COMMENTARIES

The Right to Arms: Does the Constitution or the Predilection of Judges Reign?

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Introduction

The second amendment to the United States Constitution 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."

The right to keep and bear arms is at the forefront of various emotional issues that confront society, especially the legal community. Nevertheless, judges have an obligation to interpret the Constitution, irrespective of their personal feelings, so as to carry out the intent of the Framers. If judges abandon this obligation, the public will view courts as political institutions, their decisions less rooted in the law than in the personalities and politics of the individual judges, and will view the courts as not expounding the law but rather as handing down social policy in judicial dress to suit the perceived needs of the moment.[1]

Every constitutional guarantee is burdensome to society because it places a barrier between the individual and government. Even constitutional rights that we have come to regard as indispensable involve this tension between individual freedom and state control. The right to remain silent and have counsel present during a custodial interrogation, for example, has been assailed by no less a jurist than Justice White: "In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment (pg.66) which produced him, to repeat his crime whenever it pleases him."[2]

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[1] Soon after Justice Douglas's appointment, Chief Justice Hughes gave the newcomer some surprising advice: "You must remember one thing. At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our own predilections." Mason, *William O. Douglas: A Justice for All*, Wash. Post (Book World), Nov. 2, 1980, at 1, col. 1. Justice Douglas later called for the "watering down" of the second amendment. Adams v. Williams, 407 U.S. 143, 151 (1972) (Douglas, J., dissenting).

West Virginia Supreme Court Justice Richard Neely opined that "lawyers, certainly, who take seriously recent U.S. Supreme Court historical scholarship as applied to the Constitution also probably believe in the Tooth Fairy and the Easter Bunny." He admitted: "I did elaborate manipulation of history in order to arrive at what I thought were just results." Waltz, *Laying Down the Law: How the Judge Rules*, Wash. Post (Book World), Jan. 17, 1982, at 11, col. 1.

[2] Miranda v. Arizona, 384 U.S. 436, 542 (1966) (White, J., dissenting).

Judge Malcolm Wilkey of the District of Columbia Circuit thinks the exclusionary rule should be abandoned because "every scheme of gun control ... is doomed" by it. Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 224 (Nov. 1978).

Citizens of the United States have never approved any constitutional amendment as an idle exercise to protect nugatory rights or nebulous entities. Underscoring this point, a commentator made this apt observation: "[C]onstitutions are not made to create rights in the people, but in recognition of, and in order to preserve them, and that if any are specially enumerated and specially guarded, it is only because they are peculiarly important or peculiarly exposed to invasion."[3]

The second amendment contains a number of ideas:

(1) a well-regulated militia;

(2) the security of a free state; and

(3) two separate rights of the people that may not be infringed—the right to keep arms; and the right to bear arms.

The statement of one purpose behind the right to arms does not limit the broader rights protected.[4] Chief Justice John Marshall admonished that the Constitution cannot take on the "prolixity of a legal code.... [O]nly its great outlines should be marked...."[5] Also, the conditions and circumstances of the period require a finding that while the stated purpose of the right to arms was to secure a well-regulated militia, the right to self-defense was assumed by the Framers.[6] (pg.67) "It is never to be forgotten that, in the construction of the language of the Constitution ..., as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."[7] Thus courts must liberally construe the protections of the Bill of Rights to carry out the Framers' intent.[8]

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[3] 2 J. Tucker, THE CONSTITUTION OF THE UNITED STATES 688 (1899).

[4] The Constitution protects more than just the rights specifically mentioned by name in the Bill of Rights or the fourteenth amendment. Griswold v. Connecticut, 381 U.S. 479, 486, 486 n.1. (1965) (Goldberg, J., concurring); NAACP v. Alabama, 357 U.S. 449 (1958); Thomas v. Collins, 323 U.S. 516 (1945); NLRB v. American Pearl Button Co., 149 F.2d 311 (8th Cir. 1945); Wilson v. State, 33 Ark. 557 (1878) (the right to carry a pistol for hunting is protected, even though art. II § 5, ARK. CONST., guarantees right for "common defense"); State v. Foutch, 96 Tenn. 242, 34 S.W. 1 (1896) (right to keep and bear arms guaranteed for self-defense and protection of home and family, even though art. I § 26, TENN. CONST., guarantees the right for the "common defense").

N.C. CONST., art. I § 30 (formerly art. I § 24), tracks the language of the second amendment. The right to defense of self and property was upheld in State v. Kerner, 181 N.C. 574, 107 S.E. 222, 225 (1921).

In State v. Johnson, 16 S.C. 187, 191 (1881), the court recognized an individual right by stating that the concealed carrying of arms prohibition is valid "as far as may be consistent with the right of the citizen to bear arms." S.C. CONST. art. I § 28 (1868) guaranteed the right for the "common defense." Presently art. I § 20 tracks the language of the second amendment.

[5] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

[6] Nunn v. State, 1 Ga. 243, 251 (1846); State v. Dawson, 272 N.C. 535, 159 S.E.2d 1, 9 (1968).

"The right to life was so far above dispute that authors were content merely to mention it in passing.... [T]he strategic importance of the right to life lay in its great corollary or defense: the law or right of self-preservation. This secondary right made it possible for a single man or a whole nation to meet force with force...." C. ROSSITER, SEEDTIME OF THE REPUBLIC 377 (1953); "It is a natural right which the people have reserved to themselves, confirmed by the [English] Bill of Rights, to keep arms for their own defence." BOSTON UNDER MILITARY RULE 79 (O. Dickerson ed. 1936) (quote from a newspaper of the time); "The supposed quietude of a good man allures the ruffian; while on the other hand, arms like laws discourage and keep the invader and the plunderer in awe, and preserve order in the world as well as property." I WRITINGS OF THOMAS PAINE 56 (Conway ed. 1894); and John Adams wrote, "arms in the hands of citizens may be used at individual discretion ... in private self-defence...." 3 J. ADAMS, A DEFENCE OF THE CONSTITUTION OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA 475 (1787-88).

[7] *Ex parte* Bain, 121 U.S. 1, 12 (1887).

[8] Boyd v. United States, 116 U.S. 616, 635 (1886); Engblom v. Carey, 677 F.2d 957, 962 (2d Cir. 1982).

The approach that the Framers' intent is controlling will be followed in this article. A strict interpretivist approach can cut both ways.[9] On the one hand, the right to arms is preserved as it existed in the eighteenth century by limiting the right to those arms commonly possessed by the people at that time and to their modern equivalents. On the other hand, limiting the right to arms to that dimension, modern arms falling outside that dimension would lie outside the right to arms.[10]

This article will demonstrate that the Framers intended that the second amendment guarantee to the individual the right to keep and bear arms for the following purposes:

(1) to enable the individual to perform militia duties;

(2) to deter governmental oppression;

(3) to maintain public order; and

(4) to enable the individual to exercise his right to self-defense.

It will also demonstrate that the interpretation of this right by some courts lacks logic and accuracy. These mistaken approaches view (1) the right to arms as being exclusively collective rather than individual, or (2) only applying to the right of a state to maintain a militia, or (pg.68) (3) only preventing the impairment of a state's active, organized militia.[11] These decisions would lead one to

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[9] Discussions of the opposing views to constitutional interpretation can be found in J.H. ELY, DEMOCRACY AND DISTRUST (1980). On page 1 he defines *interpretivism* as judges deciding constitutional issues confining themselves to enforcing norms that are stated clearly or implicitly in the written Constitution. *Noninterpretivism* is where courts go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document. *See also* A.M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

[10] State v. Kerner, 181 N.C. 574, 107 S.E. 222, 224-25 (1921); State v. Kessler, 289 Or. 359, 614 P.2d 94, 98-99 (1980).

[11] Brown v. Chicago, 42 Ill. 2d 501, 250 N.E.2d 129, 131 (1969); State v. Vlacil, 645 P.2d 677, 679 (Utah 1982) (per Hall, C.J., & Crockett, J.). *Cf.* People v. Liss, 406 Ill. 419, 94 N.E.2d 320, 323 (1950).

For the first time in this nation's history, in Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), *aff'g* 532 F. Supp. 1169 (N.D. Ill. 1981), a divided court brushed aside the second and fourteenth amendments and the Illinois arms guarantee arguments to uphold an ordinance banning the private possession of all handguns, even in the home. The court found: (1) the second amendment applies only to action by the federal government, but failed to address evidence and arguments on incorporation through the fourteenth amendment (notes 85, 95, 98, 99, 173 *infra*); (2) it ignored the "historical analysis of the development of English common law and the debate surrounding the adoption of the second and fourteenth amendments. This analysis has no relevance on the resolution of the controversy before us." Evidence to refute this puzzling view is found in Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. (in press 1983) & notes 6 *supra*, 41-99, 173 *infra*; (3) citing no authority, the court made the blanket claim that "the right to keep and bear handguns is not guaranteed by the second amendment" and "we do not consider individually owned handguns to be military weapons." Evidence refuting this claim is found in notes 51, 52, 118, 119, 122, 126-132 *infra* (notes 52 & 129 show the militia used privately owned handguns in WW II); notes 6 *supra*, 20, 29, 31, 34, 115, 129, 132, 149, 151-158, 164 *infra* (handguns are constitutional arms). The court's lack of intellectual precision carried over to its analysis of the Illinois state constitutional guarantee. The court incongruously held "the term arms in section 22 [of art. I, ILL. CONST.] includes handguns," but "a ban on handguns does not violate that right," relying on Delegate Foster's floor debates statements. However, Foster more broadly claimed that in Cook County (Chicago) "all firearms whatsoever" could be banned. 3 ILL. CONST. CONVEN. PROCEEDINGS 1718 (1969-1970). The floor debates further reveal a lack of consensus. *E.g.*, Delegate Hutmacher cited People v. Zerillo, 219 Mich. 635, 189 N.W. 927 (1922) (noncitizen has a right to keep a handgun) in support of the majority report, which supported a right to bear arms. *Id.* at 1707. Delegate Hendren, owner of "two shotguns and a pistol," supported the majority report because it prevented confiscation. *Id.* at 1712-13. In support of the arms guarantee the majority report listed permissible regulations to harmonize the right with the exercise of the police power. 6 PROCEEDINGS 88-90. Banning handguns was not listed as permissible regulation, and efforts to give handguns no constitutional protection failed. 7 PROCEEDINGS 2901 (proposal 131); Legal & Research Advisor's Memo No. 25 (2-18-70). The voters' intent controls the meaning, for the debates lack consensus and show a reluctance to face a controversial issue ["I'd wish I'd never seen this thing." (Delegate Foster) 3 PROCEEDINGS 1721]. Board of Educ. v. Bakalis, 54 Ill. 2d 448, 299 N.E.2d 737, 751-52 (1973) (Ryan, J., concurring). The evidence is "large majorities *oppose* an outright ban on private handgun ownership.... Majorities approaching 90% believe they have a constitutional right to own a gun." Wright & Rossi, *Weapons, Crime, and Violence in America* (Executive Summary) 17 (U.S. Justice Dep't, Nov 1981). See also note 87 *infra*. The lack of intellectual precision reveals *Quilici* as a disingenuous maneuver to turn a constitutional guarantee into an intangible abstraction. At this juncture it is appropriate to be mindful of Madison's Concerns about "a standing army, an enslaved press, and a disarmed populace." R. KETCHAM, JAMES MADISON 640 (1971).

believe that the second amendment truly reads: "The right of states to keep militias and to arm them shall not be infringed." However, the Framers did not select such restrictive language; they selected broader language to guarantee the people the right to arms.

The Colonial Experience

The historical background of the colonial era reveals the occasion, circumstances, concerns, and issues that served as the driving force for guaranteeing the preexisting right to keep and bear arms by placing it in a written constitution. The colonists discovered that war in the (pg.69) New World was quite different from the European modes of warfare they had left behind. The American Indian did not follow Grotius or Vattel's rules on the proper limits of warfare. The Indians had no international aristocracy, no conventions, and had a code of warfare of their own. They were not persuaded of the advantages of limited warfare waged only during clear weather in open field, nor were they accustomed to pitched battles and the trumpet-heralded attack. The Indians struck without warning and were a nightly terror in the remote silence of backwoods cabins. Every section of the seacoast suffered massacres. Moreover, the threat from such Indian warfare did not disappear until ten years-after the defeat of Custer's force in 1876 on the Little Bighorn River in Montana.[12] Thus, the Framers were certainly concerned with the threat posed to national security by Native Americans.

