

[Originally published as Report of the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, 97th Cong., 2d Sess., *The Right to Keep and Bear Arms*, 83-109 (1982) ("Other Views"). Reproduced in the 1982 Senate Report, pg. 83-109.]

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

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

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

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

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

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

Sir William Blackstone, an authoritative source of the common law for colonists and, therefore, a dominant influence on the drafters of the original Constitution and its Bill of Rights, set forth in his Commentaries the absolute rights of individuals as: personal security, personal liberty, and possession of private property, I *Blackstone Commentaries* 129, these absolute rights being protected by the individual's right to have and use arms for self-preservation and defense. As Blackstone observed, individual citizens were therefore entitled to exercise their "natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." *Id.* at 144.¹ Clearly evident in this statement is Blackstone's recognition that the exercise of an individual's absolute rights could be imperiled by a standing army as well as by private individuals, a view supported by his observation that "Nothing ... ought to be more guarded against in a free state than making the military power ... a body too distinct from the people." *Id.* at 414. To prevent such an occurrence, Blackstone not only believed in the individual's right to have and use arms, but further believed that for its defense a nation should rely not on a standing army, but the citizen soldier. Plainly, for such a concept to be a reality, it was necessary that all able-bodied males possess and be capable of using arms.

Blackstone was not alone in his view that the common law recognized the individual's right to possess arms: in his Pleas of the (pg.84) Crown, Hawkins noted that "every private person seems to be authorized by the Law to arm himself for [various] purposes." 1 William Hawkins, *Pleas of the Crown*, ch. 28, Section 14, p. 171 (7th ed. 1795). In agreement with Blackstone was Sir Edward Coke who wrote that "the laws permit the taking up of arms against armed persons," 2 E. Coke *Institutes of the Laws of England*, 574 (Johnson & Warner, ed. 1812).

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

B. THE HISTORY OF THE SECOND AMENDMENT

The Second amendment to the United States Constitution provides:

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

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

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

Unwilling, however, to forego completely the national defense benefits of a standing army, the Framers developed a compromise position. The federal government was granted the authority to "raise and support" an army, subject to the restrictions that no appropriation of money for the army would be for more than two years and civilian control over the army would be maintained. U.S. Constitution. Article I, Section 8, Clause 12. Furthermore, knowing ^(pg.85) that the militiaman or citizen soldier had made possible the success of the American Revolution for Independence,³ the Framers recognized that a militia would provide the final bulwark against both domestic tyranny and foreign invasion. Congress, however, was given only limited authority over the militia; it could "govern ... [only] such part of the [the militia] as may be employed in the Service of the United States ...," leaving to the states "the Appointment of the Officers, and the Authority of training the Militia ..." (emphasis added) U.S. Constitution, Article I, Section 8, Clause 16.

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

(a) The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are commissioned officers of the National Guard.

(b) The classes of the militia are: (1) The organized militia, which consists of the National Guard and the Naval Militia; and (2) The unorganized militia which consists of the members of the militia who are not members of the National Guard or the Naval Militia.

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

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

The Right is General. It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrollment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those (pg.86) enrolled, the purpose of this guarantee might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. *The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.* But this enables the government to have a well regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies a right to meet for voluntary discipline in arms, observing in doing so the laws of public order. (Emphasis added.) Thomas M. Cooley, LL.D., *General Principles of Constitutional Law in the United States of America*, 298-299 (3rd ed. 1898).

When the Constitution was sent to the states for ratification, several states, chief among them Virginia, were concerned that in spite of the restrictions written into the main body of the Constitution, a federal standing army might still threaten the hard-won liberties of the people. In Federalist No. 46, written prior to the ratification of the Constitution, James Madison discussed how

a federal standing army, which he estimated in 1788 would consist of "one twenty-fifth part of the number able to bear arms," might be checked or controlled:

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

Alexander Hamilton, too, although more favorably inclined toward a strong central government, feared the detrimental effects on individual liberty that might result from the existence of a federal standing army. He explained in Federalist No. 29 how, under the proposed constitution, a federal standing army could be avoided or at least restrained:^(pg.87)

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

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

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

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

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

This declaration of rights, I take it, is intended to secure the people against the maladministration of the Government, if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed. Now, I am apprehensive, sir, that this clause would give an opportunity to the people in power to destroy the Constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms.^(pg.88)

What, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty. Now, it must be evident that, under this provision, together with their other powers, Congress could take such measures with respect to a militia, as to make a standing army necessary. Whenever Governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins. This was done actually by Great Britain at the commencement of the late Revolution. They used every means in their power to prevent the establishment of an effective militia to the Eastward. The Assembly of Massachusetts, seeing the rapid progress that administration were making to devert them of their inherent privileges, endeavored to counteract them by the organization of a militia; but they were always defeated by the influence of the Crown. [Interruption.]

