proponents of the Second Amendment as an individual right insist that the Miller Court was attempting to dichotomize "militia" and "non-militia" weapons, the latter being subject to legislative control while the former is not. The argument then goes on to state that the court was unaware that Miller's weapon, a sawed-off shotgun, had in fact been used in World War I. Therefore, the argument continues, if the Court had only been made aware of this historical fact it would have overturned Miller's conviction and ruled the 1934 National Firearm Act unconstitutional.

The problem with this argument is twofold. First, the Court was not creating the "militia" versus "non-militia" dichotomy for the purposes of identifying individual right versus collective right weapons. Second, and probably more important, the Court was probably not attempting to formulate

a rule at all. See: Cases v. U.S. 131 F.2d 916 (1 CCA, 1942) cert. denied 319 U.S. 770, 63 S. Ct. 1431, 87 L.Ed. 1718 (1942). [Note: in the certerori denial the defendant is referred to as Velazquez v. U.S. His full name was Jose Cases Velazquez, hence, this has been a source of some confusion.]

In rejecting the military character of the shotgun the Miller court wrote:

> In the absence of any evidence tending 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 for the right to keep and bear such an instrument [emphasis added].

What we have then is two tiered test: first for the weapon and second for the weapon holder. Even assuming that clear convincing proof had shown that sawed-off shotguns were not merely part of the military arsenal but in fact were standard issue as common as K-rations and helmets and furthermore it was a court martial offense to be found without it, it still would not have done Mr. Miller a whit of good. Mr. Miller fails miserably in the weapon holder test. He was not acting in the role of the member of "militia," much less a regulated militia," and least of all the "well regulated militia," described by the Court and the Second Amendment.

The most that can be said for whose right emerged in Miller is that of the state militia's and their own arsenals. But even here common sense tells us there are clear parameters on state militia arsenals. If not, it would logically follow

that the several states could, at will, establish independent nuclear strike forces. If nothing else, such a development would certainly enliven the annual Governor's conference.

But, of course, shortly after the Miller court ruled, the idea of a "militia/non-militia" test was put to a well needed rest. In Cases [a.k.a. Velazquez] the Court of Appeals not only rejected the idea that individuals were part of the militia/non-militia weapons dichotomy but insisted that no such dichotomy was intended:

> we do not feel that the Supreme Court in this case was attempting to formulate a general rule applicable to all cases. The rule which it laid down was adequate to dispose of the case before it and that we think was as far as the Supreme Court intended to go.

Since Miller the Supreme Court has on at least two occasions spoken on the subject of the Second Amendment. In E. Adams v. Williams 407 U.S. 143, 92 S. Ct. 1921, 322 Ed. 612 (1972) Justice Douglas discussing search and seizure problems wrote:

> A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment, which reads, "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."
>
> There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted. There is no reason why pistols may not be barred from anyone with a police record. There is no reason why a State may not require a purchaser of a pistol to pass a psychiatric test. There is no reason why all pistols

should not be barred to everyone except the police.

The leading case is United States v. Miller, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206, upholding a federal law making criminal the shipment in interstate commerce of a sawed-off shotgun. The law was upheld, there being no evidence that a sawed-off shotgun had "some reasonable relationship to the preservation or efficiency of a well regulated militia." Id., at 178, 59 S.Ct. at 818. The Second Amendment, it was held, "must be interpreted and applied" with the view of maintaining a "militia."

"The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies: the common view was that adequate defense of country and laws could be secured through the Militia--civilians primarily, soldiers on occasion." Id., at 178-179, 59 S.Ct., at 818.

Critics say that proposals like this water down the Second Amendment. Our decisions belie that argument, for the Second Amendment, as noted, was designed to keep alive the militia.

Douglas and Marshall's opinion on the Second Amendment is unequivocably clear: the Amendment is a collective right of the state.

Most recently in Lewis v. United States 445 U.S. 95, 100 S. Ct. 915 __ L.Ed. _____ (1980) Justice Blackmun, writing for the majority, upheld the 1968 Gun Control Act and noted in a critical footnote:

8. These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See Unites States v. Miller, 307 U.S 174, 178, 59 S. Ct. 816, 818, 83 L.Ed. 1206 (1939) (the Second Amendment guarantees no right to keep and bear a firearm that does

N.C.L.H. STATEMENT

> not have "some reasonable relationship to the preservation or efficiency of a well regulated militia"); United States v. Three Winchester 30-30 Caliber Lever Action Carbines, 504 F.2d 1288, 1290, n. 5 (CA7 1975); United States v. Johnson, 497 F.2d 548 (CA4 1974); Cody v. United States, 460 F.2d 34 (CA8), cert. denied, 490 U.S. 1010, 93 S.Ct. 454, 34 L.Ed.2d 303 (1972) (the latter three cases holding, respectively, that Sec. 1202(a)(1), Sec. 922(g), and Sec. 922(a)(6) do not violate the Second Amendment).

The Miller standard has once again been vindicated to be a collective right of "a well regulated militia."

The Courts of Appeals on Various Aspects of the Second Amendment

U.S. v. Wilbur 545 F.2d 7641 (1st 1976)

In prosecution for violation of the Gun Control Act of 1968, trial court action in curtailing defense counsel's argument on Second Amendment was proper as preventing confusion lest jury believe that United States Constitution provided defendants with legal defense.

Eckert v. City of Philadelphia 477 F.2d 610 (3rd 1973)

Appellant's theory in the district court which he now repeats is that by the Second Amendment to the United States Constitution he is entitled to bear arms. Appellant is completely wrong about that.

U.S. v. King 532 F.2d 505 (3rd 1976)

We firmly disagree with the argument that the statute violates appellant's right to keep and bear arms. He was

neither charged with nor convicted of keeping and bearing arms. He was charged with and convicted of engaging without a license in the business of dealing in firearms and of conspiring with others so to do.

U.S. v. Graves 554 F.2d 65 (3rd 1977)

The courts consistently have found no conflict between federal gun laws and the Second Amendment, narrowly construing the latter to guarantee the right to bear arms as a member of a militia. Graves has not attempted to invoke the Second Amendment as a defense in the present prosecution. Even if he had, we would deem controlling the interpretation adopted in Miller and the cases following it.

U.S. v. Johnson 497 F.2d 548 (4th 1974)

The statute prohibiting the transportation of a firearm in interstate commerce after having been convicted of a felony is not unconstitutional as violative of defendant's Second Amendment right to keep and bear arms since the Second Amendment only confers a collective right of keeping and bearing arms which must bear a reasonable relationship to the presentation or efficiency of a well-regulated militia.

N.C.B.H. STATEMENT

U.S. v. Snider 502 F.2d 645 (4th 1974)

Dissent (not in conflict with the majority view on this issue):

Although thousand of perfectly well intentioned persons doubtless believe with all sincerity that the Second Amendment protection of the right to bear arms is violated by the Gun Law e.g. 18 U.S.C. Appendix (201 et seq.), such a contention would be frivolous.

U.S. v. Johnson 441 F.2d 1134 (5th 1971)

Appellant's remaining contention, that his constitutional right to bear arms has been infringed by the Act, misconstrues the Second Amendment. The Supreme Court dealt with such a constitutional attack directed against the National Firearms Act of 1934 in U.S. v. Miller.

U.S. v. Williams 446 F.2d 486 (5th 1971)

Statutes proscribing offense of and penalty for possession of an unregistered firearm are not violative of the right to bear arms as guaranteed by Second Amendment.

McKnight v. U.S. 507 F.2d 1034 (5th 1975)

Appeals Court upholds lower court's rejection of defendant's motion for relief on the basis that the firearms charge under which he was convicted violated his Second Amendment rights.

N.C.B.H. STATEMENT

U.S. v. Forgett 349 F.2d 501 (6th 1965)

Upholds Miller ruling regarding the National Firearms Act as not violating the Second Amendment.

Stevens v. U.S. 440 F.2d 144 (6th 1971)

Constitutional right to keep and bear arms applies only to the right of the state to maintain militia and not to individuals' rights to bear arms. Congress had authority under commerce clause to prohibit possession of firearms by convicted felons, based upon congressional finding that such possession passes threat to interstate commerce.

U.S. v. Day 476 F.2d 562 (6th 1973)

As to the alleged right to bear arms, Day's claim is meritless. There is no absolute constitutional right of an individual to possess a firearm.

U.S. v. Birmley 529 F.2d 103 (6th 1976)

Statute under which defendants were convicted of possession of unregistered firearms did not violate defendants' right to bear arms.

U.S. v. Warin 530 F.2d 103 (6th 1976)

It is clear that the Second Amendment guarantees a collective rather than an individual right. The fact that the defendant Warin, in common with all adult residents and citizens

of Ohio, is subject to enrollment in the militia of the state confers on him no right to possess the submachine gun in question.