Nor were Indians the only threat to security. Parts of the English colonies suffered intermittent threats of invasion by the French, the Dutch, and the Spanish. The earliest Virginia settlers were often in terror that the Spanish massacre of the Huguenots at Fort Caroline in Florida might be repeated in their own province.[13]

All colonists were soldiers in such warfare because all lived on the battlefield. The bravery of women became commonplace, and anyone who waited for the arrival of "troops" did not last long.[14] The colonists' reliance on arms was such that an Anglican minister could write from Maryland in 1775:

> Rifles, infinitely better than those imported, are daily made in many places in Pennsylvania, and all the gunsmiths everywhere constantly employed. In this country, my lord, the boys, as soon as they can discharge a gun, frequently exercise themselves therewith, some a fowling and others a hunting. The great quantities of game, the many kinds, and the great privileges of killing making the Americans the best marksmen in the world, and thousands support their families by the same, particularly riflemen on the frontiers, whose objects are deer and turkey. In marching through woods one thousand of these riflemen would cut to pieces ten thousand of your best troops.[15] (pg.70)

These experiences prompted the inclusion of the right to-keep and bear arms in the Federal Constitution.

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12 D. BOORSTIN, THE AMERICANS—THE COLONIAL EXPERIENCE 347-48 (1958).

13 *Id.* at 348.

14 *Id.* at 349-50.

15 *Id.* at 351.

> [E]verybody here was a bit of a soldier, none completely so. War was conducted without a professional army, without generals, and even without "soldiers" in the strict-European sense. The Second Amendment to the Federal Constitution would provide: "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."[16]

Such a view was uniquely American. In Europe rulers were reluctant to put the means of revolt into the hands of their subjects. However, in America "the requirements for self-defense and food-gathering had put firearms in the hands of nearly everyone."[17] The feeling was that "[I]f the government be equitable; if it be reasonable in its exactions; if proper attention be paid to the education of children in knowledge, and religion, few men will be disposed to use arms, unless for their amusement, and for the defence of themselves and their country."[18]

The necessity of self-defense against criminal attacks was also a reason for keeping and bearing arms. As early as 1697 there were complaints that Philadelphia was becoming invested with "pirates and rogues," and in that year, William Penn felt strongly enough to write that "there is no place more overrun with wickedness than Philadelphia."[19]

The following excerpt from a letter written from Falmouth, Virginia, on July 29, 1764, by William Allason, a merchant, to Messrs. Boyle and Scott, merchants in Glasgow, is instructive on the defensive pistol-carrying habits of civilians.[20]

> As it is sometimes dangerous in traveling through our wooden Country Particularly at this time when the Planters are pressed for old Ballances, we find it necessary to carry with us some defensive Weapons, for that purpose, you'll be pleased to send us by some of the first Ships for this River a pair of Pistols about 30/ [shillings] Price. Let them be small, for the convenience of carrying in a side Pockett, and as neat as the Price will admit of.(pg.71)

Furthermore, self-defense was not simply a response to colonial conditions but had long been protected as a natural right at common law.[21] Until late in the seventeenth century England had no standing army and until the nineteenth century no regular police force. An armed and active citizenry

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16 *Id.* at 351-52.

17 *Id.* at 352-53.

18 *Id.* at 353.

19 *Peace Bonds and Criminal Justice in Colonial Philadelphia*, PA. MAGAZINE OF HISTORY & BIOG. 183 (Apr. 1976).

20 ALLASON LETTER BOOK 1757-1770, f.134 (Va. State Library). It was considered normal for eighteenth-century civilians to carry pocket pistols for protection while traveling. G. NEUMANN, THE HISTORY OF WEAPONS OF THE AMERICAN REVOLUTION 150-51 (1967). Because concealed carrying was lawful when the Constitution was adopted, a concealed carrying statute was voided in Bliss v. Commonwealth, 12 Ky. 90 (1822).

21 One is allowed to repel force with force and the laws permit the taking up of arms against armed men. 1 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 162a and 2 INSTITUTES 574 (Johnson & Warner ed. 1812) (English translation).

Every private person is authorized by the law to arm himself against dangerous rioters and those engaged in forcible entry or detainer. 1 W. HAWKINS, A TREATISE ON THE PLEAS OF THE CROWN 170-71 (7th ed. 1795).

Personal security and self-defense are natural rights. Possession of arms for self-defense was recognized. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *129-30, *143-44 and 3 COMMENTARIES *3-4.

The right of self-defense is founded in the law of nature and cannot be superseded by any law of society. The right of self-defense resides in individuals. Deadly-force may be used to prevent felonies such as robbery, murder, rape, and arson or burglary in the habitation. M. FOSTER, CROWN CASES 273-74 (London 1776).

was an English institution because the maintenance of order was everyone's business. Men were required to perform militia and posse duty.[22]

The colonies continued and expanded upon this common law institution, and their belief in it profoundly influenced the development of the American system of government.[23] Our Constitution should thus be interpreted by reference to the common law and to English institutions that shaped its adoption.[24]

The Revolutionary War

The nation that was to rebel was but a string of separate colonies, (pg.72) separately governed, and each concerned with different economies, some with fishing or tobacco and others with farming or the fur trade.[25] Their link was their common allegiance to the Crown and their inheritance of the English common law. They also shared the unique experience of living on a new continent.

The French and Indian War introduced the English to an unaccustomed kind of warfare. The French and their Indian guerrillas did not restrict their full-scale war to pitched battles, but also utilized the ambush and hit-and-run techniques,[26] which have become the hallmark of modern guerrilla warfare. Learning from their experiences, the colonists used French and Indian guerrilla techniques to their advantage in the Revolutionary War. The French and Indian War taught the futility of European battle lines in the wilderness, and the colonists took a new and confident view of their ability to defend themselves.

The war brought new territory and saddled the English with new taxes and an increased national debt. It also reminded them that the new frontier would have to be defended. The colonies, however, had no desire to raise their own troops or to pay through taxation for the maintenance of British troops. A legislative response to the situation came in 1765 with Parliament's passage of the Stamp Act. Paradoxically, this tax measure and other tax measures and trade restrictions did not solve the problem of colonial security but instead united the colonists in a common cause against the Crown. No longer a symbol of common allegiance but a symbol of tyranny, the Crown moved

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[22] J. MALCOLM, DISARMED: THE LOSS OF THE RIGHT TO BEAR ARMS IN RESTORATION ENGLAND, 5 (Bunting Inst. of Radcliffe College 1980) (reprinted by National Rifle Ass'n, Washington, D.C.).

[23] *Id.* at 1.

[24] *Ex parte* Grossman, 267 U.S. 87, 108-09 (1925). The common law, however, serves only as a historical background and may not be invoked to abrogate constitutional rights. "At the Revolution we separated ourselves from the mother country, and we have established a republican form of government, securing to the citizens of this country *other and greater personal rights, than those enjoyed under the British monarchy*." Bridges v. California, 314 U.S. 252, 264 n.7 (1941) (emphasis added). *See also* Grosjean v. American Press Co., 297 U.S. 233, 248-49 (1936). The British press was subject to licensing. 4 W. BLACKSTONE, COMMENTARIES *152.

The British do not have a written constitution. Powell v. McCormack, 395 U.S. 486, 523 n.46 (1969). Although a constitutional guarantee's "historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system. We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch." United States v. Brewster, 408 U.S. 501, 508 (1972).

The constitutional right to arms protects greater rights than the English common law and abrogates the Statute of Northampton banning the carrying of arms in public. Simpson v. State, 13 Tenn. 356, 359-60 (1833). However, the Statute of Northampton was narrowly construed to require evil intent in carrying arms. Rex v. Knight, 87 Eng. Rep. 75 & 90 Eng. Rep. 330 (K.B. 1686).

[25] 1 R. CURRENT, T. WILLIAMS & F. FREIDEL, AMERICAN HISTORY: A SURVEY 64-65 (3d ed. 1971). "Fire and water are not more heterogeneous than the different colonies in North America." *Id.* at 85.

[26] *Id.* at 90-91.

the colonists beyond an initial desire for autonomy within the Empire to revolution and independence.[27] The early riots and tarring and feathering of revenue agents escalated into the Boston Massacre of 1770 and finally turned into the Revolutionary War with the battles at Lexington and Concord, Massachusetts, in 1775.[28]

Reports that minutemen had stored a large supply of gunpowder in Concord prompted British General Gage to send out his men to seize and destroy the supply. He intended to surprise them, but as is well known, Paul Revere and William Dawes warned the colonists and Gage's attempted bloodless coup became the first battle of the Revolutionary War.[29](pg.73)

The British did not intend merely to confiscate stores and magazines of arms and ammunition. They also intended to strip individuals of their arms, for in a revolutionary crisis an armed person with suspect loyalties was as much of a threat as stores and magazines. Such people had harassed and killed with gunfire British troops on the road from Concord back to Boston following the first battle of the war. Furthermore, the armed citizenry served as a manpower pool from which the patriots summoned men to perform militia duties.

By disarming suspect persons, the British felt confident that the revolution would be crushed.[30] In Boston, for example, General Gage confined the inhabitants within the town and ordered them to surrender their arms to their own magistrates (that they might be supposedly preserved for their owners) as a condition for being able to depart from the town. He then ordered his troops to seize the arms, detained the greatest part of the inhabitants despite his promise to release those who complied with his terms, and compelled the few who were able to depart to leave their most valuable effects behind.[31]

The disarming of the populace as the precursor of tyranny is not merely a historical phenomenon. Totalitarian governments of the right and left in the twentieth century have followed Gage's example.[32](pg.74)

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[27] *Id.* at 94-98.

[28] *Id.* at 102-03, 107-08.

[29] *Id.* at 108. Paul Revere's pistol is at the National Guard Ass'n Museum in Washington, D.C.

[30] In England, Catholics formed an important exception to the tolerant attitude toward individual ownership of arms. Since the English Reformation they had been regarded as potential subversives and were liable to have their arms impounded. In times of tension their homes might be searched and all weapons removed. Malcolm, *supra* note 22, at 7.

While at Boston a general effort was made to disarm the people, it is incredible to think that other efforts to disarm suspect people did not occur and that the British were cheerfully willing to allow people with suspect loyalties to roam at will while armed. Newspapers reported the British seizures of arms and efforts by patriots to secure arms. 2 VA. GAZETTE INDEX 1736-1780, at 30-31 & 884 (L. Cappon & S. Duff eds. 1950).

The war proved that even women could be suspect. It is estimated that 6% of those involved in the Revolutionary War were women. Dulin, *Women: Has the Battle Ended or Just Begun?*, NATIONAL GUARD 20 (Jan. 1981). "Even weamin had firelocks. One was seen to fire a blunder buss between her father and husband, from their windows...." THE SPIRIT OF 'SEVENTY-SIX 78 (H. Commager & R.B. Morris eds. 1967).

[31] The disarmament of Bostonians would later be listed as one of the grievances justifying the Revolutionary War. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF AMERICAN STATES, H.R. Doc. No. 398, 69th Cong., 1st Sess. 14-15 (1927).

The Bostonians surrendered 1,778 muskets, 634 pistols, and 38 blunderbusses. R. FROTHINGHAM, HISTORY OF THE SEIGE OF BOSTON AND OF THE BATTLES OF LEXINGTON, CONCORD, AND BUNKER HILL 95 (6th ed. 1903). By July, 1775, Boston's population of 17,000 declined to 7,000 civilians. THE SPIRIT OF 'SEVENTY-SIX 146 (H. Commager & R.B. Morris, eds. 1967).

[32] "The surrender of guns and other implements of war has been ordered by special proclamation." R. LEMKIN, AXIS RULE IN OCCUPIED EUROPE; LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 591 (Carnegie Endowment for Int'l Peace, Washington, D.C. 1944).

