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TO PRESERVE LIBERTY—A LOOK AT THE RIGHT TO KEEP AND BEAR ARMS

by *Richard E. Gardiner**

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

In the last several decades, a vocal minority, popular with the major news media, has put forth a distorted interpretation of the second amendment to the United States Constitution for the avowed political purpose of removing an obstacle from the path leading toward their goal of depriving private citizens of some or all of their firearms. And, as with virtually all attempts to minimize those precious freedoms guaranteed each American by the Bill of Rights, that minority has twisted the original and plain meaning of the right to keep and bear arms. In this article, an unfortunately brief exposition given the fact that a complete discussion of the right to keep and bear arms would necessitate a multi-volume work, I will attempt to set out the historical development of the right to keep and bear arms so as to clarify the intentions of the Framers of the second amendment and will discuss and critically comment upon some of the more significant cases decided pursuant to that amendment.

By way of introduction to this discussion, it should be kept in mind that, in construing the Constitution, it is particularly important that the values of its Framers, and of those who ratified it, be applied, and that inferences from the text and historical background of the Constitution be given great weight. Thus, the precedential value of cases and the light shed by commentators with respect to any particular provision of the Constitution tends to increase in proportion to their temporal proximity to the adoption of the main body of the Constitution, the Bill of Rights, or any other amendments.¹ That being so, it is appropriate first to examine the development of the right to keep and bear arms prior to the adoption of the second amendment.^(pg.64)

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

The right to keep and bear arms, like the other rights guaranteed by the Bill of Rights,² was not created or granted by the second amendment. Rather, this fundamental, individual right, largely developed in English jurisprudence prior to the formation of the American Republic, pre-dates the

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¹ Powell v. McCormack, 395 U.S. 486, 547 (1969).

² Georg Jellinek maintained that the only individual rights found in the English Bill of Rights were the right to petition and the right to bear arms. G. JELLINEK, THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS 49 & n.7 (M. Farrand trans. 1901). The first of these two rights is, of course, guaranteed by the first amendment to the United States Constitution and the latter by the second amendment, a clear demonstration that the Framers appreciated the relative importance of these rights.

adoption of the Constitution and was part of the common law heritage of the original colonies.³ It is thus to this common law heritage that one must look to begin to understand the right to keep and bear arms. In doing so, it is, however, important to remember that the doctrine which justifies recourse to the common law in order to better understand the guarantees of the Constitution "is subject to the qualification that the common law rule invoked shall be one not rejected by our ancestors as unsuited to their civil or political conditions."⁴ Thus, 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."⁵

As a consequence, the common law serves only as a starting point in the interpretation of constitutional guarantees. It may not be invoked to abrogate express constitutional guarantees because "[a]t the Revolution we separated ourselves from the mother country, and ... 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.*"⁶

One of the clearest expositions of the common law, as it had developed (pg.65) by the mid-eighteenth century, came from Sir William Blackstone who, because he was an authoritative source of the common law, was a dominant influence on the Framers of the Constitution. He set forth the absolute rights of individuals, "those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy,"⁷ as personal security, personal liberty, and possession of private property. These absolute rights were ultimately protected by the individual's right to have and use arms for self-preservation and defense.⁸ As Blackstone observed, individual citizens were entitled to exercise their "natural

³ None of the rights found in the Bill of Rights is granted or created by that document. Rather, the Bill of Rights protects against infringement or abridgement those fundamental human rights which the Framers viewed as naturally belonging to each individual human being. It would be a grotesque perversion of the Framers' understanding of the concept of rights to suggest that any of the rights found in the Bill of Rights, particularly the few precious substantive rights of the first and second amendments, were created by that document.

⁴ *Grosjean v. American Press Co.*, 297 U.S. 233, 249 (1936).

⁵ *United States v. Brewster*, 408 U.S. 501, 508 (1972).

⁶ *Bridges v. California*, 314 U.S. 252, 264 n.7 (1941) (quoting James Buchanan as quoted in A. STANSBURY, *THE TRIAL OF JAMES H. PECK* 434 (1883)) (emphasis added).

⁷ 1 W. BLACKSTONE, *COMMENTARIES* 123, 129.