No attempts they made were successful, until they engaged in the struggle which emancipated them at once from their thralldom. Now, if we give a discretionary power to exclude those from militia duty who have religious scruples, we may as well make no provision on this head. For this reason, [I wish] the words to be altered so as to be confined to persons belonging to a religious sect scrupulous of bearing arms. 1 Annals of Congress 749-750 (August 17, 1789).

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

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

Not removed from the originally proposed version, however, was the term "well-regulated." Contrary to modern usage, wherein "regulated" is generally understood to mean "controlled" or "governed by rule", in its obsolete form pertaining to troops, "regulated" is defined as "properly disciplined." II Compact Edition, Oxford English Dictionary 2473 (1971). In the Oxford English Dictionary, moreover, the verb "discipline," in its earlier usage, is defined as (pg.89) "to instruct, educate, train." I Compact Edition, Oxford English Dictionary 741 (1971). Furthermore, as a noun, "discipline," which is etymologically "concerned ... with practice or exercises," refers to a field of "learning or knowledge" or the "training effect of experience" that, in relation to arms, is defined as "training in the practice of arms ..." Ibid. Plainly then, by using the term "well-regulated," the Framers had in mind not only the individual ownership and possession of firearms but also the voluntary undertaking of practice and training with such firearms so that each person could become experienced with and competent in the use of firearms and thereby be prepared, should the need arise, to carry out his militia obligation. This conclusion is in complete accord with the comment of Thomas M. Cooley, *supra*, p. 7.

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

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

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

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

Pennsylvania proposed a provision stating that "the people have the right to bear arms for the defense of themselves, their state, or the United States, and for killing game, and no law shall be enacted for disarming the people except for crimes committed or in a case of real danger of public

injury from *individuals ...* " (Emphasis added.) E. Dumbauld, *The Bill of Rights and What It Means Today* 12 (1957).

And in Massachusetts, Samuel Adams proposed an amendment requiring that the "Constitution be never construed to authorize Congress to ... prevent the people of the United States, who are (pg.90) peaceable *citizens* from keeping their *own* arms." (Emphasis added.) Pierce & Hale, *Debates of the Massachusetts Convention of 1788* 86-87.

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

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

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

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

C. JUDICIAL INTERPRETATION

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

In *United States v. Cruikshank*, 92 U.S. 542 (1876), the first case in which the Supreme Court had the opportunity to interpret the Second Amendment, the court recognized that the right of the people to keep and bear arms existed prior to the Constitution by stating that such a right "is not a right granted by the Constitution ... [n]either is it in any manner dependent upon that instrument for its existence." 92 U.S. at 552. The indictment charged, inter alia, a conspiracy by Klansmen to prevent and hinder blacks from exercising their civil rights, including the bearing of arms for (pg.91) lawful purposes. The Court held, however, that the Second Amendment guaranteed that the

right to keep and bear arms shall not be infringed by Congress and hence did not apply to the instant case since the violation alleged was by fellow-citizens, not the federal government.

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

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

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

In *United States v. Miller*, supra, decided in 1939, the only case in which the Supreme Court has had the opportunity to apply the Second Amendment to a federal firearms statute, the Court carefully avoided making an unconditional finding of the statute's constitutionality; it instead devised a standard by which federal statutes relating to firearms are to be judged. The holding of the Court in *Miller*, however, should be viewed as only a partial guide to the meaning of the Second Amendment⁷ primarily because neither defense counsel nor defendants appeared before the Supreme Court, nor was any brief filed on their behalf giving the Court the benefit of argument supporting the trial court's holding that Section 11 of the National Firearms Act was unconstitutional. As a result of the absence of the normal adversarial process, the Court was presented with only the prosecution's view of the Second Amendment, a view which, needless to say, was in favor of the constitutionality of Section 11 of the National Firearms Act. In (pg.92) spite of this severe and critical limitation on its decision-making process, the Court's decision in some degree took account of the common law view of the right to keep and bear arms as well as the historical background of the Second Amendment.