"Anybody posting a placard the Germans didn't like would be liable to immediate execution, and a similar penalty was

Familiarity with the terrain, experiences with backwoods skirmishes and the French and Indian War, an armed citizenry, and the colonial militia structure were each factors that tipped the scale in favor of the colonists. The colonial militia system was not the least important of these factors. It subjected virtually all males to militia service,[33] requiring by law that they furnish themselves with arms and ammunition.[34] Men who remained unlisted on militia rolls,[35] who failed to appear when summoned, or who appeared without the required arms were guilty of offenses punishable by fine.[36] Colonial law even required persons exempt from training to keep arms and ammunition at home.[37](pg.75)

The American Revolutionary War was the progenitor of the modern wars against colonialism, and the war had features that made it revolutionary in itself. The contest was not the conventional struggle of small numbers of professional soldiers, but rather the people on the American side took up arms in their own cause against professional soldiers. A total of almost 400,000 men enlisted, most for short terms, and fought during the eight-year war.[38] George Washington could muster only about 19,000 poorly armed and trained citizens, including both

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provided for those who failed to turn in firearms or radio sets within twenty-four hours." W. SHIRER, THE RISE AND FALL OF THE THIRD REICH; A HISTORY OF NAZI GERMANY 1027 (1960).

The Nazis seized Albert Einstein's bank account for a weapons violation: the possession of a common knife in his home. 1 J. TOLAND, ADOLPH HITLER 325 (1976). "The repression continued with issuance of a series of harsh edicts ... such as the one to surrender all arms immediately or be shot." Hitler, however, during the early stages of his climb to power, got a pistol permit from the sympathetic police. 1 ADOLPH HITLER, *supra*, at 86-87, 120.

"Owning a pistol meant an obligatory conviction for terrorism...." 1 A. SOLZHENITZYN, THE GULAG ARCHIPELAGO 195 (T. Whitney tr. 1974). The right to have firearms or other weapons is forbidden and self-defense is also curtailed. 2 THE GULAG ARCHIPELAGO 431-32.

George Orwell, author of *1984*, noted that the Russian revolution and the Irish civil war were political factors that prompted the passage of restrictive gun laws. B. Bruce-Briggs, *The Great American Gun War*, 45 PUBLIC INTEREST 37, 61 (1976). Today draconian gun laws are an ugly form of repression often cloaked in liberal trappings.

[33] A New York militia statute of May 6, 1691, subjected males from 15 to 60 to militia duties. 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 231 (1894).

A 1705 Virginia statute subjected males from 16 to 60 to militia duties. 3 LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, 335 (W. Hening ed. 1823).

[34] The arms and equipment a New York militiamen was required to furnish himself included a "muskett or fuzee ... pike ... Sword ... Lance ... pistoll ... case of good pistolls ... rapier ... carabine ... poweder ... bulletts ..." 1 THE COLONIAL LAWS OF NEW YORK, *supra* note 33, at 232.

In Virginia the list included "a firelock, muskett or fusee well fixed, a good sword and cartouch box, and six charges of powder ... at his place of abode two pounds of powder and eight pounds of shott ... holsters ... a case of pistolls well fixed, sword ... carabine ...." 3 LAWS OF VIRGINIA, *supra* note 33, at 338.

[35] No person whatsoever from 16 to 60 shall remain unlisted on penalty of a fine of 20 shillings. 2 THE COLONIAL LAWS OF NEW YORK, *supra* note 33, at 84-85.

[36] Failing to appear was punishable by a fine of 20 shillings. 2 THE COLONIAL LAWS OF NEW YORK, *supra* note 33, at 85.

Failing to appear, or appearing without the required arms and ammunition, or failing to keep at his abode the required arms and ammunition were offenses punishable by a fine of 100 pounds of tobacco. 3 LAWS OF VIRGINIA, *supra* note 33, at 338.

[37] "That all persons though ffreed from Training by the Law yet that they be obliged to Keep Convenient armes and ammunition in Their houses as the Law directs To others." 1 THE COLONIAL LAWS OF NEW YORK, *supra* note 33, at 161.

Persons exempted from enrollment and service in the militia were "required and enjoyned to provide and keep at their respective places of abode ... arms and ammunition." 3 LAWS OF VIRGINIA, *supra* note 33, at 337.

[38] 1 AMERICAN HISTORY, *supra* note 25, at 111.

continentals and state militia, against General Sir William Howe's hundreds of ships and 32,000 disciplined soldiers.[39]

The contest turned into a prolonged war of attrition, the American victory at Yorktown finally provoking outcries in England against continuing the war. America's force of arms ended the fighting, and diplomatic skills finally won the war with the signing of the Treaty of Paris in 1783.[40]

Legislative History of the Second Amendment

The Americans desired a written constitution, for it was felt a constitution should contain "a fixed and definite body of principles."[41] Responding to these desires, the delegates in Philadelphia produced a document that was a product of political differences and bickering. James Madison observed that the Constitution was "in strictness, neither a national nor a federal Constitution, but a composition of both."[42] It was brief and contained ambiguities, which left room for a variety of interpretations, and thus was born the loose construction versus strict construction debate.

One of the major problems confronting the delegates was how to reconcile their fear of a standing army with the need to defend their fledgling nation. Although useful for national defense, a standing army was considered generally inimical to personal freedom and liberty. The delegates, however, were unwilling to forego completely the bolstering (pg.76) of national defense through a standing army and developed a compromise position.

They formulated affirmative safeguards to prevent the military from accruing too much power by granting the federal legislative branch the authority to raise a standing army,[43] "for governing such Part" of the militia when "in the service of the United States,"[44] and to call forth "the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions."[45] They further established congressional control by specifying that military funding could be appropriated for not longer than two years[46] and that the power to declare war was reserved to the legislative branch,[47] although the President was to be Commander in Chief.[48]

Although a state could not "keep Troops" without congressional consent,[49] the delegates limited the authority of Congress over state militias because congressional authority extended only

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39 *Id.* at 120-21.

40 *Id.* at 126-29. Professor William Marina noted that one need not go to the writings of Mao or Vo Nguyen Giap to learn about the principles of revolutionary warfare. The events of the American Revolution are filled with examples of the discovery and working out of the essentials of those principles. For example, the American patriot David Ramsay was talking about a "people's war" long before Mao Tse-tung. Washington was writing about an American strategy to "protract" the conflict many years before Communist tacticians worked out a plan for "protracted conflict." Marina, *The American Revolution as a People's War*, REASON 28, 29 (July 1976).

41 *Id.* at 101.

42 *Id.* at 145.

43 U.S. CONST. art. I, § 8, cl. 12.

44 *Id.* at cl. 16.

45 *Id.* at cl. 15.

46 *Id.* at cl. 12.

47 *Id.* at cl. 11.

48 *Id.*, art. II, § 2.

49 *Id.*, art. I, § 10, cl. 3.

to the part of "the Militia" employed in the service of the United States.[50] This indicates that an important distinction was made between "troops" and "militia,"[51] and that there existed a residual militia that was not subject to congressional control.[52] The complexity was a safeguard to prevent a single group of armed forces or combination of groups from ever gaining absolute and unchecked power.(pg.77)

The delegates submitted the Constitution to the states for their ratification. Nine state conventions had to ratify the Constitution, and by December, 1787, Delaware, Pennsylvania, and New Jersey had easily ratified it.[53]

A minority faction in the Pennsylvania convention was the first to make proposals for a Bill of Rights. On December 12, 1787, they made fifteen proposals, and proposal seven specifically addressed the right to bear arms:

> That the people have a right to bear arms for the defence 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; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil power.[54]

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[50] *Id.*, art. I, § 8, cl. 16.

[51] Troops are "soldiers collectively—a body of soldiers." So. Pac. Co. v. United States, 285 U.S. 240, 244 (1932). The word "troops" conveys to the mind the idea of an armed body of soldiers, whose sole occupation is war or service answering the regular army. Dunne v. People, 94 Ill. 120, 138 (1879).

The "militia" is *all* able-bodied men between 18 and 45. It is improbable the entire militia of the state will ever be enrolled. "[A] state may organize such portions of its militia as may be deemed necessary." *Dunne*, *supra*, 94 Ill. at 124, 132.

The "militia" does not mean the body of men organized under state authority who are known as "state militia," but signifies that portion of the people who are capable of bearing arms—the arms-bearing population. *Ex parte* McCants, 39 Ala. 107, 113 (1863).

The organization of active militia is not in violation of U.S. CONST., art I, § 10, cl. 3, as such militia is simply a domestic force, as distinguished from regular troops, and is only liable to be called into service when the exigencies of the state make it necessary. *Dunne*, *supra*, 94 Ill. at 138.

[52] During WW II the national guard was activated by the federal government for overseas duty, thus leaving the states, especially along the coasts, without protection. In a number of states the governor called upon the reserve militia, the armed citizenry, to serve as a substitute for the national guard. *See*, *e.g.*, U.S. HOME DEFENSE FORCES STUDY 32, 34, 58, 60 (Office of Sec. of Defense, Mar. 1981). "State Guard Reserve units operated only in their own towns or rural localities. Members served without pay and provided their own uniforms, arms, and ammunition. Many of them belonged to gun clubs...." *Id.* at 58.

In Maryland the reserve militia (presently recognized in MD. ANN. CODE., art. 65, §§ 1 & 5 (1979)) was called the Maryland Minute Men. 3 STATE PAPERS AND ADDRESSES OF GOVERNOR HERBERT R. O'CONOR 616-20 (1942). "Hence, the volunteers, for the most part, will be expected to furnish their own weapons. For this reason, gunners (of whom there are 60,000 licensed in Maryland), members of Rod and Gun Clubs, of Trap Shooting and similar organizations, will be expected to constitute a part of this new military organization." *Id.* at 618.

[53] 1 AMERICAN HISTORY, *supra* note 25, at 146.

[54] PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, 422 (J. McMaster & F. Stone eds. 1888). The Pennsylvania minority was the first to propose an extensive Bill of Rights and their seminal ideas found their way into the Bill of Rights and became the first, second, fourth, fifth, sixth, eighth, and tenth amendments. E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 50-56 (1957).

The Pennsylvania minority proposal reveals an intent to guarantee the traditional uses of the times: for militia use, for self-defense, and for hunting. The reference to hunting was probably an effort to prevent the enactment of game laws designed to disarm the people. It also demonstrates that the common understanding of "to bear arms" was not restricted solely to militia purposes. In the eighteenth century "bear" meant "To convey or carry." S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (unpaginated) (1979 reprint of 1755 ed.). The arms provision of LA. CONST. tit. III, art. 60 (1845), used the term "carry arms."

All fifteen proposals were defeated, 46 votes against and 23 for.[55] The convention then ratified the Constitution by the same margin.[56] Nevertheless, the minority proposals influenced members of other state conventions, and it is to these anti-Federalists we owe credit for a Bill of Rights.[57](pg.78)

In Georgia and Connecticut the Constitution was easily ratified in January, 1788,[58] and Massachusetts followed in February, ratifying by a margin of 53% for and 47% against.[59] Once again, a Bill of Rights was proposed (this time by Samuel Adams) but was rejected. The section on arms would have provided "that the said Constitution be never construed to authorize Congress ... to prevent the people of the United States, who are peaceable citizens, from keeping their own arms."[60] Between April and July, 1788, Maryland, South Carolina, New Hampshire, Virginia, and New York completed the ratification process.[61]

But most of these last states also agitated for inclusion of a Bill of Rights and thus added momentum to the cause of the anti-Federalists. When the New Hampshire convention gave the Constitution the ninth needed vote for its adoption, it proposed that "Congress shall never disarm any citizen, unless such as are or have been in Actual Rebellion."[62] Virginia also held the right to bear arms as necessary to its proposed Bill of Rights:

> That the people have a 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 defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.[63](pg.79)

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55 PENNSYLVANIA AND THE FEDERAL CONSTITUTION, *supra* note 54, at 424.

56 *Id.* at 425.

57 1 AMERICAN HISTORY, *supra* note 25, at 147-48. Of all the anti-Federalists' specific criticisms the most compelling was "the Constitution lacked a bill of rights."

58 *Id.* at 146.