Included within the right to personal security was the right to life, a right that "was so far above dispute that [colonial] 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 to self-preservation. This secondary right made it possible for a single man or a whole nation to meet force with force...." M. ROSSITER, *SEEDTIME OF THE REPUBLIC* 377 (1953).

⁸ Blackstone observed that the three principal absolute rights were protected and maintained inviolate by five auxiliary subordinate rights, the last of which was "having and using arms." The first four were: 1) the constitution, powers, and privileges of parliament; 2) the limitation of the king's prerogative; 3) applying to the courts of justice for redress of injuries; and 4) the right of petitioning the king, or either house of parliament, for the redress of grievances. W. BLACKSTONE, *supra* note 7, at 141-44. In looking at these five subordinate rights, it is apparent that the subject matter of the first three rights coincides with the subject matter of the first three articles of the Constitution, and the subject matter of the last two rights coincides with the subject matter of the first two amendments to the Constitution. Given the Framers' familiarity with Blackstone, the similarity between the format of the Constitution and Blackstone's five auxiliary rights (which were established to protect the three principal absolute rights, as was the Constitution) can be no coincidence. Moreover, the fifth amendment guarantee that no person shall be "deprived of *life, liberty*, or *property*, without due process of law" (emphasis added) tracks Blackstone's three principal absolute rights.

right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."⁹

Blackstone was not alone in this view. In his PLEAS OF THE CROWN, Hawkins noted that "every private person seems to be authorized by the law to arm himself for [various] purposes."¹⁰ Sir Edward Coke likewise wrote that "the laws permit the taking up of arms against armed persons."¹¹ This absolute and inalienable right (pg.66) of self-defense,¹² so clearly recognized by the common law, stemmed from the natural law¹³ which permits legitimate defense of life and rights equivalent thereto, including the slaying of an unjust aggressor by the use of the force necessary to repel the danger.¹⁴ The natural law permitted such defense not only because, in the conflict of rights, the right of the innocent party should prevail, but because the common social good would also suffer if the right were not recognized.

Cicero, the great legal philosopher of republican Rome and a source for the Framers' understanding of the natural law, recognized the right to be armed to resist violent attacks and robbery:

And indeed, gentlemen, there exists a law, not written down anywhere but inborn in our hearts; a law which comes to us not by training or custom or reading but by derivation and absorption and adoption from nature itself; a law which has come to us not from theory but from practice, not by instruction but by natural intuition. I refer to the law which lays it down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. When weapons reduce them to silence, the laws no longer expect one to await their pronouncements. For people who decide to wait for these will (pg.67) have to wait for justice, too—and meanwhile they must suffer injustice first. Indeed, even the wisdom of the law itself, by a sort of tacit implication,

⁹ *Id.* at 144.

¹⁰ 1 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ch. 28, § 14, at 171 (7th ed., London 1795).

¹¹ 2 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 574 (A. Johnson & T. Warner, ed., Oxford, 1812).

Each individual has, moreover, the *obligation* to defend himself or herself if he or she wishes to be protected since the police do not owe a duty to each individual to provide him or her protection. *See* Annot., 46 A.L.R. 3d 1084 (1972). *See also* Warren v. District of Columbia, 444 A.2d 1 (D.C. App. 1981).

¹² "Self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society." 3 W. BLACKSTONE, COMMENTARIES 4. Thus, the right to defend one's person with deadly force has been recognized by the courts of every state and the Supreme Court. *Beard v. United States*, 158 U.S. 550 (1895). Moreover, the Supreme Court has held that arming for self-defense is proper and that a handgun is appropriate for such a purpose. *See, e.g., Gourko v. United States*, 153 U.S. 183, 191 (1894) ("the jury were not authorized to find [the defendant] guilty of murder because of his having deliberately armed himself [with a small bright pistol], provided he rightfully so armed himself for purposes simply of self-defense"); *Thompson v. United States*, 155 U.S. 271, 278 (1894) ("the purpose of the defendant in arming himself was for self-defense"); *Smith v. United States*, 161 U.S. 85 (1896) (pistol used for self-defense); and *Rowe v. United States*, 164 U.S. 546, 547-48 (1896) (self-defense where "after deceased began cutting defendant the latter drew his pistol and fired"). In *Patsone v. Pennsylvania*, 232 U.S. 138 (1914), Justice Holmes referred to "weapons such as pistols that may be supposed to be needed occasionally for self-defense." *Id.* at 143.