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

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

an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. (Emphasis added.) 307 U.S. at 178.

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

In support of its position that the Second Amendment's protection and guarantee was limited to "ordinary military equipment" or weapons whose use "could contribute to the common defense," the Court cited one case, *Aymette v. State*, 21 Tenn. 154 2 Humph. 154 (1840). In *Aymette*, however, the Tennessee Supreme Court was construing not the Second Amendment but the provision of Tennessee's constitution guaranteeing the right to keep and bear arms, a provision which, unlike the Second Amendment, spoke of each citizen's right to keep and bear arms only as it related to the common defense. The Tennessee court thus reasoned that not all objects which could conceivably be used as weapons were protected by the Tennessee Constitution, but only those weapons "such as usually employed in civilized warfare." *Id.* at 158. This limitation is not, however, applicable to the Second Amendment since the First Congress, while debating what ultimately became the Second Amendment, emphatically rejected the "common defense" language upon which the *Aymette* decision turned. It is plain, therefore, that the interpretation of the Second Amendment in *Miller* is more limited than it should be and that the Second Amendment protects the keeping and bearing of all types of arms which could ^(pg.93) be carried by individuals. Moreover, the rejection of the "common defense" limitation signified the Framers' intention that the constitutional guarantee of the right to keep and bear arms was not inextricably tied to a militia nexus, but existed independently of it. Even accepting, however, that a militia or common defense nexus was necessary, *Aymette* went on to say that, "The citizens have an unqualified right to keep the weapon." *Id.* at 160.

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

One of the chief values of the *Miller* opinion is its discussion of the development and structure of the militia which, the Court pointed out, consisted of "all males physically capable of acting in concert for the common defense" and that "when called for service these men were expected to appear bearing arms *supplied by themselves* and of the kind in common use at the time." (Emphasis added.) 307 U.S. at 179. The other significant value of *Miller* is its implicit rejection of

the view that the Second Amendment guarantees the right to keep and bear arms only to those individuals who are members of the militia. Had the Court reviewed the Second Amendment as guaranteeing the right to keep and bear arms only to "all males physically capable of acting in concert for the common defense" it would certainly have discussed whether Miller met the qualifications for inclusion in the militia as it did with regard to the military value of a short-barrelled shotgun. That it did not signifies the Court's acceptance of the fact that the right to keep and bear arms is guaranteed to each individual without regard to his relationship with the militia.

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

It is clear that *Miller*, for all its shortcomings and limitations, supports the view that the Second Amendment protects and guarantees a fundamental individual right to keep and bear arms, subject to the restriction that only a certain category or categories of arms may, of right, be individually owned and possessed, i.e. those arms whose possession or use are reasonably related to the preservation or efficiency of the militia. As aptly put by Mr. Justice Black, in discussing *Miller* and the Second Amendment, "although the Supreme Court has held this amendment to include only arms necessary to a well-regulated militia, as so construed its (pg.94) prohibition is absolute." Black, *The Bill of Rights*, 35 N.Y.U.L. Rev. 865, 873 (1960).⁹

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

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

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

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

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

a distinction arising from *Miller's* holding that the protections of the Second Amendment are limited to those firearms with a militia nexus. The Court indicated its unwillingness to accept the broad

reach of *Miller* when it reasoned that it was already outdated because in "commando units" some sort of military use seems to have been found for almost any modern, lethal weapon. If this were true, concluded the court, the protection of the Second Amendment as set forth in *Miller* would be absolute except for antique weapons which have no modern military use since, as the court accurately observed, "... almost any other [weapon] might bear some reasonable relationship to the preservation or efficiency of a well regulated militia unit of the present day ..." Id. at 922.