59 *Id.*

60 On Feb. 6, 1788, a number of amendments were proposed, including freedom of the press, the right to petition, to be free from unreasonable searches and seizures, and the right to arms. All were rejected. DEBATES AND PROCEEDINGS IN THE MASSACHUSETTS CONVENTION 86-87 (B. Peirce & C. Hale eds., Boston 1856). Samuel Adams made the proposals. *Id.* at 266. Following the defeat of the proposals, Adams then voted for ratification of the Constitution. *Id.* at 87. *See also* 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 675 (1971).

61 1 AMERICAN HISTORY, *supra* note 25, at 146, 148.

62 1 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (J. Elliot ed. 1836) [hereinafter cited as ELLIOT'S DEBATES]. The Pennsylvania and Massachusetts proposals on arms are not found in the DEBATES.

63 3 ELLIOT'S DEBATES 659. Patrick Henry said: "The object is, that every man be armed.... Every one who is able may have a gun." *Id.* at 386. Zachariah Johnson, a Virginian, said: "The people are not to be disarmed of their weapons. They are left in full possession of them." *Id.* at 646. Thomas Jefferson's proposed Virginia constitution, which was passed over for George Mason's proposal, provided: "No freeman shall ever be debarred the use of arms." 1 PAPERS OF THOMAS JEFFERSON 344 (J. Boyd ed. 1950). Thomas Jefferson, James Madison, and George Washington owned numerous guns. Tarassuk & Wilson, *Gun Collecting's Stately Pedigree*, AM. RIFLEMAN, July 1981, at 22. *See also* Halsey, *Jefferson's Beloved Guns*, AM. RIFLEMAN, Nov. 1969, at 17.

New York also submitted a proposal on arms that guaranteed a right to keep and bear arms and provided that the militia included the body of the people capable of bearing arms.[64]

North Carolina and Rhode Island, citing the lack of a Bill of Rights, initially voted down the Constitution[65] and included a right to arms as a condition of ratification.[66]

The supporters of the Constitution expounded its meaning and benefits during the fall and winter of 1787-1788 in a series of newspaper articles, afterwards published in book form as *The Federalist.* James Madison wrote that "the advantage of being armed" was a condition "the Americans possess over the people of almost every nation." He charged that the despots of Europe were "afraid to trust the people with arms," and envisioned a militia amounting to near half a million citizens "with arms in their hands."[67]

The right to arms was also expounded in pamphlets by Noah Webster[68] and Richard Henry Lee.[69] Like Madison, both supported the concept of an armed citizenry as a deterrent to oppression.

When the conventions completed ratification, the number of amendments proposed by the states reached 186.[70] It is altogether unlikely that the Constitution would have been ratified had it not been for the (pg.80) general understanding that a Bill of Rights would be adopted,[71] given the several states' felt need for guarantees of individual liberty.

Why were the amendments in the state conventions initially defeated? The Federalists believed there was no need for them because the national government was one of limited powers, and they derided the fears of the anti-Federalists with sarcasm. For example, in Pennsylvania, Tench Coxe noted, "Nothing was said about the privilege of eating and drinking in the Constitution, but he doubted that any man was seriously afraid that his right to dine was endangered by the silence of the Constitution on this point."[72]

Echoing Coxe's sentiments, James Wilson argued in the Pennsylvania convention that since South Carolina, New Jersey, New York, Connecticut, Rhode Island, and Georgia had no declaration

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64 "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 defence of a free state." 1 ELLIOT'S DEBATES, *supra* note 62, at 327-28.

65 1 AMERICAN HISTORY, *supra* note 25, at 146.

66 The North Carolina proposal on arms copied Virginia's proposal. 4 ELLIOT'S DEBATES, *supra* note 62, at 244. The Rhode Island proposal copied New York's. 1 ELLIOT'S DEBATES, *supra* note 62, at 335.

67 THE FEDERALIST No. 46, at 299 (J. Madison) (Mentor Book ed. 1961). The population in 1790 was 3,929,214. 1 AMERICAN HISTORY, *supra* note 25, at 470. Since the state militias *in toto* would not have amounted to half a million, Madison must have had in mind virtually all males capable of bearing arms to serve as a deterrent to oppression.

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> Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence raised in the United States. A military force, at the command of Congress, can execute no laws, but such as the people perceive to be just and constitutional; for they will possess the *power*, and jealousy will instantly inspire the *inclination* to resist the execution of a law which appears to them unjust and oppressive.

PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 51, 56 (P. Ford ed. 1888).

In our system of checks and balances, the people are also a factor. The first and second amendments have a common purpose, namely a safeguard against abuse of powers by government.

69 "[T]o preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them...." LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 124 (W. Bennett ed. 1978).

70 The figure becomes 210 if New York's preliminary recitals are added. Even with duplications eliminated, 80 substantive propositions emerged. DUMBAULD, *supra* note 54, at 32.

71 *Id.* at viii.

72 R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791, 137 (1955).

of rights, and no one could honestly say their inhabitants were oppressed, these states had proved that a Bill of Rights was not an essential of a republican government.[73]

The first Congress convened for the purpose of drafting a Bill of Rights and delegated the task to James Madison. Madison did not see the Bill of Rights as fixing, and therefore to a certain extent killing, the living concept of individual rights. To Jefferson he had written that he favored "a constitutional declaration of the most essential rights," but, "at the same time I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendment, for any other reason than that it is anxiously desired by others."[74] He referred to his own proposals as "calculated to secure the personal rights of the people so far as declarations on paper can."[75]

Madison intended that the right to arms be an individual one, not merely protecting states' rights to organize militias. This view is borne out by his initial plan, later rejected by the House, to designate the amendments as inserts between sections of the existing Constitution. He did not designate the right to arms as an amendment to the martial clauses of article I, sections 8 or 10. Madison placed it as a part of a group of provisions (including freedom of religion and press) to be inserted "in article 1st, Section 9, between clauses 3 and 4."[76] The first three clauses of that section had been devoted to the few individual (pg.81) rights protected in the original Constitution, relating to slavery, suspension of habeas corpus, bills of attainder, and ex post facto laws. Madison apparently viewed the right to arms as related to rights of speech and press, and more related to the existing civil rights than to congressional or state powers over the militia.

The study of the developments in drafting the Bill of Rights is difficult because Senate sessions were secret during the period when the right to arms was under consideration, and neither house then kept a verbatim record of proceedings similar to the present *Congressional Record.* The nearest equivalent is a publication known as the *Annals of Congress*, a publication that scholars have found to be unreliable as well as incomplete; it is not safe to rely on this source alone. Nor do the *Journals* of the House and Senate for the first session of the First Congress fill this void because they embody only actions taken by vote of the respective bodies, and do not contain any account of the debates.[77]

The intended meaning of the amendment can be learned not only from what the drafters included in it but also from what they excluded from it. In its initial format the right to arms included a provision that "no person religiously scrupulous of bearing arms shall be compelled to render military service in person." This was rejected after opponents argued the federal government might arbitrarily use the provision to declare an individual religiously scrupulous, thereby denying him the right to bear arms.[78] Moreover, the Senate rejected a proposal to insert the phrase "for the common

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[73] *Id.* at 140. *Cf.* "The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient." (Roger Sherman of Connecticut), 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 588 (M. Farrand ed. 1974).

[74] 11 PAPERS OF JAMES MADISON 297 (1978).

[75] 12 PAPERS OF JAMES MADISON 258 (1979).

[76] *Id.* at 201. *See also* DUMBAULD, *supra* note 54, at 207.

[77] DUMBAULD, *supra* note 54, at ix.

[78] 1 ANNALS OF CONGRESS, 778 (1789). Rep. Gerry of Massachusetts stated:

> 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.

defence" after the words "bear arms,"[79] thereby emphasizing that the purpose of the right to arms 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 self-defense.[80]

As mentioned above, the people of that era used arms to defend themselves, to hunt, and to perform militia duties. The Revolutionary War demonstrated that an armed citizenry served as a bulwark against governmental oppression. Arms were an integral part of their culture.

The seven proposals on arms that surfaced in the state conventions reflected the customary uses of arms, and two proposals did not assign (pg.82) a reason for a right to arms,[81] thus protecting all customary uses. One proposal assigned all of the customary uses, including hunting.[82] The remaining four had a militia nexus.[83] However, in these four proposals the arms right stood by itself as a declarative independent clause: "the people have a right to keep and bear arms." The autonomy of the clause supports an interpretation that arms kept for customary uses is an unqualified right.[84]

The states would not have ratified the Constitution and the Bill of Rights if they suspected that the second amendment did not guarantee to their citizens the arms rights they already enjoyed.[85] A newspaper article of the day explains the various guarantees in the proposed Bill of Rights and suggests the paramount importance attached to the individual's right to arms:

> As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize and as the military forces which must be occasionally raised to defend our

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[79] 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 450 (J. Goebel, Jr. ed. 1971). *See also* 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1153-54 (1971).

[80] See notes 4 & 6 *supra.*

[81] Massachusetts and New Hampshire. See notes 60 and 62, *supra.*

[82] Pennsylvania. See note 54, *supra.*

[83] Virginia, New York, North Carolina, and Rhode Island. See notes 63, 64, and 66, *supra.*

[84] See notes 4 & 6 *supra*.

[85] Four state constitutions had a specific provision on arms: Pennsylvania, Vermont, North Carolina, and Massachusetts. "That the people have a right to bear arms for the defence of themselves and the State...." PA. CONST., Declaration of Rights, art. XIII (1776); VT. CONST., ch. I, art. XV (1777). Those provisions were construed in Commonwealth v. Ray, 218 Pa. Super. 72, 272 A.2d 275, 278-79 (1970), *vac. on other grounds* 448 Pa. 307, 292 A.2d 410 (1972); and State v. Rosenthal, 75 Vt. 295, 55 A. 610 (1903), to guarantee a private right to self-defense.

"That the people have a right to bear arms, for the defence of the State...." N.C. CONST., Bill of Rights § 17 (1776). In State v. Huntley, 25 N.C. 418, 422-23 (1843), the court interpreted this provision broadly: "For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun."

"The people have a right to keep and bear arms for the common defence...." MASS. CONST., art. XVII (1780). Concerns were voiced that the language was too narrow. "That the people have a right to keep and bear arms for their own and Common Defence" was urged as a better choice. THE POPULAR SOURCES OF POLITICAL AUTHORITY; DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION of 1780, 624 (O. & M. Handlin eds. 1966). This explains why the Senate voted down "common defense" language in the second amendment. See note 79, *supra*. The right to arms was judicially repealed in Commonwealth v. Davis, 369 Mass. 886, 343 N.E. 2d 847 (1976). The court also ignored favorable cases in sister states interpreting similar "common defense" language. See notes 4 & 6 *supra*. Numerous courts have interpreted the second amendment as an individual right not restricted to the militia. United States v. Bowdach, 414 F. Supp. 1346, 1353 n.11 (S.D. Fla. 1976); Nunn v. State, 1 Ga. 243 (1846); McKellar v. Mason, 159 So. 2d 700, 702 (La. App. 1964), *aff'd*, 245 La. 1075, 162 So. 2d 571 (1964); State v. Chandler, 5 La. Ann. 489, 490 (1850); *In re* Brickey, 8 Idaho 597, 70 P. 609 (1902); People v. Liss, 406 Ill. 419, 94 N.E.2d 320, 323 (1950); State v. Nickerson, 126 Mont. 157, 247 P.2d 188, 192 (1952). *See also* State v. Anonymous, 179 Conn. 516, 519, 427 A.2d 403, 405 (1980).

country, might pervert their power to the injury of their fellow citizens, *the people are* (pg.83) *confirmed by the next article in their right to keep and bear their private arms.* [86]

Early Views on the Right to Arms

Because the Framers' intent becomes less discernible with the passage of time, the precedential value of cases tends to increase in proportion to their proximity to the Convention of 1787.[87] Thus, it would be helpful to see what the early commentators said about the second amendment and how early courts interpreted it.