¹³ Natural law concepts clearly influenced the Framers and, in particular, the architects of the Bill of Rights. Jefferson's explanation of the source of the Declaration of Independence applies equally to the Bill of Rights: "the elementary books of public right, as Aristotle, Cicero, Locke, Sidney & c." T. JEFFERSON, LIVING THOUGHTS 42 (J. Dewey ed. 1963). *See* E. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955). The philosophers mentioned by Jefferson were frequently relied upon as authorities in the ratification debates and pamphlets.

¹⁴ *See* 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA 57, 67, 73, 103 ().

permits self-defense, because it does not actually forbid men to kill; what it does, instead, is to forbid the bearing of a weapon with the intention to kill.¹⁵

John Locke, too, upheld the right of potential victims to resist deadly attack with force when he observed that "the law could not restore life to my dead carcass."¹⁶

In addition to the right of self-defense, a right which would be meaningless for most people without the right to use arms, there also existed in English law, prior to the formation of the American Republic, a positive *duty* of most able-bodied freemen to keep, and be prepared to bear and use, arms both for military and law enforcement purposes. Such a duty was deeply imbedded in English and Germanic history and indeed antedates the invention of firearms.¹⁷

In the years prior to the Norman Conquest, "every free subject in the realm, whatever his primary function, was legally bound, whenever the need arose, to take arms to defend his king and his homeland."¹⁸ That obligation, which was necessitated by the absence of a standing army and a police force, was fulfilled by serving in the "fyrd" or people's army, whose functions were "to safeguard the shire [county] from invasion, to suppress riots, and arrest criminals."¹⁹

Because one of the functions of the fyrd was to repel invaders, the early Norman conquerors attempted to suppress the fyrd while consolidating their power over the defeated Saxons. In 1181, however, in an attempt to recreate the fyrd and thus reinstitute the freeman's duty to defend his home, thereby vitiating the need to raise and maintain a standing army, Henry II (1154-1189) instituted the first Assize of Arms which required "the whole body of (pg.68) freemen" to possess certain arms and armour in proportion to their wealth which could not be sold, pledged, offered or otherwise alienated and of which a lord could not "in any way deprive his men."²⁰ In 1252, another Assize of Arms under Henry III (1216-1272) expanded the duty of keeping arms to include not only freemen, but also villeins, the English equivalent of serfs, so that all "citizens, burgesses, free tenants, villeins and others from 15 to 60 years of age" were obliged to be armed.²¹ This Assize, unlike its predecessor, had a strong emphasis on the law enforcement duties of the average citizen. Thus, in addition to the requirement of possessing certain arms, the Assize established a system of "watch and ward" which mandated each city to have armed men on guard at night to arrest strangers and give the "hue and cry" to summon assistance from other citizens if anyone resisted arrest or escaped from custody. Under Edward I (1272-1307), to ensure that the requirements of the earlier Assizes were being fulfilled "for to keep the peace," the Statute of Winchester was enacted and mandated a viewing by a local authority of every man's arms twice a year.²² In addition, because under Henry III's Assize,

¹⁵ Cicero, *In Defense of Titus Annius Milo*, reprinted in SELECTED POLITICAL SPEECHES 222 (M. Grant trans. 1969).

¹⁶ J. LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 207 (London, 1689). Locke's concepts of "basic civil rights" were approved in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

¹⁷ This duty "is illustrated by the manumission ceremonies in which the former master of a liberated serf would place in his hands the weapons of a freeman as a symbol of his new status." C. W. HOLLISTER, *ANGLO-SAXON MILITARY INSTITUTIONS* 27 (Oxford, Clarendon Press, 1962).

¹⁸ J. J. BAGLEY & P. B. ROWLEY, *I A DOCUMENTARY HISTORY OF ENGLAND* 152 (New York, 1965).

¹⁹ *Id.*

²⁰ 2 ENGLISH HISTORICAL DOCUMENTS, 1042-1189, at 449 (2nd Ed., Oxford). The only arm the Assize required freemen to possess was the lance since undoubtedly they did not need to be encouraged to possess small arms such as knives.