U.S. v. Pruner 606 F.2d 871 (6th 1979)

Upholds Justice Douglas' concurring and dissenting discussion on the proposition that the purchase of guns is a constitutional right protected by the Second Amendment in Adams v. Williams.

Witherspoon v. U.S. 633 F.2d 1247 (6th 1980)

Appellant contended that the Second Amendment afforded him protection from the federal firearms statutes because he was on his own business premises. There is, of course, no such specific proviso in the Second Amendment nor is there any Supreme Court interpretation to that effect.

U.S. v. Lauchli 444 F.2d 1037 (7th 1971)

We reject defendant's argument that the Gun Control Act of 1968 is violative of the Second Amendment guarantee of the right to bear arms.

U.S. v. McCutcheon 446 F.2d 133 (7th 1971)

Statute requiring one who makes firearm to file with Secretary of Treasury or his delegate written application to make and register firearm and pay any applicable tax thereon and

statute requiring registration of such firearm by maker thereof did not infringe Second Amendment right to keeep and bear arms.

U.S. v. Three Winchester 30-30 Caliber Lever Action Carbines 504 F.2d 1288 (7th 1974)

Statute prohibiting possession of firearms by previously convicted felon does not infringe on Second Amendment's protection of right to bear arms.

U.S. v. Synnes 438 F.2d 764 (8th 1971)

While the Court in Miller dealt with the prohibited possession of a sawed-off shotgun, the reasoning and conclusion of that case has carried forward to other federal gun legislation. We think it is also applicable here. Although Sec. 1202(a) is the broadest federal gun legislation to date, we see no conflict between it and the Second Amendment since there is no showing that prohibiting possession of firearms by felons the maintenance of a "well regulated militia."

U.S. v. Decker 446 F.2d 164 (8th 1971)

The record-keeping requirements at issue here bear an even more tenuous relationship to the Second Amendment than did the statute involved in Miller. Thus, in light of the defendants failure to present any evidence indicating a conflict between the requirements of Secs. 922(m) and 923(g) and the maintenance of a well-regulated militia. We decline to hold that the statute violates the Second Amendment.

N.C.B.H. STATEMENT

Cody v. U.S. 460 F.2d 34 (8th 1972)

Second Amendment right to bear arms is not an absolute bar to Congressional regulation of the use or possession of firearms and its guarantee extends only to use or possession which has some reasonable relationship to the presentation or efficiency of a well-regulated militia.

U.S. v. Turcotte 558 F.2d 893 (8th 1977)

We find no reason to reconsider the decision in Cody that the prohibition of section 922 does not obstruct the maintenance of a well-regulated militia, and therefore is not violative of the Second Amendment.

U.S. v. Wynde 579 F.2d 1088 (8th 1978)

Upholds U.S. v. Turcotte, which declared that Sec. 922(h) does not violate the Second Amendment right to bear arms.

U.S. v. Tomlin 454 F.2d 176 (9th 1972)

Statutes requiring registration of firearms and making it unlawful for any person to receive or possess unregistered firearms are not unconstitutional as infringing on right to bear arms under Second Amendment.

U.S. v. Oakes 564 F.2d 384 (10th 1977)

Purpose of the Second Amendment guaranteeing the right of the people to keep and bear arms, was to preserve the

effectiveness and assure the continuation of the state militia. To apply the Second Amendment so as to guarantee defendant's right to keep an unregistered firearm which was not shown to have any connection to the militia, merely because defendant was technically a member of the Kansas militia, would be unjustified in terms of either logic or policy; and his membership in "Posse Comitatus," an apparently non-governmental organization.

Historical Bases of the Right To Keep and Bear Arms

by David T. Hardy, Partner in the Law Firm Sando & Hardy

In analysing the right to keep and bear arms, we must constantly keep in mind that it is one of the few rights in the Constitution which can claim any considerable antiquity. Freedom of the press, for instance, had little ancestry at common law: statutes requiring a government license to publish any works on political or religious matters were in effect in England until 1695, when they were allowed to expire for economic, not libertarian, reasons.[1] Long after that date, prosecutions after-the-fact for seditious libel were common. In the Colonies, these and similar statutes were likewise enforced and offending religious material was burned in Massachusetts as late as 1723.[2] Protests against general search warrants did not become common until after 1760, and the invalidity of such warrants at common law was not recognized until the eve of the American Revolution.[3]

In contrast to these rights, the right to keep and bear arms can claim an ancestry stretching for well over a millenium. The antiquity of the right is so great that it is all but impossible to document its actual beginning. It is fairly clear that its origin lay in the customs of Germanic tribes, under which arms bearing was a right and a duty of free men; in fact, the ceremony for giving freedom to a slave required that the former slave be presented with the armament of a free man.[4] He then acquired the duty to serve in an equivalent of a citizen army. These customs were brought into England by the earliest Saxons. The first mention of the citizen army, or the "fyrd" is found in documents dating to 690 A.D., but scholars have concluded that the duty to serve in such with personal armament "is older than our oldest records." (Not knowing of the earlier records, 18th century legal historians including the great Blackstone attributed the origin of the English system to Alfred the Great, who ruled in the late 9th century A.D.)[5]

This viewpoint of individual armament and duty differed greatly from the feudal system which were coming into existence in Europe. The feudal system presupposed that the vast bulk of fighting duties would fall to a small warrior caste, composed primarily of the mounted knight. These individuals held the primary political and military power. Thus peasant armament was a threat to the political status quo. In England, on the other hand, a system evolved whereby peasant armament became the great underpinning of the status quo and individual armament became viewed as a right rather than a threat.

This in turn significantly changed the evolution of political systems in Britain. Since so much military power lay with the private citizen, the traditional monarchy was necessarily much more a limited monarchy than an absolute one. Even after the Norman

Conquest of 1066, which brought feudal systems into Britain, kings regularly appealed to the people for assistance. William Rufus, second Norman king of England, was driven to appeal to the citizenry to put down a rebellion of feudal barons. To obtain the assistance of the individual armed citizen, he promised the people of England to provide better laws then had ever been made, to rescind all new taxes instituted during his reign, and to annul the hated forest laws which imposed draconian punishments; inspired by his promises, the citizenry rose with their arms and defended his government against the rebels.[6] After his death, his brother, Henry I, often drilled the citizen units in person, seeking to appeal to the individual members. In short, kingship in Britain became a far more democratic affair than it would ever become on the Continent, due in major part to the individual armament of the British citizen.

The Angevin monarchs expanded this still farther. Henry II, who is considered the father of the common law, promulgated the Assize of Arms in 1181. This required all British citizens between 15 and 40 to purchase and keep arms. The type of arms required varied with wealth; the wealthiest had to provide themselves with full armor, sword, dagger, and war horse, while even the poorest citizens, "the whole community of freemen", must have leather armor, helmet, and a lance.[7] Twice a year all citizens were to be inspected by the king's officials to insure that they possessed the necessary arms. Conversely, the English made it quite clear that the king was to be expected to depend exclusively upon his armed freemen. When rebellious barons forced John I to sign the Magna Carta in 1215, they inserted in its prohibitions a requirement that he "expel from the kingdom all foreign knights, crossbowmen, sergeants, and mercenaries, who have come with horses and weapons to the harm of the realm."

Henry III continued this tradition. In his 1253 Assize of Arms he expanded the age categories to include everyone between 15 and 60 years of age, and made a further modification which bordered on the revolutionary. Now, not only were freemen to be armed, but even villeins, who were little more than serfs and were bound to the land. Now all "citizens, burgesses, free tenants, villeins and others from 15 to 60 years of age" were legally required to be armed.[8] Even the poorest classes of these were required to have a halberd (a pole arm with an axe and spike head) and a knife, plus a bow if they owned lands worth over two pounds sterling.