Saint George Tucker (1752-1828) served as a colonel in the Virginia militia, was wounded in the Revolutionary War, was a law professor at William and Mary, and later was a justice on the Virginia Supreme Court from 1804 to 1811. He was also a friend of Thomas Jefferson. In 1803 he published a five-volume edition of Blackstone's Commentaries on the Laws of England.[88]

To Blackstone's listing of the "fifth and last auxilliary right of the subject ... that of having arms ... suitable to their condition and degree, and such as are allowed by law," Tucker in a footnote added: (pg.84) "The right of the people to keep and bear arms shall not be infringed." He cited the second amendment, noting that it is "without any qualification as to their condition or degree, as is the case in the British government."[89] He added: "Whoever examines the forest, and game laws in the British code, will readily perceive that the right of keeping arms is effectually taken away from the people of England."[90]

In discussing the second amendment, Tucker wrote:

> This may be considered as the true palladium of liberty .... The right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited,

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[86] Federal Gazette and Philadelphia Evening Post, June 18, 1789, No. 68 of Vol. II, at 2, col. 1 (emphasis added). Tench Coxe in a letter to Madison admitted being the author. 12 PAPERS OF JAMES MADISON 241 n.1 (1979). "Great weight has always been attached, and very rightly attached, to contemporaneous exposition." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418 (1821).

[87] Powell v. McCormack, 395 U.S. 486, 547 (1969). The trend of early state constitutions, at the time when Jefferson and Madison were still alive, was to guarantee the right to arms for defense of self and the state. KY. CONST., art. XII § 23 (1792); OHIO CONST., art. I § 20 (1803); IND. CONST., art. I § 20 (1816); MISS. CONST., art. I, § 23 (1817); CONN. CONST., art. I § 17 (1818); ALA. CONST., § 23 of Declaration of Rights (1819); MO. CONST., art. XIII § 3 (1820). TENN. CONST., art. XI § 26 (1796), and MAINE CONST., art. I § 16 (1820), guaranteed the right to arms for the "common defense." This demonstrates that while the right to arms was deemed important, there was no consensus on the precise language, probably because the full enjoyment of the right at the time was taken for granted. A constitutional guarantee should be read in a sense most obvious to the common understanding at the time of its adoption. Eisner v. Macomber, 252 U.S. 189, 220 (1920) (Holmes, J., dissenting).

"[M]ost Americans believe they have a [constitutional] right to own a gun." There is also little support for an outright ban on handguns. Wright, *Public Opinion and Gun Control: A Comparison of Results From Two Recent National Surveys*, 455 ANNALS OF THE AM. ACADEMY OF POL. & SOC. SCIENCE 34, 37, 38 (May 1981). *See also* FEDERAL REGULATION OF FIREARMS, Report for Senate Comm. on the Judiciary by Cong. Research Service, 97th Cong., 2d Sess., 261 (1982). The vast majority of citizens believe they have an individual right to own a gun. In the 1982 elections voters overwhelmingly adopted constitutional guarantees on arms in Nevada and New Hampshire and rejected by a 2-to-1 margin an initiative to register and freeze the number of handguns in California. Omang & Morgan, *Freeze Backers, Gun Lobby Hail Victories in Ballot Referenda*, Wash. Post, Nov. 4, 1982, at A26, col. 1.

[88] THE RIGHT TO KEEP AND BEAR ARMS, Report of Senate Subcomm. on Constitution of the Judiciary Comm., 97th Cong., 2d Sess., 6-7, 60 (1982).

[89] 2 W. BLACKSTONE, COMMENTARIES 143 n.40 (Tucker ed. 1803).

[90] *Id.* at n.41.

> 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: a never failing lure to bring over the landed aristocracy to support any measure, under that mask, though calculated for very different purposes. True it is, their bill of rights seems at first view to counteract this policy: but the right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorize the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subject to a penalty.[91]

Tucker thus merged self-defense, prevention of standing armies, and protection from oppression all into a single concept—the generalized right of keeping and bearing arms as protected by the second amendment.

William Rawle (1759-1836) was a Quaker, a correspondent of Thomas Jefferson, and George Washington's choice as the first Attorney General, an appointment Rawle declined. Like Tucker, he was in all probability familiar with the affairs of the early government.[92]

In 1825 he published a textbook on the Constitution,[93] and in regard to the first clause of the second amendment, he wrote that a disorderly militia is a disgrace; it must be well regulated. He also felt that "[I]n a people permitted and accustomed to bear arms, we have (pg.85) the rudiments of a militia."[94] Rawle continued with the second portion of the amendment:

> 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 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.[95]

However, Rawle pointed out that "[t]his right ought not, however, in any government, to be abused to the disturbance of the public peace."[96] An assemblage of persons with arms for an unlawful purpose is an indictable offense. He added that a person carrying arms abroad "attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them, would be sufficient cause to require him to give surety of the peace."[97] Thus, his writings support the notion of a constitutionally guaranteed individual right to keep and bear arms for other than militia use.

While the second amendment does not refer to infringement by Congress, the Georgia Supreme Court established that it applies directly to the state by upholding its provisions at a time when the state constitution did not have a provision on arms. Hawkins Nunn was charged with

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91 1 W. BLACKSTONE, COMMENTARIES 300 app. (Tucker ed. 1803).

92 THE RIGHT TO KEEP AND BEAR ARMS, *supra* note 88, at 7, 60.

93 W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Phil. 1825). *See also*, *id.* (Phil. 1829 ed.).

94 *Id.* at 153 (1829 ed.).

95 *Id.* at 125-26.

96 *Id.* at 126.

97 *Id.*

"having and keeping about his person, and elsewhere, a pistol, the same not being such a pistol as is known and used as a horseman's pistol." The court voided the statute on second amendment grounds and discussed extensively the right to keep and bear arms:

> It is true, that these adjudications are all made on clauses in the State Constitutions; but these instruments confer no new rights on the people which did not belong to them before. When, I would ask, did any legislative body in the Union have the right to deny to its citizens the privilege of keeping and bearing arms in defence of themselves and their country?
>
> 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.
>
> The right of the whole people, old and young, men, women and (pg.86) 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 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.[98]

Nunn's view that the first, fourth, fifth, and sixth amendments apply to the states is now the law of the land. Hence, the second amendment does also apply to the states.[99]

Supreme Court Interpretation

The Court has had occasion to decide four cases on the right to arms, but three of these came in the nineteenth century and are of little precedential value because none decide the full scope and meaning of the right. One of these cases, *United States v. Cruikshank*,[100] involved a conspiracy by more than a hundred klansmen to deprive blacks of first and second amendment rights. The Court held that the first amendment was not "a right granted to the people by the Constitution," and also that the second amendment was not "a right granted by the Constitution."[101] This recognizes the

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[98] Nunn v. State, 1 Ga. 243, 247-51 (1846). The GA. CONST. of 1861, art. I, § 6, finally adopted a right to arms.

The *Nunn* decision establishes the correct meaning of the second amendment. Judge Lumpkin, the author of *Nunn*, started practicing law in 1820, when Jefferson and Madison were still alive. He studied at the University of Georgia and Princeton University. He died in 1867. In view of the times and his age, he probably did not mean children when he used the term "boys" in *Nunn.* Judge Lumpkin In Memoriam, 36 Ga. 19 (1867), Letter from Retired Georgia Chief Justice Bond Almand to author (Oct. 23, 1981).

[99] The Supreme Court has not specifically held that the second, third, and seventh amendments, as well as the indictment provision of the fifth and the bail provision of the eighth, apply to the states. However, recently federal circuit courts have decided that the third amendment and the bail provision of the eighth amendment apply to the states. Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982) (third amendment); Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981) (bail), *vac. as moot sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982).

The Supreme Court's initial approach is protecting fundamental rights of speech, press, and assembly was to employ the fourteenth amendment's due process clause, unrelated to procedural due process. Fiske v. Kansas, 274 U.S. 380 (1927); Near v. Minnesota, 283 U.S. 697 (1931); DeJong v. Oregon, 299 U.S. 353 (1937). *DeJong* held that the explicit mention of Congress in the first amendment does not argue against exclusion of that limitation under the fourteenth amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), took a broader approach to the fundamental concept of liberty embodied in the fourteenth amendment by having it embrace the liberties guaranteed by the first amendment. Everson v. Board of Educ., 330 U.S. 1 (1947), reaffirmed the application of first amendment rights to the states by the fourteenth amendment.

[100] 92 U.S. 543 (1876).

[101] *Id.* at 551, 553.

principle that certain rights (pg.87) predate the Constitution and that such rights are guaranteed rather than granted by a Constitution.[102]

The Court, however, held that the national government shall not infringe such rights, and citizens have "to look for their protection against any violation by their fellow-citizens" to the police power of the state. Subsequent Supreme Court cases have rendered the *Cruikshank* decision a relic of Reconstruction by holding that the first amendment applies to the states and that private interference with federal constitutional rights may be punished.[103]

In *Presser v. Illinois*[104] the defendant was prosecuted for leading a band of armed men in a parade without a license. The Court reaffirmed *Cruikshank*'s holding that the second amendment applied only to infringement by the federal government. The Court defined the constitutional term "militia" and held that a state could not disarm the people because the people have a duty to the federal government to maintain public security and owe militia duties to the federal government.

> 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 State, 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.[105] (pg.88)

Miller v. Texas[106] cited *Presser* for the proposition that the second and fourth amendments[107] did not apply to the states. The Court did not decide whether those amendments applied to the states through the fourteenth amendment because that issue "was not set up in the trial court."[108]

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[102] The right to arms "predates any Constitution of the Commonwealth." Commonwealth v. Ray, 218 Pa. Super. 72, 272 A.2d 275, 278-79 (1970).

[103] United States v. Guest, 383 U.S. 745 (1966) (private interference with federal constitutional rights may be punished); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (first amendment applies to states).

[104] 116 U.S. 252 (1886).

[105] *Id.* at 265. The opinion essentially held that banning armed marches does not infringe the right to arms; that even laying the second amendment aside, the people have a right to arms; and that due process and privileges and immunities add nothing to the right to arms because the court already held that the law against armed marches does not infringe the right to arms. In Dunne v. People, 94 Ill. 120, 140 (1879), the court held that an act prohibiting armed parades or drills without a license does not infringe the right to arms for defense of person and property. The right to arms guarantees of Arizona and Washington contain proscriptions against armed bodies. ARIZ. CONST., art. 2 § 26; WASH. CONST., art. I § 24.

The Recorder of London on July 24, 1780, opined that an armed association of men could not assemble together and march where they pleased, for "an affirmative answer would amount to a dissolution of all government and a subversion of all law." W. BLIZARD, DESULTORY REFLECTIONS ON POLICE: WITH AN ESSAY ON THE MEANS OF PREVENTING CRIMES & AMENDING CRIMINALS 61 (London 1785). However, he opined that the right to possess arms is an individual right; "that it cannot be unlawful to learn to use them (for such lawful purposes) with safety and effect"; and that "The lawful purposes, for which arms may be used, (besides immediate self-defence,) are, the suppression of violent and felonious breaches of the peace, the assistance of the civil magistrates in the execution of the laws, and the defense of the kingdom against foreign invaders." *Id.* at 60, 63.

[106] 153 U.S. 535 (1894).

[107] The fourth amendment now applies to the states through incorporation under the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule of fourth amendment applies to states); Wolf v. Colorado, 338 U.S. 25 (1949).

[108] 153 U.S. 535, 538 (1894).

In *United States v. Miller*,[109] the Supreme Court reversed the district court's sustention of a demurrer and quashing of the indictment on second amendment grounds:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. 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.[110]

The quoted phrase "In the absence of any evidence" is crucial to the opinion of the Court. The defendants did not appear nor were they represented before the Supreme Court. Thus the opinion suffers from a fundamental defect, the Court considering only one view. Further, the reference to the "common defense" flies in the face of the historical intent of the amendment: "The Senate refused to limit the right to bear arms by voting down the addition of the words 'for the common defense.'"[111]

Miller held that:

> [T]he Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for (pg.89) service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.[112]

The Court simply refused to take judicial notice that a particular shotgun's possession or use had some reasonable relationship to the preservation or efficiency of a well-regulated militia. The Court made no finding that the right to arms belonged only to the militia and in remanding did not suggest that the lower court inquire as to what constitutes the militia in Arkansas, nor did it suggest an inquiry as to the defendants' able-bodiedness. These factors and the Court's definition of militia also indicate that a locality rule in judging the breadth of the second amendment was not adopted.[113]

Miller holds that the Constitution protects the right to "possession or use" of arms having a militia utility, e.g., shotguns, rifles, and pistols. But the Court was willing to narrow the right by holding that some shotguns may not be "indispensable." The arms must "[have] some reasonable relationship to the preservation or efficiency of a well regulated militia...." Justice Black has claimed that "only arms necessary to a well-regulated militia" are absolutely protected.[114] At a minimum, the

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[109] 307 U.S. 174 (1939).