²¹ J. J. BAGLEY & P. B. ROWLEY, *supra* note 18 at 155.

²² Statute of Winchester, 1285, 13 Edw. 1, ch. 6. This statute, which also required local landholders to cut back brushwood along the royal highways to a distance of 200 feet to deprive criminals of a place to hide, was repealed by James I in 1623, 21 Jac. I, ch. 28.

criminals had simply been run out of the city and not pursued and arrested, thus allowing them to escape punishment and continue their activities, the requirements of an earlier statute, which imposed a fine upon those who did not assist in the apprehension of criminals, were reenacted.

In later years, the Tudor kings began the first attempts to impose limits upon the use and possession of weapons; in particular, crossbows and the then-new firearms. These measures were not, however, intended to disarm the citizenry (who made up the bulk of the military forces) but rather to prevent their being diverted from practice with the longbow (the primary English military weapon since it could be fired relatively rapidly and penetrate chain mail at as much as 400 yards) by sport with crossbows and firearms which, at the time, were less effective for military purposes.²³ Such laws were also intended to restrict the hunting of (pg.69) game to the king and the landed gentry. Thus, when in 1503, Henry VII (1485-1509), after observing that "shotyng in Longe Bowes hathe ben moche used in this ... Realme, wherby Honour & Victorie hathe ben goten ageyne utwarde enymyes & the Realme gretly defended," limited shooting (but not possession) of crossbows to those with land worth 200 marks annual rental and those who had a license from the king, an exception was provided for those who "shote owt of a howse for the lawefull defens of the same."²⁴ In 1511, Henry VIII (1509-47), noting that "good Archers" had "defended this Realme", instituted a requirement of long-bow ownership, requiring all able-bodied men to "use and ex[er]cyse shootyng in longbowes, and also to have a bowe and arrowes redy contynually in his house to use hymself and do use hymself in shotyng"; fathers were also required to provide bows and arrows for their sons between the ages of 7 and 14 and to train them in longbow use. In addition, because "so meny men have opteyned license to shote in Crosebowes ... And many men p[r]tendyng to have landes & tenements to the yerely value of [200] marks shote dayly in Crosebowes", the property requirement was increased to 300 marks.²⁵

In 1514 the limitation on shooting of crossbows was extended to include firearms since many people "not regarding nor fering the penalties of the [earlier statute] use daily to shote in Crosebowes and hand gonnes;" and for the first time, persons not meeting the property requirement were prohibited from possessing crossbows and "hand gonnes" (which at that time meant any firearm carried by hand, as distinguished from cannon).²⁶ There were, however, exceptions to the prohibition for those who lived near the sea or Scotland and for those who had licenses issued by the king, thereby emphasizing that the purpose of the law was primarily to protect the king's deer and to encourage "shoting in long bowes." (pg.70) Nine years later, however, Henry reduced the property qualification to 100 pounds per year²⁷ and in 1533 expanded the areas exempted from the prohibitions of the law to include the counties of Northumberland, Durisme, Westmoreland, and

²³ As early as 1369, Edward III ordered the sheriff of London to require that "everyone ..., strong in body, at leisure time on holidays, use in their recreation bowes and arrows ... and learn and exercise the art of shooting ..." and to stop all other games which might distract them from this practice. E. HEATH, *THE GREY GOOSE WING* 109 (1971). Richard II followed suit, requiring servants and laborers to "have Bows and Arrows, and use the same the Sundays and Holydays, and leave [all playing at Tennis or Football, and other Games called Coits, Dice, Casting of the Stone, [Kailes.] and other such importune Games;]...." (brackets in original) 1388, 12 Ric. 2, ch. 6.

²⁴ 19 Hen. VII, ch. 4 (1503-4).

²⁵ An Acte Concerning Shooting in Longe Bowes, 3 Hen. VIII, ch. 3 (1511); An Acte Agaynst Shooting in Crosbowes, 3 Hen. VIII, ch. 13 (1511).

²⁶ Acte Avoidyng Shoting in Crosbowes, 1514, 6 Hen. 8, ch. 13.