The role of the armed citizen expanded under the rule of the four Edwards. During civil wars in Wales, Edward I discovered the utility of the Welsh longbow, an extremely potent bow (its pull was estimated to have been between 100-200 pounds, whereas today a 60-pound bow is considered extremely powerful) which could penetrate the heaviest armor. Unlike the crossbow (and to an even greater extent, the armor and horse of the mounted knight) the longbow could be made cheaply enough and maintained easily enough to become the universal armament of all citizens. While on the Continent so deadly a weapon was considered a threat to the rule of the armored knight, in Britain its use was encouraged by the monarch. At Crecy, Poitiers and Agincourt, the longbow in the hands of British commoners decimated the French armored

knights. By 1369 Edward III was ordering the sheriffs of London to require "everyone of said city stronge in body, at leisure time on holidays" to "use in their recreation bowes and arrows."[9] He hardly needed the encouragement; the archery ranges outside London were so constantly swamped with arrows that no grass would grow upon them. Edward IV continued this policy, commanding that "every Englishman or Irishman dwelling in England must have a bow of his own height", and commanding that each town build and maintain an archery range upon which every citizen must practice on feast days.[10] In 1470 he banned games of dice, horseshoes, and tennis in order to force citizens to use nothing but the bow for sport.[11] He imposed price controls on bows in order to ensure that bows would be inexpensive enough for even the poorest citizen to purchase them.[12]

While the common law sought to force all commoners to possess what was then the most deadly military weapon, it also imposed only the most minimal restraints upon use of that weapon. These focused purely upon criminal misuse of the weapon or its transportation into certain highly protected areas. In 1279, for instance, those coming before the royal courts were required to "come without all force and armor".[13] The Statute of Arms, whose date of enactment is uncertain, required that spectators at tournaments attend without armament and that those participating in the tournament carry swords without points.[14] The 1328 Statute of Northampton prohibited anyone, other than the king's servants or citizens attempting to keep the peace, from coming before the king's ministers "with force and arms", or acting "in affray of the peace", and from going or riding "armed by night or by day in fairs, markets, nor in the presence of the justices or other ministers nor in no part elsewhere...."[15] In light of the common law preference for individual armament, however, English courts construed this to mean that only carrying of arms in a threatening or terrifying manner was prohibited. In the words of William Hawkins in his "Pleas of the Crown", "no wearing of arms is within the meaning of the statute, unless it be accompanied with such circumstances as are apt to terrify the people; from which it seems to follow, that persons of quality are in no danger of offending against the statute by wearing common weapons...."[16] Thus the sole common law restraints upon use of armament in this period focused either upon carrying into specially protected areas or upon what today would be considered assault with a deadly weapon.

While firearms had been invented sometime before, only in the 16th century did they become truly portable with the invention of the wheellock. This breakthrough inspired a number of attempts in Europe and England to control weaponry. The Emperor Maxmilian attempted to impose bans upon wheellock manufacture throughout his empire on the Continent; the French imposed strict controls both upon manufacture and sale of firearms and upon assembly of ammunition and making of powder.[17] The English briefly experimented with such but found them repugnant to their institutions. Henry VII had in 1503 banned the shooting of crossbows upon an extremely limited basis.[18] First, only shooting and not possession was outlawed, and that only without a license or "placarde" from the king. Secondly, an exception was made for those who shot in

defense of a residence ("but if he shote aw of a howse for the lawefull defen of the same") and for lords who owned land worth 200 marks per year. Third, as might be surmised from the ban upon shooting rather than upon ownership, the purpose was to force citizens to use the longbow, which was considered a much deadlier weapon.

His successor Henry VIII was a great devotee of the longbow and early in his reign attempted to push its use by still more vigorous means. In 1511 he enacted "an act concerning shooting in longe bowes" which banned games, required fathers to purchase bows for sons between the ages of 7 and 14 and to "lern theym and bryng theym up in shootyng". From age 14 until 40 each non-disabled citizen was obliged to practice longbow shooting and also to have bow and arrows "contynually in hys house." Anyone who failed to own and use a longbow was subject to a fine. The ban upon crossbows was renewed and the property requirement for such was raised to 300 marks.[19]

In 1514 Henry extended the ban upon crossbows to include "handgonnes" (which at that time meant any firearm carried by hand, as opposed to cannons, rather than what are today called "pistols"), and to extend the ban to possession as well as shooting.[20] Once again the intent was to force ownership and use of the longbow in place of the less efficient firearms of the time.

Unlike his continental equivalents, Henry was soon forced to give up his attempt at gun control. In 1523 the property qualification was lowered from 300 pounds sterling to only 100 pounds, and the penalty was reduced from imprisonment and fine to a fine only.[21] In 1541 the statute was again amended (adding in its preface a protest that despite the earlier law people "have used and yet doe daylie ryde and go in the King's highwayes and elsewhere, having with them crosbowes and little handguns") to permit ownership of the longer arms (over three-quarters of a yard or one yard in total length, depending upon type) by any citizen, and ownership of the shorter arms by citizens with over 100 pounds' worth of land.[22] It also prohibited shooting within a quarter of a mile of a town except upon a range "or for defense of his person or house", and provided that "it shal be laufull from henceforth to all gentlemen, yoemen and servingemen . . . and to all the inhabitants of citties, boroughes and markett townes of this realme of Englande to shote with any handgune, demyhake or hagbutt at anye butt or bank of earth . . . to have and kepe in everie of their houses any such handgune or handgunes . . . with the intent to use and shote the same at a but or bank of earth . . . this present act or anythinge therein conteyned to the contrarie notwithstandinge." Eventually Henry gave up the entire effort and simply rescinded his firearm laws by proclamation.[23] Weapons control—at least that which limited armament rather than required it—was recognized as repugnant to the English system. Indeed, the Tudor legal commentator Sir John Fortescue would comment (in his comparison between the happy state of peasants in England, with its limited monarchy, and the unhappy state of peasants in France, with absolute monarchy) that the French peasants were so poorly off that they not only starved but could not have any "Wepen" or the means to obtain it.[24] The consciousness of English as a weap-

ons owning and using people, in contrast to the French and other Continentals, was beginning to take form.

Under Elizabeth the English militia system developed still farther; indeed, it was during her reign that the phrase "militia" was first used to describe the concept of a universally armed people ready to stand in defense of their nation.[25] The militia were now mustered by county lieutenants and called to formal musters to display and practice with their weapons.[26] Elizabeth also sought the creation of "trained bands" or "train bands", which were small militia units given special training and provided with governmentally purchased arms.[27]

Her efforts largely decayed under her successor James I, who permitted repeal of some of the most important militia statutes. His successor, Charles I, paid the price. Increasing hostility from Parliament, which was now beginning to assert itself as a distinct legislative body, brought the kingdom to the brink of civil war. The king compromised, sending his best advisor to the scaffold, but when Parliament asked for control over the militia he exploded. "By God, not for an hour, you have asked that of me in this, which was never asked of a king,"[28] he replied. An unsuccessful attempt to arrest five members of Parliament on charges of treason led to the final breach. The five members were protected by the London militia, and the king was forced to flee the city and attempt to muster his own army.

As the civil war wore on, Parliament was at length driven to create the "New Model Army", a standing body of veteran troops who were predominantly Puritan.[29] These were rigorously disciplined under the leadership of Oliver Cromwell, who eventually rose to head the army, and with their aid Parliament ended as the victor in the civil war. But in July 1647 the New Model Army (alienated by a failure of pay and by the anti-Puritan measures of the Parliament) marched on London and took over the government. On December 6, 1648 troops, acting on Cromwell's orders, surrounded the Parliament building and drove off over 140 members. The remainder formed what became known as "the Rump Parliament". By 1653 even the Rump was an impediment to Cromwell and he used his troops to totally shut down parliamentary government; the army officers then selected a new Parliament composed largely of Puritan elders. A short time later Cromwell pressured its dissolution and in 1654 he replaced it with yet another Parliament, in whose election only those whose land was worth over 200 pounds sterling could vote. This Parliament in turn named Cromwell "Lord Protector" and king of England in all but name. Yet a year later Cromwell dissolved even this Parliament and established a military dictatorship, dividing the nation into eleven districts, each headed by a major general whose duties included political surveillance, censorship of publications, and influencing future elections.[30] A major factor in the dissolution of several of these parliaments was their attempt to adopt new militia statutes; Cromwell, who controlled by the new model army, had little interest in permitting Parliament to reorganize the militia.

Following Cromwell's death, the English were more than happy to accept back the son of the late Charles, Charles II, as monarch. Charles II promptly dissolved the army, offering full pay plus a

bonus from his own finances, and guaranteeing work on public works projects for the demobilized troops.[31] He also sought to secure himself by a variety of legislation which people in Parliament, in their haste to welcome the end of Puritan rule, did not recognize as dictatorial. In 1661 and 1662 he expanded the definition of treason, imposed press censorship, restricted practice of religion by Puritans and others and leveled the protective walls of many towns which had sided with Parliament.[32] Instructions were also issued to the lord's lieutenant to form special militia units out of volunteers of favorable political views, "the officers to be numerous, disaffected persons watched and not allowed to assemble, and their arms seized. . . ."[33] The excessive searches for arms under that order led to Parliamentary resistance and refusal to grant a militia bill in the sessions of 1660 and 1661.[34] Only in 1662 was Charles able to obtain a militia statute pleasing to him. The 1662 statute permitted the King to appoint Lieutenants for each county and major city; these lieutenants could charge persons with the responsibility of equipping and paying a militia man. But not every Englishman was required to be armed or serve, and those who were required could always hire a substitute to appear for them. The lieutenants were moreover empowered to hire persons "to search for and seize all arms in the costody or possession of any person or persons whom the said lieutenant or any two or more of their deputies shall judge dangerous to the peace of the kingdom. . . ."[35] The Calendar of State Papers for the period is filled with reports of confiscations of weapons from suspicious persons and religious independents.[36] Charles also by proclamation ordered gunsmiths to produce records of all firearms sold; importation of firearms from overseas was banned; and carriers throughout the realm were forbidden to transport firearms without first obtaining a license. (The resemblance between these measures and the American 1968 Gun Control Act is astonishing).