[110] *Id.* at 178. The short-barreled shotgun is the modern equivalent of the ancient blunderbuss. It was not uncommon for a blunderbuss to have a barrel under 18 inches. F. WILKINSON, ANTIQUE FIREARMS 99 (1969). *Cf.* Burks v. State, 162 Tenn. 406, 36 S.W.2d 892 (1931) (miniature shotgun with 12 1/2-inch barrel is constitutionally an arm).

[111] 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 450 (J. Goebel, Jr. ed. 1971).

[112] United States v. Miller, 307 U.S. 174, 179 (1939).

[113] *Cf.* Miller v. California, 413 U.S. 15 (1973) (obscenity determined by local rather than national standards).

[114] Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 873 (1960). Justice Black's individual rights view has Supreme Court support. In Dred Scott v. Sanford, 60 U.S. 393 (1857), the Court included the right "to keep and carry arms wherever they went" as a privilege and immunity. *Id.* at 417. It also listed the right to arms in a list of individual rights which Congress could not deny. *Id.* at 450. In Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897), the Court, in discussing individual rights, opined that a law against concealed carrying is not repugnant to the second amendment, but to admit this exception is to admit there is a fundamental right. In Moore v. City of East Cleveland, 431 U.S. 404, 502 (1977), an earlier list of individual rights, including the right to arms, was approved.

arms that should be protected are those suitable (not indispensable) for militia use,[115] because the term "necessary" does not mean "absolutely or indispensably necessary."[116]

The Meaning of the Second Amendment

A Well-regulated Militia

The militia system has always had a dual purpose: availability to local colonial or state authorities to maintain order in times of internal (pg.90) crisis or disorder, and availability to central authority (be it royal or federal) in times of war or grave national emergency.[117]

The Supreme Court has defined militia under the Constitution as "all citizens or all males capable of bearing arms."[118] The militia is thus more than just the national guard,[119] for the national guard is but a creature of statute, and a statute may not create or abrogate a constitutional right. The present national guard statute confers upon the national government the daily power to evade any claim that the second amendment grants to the states the right to have armed militiamen.[120] The sophisticated organization, equipment, and training of the national guard would indicate that it has undergone a metamorphosis from being an inclusive and ad hoc militia comprised of the people to being exclusively professional troops, and the United States government may prevent the states from keeping troops in times of peace.[121] Nevertheless, the distinction between the militia and the national guard has been judicially recognized.[122] Thus attempts to limit the militia to the national guard and in turn to limit the term "people" to those in the national guard ignore both history and case law.

The belief that the Constitution meant to restrict the ownership of all arms to members of the armed forces and police is a misconception. It derives from the unsupported and erroneous claim that

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[115] As a practical matter, the people carried whatever weapons they commonly had into battle. Matthews v. State, 237 Ind. 677, 148 N.E.2d 334, 340 (1958) (Emmert, C.J., dissenting); C. COLBY, REVOLUTIONARY WAR WEAPONS 12 (1963). This included pistols. *Id.* 11-15.

[116] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413 (1819).

[117] U.S. HOME DEFENSE FORCES STUDY, *supra* note 52, at iii.

[118] See note 105, and text at note 112, *supra*. Numerous state constitutions reflect this view. *E.g.*, "A militia shall be provided and shall consist of all persons over the age of seventeen...." IND. CONST., art. 12 § 1; "The State militia consists of all able-bodied persons residing in the State...." ILL. CONST., art. XII § 1. This comports with anti-Federalist views that "A militia, when properly formed, are in fact the people themselves ..." and that "the constitution ought to secure a genuine and guard against a select militia ...," by having the militia include "all men capable of bearing arms...." 2 THE COMPLETE ANTI-FEDERALIST 341 (H. J. Storing ed. 1981). The militia is thus more than the national guard.

[119] THE RIGHT TO KEEP AND BEAR ARMS, *supra* note 88, at 4-5, 7, 56-59. *See also* Lane, *The Militia of the U.S.*, MILITARY REVIEW 13, 15 (Mar. 1982). The militia could not be solely a creature of statute because colonies from time to time allowed their militia acts to expire, leaving the colony without a statutory militia. New York, e.g., had no statute between 1769-72 and 1774-75. 4 THE COLONIAL LAWS OF NEW YORK, *supra* note 33, at 592; *id.* vol. V at 342-51.

[120] Gilligan v. Morgan, 413 U.S. 1, 7 (1973); 10 U.S.C. §§ 331-333 & 3499-3500 (1971).

[121] U.S. CONST., art. I, § 10, cl. 3.

[122] Terms "militia" or "militiamen" comprehend every citizen-soldier who in time of war or emergency forsakes his civilian pursuits for temporary military duty and are not restricted to the national guard. State *ex rel.* McGaughey v. Grayton, 349 Mo. 700, 163 S.W.2d 335, 337 (1943) (en banc). The militia is classified into the organized militia and the reserve militia. *Id.*, 163 S.W.2d at 340. *See also* People *ex rel.* Leo v. Hill, 126 N.Y. 497, 504, 27 N.E. 789, 790 (1891).

Numerous statutes make the distinction between the militia and the national guard. *See*, *e.g.*, 10 U.S.C. § 311 (1971); 46 CAL. MIL. & VET. CODE § 121 (West 1955); CONN. GEN. STAT. ANN. § 27-2 (West 1975); R.I. GEN. LAWS § 30-1-4 (1969).

the militia was a regular military formation of some sort, separate and distinct from the people. This misconception would limit the keeping and bearing (pg.91) of arms to the standing armed forces and the police, the very thing the Founding Fathers meant to prevent.[123]

The second amendment did not grant the states any powers over their militia that the article I, section 8 militia clause did not already grant. The power of the states to legislate on militia matters existed prior to the formation of the Constitution and, not being prohibited by the Constitution, remains with the states.[124] A state unquestionably may use its militia to put down an armed insurrection: that power is essential to the existence of a state.[125] Only the article I, section 10 provision limits this power by forbidding the states to keep standing troops in time of peace without congressional approval.

In the Second World War the militia proved a successful substitute for the national guard, which was federalized and activated for overseas duty.[126] Members of the militia, many of whom belonged to gun clubs and whose ages ranged from 16 to 65, served without pay and provided their own arms.[127] Their mission was to serve as a local early warning and intelligence source for regular troops and as a delaying force. Their training stressed guerrilla tactics, patrolling, demolitions, and roadblock techniques, and the firepower of some units was impressive.[128]

The national government activated the Maryland National Guard (pg.92) for overseas service. Governor Herbert R. O'Conor then called on men "of all ages and stations in life" to volunteer for the manning of home guard stations for the task of "repelling invasion forays, parachute raids and sabotage uprisings in the state." Before the end of 1943, 15,000 Maryland Minute Men, as these men were designated, manned home guard stations. These men were expected to bring their own arms—rifles, shotguns, and pistols—for training and use on guard duty. At a time when Nazi submarines were sinking American ships off the Atlantic coast, the fear of invasion was very real.[129]

The national government also activated the Virginia National Guard for overseas duty, thus making it necessary to call upon the local armed citizenry to perform militia duties. They were variously called the minute men, the home guard, or the reserve militia. Because a shortage of arms prompted some members of the militia to borrow .22's from youngsters, sportsmen with their own guns were especially sought after for recruitment in the militia: "Since its personnel would have to

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123 MILITARY REVIEW, *supra* note 119, at 15.

124 Houston v. Moore, 18 U.S. 1, 16-17 (1820). This reflects John Marshall's view that the states had retained their powers over the militia. 3 ELLIOT'S DEBATES, *supra* note 62, 419-21.

125 Luther v. Borden, 48 U.S. 1, 45 (1849). The tenth amendment, furthermore, protects the reserved powers of a state. *Cf.* National League of Cities v. Usery, 426 U.S. 833 (1976).

126 U.S. HOME DEFENSE FORCES STUDY, *supra* note 52, at 32, 34.

127 *Id.* at 58, 62-63.

128 *Id.* at 58, 60.

129 Baker, *I remember—The "Army" With Men From 16 to 79* [Baltimore] Sun Magazine, Nov. 16, 1975, at 46; 3 STATE PAPERS & ADDRESSES OF GOV. O'CONOR, *supra* note 52, at 616-20.

On file with *Oklahoma Law Review* are (1) a copy of an honorable discharge certificate from the WW II Reserve Militia of Maryland (Maryland Minute Men); and (2) an affidavit from a former Maryland Minute Man swearing that he performed militia duties during WW II with his personally owned .22 rifle and .32 pistol and that members were required to supply their own arms, which included rifles, shotguns, pistols, and hunting knives.

furnish its own weapons and ammunition, its membership campaign leaned heavily on sportsmen of the state."[130]

All over the country individuals armed themselves in anticipation of threatened invasion.[131] A manual distributed en masse by the War Department recommended the keeping of "weapons which a guerrilla in civilian clothes can carry without attracting attention. They must be easily portable and easily concealed. First among these is the pistol."[132]

Historically militia formations were most effective when responding to obvious threats close to home. They were to harass and impede the enemy wherever possible and to support friendly formations. Consisting of small tactical formations armed with a wide variety of weapons, the militia had actually taken the field against the soldiers of George III and defeated them. A British officer underestimated the patriots as "a mob without order or discipline, and very awkward at handling their arms."[133] The lessons of Vietnam, Nicaragua, Africa, and the Soviet intervention into Afghanistan illustrate the limitations of push-button warfare against dispersed small units fighting in their own territory. The militia's critics tend to ignore this strength and concentrate only on the militia's weaknesses.[134] They claim a poorly trained and ill-equipped citizenry is no match for professional troops. Nevertheless, history demonstrates that a highly motivated but ill-equipped and poorly trained armed citizenry can wear down and defeat professional troops in a prolonged war of attrition.(pg.93)

The Security of a Free State

The Framers believed that "the right of the people to keep and bear Arms" would, *inter alia*, constitute insurance of the continued existence of a free state through the militia. Moreover, at common law the maintenance of order was everyone's business, and an armed and active citizenry was a part of one's social responsibility. All able-bodied men between the ages of 16 and 60 were subject to the sheriff's summons for posse duty or to suppress local disorders. For large-scale emergencies, such as invasion or insurrection, a civilian militia was intermittently mustered for military duty. On a smaller scale, English subjects were involved in everyday police work. When a crime occurred, citizens were to raise a "hue and cry" to alert their neighbors and were expected

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130 M. SCHLEGAL, VIRGINIA ON GUARD—CIVILIAN DEFENSE AND THE STATE MILITIA IN THE SECOND WORLD WAR 45, 131 (Va. State Lib. 1949).

131 *To Arms*, TIME, Mar. 30, 1942, at 1.

132 LEVY, GUERRILLA WARFARE 55 (Penguin Books and Infantry J. 1942).

133 THE SPIRIT OF 'SEVENTY-SIX 150 (H. Commager & R.B. Morris eds. 1967). The patriots were also described as "skillful enough in the use of musket or rifle ... [and] ... better suited to frontier warefare against the Indians than to the discipline of an army camp." *Id.* at 151-52.

Therefore, a well-regulated militia means one that has had some training or that at least is composed of people who have had some training. This is to prevent the militia from becoming a disorderly mob, dangerous not to the enemy but to its own state and country. In its obsolete form pertaining to troops, *regulated* is defined as "properly disciplined." 7 OXFORD ENGLISH DICTIONARY 380 (1933). Moreover, *discipline* in relation to arms is defined as "training in the practice of arms." 3 OXFORD ENGLISH DICTIONARY 416 (1933).