²⁷ Thacte for Shoting in Crosbowes and Handgonnes, 14 & 15 Hen. VIII, ch. 7 (1523).

Cumberland. In 1541, realizing that his subjects possessed and used firearms for recreation and defense in spite of his efforts, Henry repealed all the former statutes and prohibited only the carrying of loaded firearms on a "Jorney goinge or riding in the Kings highe waye or elsewhere;" the prohibitions on keeping and shooting firearms were limited only to firearms smaller than "the lenghe of one hole Yard" for some and "thre quarters of one Yarde" for others. As the statute makes clear, he did so because it was recognized that exercise in the shooting of firearms (which by then were no longer considered merely ineffective sporting items) by the citizens "may the better ayde and assist to the defence of this Realme...."²⁸

In 1670, after centuries of *requiring* citizens to possess and be exercised in the use of arms so as to vitiate the necessity for both a standing army and a police force, Charles II (1660-1685) instituted the Act for the Better Preservation of the Game,²⁹ which prohibited the possession of guns and bows and thus, *for the first time in English history*, denied most citizens the common law right to possess arms other than knives and swords. This statute, which followed earlier actions by Charles disarming the remnants of Cromwell's republican army as well as any other persons suspected of not being loyal to the crown, and which ran directly contrary to the common law, were a means of consolidating Charles' power by removing from the citizenry their ability to oppose his tyranny.³⁰ As Blackstone observed of the purpose of the Game Acts: "For (pg.71) prevention of popular insurrections and resistance to the government, by disarming the bulk of the people; which last is a reason oftener meant, than avowed, by the makers of forest or game laws."³¹

Nonetheless, Charles' game acts were interpreted and enforced by the courts so as not to abrogate the common law right to possess guns.³² For example, *Rex v. Gardner*³³ held that the Game Acts did "not extend to prohibit a man from keeping a gun for his necessary defence...."³⁴ Demonstrating the courts' reluctance to enforce the Game Act, Justice Page noted that "keeping a lurcher, without using it in killing game, was not within the Statute of Car. 2, *though it be expressly named therein.*" Likewise, referring specifically to the acts of Charles II,³⁵ and Anne,³⁶ the court held

²⁸ An Acte Concerninge Crosbowes and Handguns, 1541, 33 Hen. 8 ch. 6.

²⁹ 1670, 22 Car. 2, ch. 25, § 3.

³⁰ Charles had thus established a small standing army loyal to him and had molded the militia, which by that time no longer consisted of all able-bodied men, but only selected men from each locality formed into trained bands, into a large and effective royal police force. Thus, the militia, which had once been representative of the people, now included only those who had demonstrated loyalty to the crown. To control firearms at the source, he had also ordered gunsmiths to produce a record of all the weapons they had manufactured, together with a list of purchasers, in the six months since he had taken the throne. That list was to be updated every week. Privy Council 2/55/71 (Dec. 1660). In addition, guns could not be transported without a special license. And the importation of firearms was completely barred on the dual grounds that foreign weapons led "to the great impovrishment" of English manufacturers, and that they might aid insurrection. Privy Council orders of Mar. 28, 1661 and Sept. 4, 1661, Privy Council 2/55/189 and 1/55/187.

³¹ 2 W. BLACKSTONE, COMMENTARIES 412.

³² Henry St. George Tucker stressed the more absolute character of the right to keep and bear arms in America: 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....

H. TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA 43 (Philadelphia, 1831).

³³ 87 Eng. Rep. 1240 (K.B. 1739).

³⁴ *Id.* at 1241.

³⁵ 1670, 22 Car. 2, ch. 25, § 3.