The First Circuit failed to consider the unambiguous wording of the Second Amendment in reaching its conclusion. The Second Amendment speaks not only of the right to keep arms, but to bear them as well, implying that the category of arms, the possession of which is protected, is limited to those arms that an ordinary individual can bear and does not extend to weapons such as cannons, trench mortars, and antitank guns, which cannot be carried by an ordinary individual. Also not protected are instrumentalities such as bombs which, although conceivably they could be carried by a single individual, are not arms in the sense used in the Second Amendment; rather, the historically and constitutionally protected (pg.95) arms are those such as muskets, shotguns, rifles and pistols, which are ordinarily possessed by private individuals. To argue, ad absurdum, as the *Cases* court did, that all weapons are protected by the Second Amendment overlooks the fact that the Framers of the Bill of Rights were fully aware of the existence of heavier, horse-drawn and crew served arms which the individual was physically incapable of bearing. Had framers of the Bill of Rights intended to protect all weapons, they would not have linked the right to bear arms with the right to keep arms.¹¹

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

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

D. THE RIGHT TO SELF-DEFENSE

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

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

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

II. Antebellum judicial construction

In the period from the adoption of the constitution to the War Between the States, keeping and bearing arms was treated as a virtually unquestioned right of each individual. The fundamental right to have arms was based in part on the political lessons of the Revolutionary experience. "None but an armed nation can dispense with a standing army," Jefferson wrote in 1803. "To keep ours armed and disciplined, is therefore at all times important." The ^(pg.96) Jefferson Cyclopedia 553 (1900). In 1814, Jefferson further observed that "we cannot be defended but by making every citizen a soldier, as the Greeks and Romans who had no standing armies." *Id.* at 551. In addition to the prevention of aggression from domestic tyranny or foreign invasion, individual possession of arms functioned to provide a basic means of self-defense, as well as of subsistence for hunters.

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

A. JUDICIAL COMMENTARIES

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

In the second article, it is declared, that a *well regulated militia is necessary to the security of a free state*; a proposition from which few will dissent. Although in actual war, the services of regular troops are confessedly more valuable; yet, while peace prevails, and in the commencement of a war before a regular force can be raised, the militia form the palladium of the country. They are ready to repel invasion, to suppress insurrection, and preserve the good order and peace of government....

The corollary, from the first position, is, that the right of the people to keep and bear arms shall not be infringed.

The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretense by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.

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

Rawle's analysis stresses the significance of the first clause of the Second Amendment as an imperative for a militia system as opposed to a standing army. Clause two is then treated both in its linkage to clause one in that the individual right to keep and bear arms encourages a militia system,

and independently as recognition of a fundamental right to have arms unrestrained by state no less than federal legislation. In negative remarks on English policy, (pg.97) Rawle also clarified that the right to have arms is deemed more absolute in America than Britain, and that the Second Amendment protects individual use of arms for non-militia purposes such as hunting.

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

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

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

B. STATE CASES

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

The right existed at the adoption of the constitution; it had then no limits short of the moral power of the citizens to exercise it, and in fact consisted in nothing else but in the liberty of the citizens to bear arms. Diminish that liberty, therefore, and you necessarily restrain the right, and such is the diminution and restraint, which the act in question most indisputably imports, by prohibiting the citizens wearing weapons in a manner which was lawful to wear when the constitution was adopted. *Id.* at 92.¹²

Whether carrying and wearing dangerous weapons constituted an affray at common law was the issue in the Tennessee case of *Simpson v. State*, 13 Tenn. Reports (5 Yerg.) 56 (1833). The Court (pg.98) answered in the negative, citing Blackstone for the proposition that violence which terrifies the people must also be present. The government cited Serjeant Hawkins, Pleas of the Crown, Bk. 1, ch. 28, sec. 4, regarding the Statute of Northampton, 2 Edw. 3, c.3(1328), that an affray could exist

where one is armed with unusual weapons which naturally cause terror to the people, but the court rejected those "ancient English statutes, enacted in favour of the king, his ministers, and other servants" which provided that "no man ... except the king's servants, & c. shall go or ride armed by night or by day." 13 Tenn. Reports (5 Yerg.) 358 (1833). The court seemed resentful of royal privilege in noting that the same source adds "persons of quality are in no danger of offending against this statute by wearing their common weapons" and, while rejecting the existence of a common law abridgement of the right to bear arms (*Id.* at 359), argued in the alternative that any such abridgement would be abrogated by the state constitution, which provided "that the freemen of this State have a right to keep and bear arms for their common defense."