In 1671 this was followed with an amendment to the Hunting Act. Hunting was restricted to those who owned lands worth 100 pounds and, most importantly, those who could not hunt (who formed the vast bulk of the kingdom) were "declared to be persons by the laws of this realm, not allowed to have or keep for themselves, or any other person or persons, any guns, bows, greyhounds. . . ."[37] "Guns" were an addition to the list: all but the wealthiest land-owners could be disarmed. As Charles' reign wore on he encountered increasing opposition from Parliament and from what was becoming the Whig party. This he met by such drastic measures as moving the sitting of Parliament from London (which was quite favorable to the Whigs) to Oxford, and by arresting and executing several Whig leaders on charges of treason. Charles survived, but it was a close race.

James II, Charles' brother and successor, would not be so lucky. He continued to enforce the laws on disarmament, directing them with increasing force against Puritans and his political opponents. Moreover he used his "dispensing power" to permit Catholic officers to stay with the army. He sought to obtain permission to expand the standing army complaining that during rebellion the militia "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. . . ."[38] Parliament refused, but James kept a limited standing army on foot from his own resources. In 1686 he issued orders to six lord lieutenants complaining that "a great many persons not qualified by law, under pretense of shooting matches, keep muskets or other guns in their houses," and that he desired them to "cause strict search to be made for such muskets or guns and to seize and safely keep them until further order."[39] In Ireland he ordered General Tyrconnel to disarm the populance:

> A royal order came from Whitehall for disarming the population. This order Tyrconnel strictly executed as he respected the English. Although the country was infested by predatory bands, a Protestant gentleman could scarcely obtain permission to keep a brace of pistols.[40]

These measures did James little good; in 1688 his son-in-law and daughter, William of Orange and Mary entered the nation in a supposed "invasion" which came to be known as the "the Glorious Revolution". After defection of a number of his nobility and refusal of the militia to fight, James fled to the Continent.

This left Parliament with an interesting question: was James king and, if not, how did they go about putting William and Mary on the throne? They approached this problem by promulgating a Declaration of Rights, which listed complaints against James and argued that these had forfeited him the right to rule. After William accepted this Declaration as definitive of the rights of Englishmen, he was permitted to assume the throne and call a Parliament, which then reenacted the Declaration as the Bill of Rights.[41]

The Declaration and Bill of Rights were later said to be "the essence of the revolution"; [42] only a year before the adoption of the American Bill of Rights, the great English jurist Edmund Burke would refer to the Declaration as "the cornerstone of our Constitution."[43] The Declaration listed a variety of civil liberties which James was accused of infringing. Prominent among these was the right to keep and bear arms. The form finally adopted complained that James had violated the liberties of the kingdom by keeping a standing army and moreover by causing his Protestant subjects "to be disarmed at the same time when Papists were both armed and employed contrary to law." It accordingly resolved that "the subjects which are Protestant may have arms for their defense suitable to their conditions and as allowed by law."[44] Since only slightly over one percent of the population was then Catholic, this amounted to a general right to own arms applicable to virtually all Englishmen. The possible restriction—that they be arms "as allowed by law"—was clarified by prompt amendment of the Hunting Act to remove the word "guns" from items which even the poorest Englishman was not permitted to own. Now all Englishmen could own arms "for their defense suitable to their conditions and as allowed by law" in the form of whatever firearms they desired.[45]

A few modern writers, none of whom cite any historical evidence, have claimed that the Bill of Rights was directed not so much at disarmament as at the fact that Catholics were permitted to be armed while the Protestants had been disarmed.[46] The statutory

history of the Declaration of Rights proves beyond any doubt that this is a totally incorrect. The debates in the House of Commons, as recorded by Lord Somers, the principal draftsman of the Declaration, show that the Members focused on the confiscation of private arms collections under the 1662 Militia Act. Sergant Maynard, for instance, complains of James: "Can he sell or give away his subjects; an act of Parliament was made to disarm all Englishmen, whom the lieutenant should suspect, by day or by night, by force or otherwise—this was done in Ireland for the sake of putting arms into Irish hands." Somers condensed a speech by Sir Richard Temple to "Militia bill—power to disarm all England—now done in Ireland." A Mr. Boscawen complained of "arbitrary power exercised by the ministry—militia—imprisoning without reason; disarming—himself disarmed. . . ." Sergeant Maynard complained of the "Militia Act—an abominable thing to disarm the nation. . . ."[47]

The Lords felt even more strongly about the issue. The Commons originally passed a declaration simply declaring that "the acts concerning the militia are grievous to the subject" and that "it is necessary for the public safety that the subjects which are Protestant should provide and keep arms for the common defense; and that the arms which have been seized and taken from them be restored."[48] The Lords apparently felt this did not state the individual rights strongly enough and completely omitted the language regarding the common defense, substituting the final version: "The subjects which are Protestant may have arms for their defense suitable to their conditions and as allowed by law."[49] The language referring to the fact that Catholics were armed while the disarmaments were proceeding was added only at conference, with the Lords suggesting that it was a "further aggravation" to the underlying illegality and therefore "fit to be mentioned."[50] Indeed, the modern British historian J. R. Western complains that the modifications by the House of Lords created too much of an individual right: "The original wording implied that everyone had a duty to be ready to appear in arms whenever the state was threatened. The revised wording suggested only that it was lawful to keep a blunderbuss to repel burglars."[51]

The "Glorious Revolution" also gave birth to the political philosophy which underlay the American Revolution less than a century later. The two major British parties, the Whigs and the Tories, had achieved both their essence and their names during the fight under Charles II to exclude his brother James II from the succession to the throne. One of the major points of the Whig philosophy was the need for a true militia, in the sense which England had had it during the Tudor years, and the scrapping of the standing army. All the major Whig authors stressed this point; Algernon Sidney counseled that "no state can be said to stand on a steady foundation, except those whose whole strength is in their own soldiery, and the body of their own people;"[52] Robert Molesworth advised that with standing armies "the people are contributors to their own misery; and their purses are drained in order to their misery,"[53] while attacking disarmament under the game laws with the argument that "I hope no wise man will put a hare or a partridge in balance with the safety and liberties of English-

en".[54] These and other Whig authors were to be found in the rary of every American political thinker during the years before e Revolution;[55] John Adams himself would estimate that ninety rcent of Americans were at that time Whigs by sentiment.[56] Notwithstanding this growing support for a true militia, the use the militia system in Britain steadily declined. By 1757, when a w Militia Act was adopted, only 32,000 men, a very small part of e population, were to serve.[57] The officers were to be chosen om the more wealthy of the gentry; property qualifications were posed for all commissioned officers. The government would issue e arms to the militia, which were to be kept under lock and key, d could be seized by the lieutenant or deputy lieutenant of the unty whenever he "shall adjudge it necessary to the peace of the ingdom".[58] "The Whigs considered this "select militia" as little etter than a standing army: it was hardly a true "militia", an rmed citizenry. In the debates over the Scottish militia act, the ord Mayor of London argued to the Commons that the militia could not longer be deemed a constitutional defense, under the mmediate control and direction of the people; for by that bill they ere rendered a standing army for all intents and purpose."[59] his background—that of a tradition of an armed citizenry met vith recent infringements upon the traditional right of bearing rms—formed the background of the political views of the framers f our own Constitution.

The American experience with citizen armament had been more xtensive even than that of Britain. The early colonists brought heir own arms and secured additional ones from the government. As early as September 1622, they were being armed not only with muskets but with "three hundred short pistols with firelocks".[60] Virginia in 1623 ordered that no one was to "go or send abroad with a sufficient party well armed" and each plantation was to insure that there was "sufficient of powder and ammunition within the plantation".[61] In 1631 it ordered that no one work their fields unarmed and required militia musters on a weekly basis following church services: "All men that are fittinge to bear armes, shall bring their peeces to church . . ."[62] By 1673 the colony provided that persons unable to purchase firearms from their own finances would be supplied guns by the government and required to pay a reasonable price when able to do so. Similar legislation was imposed in the other colonies. The first session of the legislature of the New Plymouth Colony required "that every free man or other inhabitant of this Colony provide for himself and each under him able to beare armes, a sufficient musket and other serviceable peece for war" with other equipment.[63] Similar measures were enacted in Connecticut in 1650.