³⁶ An Act for the Better Preservation of Game, 1706, 6 Anne, ch. 16.

that "as these acts restrain the liberty which was allowed by the Common law," they "ought not to be extended further than they must necessarily be."³⁷ *Malloch v. Eastly*³⁸ similarly held that "the mere having a gun was no offense within the game laws, for a man may keep a gun for the defence of his house and family...."³⁹ Several years later, the court stated: "It is not to be imagined, that it was the intention of the Legislature ... to disarm all the people of England ... as a gun may be kept for the defence of a man's house, and for divers other lawful purposes...."⁴⁰

The Statute of Northampton, which provided that no man should "go nor ride armed by night or by day in fairs, markets, nor (pg.72) in the presence of the justices or other ministers,"⁴¹ and thus dealt only with the *bearing* of arms in public places, not the keeping of arms, was also given a very narrow reading by the courts in that they required proof that the carrying of arms was to "terrify the King's subjects."⁴² Moreover, there was recognized a "general connivance to gentlemen to ride armed for their security."⁴³ In *Rex. v. Dewhurst*,⁴⁴ it was held that the law went only so far as prohibiting a person "to carry arms to a public meeting, if the number of arms which are so carried are calculated to produce terror and alarm...."⁴⁵ Thus, in addition to having "a clear right to arms to protect himself in his house," a person had "a clear right to protect himself when he is going singly or in a small party upon the road...."⁴⁶ *Rex v. Mead*,⁴⁷ likewise held that it was "a great offense at common law" to "go armed to terrify the King's subjects," and that the Statute of Northampton, as construed in *Rex v. Knight*,⁴⁸ was "but an affirmance of the law."⁴⁹

Succeeding Charles II was James II (1685-1688) who attempted to expand the royal standing army and continued many of the repressive policies of Charles; moreover, because he was a devout Catholic, such policies were directed primarily against Protestants. James' brief rule ended, however, with the Glorious Revolution of 1688 and James' abdication.

Since one of the goals of the Glorious Revolution was to reinstate the right of Protestants to have arms, a right of which they had been deprived to prevent resistance to James' repressive policies, when the throne was offered to William and Mary, it was offered subject to their acceptance of the rights, including the right of Protestants to have arms, laid down in a Declaration of Rights.

³⁷ 2 CHITTY, TREATISE ON THE GAME LAWS 1068, 1071 (London, 1812).

³⁸ 87 Eng. Rep. 1370 (K.B. 1744).

³⁹ *Id.* at 1374.

⁴⁰ *Wingfield v. Stratford*, 96 Eng. Rep. 787 (K.B. 1752); *accord* *The King v. Thompson*, 100 Eng. Rep. 10, 12 (K.B. 1787) (it is "not an offence to keep or use a gun"), and *Rex v. Hartley*, II Chitty 1178, 1183 (1782) ("a gun may be used for other purposes, as the protection of a man's house.").

⁴¹ Statute of Northampton, 1328, 2 Edw. 2, ch. 3.

⁴² *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686). *See also* W. BLACKSTONE, COMMENTARIES 149.

⁴³ *Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686).

⁴⁴ *State Trials*, New Series 529 (1820).

⁴⁵ *Id.* at 601-02.

⁴⁶ *Id.* at 602.

⁴⁷ 19 T.L.R. 540 (1903).

⁴⁸ *See supra* note 43 and accompanying text.

⁴⁹ 19 T.L.R. at 541.

After they ascended the throne and Parliament was formally convened, the Declaration was enacted into law.⁵⁰ (pg.73)

The first part of the Declaration consisted of the specific acts by which James II had subverted "the Laws and Liberties of this Kingdom." In that part is found the complaint: "By causing several good Subjects, being Protestants, to be disarmed, at the same time when Papists were both armed and employed, contrary to Law." As a consequence, the second part listed among other "true, ancient, and indubitable rights" that "the subjects which are Protestant may have arms for their defence suitable to their conditions and as allowed by Law."⁵¹ Since only slightly over two percent of the population was then Catholic (and they, even as enemies of the state, were given limited rights to keep arms), this amounted to a general right to keep arms.

In sum, by the time of the American Revolution, English law had developed a tradition of keeping and bearing arms which stretched back almost a millenium, a tradition which was retained and protected by the courts even during the brief eighteen year period in which the common law right of most citizens to possess and use arms other than knives and swords was extinguished by statute.⁵² And it was within this tradition of the individual's right to have and use arms for his own defense, as well as to enable him to contribute to the defense of the nation, that the spark which ignited the american Revolution was struck when the British, by attempting to seize stores of powder and shot in Concord and seeking to disarm the inhabitants of Boston, sought to deny the Massachusetts colonists the ability to protect their rights.