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

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

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

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

The Georgia court explained the relation between individual arms possession and the militia by reference to the fact that "in order to train properly that militia, the unlimited right of the people to keep and bear arms shall not be impaired," (*Id.* at 251), (pg.99) and added that both constitutional and natural rights were at stake. Contending that the state governments were prohibited from violating the rights to assembly and petition, against unreasonable searches and seizures, to an impartial jury in criminal prosecutions, and to assistance of counsel, the court continued:

Nor is the right involved in this discussion less comprehensive or valuable: "The right of the people to bear arms shall not be infringed." The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed or broken in upon, in the smallest degree; and all this for the

important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this right.... Id. at 251.

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

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

C. SLAVERY AND THE DRED SCOTT DILEMMA

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

In *State v. Newsom*, 27 N.C. 203 (1844), the Supreme Court of North Carolina upheld "an act to prevent free persons of color from carrying fire arms" on the ground that "the free people of color cannot be considered as citizens." Id. at 204. The court also stated: "in the second article of the amended Constitution, the States are neither mentioned nor referred to. It is therefore only restrictive of the powers of the Federal Government." Id. at 207. In *Cooper v. Savannah*, 4 Ga. 72 (1848), Georgia found its similar provision constitutional on the following logic: "Free persons of (pg.100) color have never been recognized here as citizens, they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office." Id. at 72.

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

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

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

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

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

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

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

After the War Between the States, judicial commentators continued to interpret the Second Amendment as protecting an individual right from both state and federal infringement. The right to keep and bear arms and other Bill of Rights freedoms were viewed (pg.101) as common law rights explicitly protected by the Constitution. T. Farrar, *Manual of the Constitution*, 59, 145 (1867). Joel P. Bishop wrote in 1865:

The constitution of the United States provides, that, "a well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." This provision is found among the amendments; and; though most of the amendments are restrictions on the General Government alone, not on the States, this one seems to be of a nature to bind both the State and National legislatures. II J. Bishop, *Commentaries on the Criminal Law*, Section 124 (1865).

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

A. FIREARMS AND THE ABOLITION OF SLAVERY

Having won their national independence from England through armed struggle, post-Revolutionary War Americans were acutely aware that the sword and sovereignty go hand-in-hand, and that distribution of firearms among the oppressed ushered in a new epoch in the

human struggle for freedom. Furthermore, both proponents and opponents of slavery were cognizant that an armed black population meant the abolition of slavery, although some blacks were trusted with arms to guard property, for self defense, and for hunting. This sociological fact explained not only the legal disarming of blacks, but also the advocacy of a weapons culture by abolitionists. Having employed the instruments for self-defense against his pro-slavery attackers, abolitionist and Republican Party founder Cassius Marcellus Clay wrote that "'the pistol and the Bowie knife' are to us as sacred as the gown and the pulpit." ⁷ *The Writings of Cassius Marcellus Clay*, 257 (H. Greeley ed. 1848).

B. THE CIVIL RIGHTS ACT OF 1866

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

When Congress took up Senate Bill No. 61, which became the Civil Rights Act of 1866, (14 Stat. 27 (1866)) Sen. Lyman Trumbull (R., Ill.), Chairman of the Senate Judiciary Committee, indicated ^(pg.102) that the bill was intended to prohibit inequalities embodied in the black codes, including those provisions which "prohibit any negro or mulatto from having fire-arms." *Cong. Globe*, 39th Cong., 1st Sess., pt. 1, 474 (Jan. 29, 1866). In abolishing the badges of slavery, the bill would enforce fundamental rights against racial discrimination in respect to civil rights, the rights to contract, sue and engage in commerce, and equal criminal penalties. Sen. William Saulsbury (D., Delaware) added:

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

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

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

of the board of police." Id. at 517 (Jan. 30, 1866). And Rep. Josiah B. Grinnell (R., Iowa) complained: "A white man in Kentucky may keep a gun; if a black man buys a gun he forfeits it and pays a fine of five dollars, if presuming to keep in his possession a musket which he has carried through the war." Id. at 651 (Feb. 5, 1866).