134 Lane, *The Militia of the U.S.*, MILITARY REVIEW 13, 16 (Mar. 1982).

to pursue the criminals "from town to town, and from county to county."[135] This concept of public security also advances the "security of a free State."[136]

The People

The term *people* has been consistently interpreted to mean that the Constitution protects an individual right, as in the first, fourth, ninth, (pg.94) and tenth amendments.[137] The only deviation involves the arms right, and it comes in the seminal case of *City of Salina v. Blaksley*,[138] which held that it is solely a collective rather than an individual right. James Blaksley was convicted of carrying a pistol within the city "while under the influence of intoxicating liquor." While the conviction could have been sustained under the general police powers of the state,[139] the court chose "to treat the question [of bearing arms] as an original one." It misread *In re Brickey*[140] by claiming that the case

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[135] MALCOLM, *supra* note 22. "It is the right and duty of a private person to apprehend one who has committed a felony in his presence, either at the time of its commission or upon immediate pursuit." Yingst v. Pratt, 139 Ind. App. 695, 220 N.E.2d 276, 280 (1966) (en banc). Other cases in accord include Suell v. Derricott, 161 Ala. 259, 49 So. 895, 900 (1909); Pond v. People, 8 Mich. 149, 178 (1860). Chief Justice Cardozo held that not only does every able-bodied citizen have a duty to aid in the suppression of crime, but this duty to prevent crime may even extend to being required to have arms to carry out such duty. Babington v. Yellow Taxi Corp., 250 N.Y. 14, 16-17, 164 N.E. 726, 727 (1928).

The state has the authority to train its able-bodied men so that they may perform military duties or constabulary duties when called upon. Hamilton v. Regents of Univ. of Cal., 293 U.S. 245, 260 (1934).

[136] The police have no duty to protect the individual citizen. Weiner v. Metropolitan Transp. Auth., 55 N.Y.2d 175, 448 N.Y.S.2d 141 (1982); Warren v. District of Columbia, 444 A.2d 1 (D.C. App. 1981). "[T]here is no constitutional right to be protected by the state against being murdered by criminals or madmen." Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982). It is common knowledge that the police are often understaffed and, even where adequately staffed, cannot possibly be expected always to protect the citizen.

"[L]eft with individuals [is] the exercise of the natural right of self defence, in all those cases in which the law is either too slow, or too feeble to stay the hand of violence." 2 J. KENT, COMMENTARIES ON AMERICAN LAW 12 (1827).

The posse and the militia both comprise able-bodied men and both perform the similar functions of maintaining the public order, with the militia being used exclusively for disorders which traditional civil authorities are unable to suppress. Despite the existence of a large body of professional law enforcement officers, the posse is still occasionally called on to apprehend criminals. On June 6, 1977, a posse was sent to search for mass-murderer Theodore Robert Bundy following his escape from the courthouse in Aspen, Colo. R. LARSEN, BUNDY: THE DELIBERATE STRANGER 179-82 (1980). Recently a California posse apprehended two robbers. *The Armed Citizen*, AM. RIFLEMAN 6 (July 1982).

[137] Payton v. New York, 445 U.S. 573, 589 (1980) (fourth amendment); Griswold v. Connecticut, 381 U.S. 479, 488-89 (1965) (ninth amendment); Cantwell v. Connecticut, 310 U.S. 296 (1940) (religion); DeJong v. Oregon, 299 U.S. 353 (1937) (speech and peaceable assembly); Near v. Minnesota, 283 U.S. 697 (1932) (speech and press). "The use of the words 'the people', in both these Amendments [ninth and tenth] strongly emphasizes the desire of the Framers to protect individual liberty." Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 871 (1960).

[138] 72 Kan. 230, 83 P. 619 (1905). The collective right holding has been rejected by other courts. *E.g.*, *see* People v. Nakamura, 99 Colo. 262, 62 P.2d 246 (1936) (en banc); State v. Dawson, 272 N.C. 535, 159 S.E.2d 1, 9 (1968).

[139] The prevailing view is that prohibiting the concealed carrying of weapons does not infringe the private right to bear arms guaranteed in the federal and various state constitutions. "Any one, carrying a weapon for a laudable purpose, will not desire to conceal it." C. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES, 13-14, 503 (1886).

The right to arms is subject to regulations to promote the peace, order, and security of society, "provided they do not nullify the constitutional right or materially embarrass its exercise." E. FREUND, THE POLICE POWER 90-91 (1904).

"A statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional." State v. Reid, 1 Ala. 612, 616, 35 Am. Dec. 44 (1840). This is an indication that a ban on the ownership of such commonly possessed arms as pistols, shotguns, or rifles would be clearly unconstitutional, and that a blanket ban on the peaceful, open carrying of arms would likewise be unconstitutional.

[140] 8 Idaho 597, 70 P. 609 (1902).

sanctioned the carrying of concealed weapons on constitutional grounds. However, *Brickey* merely struck down a statute that forbade the carrying of a pistol in town in any manner, specifically holding that forbidding the carrying of concealed weapons would be a valid regulation of the arms right. The court also misread *Commonwealth v. Murphy*[141] by claiming it "strongly supports the position we have taken." *Murphy* involved parading without a license by armed men, and the *Murphy* court merely cited *Presser v. Illinois*[142] in upholding the conviction.

The collective right holding suffers from a fundamental defect. Aside from the conceptual difficulty of seeing how something can exist in a whole without existing in any of its parts, the collectivist holding essentially claims that there is a nebulous entity that exists somewhere between the individual and the state that is so important that the Framers (pg.95) protected it with a constitutional guarantee.[143] Addressing this question of a collectivist limitation on the second amendment, Judge Cooley wrote the following:

> 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 guaranty 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 the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.[144]

The collectivist argument should not be followed by the courts because it has neither historical support nor case law support prior to the Kansas decision, and it is illogical because the very concept of a right, particularly one contained within the Bill of Rights, is individual.

The principle of rigid *stare decisis* has no application to an unconstitutional law or to even a course of action taken by the courts. "That an unconstitutional action has been taken before surely

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[141] 166 Mass. 171, 44 N.E. 138 (1896).

[142] 116 U.S. 252 (1886).

[143] The tenth amendment makes a clear distinction between the people and the state. Therefore, the people and the state are not interchangeable entities in the second amendment. The collective right view claims that while all of the people have a right, the individual person has no right. This essentially means that the second amendment protects no one and guarantees nothing, for regardless of how clearly unconstitutional a law may be, no individual would have standing to challenge such a law.

At a minimum, the Framers guaranteed each person the right to keep arms irrespective of his relation to the militia because of a possibility foreseen by the Framers that the occasion might arise when each person would bear arms in the militia. It must be remembered that although the militia is made up of people, all of the people are not necessarily in the militia. All of the people are either the constitutional militia or are potentially the constitutional militia; thus each person has a right to arms.

[144] T. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 298-99 (3d ed. 1898).

does not render (pg.96) that same action any less unconstitutional at a later date."[145] On one occasion, the Court branded a whole line of decisions it had pursued for nearly a century "an unconstitutional assumption of power by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."[146]

The term *people* should be interpreted to include individuals. However, that does not mean that all individuals have a right to keep and bear arms. Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded infants, idiots, lunatics, and felons.[147]

The Right to Keep and Bear Arms

The Framers understood "arms" to mean "Weapons of offence, or armour of defence." "Armour" was defined as "Defensive arms."[148] Constitutionally protected arms are those that were commonly possessed by the people of the times, including rifles, shotguns, pistols, swords, knives, and clubs.[149]

A number of Revolutionary War figures owned guns: George Washington, Thomas Jefferson, and James Madison.[150] Washington owned as many as 50 guns, including handguns.[151] Jefferson owned some 25 guns, including a pair of screw-barrelled pocket pistols.[152]

There is a movement to ban handguns in this country. Nevertheless, handguns are constitutionally protected arms.[153] Pistols were used during (pg.97) the Revolutionary War, and not just by officers. "[T]he pistol was the principal firearm of a small yet important body of enlisted men."

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[145] Powell v. McCormack, 395 U.S. 486, 546-47 (1969).

[146] Erie R.R v. Tompkins, 304 U.S. 64, 79 (1938). *See also* Monell v. Department of Social Serv. of N.Y. City, 436 U.S. 658 (1978). *Cf.* Brown v. Board of Educ., 347 U.S. 483 (1954) *to* Plessy v. Ferguson, 163 U.S. 537 (1896).

[147] T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 57 (7th ed. 1903). The early Florida, Tennessee, and Louisiana guarantees on arms restricted it to "free white men." FLA. CONST., art. I § 21 (1838); TENN. CONST., art. I § 26 (1834); LA. CONST., tit. III, art. 60 (1845). The passage of the thirteenth and fourteenth amendments would indicate that, save for felons, the mentally infirm, and persons of tender years, all of the people may now enjoy the right to arms.

[148] DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 54.

[149] Examples are State v. Kerner, 181 N.C. 574, 107 S.E. 222, 224 (1921) (rifle, musket, shotgun, and pistols); State v. Kessler, 289 Or. 359, 614 P.2d 94, 98 (1980) (firearms, hatchets, swords, knives, and billy clubs); State v. Duke, 42 Tex. 455, 458-59 (1875) ("such arms as are commonly kept, according to customs of the people, and are appropriate for open and manly use in self-defense, as well as such as are proper for the defense of the State," and include the shotgun, rifle, and "holster pistol"). *Duke* was cited in United States v. Miller, 307 U.S. 174, 182 n.3 (1939).

[150] See note 63, *supra*.

[151] Halsey, *George Washington's Favorite Guns*, AM. RIFLEMAN, Feb. 1968, at 23.

[152] See note 63, *supra*.

[153] Numerous vintage and modern cases hold explicitly or implicitly that a handgun is an arm in a constitutional sense. Wilson v. State, 33 Ark. 557 (1878); Rinzler v. Carson, 262 So. 2d 661, 666 (Fla. 1972); *In re* Brickey, 8 Idaho 597, 70 P. 609 (1902); Schubert v. DeBard, 398 N.E.2d 1339 (Ind. App. 1980) (motion to transfer denied 8-28-1980); State v. Bias, 37 La. Ann. 259, 260 (1885); People v. Zerillo, 219 Mich. 635, 189 N.E. 927 (1922); Taylor v. McNeal, 523 S.W.2d 148, 150 (Mo. App. 1975); State v. Nickerson, 126 Mont. 157, 247 P.2d 188, 192 (1952); City of Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (Ct. App. 1971); State v. Kerner, 181 N.C. 574, 107 S.E. 222, 224 (1921) ("historical use of pistols as 'arms' of offense and defense is beyond controversy ..."); Glasscock v. City of Chattanooga, 157 Tenn. 518, 11 S.W.2d 678 (1928); Andrews v. State, 50 Tenn. 165 (1871) ("the pistol known as the repeater is a soldier's weapon ..."); State v. Duke, 42 Tex. 455, 458-59 (1875); State v. Rosenthal, 75 Vt. 295, 55 A. 610 (1903). A pistol is not an arm that serves no lawful purpose. Pistols have a variety of legitimate uses. Commonwealth v. McHarris, 246 Pa. Super. 488, 371 A.2d 941, 943-44 (1977). *See also* Sturm, Ruger & Co. v. Bloyd, 586 S.W.2d 19, 22 (Ky. 1979) ("revolver ... not ... unsafe for general use").

The cavalry, the navy, and selected infantry regiments all used pistols.[154] The first federal militia statute mentioned pistols,[155] and colonial laws more generally also considered pistols legitimate arms.[156]

The continued usefulness of the pistol to modern militia is beyond cavil: the army is soliciting offers for the purchase of 217,439 9mm pistols with a maximum length of 8.7 inches,[157] and the pistol is used by every armed force in the world.[158]

The Oregon Supreme Court defined what constitutes arms in a constitutional sense in *State v. Kessler*:

> [T]he 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....
>
> [A]dvanced weapons of modern warfare have never been intended for personal possession and protection. When the constitutional drafters referred to an individual's "right to bear arms," the arms used by the militia and for personal protection were basically the same weapons. Modern weapons used exclusively by the military (pg.98) are not "arms" which are commonly possessed by individuals for defense, therefore, the term "arms" in the constitution does not include such weapons.
>
> If the text and purpose of the constitutional guarantee relied exclusively on the preference for a militia "for defense of the State," then the term "arms" most likely would include only the modern day equivalents of the weapons used by colonial militiamen.[159]

The right to keep arms is a private, individual right guaranteed to the citizen and not the militiaman.[160] After all, the militia could bear arms belonging to a governmental body or belonging to individual members. Furthermore, while the militia is made up of people, all people are not in the militia. Public servants, for example, were not in the militia.[161] Nevertheless, even persons exempt from militia duties were required to keep arms.[162]

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154 The largest manufacturer of pistols was the Rappahannock Forge in Falmouth, Va. Peterson, *Pistols in the American Revolution*, AM. RIFLEMAN, Oct. 1955, at 31.