II. THE HISTORY OF THE SECOND AMENDMENT

The history of the second amendment indicates that its purpose was 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 (pg.74) out his obligation to assist in the common defense. The Framers did not intend to limit the right to keep and bear arms to members of a formal military body, but rather intended to ensure the continued existence of an "unorganized" armed citizenry prepared to assist in the common defense against a foreign invader or a domestic tyrant.⁵³

Subsequent to the American Revolution, which had, to a large extent, been fought by citizen soldiers, it was agreed that the Articles of Confederation were in need of revision to strengthen the

⁵⁰ 1689, An Act Declaring the Rights and Liberties of the Subject, 1 W. & M., sess. 2, ch. 2. As originally proposed on February 2, 1689, by the House of Commons Committee (10 H.C. Jour. 15, reprinted 1803) it provided: "7. It is necessary for the public safety, that the Subjects which are Protestants, should provide and keep Arms for their common Defence. And that the Arms which have been seized, and taken from them, be restored." As finally passed on February 12, 1689, however, the references to common defense and to a *requirement* that arms be kept were stricken thereby making plain that the purpose was to guarantee an individual *right* to armed self-defense.

⁵¹ *Id.* It has been suggested that the language "as allowed by Law" anticipated that laws might be enacted limiting the right to arms. The "law" referred to in that phrase is not, however, future statutory law but rather the common law which existed prior to the reign of Charles II and James II and which recognized a near absolute right to keep arms and a somewhat more limited right to bear them.

⁵² It was because of the changes wrought by the Glorious Revolution of 1688 and the Bill of Rights of 1689 that in subsequent years game statutes, *e.g.*, 1706, 5 Ann., ch. 14, § 4, did not include any mention of guns.

⁵³ In A. SIDNEY, DISCOURSES CONCERNING GOVERNMENT (1689), the author postulated that in the true commonwealth, "the body of the people is the public defense, and every man is armed...." *Id.* at 157. Much earlier, Aristotle had written that the disarming of commoners created imbalance and oppression. ARISTOTLE, POLITICS 71 (Sinclair trans. 1962). Thus, where "the farmers have no arms, the workers have neither land nor arms; this makes them virtually the servants of those who do possess arms." *Id.* at 79. He concluded that tyrants have a basic "mistrust of the people; hence they deprive them of arms...." *Id.* at 218.

structure of the new nation. Once assembled in Philadelphia to write what ultimately became the Constitution, one of the gravest problems faced by the Framers was whether the federal government should be permitted to maintain a standing army. Because of the lessons of history (particularly the reigns of Charles II and James II) and their personal experiences in and prior to the Revolution, the Framers realized that although useful for national defense, the 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 forgo completely the national defense benefits of a standing army, the Framers developed a compromise position, wherein 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 that civilian control over the army would be maintained.⁵⁴ Furthermore, knowing that the militiaman or citizen soldier had made possible the success of the American Revolution, and recognizing that the militia would be the final bulwark against both domestic tyranny and foreign invasion, the Framers divided authority over the militia,⁵⁵ empowering Congress to "govern ... (pg.75) [only] *such part of them* [the militia] as may be employed in the Service of the United States ...," and leaving to the states "the Appointment of the Officers, and the Authority of training the militia...."⁵⁶ It is thus 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.⁵⁷

This distinction was first codified, to some degree, in the Militia Act of 1792⁵⁸ which defined both an "organized" militia and an "enrolled" militia. (It also required officers and dragons to be armed with "a pair of pistols.") The "unorganized" or "enrolled" militia, whose members were expected to be familiar with the use of firearms and to appear *bearing their own arms*,⁵⁹ were not actually in service, but were nonetheless available to assist in the common defense should conditions

⁵⁴ U.S. CONST., art. I, § 8, cl. 12.

⁵⁵ Justice Story wrote:

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 upon the rights of the people. *The right of the citizens 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 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §1890, at 746-47 (Philadelphia, 1833). Likewise, Jefferson wrote in 1803: "None but an armed nation can dispense with a standing army ... To keep ours armed and disciplined, is therefore at all times important." THE JEFFERSON CYCLOPEDIA 553 (1900).

⁵⁶ U.S. CONST., art. I, § 8, cl. 16 (emphasis added).