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

Rep. Sidney Clarke (R., Kansas) objected to an 1866 Alabama law providing: "That it shall not be lawful for any freedman, mulatto, or free person of color in this State to own firearms, or carry about his person a pistol or other deadly weapon." Id. at 1838 (April 7, ^(pg.103) 1866). Clarke also attacked Mississippi, "whose rebel militia, upon the seizure of the arms of black Union soldiers, appropriated the same to their own use." Id. at 1838.

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

C. THE FOURTEENTH AMENDMENT

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

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

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

D. THE ANTI-KKK ACT

Within three years of the adoption of the Fourteenth Amendment in 1868, Congress was considering enforcement legislation to suppress the Ku Klux Klan. The famous report by Rep. Benjamin F. Butler (R., Mass.) on violence in the South assumed that the right to keep arms was necessary for protection not only against the militia, but also against local law enforcement agencies. Noting instances of "armed confederates" terrorizing the negro, the report stated that "in many counties they have preceded their outrages upon him by disarming him, in violation of his right as a citizen to 'keep and bear arms,' which the Constitution expressly says shall never be infringed," 1464 H.R. Rep. No. 37, 41st Cong., 3rd Sess. 3 (Feb. 20, 1871). The congressional power based on the Fourteenth Amendment to legislate to prevent states from depriving any U.S. citizen of life, liberty, or property accounted for the following provision of the committee's anti-KKK bill.^(pg.104)

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

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

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

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

Further comments clarified that the right to arms was a necessary condition for the right of free speech. Sen. Adelbert Ames (R., Miss.) averred: "In some counties it was impossible to

advocate Republican principles, those attempting it being hunted like wild beasts; in others, the speakers had to be armed and supported by not a few friends." Id. at 196. (Mar. 21, 1871). Rep. William L. Stoughton (R., Mich.) added: "If political opponents can be marked for slaughter by secret bands of cowardly assassins who ride forth with impunity to execute the decrees upon *the unarmed and defenseless*, (pg.105) it will be fatal alike to the Republican party and civil liberty." [Emphasis added] Id. at 321 (Mar. 28, 1871).

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

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

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

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

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

state agents could be sued (pg.106) under the predecessor to Section 1983 for deprivation of the right to keep arms.

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

Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States

These eight articles ... never were limitations upon the power of the States, until made so by the fourteenth amendment. The words of that amendment, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" are an express prohibition upon every State of the Union Id. at pt. 2, Appendix 84 (Mar. 31, 1871).

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

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

The rights, privileges and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject-matter of this bill...

In addition to the original rights secured to him in the first article of amendments he had secured the free exercise of his religious belief, and freedom of speech and of the press. Then again he has secured to him the *right to keep and bear arms in his defense*.... [Dawes then summarizes the remainder of the first eight amendments.]

And still later, sir, after the bloody sacrifice of our four years' war, we gave the most grand of all these rights, privileges, and immunities, by one single amendment to the Constitution, to four millions of American citizens.

[I]t is to protect and secure to him in these rights, privileges, and immunities this bill is before the House. [emphasis added] *Cong Globe*, 42nd Cong., 1st. Sess., pt. 1, 475-476 (April 5, 1871).(pg.107)

E. THE CIVIL RIGHTS ACT OF 1875

After passage of the anti-KKK bill, discussion concerning arms persisted as interest developed toward what became the Civil Rights Act of 1875, now 42 U.S.C. 1984. A report on affairs in the South by Sen. John Scott (R., Penn.) indicated the need for further enforcement legislation: "negroes who were whipped testified that those who beat them told them they did so

because they had voted the radical ticket, and in many cases made them promise that they would not do so again, and wherever they had guns took them from them." 1484 S. Rep. No. 41, 42nd Cong., 2nd Sess., pt. 1, 35 (Feb. 19, 1872).

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

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

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

His right to bear arms, to freedom of religious opinion, freedom of speech, and all others enumerated in the Constitution would still remain indefeasibly his, whether he remained in the Territory or removed to a State.

And those and certain others are the privileges and immunities which belong to him in common with every citizen of the United States, and which no State can take away or abridge, and they are given and protected by the Constitution.