155 1 Stat. 271, 272 (1792).

156 See note 34, *supra*. Also, Connecticut's 1678 militia law referred to a "case of pistolls and holsters." 3 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 12, 295 (H. Trumbell ed. 1859). New Jersey's 1744 law referred to "a Case of Pistols." 6 DOCUMENTS RELATING TO COLONIAL HISTORY OF NEW JERSEY 193 (W. Whitehead ed. 1882). A 1701 Rhode Island law referred to "pistol." 3 RECORDS OF THE COLONY OF RHODE ISLAND 433 (J. Bartlett ed. 1856). Pistols were even used in the Boston Tea Party. AMERICAN HISTORY TOLD BY CONTEMPORARIES 433 (A.B. Hart ed. 1926).

157 *Service Pistol Update*, AM. RIFLEMAN, Sept. 1981, at 30. The modern military pistol is smaller in size than ancient military pistols because of modern metallurgy and smokeless powder.

158 W.H.B. SMITH, SMALL ARMS OF THE WORLD *passim* (E. Ezell ed., 11th rev. ed. 1977).

159 289 Or. 359, 614 P.2d 94, 98-99 (1980).

160 Andrews v. State, 50 Tenn. 165, 182 (1871).

161 3 ELLIOT'S DEBATES, *supra* note 62, at 425-26. A person exempt from militia duty cannot be disarmed because he is still potentially a militiamen. He also may keep arms for selfdefense and other normal uses. See notes 4 & 6 *supra*.

162 See note 37, *supra*.

In Tennessee the right to keep and bear arms is guaranteed for the "common defense."[163] In *Andrews v. State*,[164] the Tennessee court held that the right to keep arms is an individual right:

> [T]he right to keep them, with all that is implied fairly as an incident to this right, is a private individual right guaranteed to the citizen not the soldier.... The passage from [Justice] 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.[165]

This rule was laid down even though the court believed that the militia, as an organization, had passed away in almost every state and remained as a memory of the past, probably never to be revived.[166] The later experiences of the Second World War proved that view incorrect.[167] (pg.99)

Most important, the *Andrews* court chose to carry out the intent of a constitutional guarantee, rather than to nullify the right to keep and bear arms on policy grounds and tailor the decision to suit the perceived needs of the moment and serve it with judicial dressing. More recently a court voided a statute with this comment:

> 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.[168]

The Right Shall Not Be Infringed

The term *infringe* means to defeat, to frustrate, to violate, to destroy, or to hinder.[169] The Framers chose to command that the right to arms not be infringed and thus guaranteed the right to keep and bear arms, even though they were aware of crime. They balanced the interests in guaranteeing the arms right,[170] for it is clear that the colonies were not free from crime. For example,

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[163] Art. I § 26.

[164] 50 Tenn. 165, 182, 183-84 (1871). Right to keep arms includes purchasing arms and ammunition, keeping arms in repair, and using arms for ordinary purposes. *Id.* at 178.

The right to bear arms has been defined: "When we see a man with musket to shoulder, carbine slung on back, or pistol belted to his side, or such like, he is bearing arms in the constitutional sense." State v. Bias, 37 La. Ann. 259, 260 (1885). LA. CONST., Bill of Rights art. 3 (1879) tracked language of second amendment.

[165] Andrews v. State, 50 Tenn. 165, 184 (1871).

[166] *Id.*

[167] See notes 52, 126-132, *supra*.

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

[169] This is the common dictionary definition, found in dictionaries dating from 1755 to the present.

[170] In 1771 a small-scale civil war broke out as a result of the Regulator movement in North Carolina. Nine members of the militia and nine Regulators were killed. Six Regulators were hanged for treason. 1 AMERICAN HISTORY, *supra* note 25, at 95. Daniel Shays' rebellion was quelled in January, 1787. Several of his men were killed in a clash with militiamen. Shays and his lieutenants were subsequently pardoned. *Id.* at 136. Thomas Jefferson was not alarmed. George Washington, while not taking the news so calmly, refused to listen to renewed suggestions that he make himself a military dictator. *Id.* at 142. The Bill of Rights took effect in 1791. *Id.* at 149.

"[A]rguments of policy must give way to a constitutional command...." Payton v. New York, 445 U.S. 573, 602 (1980).

in 1630 the pilgrims at Plymouth colony hanged John Billington for murdering John Newcomen with a blunderbuss; in 1678, Thomas Hellier was hanged in Westover, Virginia, for hacking three people to death; Thomas Lutherland was hanged February 23, 1691, in New Jersey for murdering John Clark, a boat trader, and stealing his supplies; and Alexander White was hanged at Cambridge, Massachusetts, on November 18, 1784, for murder and piracy.[171] The Framers apparently felt that crime must be prevented by "the penitentiary and gallows, and not by a general deprivation of a constitutional privilege."[172] (pg.100)

Conclusion

The right to arms may not be undercut simply because some persons at the moment consider it a troublesome right. Nor can a constitutional right be made dependent upon a popular consensus that there is a continued need for it. Though the Bill of Rights can expand to meet the needs of the times, it cannot contract to fit the perceived needs of the moment. A too restrictive approach would restrict the right to an absurd point, protecting flintlock firearms but not modern cartridge arms.[173]

The second amendment should apply to the states by incorporation through the fourteenth amendment. The second amendment right, whose roots go back an immeasurable period of time to the natural right of self-defense, is and always has been a fundamental one. The right to keep and bear arms has been firmly established in our concept of "liberty" under the due process clause.[174]

A court should not hesitate in declaring an arms statute unconstitutional, for the courts have struck down statutes or ordinances limiting the right to keep and bear arms on at least seventeen occasions.[175] The (pg.101) intent of the Framers and the historical surroundings of their time mandate

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[171] J.R. NASH, BLOODLETTERS AND BADMEN 55, 255, 345, 606 (1973).

[172] Wilson v. State, 33 Ark. 557, 560 (1878).

[173] A too-restrictive approach would undercut other rights. The protections of the Bill of Rights must be brought into harmony with the times. Katz v. United States, 389 U.S. 347 (1967) (fourth amendment protection extends to recording of oral statements made in a telephone booth). Thus self-loading rifles, shotguns, and pistols are protected arms but machine guns are not. Rinzler v. Carson, 262 So. 2d 661, 666 (Fla. 1972).

[174] For a detailed discussion demonstrating the logic of incorporation, *see* Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON L. REV. 1 (1981).

Thirty-nine state constitutions contain a right to arms. This would indicate that the right is fundamental. Benton v. Maryland, 395 U.S. 784, 794-96 (1969). (State constitutions are to be considered in incorporation process). The right to arms guarantees of early state constitutions were cited in demanding a Bill of Rights. 5 THE COMPLETE ANTI-FEDERALIST 26 (H.J. Storing ed. 1981).

In the absence of a full briefing, comments about the second amendment and its application to the states are unwise and are *obiter dictum.* State v. Vlacil, 645 P.2d 677, 681 n.1 (Utah 1982) (Oakes, J., concurring).

See the Appendix for a list of the state constitutions.

[175] Wilson v. State, 33 Ark. 557 (1878); City of Lakewood v. Pillow, 180 Colo. 20, 23, 501 P.2d 744, 745 (1972) (en banc); People v. Nakamura, 99 Colo. 262, 62 P.2d 246 (1936) (en banc); Nunn v. State, 1 Ga. (1 Kelly) 243 (1846); *In re* Brickey, 8 Idaho 597, 70 P. 609 (1902); Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822); People v. Zerillo, 219 Mich. 635, 189 N.W. 927 (1922); City of Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (Ct. App. 1971); State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921); *In re* Reilly, 31 Ohio Dec. 364 (C.P. 1919); State v. Blocker, 291 Or. 255, 630 P.2d 824 (1981); State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980); Glasscock v. City of Chattanooga, 157 Tenn. 518, 11 S.W.2d 678 (1928); Andrews v. State, 50 Tenn. 165 (1871); Smith v. Ishenhour, 43 Tenn. 214, 217 (1866); Jennings v. State, 5 Tex. Crim. App. 298 (1878); State v. Rosenthal, 75 Vt. 295, 55 A. 610 (1903).

Furthermore, "constitutional rights may not be denied simply because of hostility to their assertion or exercise." Watson v. City of Memphis, 373 U.S. 526, 535 (1963). "[The Constitution of the United States] was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages...." Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326

the voiding of (1) any law that infringes the right of the people (excepting those people who fall into a traditional high-risk category, such as felons, the mentally deficient, and infants) to keep any arms commonly used for personal protection or any of the modern equivalent of arms that were fairly commonly possessed by the people at the adoption of the Constitution, or (2) any law that infringes the right to bear those arms for traditional lawful purposes.(pg.102)

APPENDIX

STATE CONSTITUTIONAL PROVISIONS ON THE RIGHT TO KEEP AND BEAR ARMS

Thirty-nine states have constitutional provisions on the right to keep and bear arms.

Alabama: That every citizen has a right to bear arms in defense of himself and the state. Article I, section 26.

Alaska: A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. Article I, section 19.

Arizona: The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. Article 2, section 26.

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

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

Connecticut: Every citizen has a right to bear arms in defense of himself and the state. Article I, section 15.

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

Georgia: The right of the people to keep and bear arms, shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne. Article I, section I, pare. v.

Hawaii: A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. Article I, section 15.

Idaho: The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of legislation punishing the use

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(1816).

The law must be followed although the court experiences no satisfaction with the result, for "this is a court of law and not a theological institution." Oleff v. Hodapp, 129 Ohio St. 432, 195 N.E. 838, 841 (1935).

Constitutional activism that destroys a right is particularly dangerous because it changes the law of the land without the consent of the governed and nullifies article V of the United States Constitution.

of a firearm. No law shall impose licensure, registration or special (pg.103) taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony. Article I, section 11.

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

Indiana: The people shall have a right to bear arms, for the defense of themselves and the State. Article I, section 32.

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

Kentucky: All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: ... 7. The right to bear arms in defense of themselves and of the state, subject to the power of the general assembly to enact laws to prevent persons from carrying concealed weapons. Kentucky Bill of Rights, section I, para. 7.

Louisiana: The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person. Article I, section 11.

Maine: Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned. Article I, section 16.

Massachusetts: The people have a right to keep and bear arms for the common defence. And as, in times of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it. Massachusetts Declaration of Rights, part I, article XVII.

Michigan: Every person has a right to keep and bear arms for the defense of himself and the state. Article I, section 6.

Mississippi: The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power where thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons. Article 3, section 12.

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

Montana: The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power (pg.104) when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons. Article II, section 12.

Nevada: Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes. Article I, section 11, para. 1.

New Hampshire: All persons have the right to keep and bear arms in defense of themselves, their families, their property, and the state. Part First, article 2a.

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

North Carolina: A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under

strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice. Article I, section 30.

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

Oklahoma: The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons. Article 2, section 26.

Oregon: The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power. Article I, section 27.

Pennsylvania: The right of the citizens to bear arms in defence of themselves and the State shall not be questioned. Article I, section 21.

Rhode Island: The right of the people to keep and bear arms shall not be infringed. Article I, section 22.

South Carolina: A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall (pg.105) in time of peace be quartered in any house without the consent of the owner nor in time of war but in the manner prescribed by law. Article I, section 20.

South Dakota: The right of the citizens to bear arms in defense of themselves and the state shall not be denied. Article VI, section 24.

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

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

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

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

Virginia: That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power. Article I, section 13.

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

Wyoming: The right of citizens to bear arms in defense of themselves and of the state shall not be denied. Article I, section 24.

STATES WITHOUT CONSTITUTIONAL PROVISIONS

Eleven states do not have a constitutional provision on arms: California, Delaware, Iowa, Maryland, Minnesota, Nebraska, New Jersey, New York, North Dakota, West Virginia, and Wisconsin.