When the colonies began drifting toward revolution following the elections of 1760, the colonists were thus well equipped for their role. The British government began extensive troop movements into Boston in 1768 to reduce opposition, and the town government responded by urging its citizens to arm themselves and be prepared to defend themselves against the deprivations of the soldiers. When Tories responded that this order was illegal, the colonial newspapers responded that the right of personal armament was guaranteed to every Englishman. The Boston Evening Post asserted that

"It is certainly beyond human art and sophistry, to prove that the British subjects, to whom the privilege of possessing arms is expressly recognized by the Bill of Rights, and to live in a province where the law requires them to be equipped with arms, are guilty of an illegal act, in calling upon one another to be provided with them, as the law directs."[64] The New York Journal Supplement argued that the proposal "was a measure as prudent as it was legal" and that "it is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defense. . . ."[65] There can be little doubt from these passages that the American colonists viewed the English 1688 Declaration of Rights as recognizing an individual right to own private firearms for self defense—even defense against government agents.

Years passed before these proposals were actually put into effect, but the warning signs were present long before the revolution itself broke out, and some British heeded them. Pitt, the great Whig minister and friend of the Colonies, had warned that "three millions of Whigs, with arms in their hands, are a very formidable body."[66] Rather than the conciliation he called for, the result was an attempt to disarm the Americans—an attempt which brought on the Revolution. In December, 1774, for instance, export of guns and powder to the colonies was prohibited.[67] When a group of British regulars quietly emptied a militia powder magazine in September, 1774, the reaction was dramatic. To some "it seemed part of a well designed plan to disarm the people";[68] others were inflamed by incorrect rumors that six colonists had been killed during the raid. Over 60,000 armed citizens turned out, heading toward Boston, prepared for war.[69] This was more men under arms than would be boasted by the entire British military establishment at the time. Fortunately for that establishment, the colonists were convinced that their actions were premature and returned to their homes. By September, a Massachusetts town had instituted "the Minutemen", a group of select militia.[70] Others formed special companies of militia—one of which in Virginia included George Washington and George Mason, who would later draft the Virginia Declaration of Rights.[71] In December the Maryland Convention called upon the colonies to form a "well regulated militia" and illustrated what it meant by instructing all citizens between the ages of 16 and 50 to arm themselves and form into companies.[72] The following month the Fairfax Committee of Public Safety, chaired by George Washington, joined in this resolution, further defining its intent with the comment that "A well regulated militia, composed of gentlemen, freeholders, and other freemen, is the natural strength and only security of a free government", and recommending all persons between 16 and 50 to "provide themselves with good firelocks".[73] When Patrick Henry shortly thereafter gave his famed "give me liberty or give me death" speech, the resolution which he moved by his oration began "Resolved, that a well regulated militia, composed of gentlemen and freemen, is the natural strength and only security of a free government".[74]

The Colonials did not have long to wait. General Gage, military governor of Boston, was already writing to London with regard to

the "idea of disarming certain counties."[75] In April, 1775, Gage made the mistake of repeating his earlier raid upon a militia arsenal. This time there was firing and a number of colonists were killed. The regulars were compelled to fight their way back to Boston, swamped under the harrassing fire of militia who swarmed in on their flanks; without a last minute relief attack from Boston the entire column might have been forced to surrender by ammunition exhaustion. The British lost nearly 300 men in killed, wounded, and missing. Within a few days 16,000 militia descended upon Boston and besieged the area. During a British attack on Breeds Hill, colonial sharpshooters (one of whom commented that he fired "taking deliberate aim, as at a squirrel, and saw a number of men fall")[76] inflicted disastrous losses on British troops. Over 1,000 regulars fell, 40 percent of the attacking force and over a tenth of the entire British army in the Colonies. Officers suffered especially serious losses; one rifleman was said to have shot down twenty officers in ten minutes; every single member of Gage's staff was shot down.[77]

In the meantime the militia throughout the rest of the Colonies seized political control at the grass roots. Tories were quickly put down; British foraging parties cut off; the mechanisms of government and administration lay solidly in the hands of revolutionaries. While the British during the French and Indian War were supplied primarily from the Colonies, throughout the revolution they would have to draw primarily from their homeland. The constant damage to British foraging parties ultimately led to a shipping problem which, one historan judges, would have ended the war by 1782 in any event.[78]

The militia played no minor role in the fighting: "Seldom has an armed force done so much with so little—providing a vast reservoir of manpower for a multiplicity of military needs, fighting (often unaided by Continentals) in the great majority of the 1,331 land engagements of the war."[79]

Following the war the colonies were temporarily governed under the Articles of Confederation, which permitted a federal force necessary to garrison forts and prohibited states from maintaining any standing forces. During these years a number of militia proposals were put forward by George Washington, Alexander Hamilton, Baron Steuben and Henry Knox.[80] All involved a general militia—in which essentially every free citizen would serve—and a "select militia". Steuben's proposal gave the greatest emphasis to the select militia; he would have had a small force of 21,000 select militiamen, chosen by volunteering, who would train one month out of each year. None of these proposals became law.

By 1787 the difficulties with the Articles of Confederation were becoming insurmountable, and work began on a new Constitution. As adopted, the Constitution gave Congress the power to provide "for organizing, arming and disciplining the militia" but it could "govern" only those in federal service, while the states would have the power of appointing officers and actually training the militia according to the uniform system of discipline. Militiamen would be subject to federal martial law only when called into active service.

In the state conventions called to ratify the Constitution, the proposal faced serious opposition. A major part of the opposition,

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later termed anti-Federalist, focused on the fact that the Constitution lacked a Bill of Rights. The British Bill of Rights was called into attention as a precedent for such a measure. In the conflicts in the states three themes relating to citizen armament soon became apparent. The first was the acceptance by both Federalist and anti-Federalist of the critical role of the armed citizen; the second was a distrust both of standing armies and of select militia, like the modern National Guard; the third was pressure for a Bill of Rights which would include provisions guaranteeing rights of individual armament.

These thoughts began to take form in Connecticut, the fourth state to ratify. An anti-Federalist article in the Connecticut Journal objected strongly to the failure to outlaw a standing army and went on to criticize the Constitution's militia provisions as permitting the formation of a select militia: "This looks too much like Baron Steuben's militia, by which a standing army was meant and intended."[81] In Pennsylvania the opposition became even stiffer as the sentiment for a Bill of Rights grew. In a pamphlet hurriedly written to support adoption of the Constitution without the Bill of Rights, Noah Webster argued that the existing universal citizen armament made a standing army of little danger. He claimed that a standing army is oppressive only when it is "superior to any force that exists among the people" since otherwise it "would be annihilated on the first exercise of acts of oppression." He advised that the general armament of Americans rendered any constitutional limitations on a standing army unnecessary:

> Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom of Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed and constitute a force superior to any band of regular troops that can be, on any pretense, raised in the United States."[82]

In the convention the fighting was heavy. Delegate John Smiley argued that "Congress may give us a select militia which will, in fact, be a standing army. . . . When a select militia is formed, the people in general may be disarmed."[83] (The universal hostility to a select militia forms a most convincing refutation to the current argument that the "militia" referred to in the Second Amendment is the National Guard. On the contrary, virtually every citation to such militia during the drafting and ratification period views them as an evil comparable to a standing army and stresses that only a militia composed of the entire body of the populace armed and trained will protect freedom). Ultimately, Delegate Robert Whitehill moved a series of fifteen proposed amendments which would have established a bill of rights protecting freedom of conscience, speech, press, and virtually every other right ultimately incorporated into the Bill of Rights. This proposal was not adopted in Pennsylvania but was widely read in the Colonies and formed the inspiration for later proposals.[84] Its provision of keeping and bearing arms made it every clear that the right protected was to be an individual right:

> That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals. . . .[85]

In the Massachusetts Convention similar thoughts were expressed. Delegate Sedgwick asked whether a standing army "could subdue a nation of freemen, who know how to prize liberty, and who have arms in their hands?"[86] Sam Adams, who had done so much to bring on the revolution, spoke convincingly for the anti-Federalist position. He called for a bill of rights which would have provided "that the said Constitution shall never be construed to authorize Congress to infringe the just liberty of the press or the rights of conscience; or to prevent the people of the United States who are peaceable citizens from keeping their own arms. . . ."[87] Like the Pennsylvania minority, Adams clearly considered the right of armament as a right of individual citizens to own personal arms.

In the following months additional states ratified, bringing the total to eight. A ninth vote was needed before the necessary majority would be obtained and the Constitution would become binding upon the states which had ratified to date. That critical vote was provided by New Hampshire, which added to its ratification a recommendation for a bill of rights including the provision that "Congress shall never disarm any citizen unless such as are or have been in actual rebellion."[88] A clearer statement of an absolute individual right could not have been drafted. The major commercial state—New York—and major intellectual state—Virginia—still remained to be heard from.

The Virginia Convention set the record for legal and intellectual talent. Major participants included Patrick Henry, George Mason, James Madison and John Marshall. The major writings of the period came from Richard Henry Lee, who had in the Continental Congress moved the drafting of the Declaration of Independence. In his "Letters from the Federal Farmer to the Republican" he warned that Congress might suddenly undermine the strength of the "yeomanry of the country" who possessed the lands, "possess arms, and are too strong a body of men to be openly offended."[89] He added "This might be done in a great measure by the Congress, if disposed to do it, by modeling the militia. Should one-fifth or one-eighth of the men capable of bearing arms be made a select militia, as has been proposed . . . and all the others put upon a plan that will render them of no importance, the former will answer all the purposes of an army, while the latter will be defenseless."[90] Like others in Connecticut and Pennsylvania, Lee feared a "select militia" similar to the modern National Guard, which he considered a betrayal of the militia tradition and similar to a standing army. In strong terms he advised:

> First, the Constitution ought to secure a genuine, and guard against a select militia, by providing that the militia shall always be kept well organized, armed and disciplined, and include, according to the past and general

> usage of the states, all men capable of bearing arms, and that all regulations tending to establish this general useless and defenseless, by establishing select corps of militia or distinct bodies of military men, not having permanent attachments in the community, to be avoided.[91]

He extensively criticized select militia and argued that on the contrary "to preserve liberty, it is essential that the whole body of people always possess arms, and be taught alike, especially when young, how to use them. . . ."[92] In the Convention, Patrick Henry seconded Lee's judgments. Henry joined with Lee—and with Sam Adams and others who defended individual armament—explaining that "The great object is that every man be armed" and that "Everyone who is able may have a gun."[93] While Virginia ratified, it did so with a call for a bill of rights, including a recognition "that the people have the right to keep and bear arms; 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."[94]

From Virginia, the debate moved to New York. The New York controversy gave rise to the famed "Federalist Papers." Since these were devoted to justifying adoption of the constitution without a Bill of Rights, they are at best of marginal utility in interpreting the early amendments to the Constitution. Even so, their authors stressed citizen armament as a bulwark of liberty which made adoption of the Constitution safe. Hamilton, no friend of the militia (and little friend of democracy, for that matter) attacked proposed limits on standing armies in Federalists 25 and 26. In Federalist 29 he suggested that militia could not be expected to tolerate much professional training: "little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped." This armed but untrained citizenry, together with a select militia would ensure liberty despite a standing army: "That army can never be formitable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and use of arms . . ."

Madison in Federalist 46 argued the point at greater length, stressing citizen armament and state goverments as bulwarks of freedom:

> Besides the advantage of being armed, which the Americans possess over the people, 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 . . . 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.

If those people were armed and formed into militia units by subordinate governments, Madison asserted, "It may be affirmed with the greatest assurance that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it." To him citizen armament was not merely a matter of

military service or collective defense, but a guarantee of all other freedoms, to be used if necessary, against the government.

New York joined in ratifying, but by an even closer margin than most states: a shift of two votes out of fifty-seven cast would have rejected the constitution. It proposed amendments, including a recognition "That the people have a right to keep and bear arms; that a well-regulated militia, including the body of the people capable of bearing arms, is the proper, natural, and safe defense of a free state."

Only a few weeks later, word came that North Carolina had joined Rhode Island in rejecting the proposed constitution, citing the lack of a bill of rights. Among the amendments they called for before the delegates would sign was a provision identical to the New York and Virginia "Keep and bear arms" sections.

The constitution thus went into effect with eleven ratifications. But the pressing need for a bill of rights was clear. Not only had two states repudiated the new constitution, but five of the ratifying states had demanded such a bill and influential minorities in two more had striven unsuccessfully for it. (While freedom of speech was designated by only three ratifying states, the right to bear arms was mentioned by all five which called for a bill of rights, as well as by both groups of minority delegates and the dissenting North Carolina convention. This constitutional preference poll would suggest the ratifying conventions considered the right of private armament to be even more important than free speech.)

The Constitution carried in New York and eventually in every other state: but the anti-Federalist sentiment for a bill of rights also triumphed. Ultimately James Madison was put to the task of drafting a bill of rights. From the many proposals by the state conventions, he eventually distilled a limited number of rights deserving specific recognition, protecting the rest with the "catch-all clauses" of the Ninth and Tenth Amendments. The rights given express recognition were primarily procedural. Only the First and Second Amendments created substantive rights and these were a very small number of rights: speech, press, assembly, and keeping and bearing arms. These were viewed as the critical matters upon which the federal government might not infringe, under any conditions (and even by proceeding in accord with the procedural guarantees of the Fourth, Fifth and Sixth Amendments). Madison's initial proposal for what became the Second Amendment was worded: "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."

There is no doubt that Madison saw this as an individual right. His earliest drafts of the Bill of Rights did not separate those proposals into numbered amendments which would follow the constitution. Instead, the amendments would have been inserted into the body of the constitution at specified points. Madison did not place the right to keep and bear arms as a limitation on Congress's power over the militia, set out in Article I section 8 of the constitution. Instead, he grouped the right to arms with rights of freedom of religion, speech and press, to be inserted "in article first, section

nine, between clauses 3 and 4."[95] This would have put these provisions immediately following the general limitations of congressional power over citizens—outlawing suspension of habeas corpus, bills of attainder and ex post facto laws. Madison viewed his right to keep and bear arms proposal as a civil right, not a limit on federalization of the militia. Further, in an outline of a proposed speech on introduction of the Bill of Rights, Madison mentioned these "relate 1st to private rights," and indicated he meant to criticize the 1689 Declaration of Rights as too narrow: "No freedom of the press—conscience—GL warrants . . . attainders—arms to Protestants."[96] Apparently, he felt the 1689 recognition that "Protestants may have arms for their defense" should be extended to all, that the second amendment would broaden, not narrow, this.

Like most of his draft, the wording was both lengthy and convoluted. In the House of Representatives his proposals were edited extensively; since "the right of the people" was already contained in the provision, the comment that the militia would consist "of the body of the people" was deleted. The religious exemption was removed in view of objections that the Congress might exempt too may people on these grounds and thus destroy the concept of the militia. When the proposal was submitted to the Senate, it was proposed that the right be limited to keeping and bearing arms "for the common defense", but the Senate refused the amendment, retaining it in its broadest form.[97]

Contemporaries of the first Congress clearly viewed the Second Amendment as creating an individual right. When St. George Tucker, then a professor at William and Mary School of Law and later a Justice of the Virginia Supreme Court, published a five-volume edition of Blackstone's Commentaries in 1803, he commented that "whenever standing armies are kept up, and the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction. In England, the people have been disarmed, generally under the specious pretext of preserving the game."[98] He criticized the British Bill of Rights for limiting its guarantee of arms ownership to Protestants, whereas the American right was "without any qualification as to their condition or degree, as is the case in the British government."[99] William Rawle in his 1825 "View of the Constitution" suggested that:

> 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.[100]

Tucker and Rawle had unique advantages in interpreting the Bill of Rights. Tucker had fought in the Revolutionary militia and was twice wounded in action. He was a close friend of Jefferson, an associate of Madison, and had a brother in the first Senate. Rawle was a friend of Washington and was offered the post of first Attorney General.

The Congress itself made its intent clear when the second Congress adopted the Militia Act of 1792. This required every "free able bodied white male citizen. . . . who is or shall be of the age of 18 years, and under the age of 45 years" to be enrolled in the

militia and "within six months thereafter, provide himself with a good musket or firelock," plus ammunition and equipment.[101] The bill remained on the books until 1903. Thus, from the subsequent enactments of Congress, as well as the contemporaneous statements of the drafters and their associates, there can be little doubt that the drafters of the Second Amendment viewed that amendment as creating an individual right to keep and carry arms for purposes ranging from self protection to hunting to acquisition of military skills.