The following are most, if not all, the privileges and immunities of a citizen of the *United States*:

The right to the writ of *habeas corpus*; of peaceable assembly and of petition; ... *to keep and bear arms*; ... from being deprived of the right to vote on account of race, color or previous condition of servitude. [emphasis added] *Cong. Rec.*, 43rd Cong., 1st Sess., pt. 6, Appendix 241-242 (May 4, 1874).

Arguing that the Fourteenth Amendment created no new rights but declared that "certain existing rights should not be abridged by States," the Georgia Democrat explained:^(pg.108)

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

...And the instant the fourteenth amendment became a part of the Constitution, every State was at that moment disabled from making or enforcing any law which would deprive any citizen of a State of the benefits enjoyed by citizens of the United States under the first eight amendments to the Federal Constitution. (emphasis added) *Id.* at 242.

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

REFERENCES

1. Although the common law in effect in the colonies did not develop any limitation on the absolute right of individuals to keep arms, it did recognize certain restrictions on the manner in which individuals could *use* arms.
2. Individual colonists, of course, kept their own firearms, with powder and shot, in their residences.
3. Justice Story wrote in 1833: "The militia is the natural defense of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample on the rights of the people. *The right of the citizen to keep and bear arms has justly been considered, as the palladium of the liberties of a republic*; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them." (emphasis added.) 3 *Commentaries on the Constitution of the United States*, Section 1890, pp. 746-747 (1833).
4. Actually, the militia embraces a larger class of persons than today's statutory unorganized militia since it consists of at least all persons "physically capable of acting in concert for the common defense." *U.S. v. Miller*, 307 U.S. 174, 179 (1939). The Virginia Constitution, upon which the Bill of Rights was modeled, provides that the militia is "composed of the body of the people." Article I, Section 13.
5. Of the twelve proposed amendments, all but the first two dealt with the protection of the rights of individuals; all but the first two were ratified. Since, of the ten remaining, Amendments 1 and 3 through 10 have repeatedly been held to secure fundamental individual rights, it is logical that the Second Amendment also secures a fundamental individual right.
6. The word "people" as used in the First, Fourth, Ninth, and Tenth Amendments has consistently been construed to mean individual.
7. This view is supported by the Congressional Research Office of the Library of Congress which has observed, "At what point regulation or prohibition of what classes of firearms would conflict with the [Second] Amendment, whether there would be a conflict, the *Miller* case does little more than cast a faint degree of illumination toward answering." *The Constitution of the United States of America, Analysis and Interpretation*, Senate Document No. 92-82.
8. Applying this test, the defendant would have little difficulty today in demonstrating that possession of such a shotgun is protected by the Second Amendment, since shotguns were military issue in both World Wars, Korea, and Vietnam.
9. Numerous cases have held that a handgun is an arm for constitutional purposes, for example, in *State v. Kerner*, 181 N.C. 574, 107 S.E. 222, 224 (1921), the Court observed that the "historical use of pistols as 'arms' of offense and defense is beyond controversy...." Similar holdings are found in *In re Brickey*, 8 Ida. 597, 70 P. 609 (1902) and *State v. Rosenthal*, 75 Vt. 295, 55 A. 610 (1903). Moreover, in colonial times pistols saw considerable service as a personal weapon. As a noted historian observed,
It was considered normal for civilians to carry pocket pistols for protection while traveling ... Among eighteenth century civilians who traveled or lived in large cities, pistols were common weapons. Usually they were made to fit into pockets, and many of these small arms were also carried by military officers. George C. Neumann, *The History of Weapons of the American Revolution*, pp. 150-151 (Bonanza Books, N.Y. 1967).
10. Although *Tot* was appealed to the Supreme court, the Second Amendment issue was not addressed by that Court.
11. This view, moreover, is consistent with the common law which prohibited the bearing of arms when carried in such a manner as would terrify the people. 4 Blackstone Commentaries 149. Furthermore it is consistent with the concept of the militia as a body of persons who maintained firearms in their homes for self-defense and to be ready to contribute to the common defense.
12. But see *State v. Reid*, 1 Ala. Reports 612, 616-7 (1840), while holding that a statute prohibiting the carrying of concealed weapons was not incompatible with the right to keep and bear arms in defense of self and state, added: "A statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional."