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> 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.

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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.

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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.

100 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 them 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

[illegible]
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
Center 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 National 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)

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

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 #43

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.

The 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 firearms 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 convicted 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

N.C.B.B. STATEMENT

> 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 w 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. 316, 818, 83 L.Ed. 1206 (1939) (the Second Amendment guarantees no right to keep and bear a firearm that does

> 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 764] (1st 1976)

In prosecution for vio' "ion of the Gun Control Act of 1968, trial court action in c tailing 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 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 4b (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.

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N.C.B.H. STATEMENT

<u>U.S. v. Forgett 349 F.2d 601 (6th 1965)</u>

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

<u>Stevens v. U.S. 440 F.2d 144 (6th 1971)</u>

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>U.S. v. Day 476 F.2d 562 (6th 1973)</u>

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>U.S. v. Birmley 529 F.2d 103 (6th 1976)</u>

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

<u>U.S. v. Warin 530 F.2d 103 (6th 1976)</u>

It [illegible] clear that the Second Amendment guarantees a [illegible] rather than an individual right. The fact that the [illegible] 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-

men".[54] These and other Whig authors were to be found in the library of every American political thinker during the years before the Revolution;[55] John Adams himself would estimate that ninety percent of Americans were at that time Whigs by sentiment.[56]

Notwithstanding this growing support for a true militia, the use of the militia system in Britain steadily declined. By 1757, when a new Militia Act was adopted, only 32,000 men, a very small part of the population, were to serve.[57] The officers were to be chosen from the more wealthy of the gentry; property qualifications were imposed for all commissioned officers. The government would issue the arms to the militia, which were to be kept under lock and key, and could be seized by the lieutenant or deputy lieutenant of the county whenever he "shall adjudge it necessary to the peace of the kingdom".[58] "The Whigs considered this "select militia" as little better than a standing army: it was hardly a true "militia", an armed citizenry. In the debates over the Scottish militia act, the Lord Mayor of London argued to the Commons that the militia "could not longer be deemed a constitutional defense, under the immediate control and direction of the people: for by that bill they were rendered a standing army for all intents and purpose."[59] This background—that of a tradition of an armed citizenry met with recent infringements upon the traditional right of bearing arms—formed the background of the political views of the framers of our own Constitution.

The American experience with citizen armament had been more extensive even than that of Britain. The early colonists brought their 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 [illegible] cans possess over the people, the existence of subor[illegible] 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—GI. 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.

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9. E. G. Heath, The Grey Goose Wing 109 (1971).

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11. *Id.*

12. *Id.* at 128. 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.

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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.

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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 examples: "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 31 (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 Rohner, "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).
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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).
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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, 8 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 . . ." 8 AM. Rep. at 17.
108. *Wilson* v. *State* 43 Ark. 557, 34 Am. Rep. 52 (1878).
109. *State* v. *Wilforth*, 35 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. *Zerillo*, 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).
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Biographic Sketch

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

By Stephen P. Halbrook*

> A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. —U.S. Const. amend. II.
>
> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. —U.S. Const. amend. XIV, § 1.

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

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

A. Arms and Slavery

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

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This is a revision of a portion of the author's The Jurisprudence of the Second and Fourteenth Amendments, IV GEORGE MASON L. REV. (1981).

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

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

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

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

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

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

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

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

B. THE CIVIL RIGHTS ACT OF 1866

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

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

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

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

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

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

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

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

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

C. THE FOURTEENTH AMENDMENT

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

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

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

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

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

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

D. THE ANTI-KKK ACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. THE CIVIL RIGHTS ACT OF 1875

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

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

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

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

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

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

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

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

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

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

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

REFERENCES

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

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

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

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

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

5. State v. Newson, 27 N.C. 203, 204 (1844); Cooper v. Savannah, 4 Ga. 72 (1848).

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

7. "What was the fourteenth article designed to secure? . . . [T]hat the privileges and immunities of citizens of the United States shall not be abridged or denied by the United States or by any State; defining also, what it was possible was open to some question after the Dred Scott decision, who were citizens of the United States." Sen. George F. Edmonds (R., Vt.), CONG. GLOBE, 40th Cong., 3rd. Sess., pt. 1, 1000 (Feb. 8, 1869).

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

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

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

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

11. DuBois, John Brown 106 (1909).

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

13. 61 The War of the Rebellion, ser. 1, pt. 2, 1068 & 1315 (1880–1901). R. Durden, The Gray & The Black 250 (1972).

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

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

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

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

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

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

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

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

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

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

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

67. *Id.* 242. Italic added.

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

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

George F. Edmunds (R., Vt.) worried that repeal of the statute "will authorize anybody and everybody in the State of Texas, under what they call its ancient militia laws . . . to organize a militia hostile to the Government," id. at 31, and thus advocated "a selected militia" chosen by State and federal governments. Id. In contrast, Garrett Davis (D. Ky.) stated: "Wherever a State organizes a government it has of its own inherent right and power authority to organize a militia for it. Congress . . . has no right to prohibit that State from the organization of its militia." *Id.* at 84. Willard Warner (R., Ala.) stressed the first clause of the Second Amendment to form militias independent of federal control: we have the right now, being restored to our full relations to the Federal Government, to organize a militia of our own, and that we could have done so at any time in the past, this law to the contrary notwithstanding. Article two of the amendments of the Constitution provides that—

"A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." *Id.* at 85.

The prohibitionary statute was repealed. *id.* at 86. *Cf.* Houston v. Moore, 18 U.S. 1, 16-17 (1820).

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

The Second Amendment to the United States Constitution Guarantees an Individual Right To Keep and Bear Arms

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

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

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

A. Common Law Development of the Right to Keep and Bear Arms

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

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

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

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

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

B. THE HISTORY OF THE SECOND AMENDMENT

The Second amendment to the United States Constitution provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. JUDICIAL INTERPRETATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

prohibition is absolute." Black, The Bill of Rights, 35 N.Y.U.L. Rev. 365, 373 (1960). [9]

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

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

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

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

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

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

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

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

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

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

D. THE RIGHT TO SELF-DEFENSE

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

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

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

II. Antebellum judicial construction

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

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

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

A. JUDICIAL COMMENTARIES

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

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

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

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

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

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

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

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

B. STATE CASES

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

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

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

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

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

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

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

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

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