The right of individual citizens to keep and bear arms found early recognition by the courts, in a solid chain of precedent stretching forward for nearly two centuries. In 1813, Kentucky adopted the first general concealed weapon ban and nine years later the act was struck down as an invasion of the right to keep and bear arms.[102] Similar statutes were later upheld in other States—upon the grounds that only one form of carrying, not all forms, were restricted.[103] The Alabama Supreme Court, for instance, added:

> We do not desire to be understood as maintaining, that in regulating the manner of wearing arms, the legislature has no limit other than its own discretion. A statute which, under the pretence 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 defense would be clearly unconstitutional.[104]

Likewise, when Georgia in 1837 enacted the first ban on pistol ownership, its supreme court promptly struck it down, holding in the process that the second amendment applied to the states. It explained the amendment's meaning: "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 merely such as are used by the militia, shall not be infringed . . . and this for the important end to be achieved, the rearing up and qualifying of a well-regulated militia, so vitally necessary to the security of a free state."[105]

Second amendment issues rarely came before the federal courts at this time, simply because there were no federal controls on arms ownership. But the position of the United States Supreme Court was indicated in the famed *Dred Scott* case, where it held that the free black Americans were not citizens. The majority indicated that if blacks were regarded as citizens, "entitled to the privileges and immunities of citizens," they would have freedom of speech and assembly, "and to keep and carry arms wherever they went."[106]

Post civil war arms enactments encountered judicial limitations arising at the individual right to keep and bear arms. Tennessee, for instance, had to amend its constitution to expressly grant legislative power to "regulate the wearing of arms." Even so, its 1870 ban on carrying small ("pocket") pistols barely passed constitutional muster, the court warning that the legislature might not prohibit the carrying of "all manner of arms" since the power to regulate "does not fairly mean the power to prohibit."[107] Arkansas upheld a ban on pistol carrying only by construing it to apply only to pocket pistols and not to rifles, shotguns, or larger handguns. "To

prohibit a citizen from wearing or carrying a war arm . . . is an unwarranted restriction upon the constitutional right to keep and bear arms. If cowardly and dishonest men sometimes shoot unarmed men with army pistols or guns, the evil must be prevented by the penitentiary and the gallows, and not by a general deprivation of a constitutional privilege."[108] A similar technique was used to construe Missouri's 1875 carrying ban to apply only to concealed carry, the court citing with approval the concept that legislatures might not limit carrying so as to make the arms useless for defense.[109]

Nor has recognition of the right to keep and bear arms been lacking in our century. City bans on handgun carrying have been struck down in North Carolina ("the right to bear arms is a most essential one to every free people and should not be whittled down by technical constructions")[110] Tennessee,[111] and New Mexico.[112] The Michigan Supreme Court has stricken a ban on gun ownership by non-citizens with the comment that "the guarantee of the right of every person to bear arms in defense of himself means the right to possess arms for legitimate use in defense of himself (and) his property."[113] A similar statute was stricken in Colorado, its Supreme Court expressly rejecting the "collective rights" approach.[114] The U.S. Supreme Court, in *United States* v. *Miller*,[115] held that a court cannot merely take judicial notice that an arm is within the second amendment's protections, but explained:

> The Constitution as originally adopted granted to the Congress power "to provide for calling forth the Militia (etc.) . . ." With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the second amendment were made. It must be interpreted and applied with that end in view.
>
> The signification attributed to the term "militia" appears from the debates in the Convention; the history and legislation of the colonies and states, and the writings of approved commentators. These show plainly enough that the militia comprised all males physically capable of acting in concert for the common defense . . . and further, that ordinarily 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.

The right to keep and bear arms has found its most recent recognition in two 1980 decisions in Oregon[116] and Indiana,[117] the first striking down a very narrow arms possession ban, the second strictly limiting power to refuse carrying licenses.

In summary, the right to keep and bear arms is, in all probability, the oldest right memorialized in the Bill of Rights. Its common law right extends beyond our written records forward to the 1689 Declaration of Rights—so largely a response to individual disarmament under laws of the 1660's—and to our own Revolution, brought on primarily by British attempts at disarmament of the colonists. The recognition of the right in our own Bill of Rights is a natural outgrowth of that experience and of demands for preserva-

tion of a clearly individual right to own and carry arms. It is a right reserved to "the people"—the same "people" who possess the right to assemble, and security from unreasonable searches and seizures, the "people" whom the tenth amendment distinguishes from "the states." It is clearly not a right relating solely to the National Guard, which had no legal recognition prior to 1903, and whose 18th century predecessors were criticized by Richard Henry Lee and other constitutional figures as equal in danger to standing armies. Rather, it is a right reserved to individual citizens, to possess ("keep") and carry ("bear") arms for personal and political defense of themselves and their rights.

References

1. 3 W. Churchill, A History of the English Speaking Peoples 168 (1957). E. W. Williams, The Eighteenth Century Constitution 399–401 (Cambridge University 1960). Despite existence of this censorship, freedom of press was completely omitted from the 1688 "Declaration of Rights."
2. 1 John Tebbel, A History of Book Publishing in the United States 45 (1972).
3. In 1763, to be precise, when John Wilkes won substantial civil awards against ministers who issued general warrants for search and arrest of those responsible for an alleged seditious libel. G. Rude, Wilkes and Liberty 27–29 (1962); Churchill, supra, at 165–67. "From the "Glorious Revolution onwards, Secretaries of State had, for nearly a hundred years, been issuing similar warrants . . . and, until April 1763, their validity had never been challenged in a Court of law." Rude, supra at 29.
4. Charles Hollister, Anglo-Saxon Military Institutions 27 (Oxford University 1962). Hollister's excellent study is matched only by Brooks, "The Development of Military Obligations in Eighth and Ninth Century England," in England before the Conquest 69 (Clemoes and Hughes, ed. Cambridge University 1971).
5. William Blackstone, Commentaries on the Common Law of England, Book 1 Ch.XIII; 1 J. Bagley & P. Rowly, a Documentary History of England 1066–1540, at p.152.
6. H. W. C. Davis, England Under the Normans and Angevins 75 (1957).
7. 1 Francis Grose, Military Antiquities Respecting a History of the British Army 9–11 (London, 1812). "Assize" was a term which had several meanings in medieval law. In this sense it signified a proclamation or piece of legislation which was intended to modify or expand traditional law, rather than simply construe it—the earliest form of what we today would consider true legislation. W. L. Warren, Henry II, at 281 (1973).
8. Bagley & Rowley, *supra*, at 155–56.
9. E. G. Heath, The Grey Goose Wing 109 (1971).
10. Robert Hardy, The Longbow: A Social and Military History of 129 (1977).
11. *Id.*
12. *Id.* at 123. These price limitations would be repeated through to the reign of Henry VIII, along with requirements for import of longbows and quotas on less expensive longbows.
13. 7 Edward I c.2 (1279).
14. 1 Statutes of the Realm 151, 230 (London, 1810).
15. 2 Edw.III c.3 (1328).
16. 1 W. Hawkins, Pleas of the Crown 267 (6th ed. 1788). *See also* Rex V. Knight, 87 Eng. Rep. 75 (King's Bench 1686); Rex V. Dewhurst, 1 State Trails (New Series) 529 (1820).
17. L. Kennet & J. Anderson, The Gun in America 12, 15 (1975); N. Perrin, Giving Up the Gun 58 (1975).
18. 19 Henry VI c.4 (1503).
19. 3 Henry VIII c.3, 13 (1511).
20. 6 Hen.VIII c.13 (1514).
21. 14 & 15 Hen. VIII c.7 (1523).
22. 33 Hen. VII c.6 (1541).
23. Perrin, *supra*, at 59–60.
24. "Thai gon crokyd, and ben feble, not able to fight, nor to defend ye realm; nor thai have wepen, nor money to bie thaim wepen withall." Sir John Fortescue, The Governance of England 114 (C. Plummer, ed., Oxford, 1885). The Venetian ambassador to France confirmed this in a 1537 report of peasants taken into military service: "They were brought up in slavery, with no experience of handling weapons.

and since they have suddenly passed from total servitude to freedom, sometimes they no longer want to obey their master." 1 R. Laffont, The Ancient Art of Warfare 485 (1966).

25. Jim Hill, The Minutemen in War and Peace 26-27 (1968). "Militia" was apparently derived from the French word "milice" which in turn can be related to the Latin term "miles", or soldier.

26. The foremost study of the militia system under Elizabeth is Lindsay Boynton, The Elizabethan Militia (1967).

27. C. G. Cruickshank, Elizabeth's Army 24-25 (2d ed. 1968).

28. Richard Ollard, This War Without an Enemy 53 (1976).

29. See generally Correlli Barnett, Britain's Army 89-90 (1970); Charles Firth, Cromwell's Army (1962).

30. Michael Gruber, The English Revolution 125 (1967); Barnett, supra, at 107.

31. John Childs, The Army of Charles II at 9 (1976).

32. Joyce Malcolm, Disarmed: The Loss of the Right to Bear Arms in Restoration England, 11 (Mary Ingraham Bunting Institute, Radcliffe College, 1980).

33. 8 Calendar of State Papers (Domestic), Charles II, No. 188, p. 150 (July, 1660).

34. J. R. Western, The English Militia in the Eighteenth Century 11-13 (1965).

35. 14 Car.II c.3 (1662). The political background of the passage of this enactment is discussed in Western, supra, at 11.

36. A few exampies: "Think Fauntleroy an untoward fellow; arms for thirty or forty were found in his house last year" (68 Calendar of State Papers (Domestic) Charles II, No. 35, p. 44 (February, 1662); [Jacob Knowles, arrested for] "dangerous designs, he having been taken on the guard with a pistol upon him." (70 Calendar of State Papers (Domestic), Charles II, No. 13, p. 83 (March, 1662); "Hearing of a nonconformist meeting, issued warrant for the search of arms; the officers being denied entrance broke open the doors, and found 200 or 300 persons." (88 Calendar of State Papers (Domestic), Charles II, No. 56, p. 332).

37. 22 & 23 Car. II, c.25 (1671).

38. Andrew Browning, English Historical Documents 1660-1714, at 81 (1953).

39. 2 Calendar of State Papers (Domestic), James II, No. 1212 at p. 314 (December, 1686).

40. 3 Thomas Macaulay, The History of England in the Accession of Charles II, 136-37 (London, 1856).

41. 1 Gul. & Mar., sess. 2, c.2 (1689).

42. James Jones, The Revolution of 1688 in England 316-317 (London, 1972).

43. L. Brevold & R. Ross, The Philosophy of Edmund Burke 192 (1970).

44. 1 Gul. & Mar., sess. 2, c.2 (1689).

45. Joyce Malcolm, Disarmed: The Loss of the Right to Bear Arms in Restoration England 16 (Mary Ingraham Bunting Institute, Radcliffe College, 1980).

46. See Rouner, "The Right to Bear Arms: A phenomenon of Constitutional History," 16 Cath. U. L.Rev. 53, 59 (1966).

47. 2 Philip, Earl of Hardwicke, Miscellaneous State Papers From 1501-1726, at 407-417 (London, 1778).

48. Journal of the House of Commons From December 26, 1688 to October 26, 1693, at 5, 6, 21-22 (London 1742).

49. Western, supra, at 339.

50. Journal of the House of Commons, supra, at 25.

51. Western, supra, at 339.

52. Algernon Sidney, Discourses Concerning Government 156(3d ed., London 1751) (Library of Congress, Rare Books Collection).

53. Robert Molesworth, An account of Denmark as it Was in The Year 1692, at 123 (London, 1692; reprinted, Copenhagen, 1976).

54. Francis Hotoman, Franco-Gallia XXVIII (Tr. by Robert Molesworth, 1721) (Library of Congress, Rare Books Collection).

55. But a few exampes: in 1773, Harvard's library contained Harrington and Molesworth; Sidney was added by 1790. The College of New Jersey (today Princeton) boasted Sidney by 1760, as did the New York Society Library. John Adams' private library contained a two volume edition of Sidney and Molesworth; Jefferson at various times bought several different editions of both authors. H. Colbourn, The Lamp of Experience 200-18 (1965).

56. Clinton Rossiter, The Political Thought of The American Revolution 55 (1963).

57. Barnett, supra, at 174.

58. 30 Geo. II c.2 (1757). This power was invoked during the waves of rioting which spread across the English nation in 1766. Tony Hayter, The Army and The Crowd in Mid-Georgian England 158 (1978).

59. The North British Intelligencer, Vol. 1 at p.20 (Edinburgh, 1776). (Library of Congress Rare Books Collection).

60. Harold Gill, The Gunsmith in Colonial Virginia 3 (1974).
61. 1 William Hening, The Statutes at Large: Being a Collection of All The Laws of Virginia From The First Session of The Legislature in The Year 1619, at 127 (New York 1823).
62. *Id.* at 173–74.
63. William Brigham, The Compact With The Charter and Laws of The Colony of New Plymouth 31 (Boston, 1836).
64. Oliver Dickerson, ed. Boston Under Military Rule 61 (1936).
65. *Id.* at 79.
66. 1 William Gordon, The History of The Rise, Progress and Establishment of The Independence of The United States 442–43 (London, 1788). (Library of Congress Rare Books Collection).
67. John Alden, General Gage in America 224 (1948).
68. Stephen Patterson, Political Parties in Revolutionary Massachusetts 103 (1973).
69. *Id.*
70. *Id.* at 104–05; Gavin, supra, at 64.
71. 1 Kate Rowland, The Life of George Mason 181, 430–32 (1892).
72. Id. at 182–83; Donald Higginbotham, "The American Militia: A Traditional Institution With Revolutionary Responsibilities," in Reconsiderations on The Revolutionary War 92 (1978).
73. Rowland, supra, at 183, 427–28.
74. Hezekiah Miles, Republication of The Principles and Acts of The Revolution in America 278 (New York, 1876).
75. 1 The Political Writings of Thomas Paine at 111 (Boston, 1856).
76. Charles Flood, Rise and Fight Again 61 (1976).
77. Willard Wallace, Appeal to Arms 43 (1951); Joe Huddleston, Colonial Riflemen in The American Revolution 25 (1978).
78. I. Christie, Crisis of Empire 106 (1966).
79. Higginbotham, supra, at 103.
80. The best study of these proposals is John McAuley Palmer's Washington, Lincoln, Wilson: Three War Statesmen (1930). Palmer was responsible for locating Washington's militia plan, which had been missing from Congressional archives for over a century.
81. 3 Merrill Jensen, ed., The Documentary History of The Ratification of The Constitution 378 (1976).
82. Noah Webster, An Examination Into The Leading Principles of The Federal Constitution Proposed by The Late Convention, reprinted in Paul Ford, ed., Pamphlets on The Constitution of The United States 56 (New York, 1888).
83. 2 Jensen, supra, at 508.
84. E. Dumbauld, The Bill of Rights and What It Means Today 11 (1959).
85. 2 Jensen, supra, at 597–98.
86. 2 Jonathan Elliot, ed., Debates in The Several State Conventions on The Adoption of The Federal Constitution 97 (2d ed. 1888).
87. Paul Lewis, The Grand Incendiary 359–60 (1973).
88. Joseph Walker, Birth of The Federal Constitution: A History of The New Hampshire Convention 51 (Boston, 1888); Documents Illustrative of The Formation of The Union of The American States 1026 (House of Representatives Document 398: Government Printing Office 1927).
89. Walter Bennett, ed., Letters From The Federal Farmer to The Republican 21 (1978).
90. Id. at 21–22.
91. Id. at 124.
92. Id.
93. Debates and Other Proceedings of The Convention of Virginia . . . taken in shorthand by David Robertson of Petersburg, 275 (2nd ed., Richmond, 1805).
94. Documents Illustrative of The Formation of The Union, supra, at 1030.
97. See generally, 1 J. Goebel, History of the Supreme Court of the United States 456 ( ).
98. 1 S. Tucker, ed., Blackstone's Commentaries 300 (Philadelphia, 1803).
99. Id. at 143.
100. W. Rawle, A View of the Constitution 125–6 (2d ed. 1829).
101. Act of May 8, 1792. See generally J. Mahony, The American Militia: Decade of Decision (1960).
102. *Bliss* v. *Commonwealth*, 12 Ky. 90 (1822).
103. *State* v. *Mitchell*, 3 Ind. (Blackf.) 229 (1839). State v. Reid, 1 Ala. 612 (1840); State v. Buzzard, 4 Ark. 18 (1842)
104. *State* v. *Reid*, supra.

105. *Nunn* v. *State*, 1 Ga. 243, 251 (1846).
106. *Dred Scott* v. *Sanford*, 60 U.S. 393, 417 (1857)
107. *Andrew* v. *State*, 50 Tenn. 165, 3 Am. Rep. 8 (1971). The Andrews Court went on to note that "this right was intended . . . to be exercised and enjoyed by the citizen as such, and not by him as a soldier . . ." 3 AM. Rep. at 17.
108. *Wilson* v. *State*, 33 Ark. 557, 34 Am. Rep. 52 (1878).
109. *State* v. *Wilforth*, 85 Mo. 528, 530 (1882).
110. *State* v. *Kerner*, 181 N.C. 574, 107 S.E. 222 (1921).
111. *Glasscock* v. *City of Chattanooga*, 157 Tenn. 518, 11 S.W. 2d. 678 (1928).
112. *City of Las Vegas* v. *Moberg*, 82 N.M. 626, 485 P. ad 737 (1971) ("an ordinance may not deny the people the constitutionally guaranteed right to bear arms.")
113. *People* v. *Zerilla*, 219 Mich. 635, 189 N.W. 927 (1923).
114. *People* v. *Nakamura*, 99 Colo. 262, 62, P. 2d 246 (1936).
115. *United States* v. *Miller*, 307 U.S. 175, 178–79 (1939).
116. *State* v. *Kessler*, 289 Ore. 359, 614 p. 2d 94 (1980).
117. *Schubert* v. *DeBard*, ———— Ind. App. ————, 398 NE2d 1139 (1980).