⁵⁷ 10 U.S.C. § 311 continues to recognize such a distinction. The constitutional militia, however, 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." *United States v. Miller*, 307 U.S. 174, 179 (1939). For example, the Illinois Constitution provides: "The State Militia consists of all able-bodied persons residing in the State except those exempted by law." ILL. CONST., art. 12, § 1. The Virginia Constitution, upon which the Bill of Rights was modeled, is even broader in providing that the militia is "composed of the body of the people." VA. CONST., art. 1, § 13.

⁵⁸ 1 Stat. 271 (*repealed by* Act of Jan. 21, 1903, ch. 196 § 25, 32 Stat. 775, 780).

⁵⁹ *United States v. Miller*, 307 U.S. 174, 179 (1939).

necessitate either support of the organized militia or possibly defense against a standing army or even the organized militia.⁶⁰ (pg.76)

When the proposed Constitution was sent to the states for ratification, Antifederalists (the popular name for those opposing the Constitution) were concerned that in spite of the restrictions in the Constitution, a federal standing army which would threaten the hard-won liberties of the people, might still exist. To mollify those fears, James Madison discussed, in the Federalist No. 46, 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.*⁶¹

Moreover, the Antifederalists were concerned about the distribution of power over the militia between the federal government and the states.⁶² This concern centered on the fear of the Antifederalists that Congress was given a power which might be used to effectively disarm the militia thereby negating any potential use of the militia to oppose a standing army.⁶³ That that fear was genuine is (pg.77) apparent from the history of the militia as it had developed in England and subsequently on this continent. Because many of those citizens who were members of the militia

⁶⁰ Since the organized militia could not fulfill the function of protecting "the security of a free State," as the Constitution places it under the potential control of the federal government (the very government that the constitutional militia was to protect against), it is apparent that the organized militia (today's National Guard) is not the equivalent of the constitutional militia. Moreover, it is logically unsound to equate the organized militia with the constitutional militia since the organized militia is a creature of statute and thus could be dissolved by statute.

⁶¹ J. MADISON, THE FEDERALIST No. 46, at 334-35 (B. Wright, ed., 1961).

⁶² Likewise, at the constitutional convention, there had been vigorous debate over the control over the militia. This, however, like the debate during the ratification period, was a debate over distribution of powers between the states and the federal government, not a debate on the need for a bill of rights, an entirely independent matter.

⁶³ The resolution of the dispute over the distribution of power over the militia in favor of the states is found not in the second amendment, but in the tenth amendment mandate that "[t]he powers ... not prohibited by [the Constitution] to the States, are reserved to the States...." U.S. CONST., amendment X. As one contemporary writer observed of the proposed second amendment:

It is remarkable that this article only makes the observation, 'that a well regulated militia, composed of the *body* of the people, is the best security of a free state;' it does not ordain, or constitutionally provide for, the establishment of such a one. *The absolute command vested by other sections in Congress over the militia, are not in the least abridged by this amendment.*

(emphasis added) Centinel, Revived, No. XXIX. Philadelphia Independent Gazetteer, Sept. 9, 1789, at 2 col. 2. Thus, the states could still exercise power over the militia, the power being "concurrent in the states and in Congress...." *Leo v. Hill*, 126 N.Y. 497, , 27 N.E. 789, 790 (1891).

would not always voluntarily keep themselves armed and practiced in the use of arms, the pre-Revolutionary states (and of course the English kings) found it necessary to *require* them to possess and use arms.⁶⁴ If, however, Congress were to be given the power to *provide for* arming the militia, that power might be construed as removing from the states' their power to require their citizens to be armed.⁶⁵ Thus, Congress, if it wished to destroy the militia, it could simply "neglect to provide for arming and disciplining the militia...."⁶⁶ As noted above, the possibility of such a construction of the Constitution was negated by the Tenth Amendment.⁶⁷

More importantly, the Antifederalists were concerned with the absence of a Bill of Rights.⁶⁸ As one of the leading historians of the (pg.78) period has observed: "Only the alarm created by the threatened concentration of power in the second American constitution of 1787 could account for the agitation on behalf of a federal bill of rights."⁶⁹ Indeed, the absence of a Bill of Rights was the primary concern of the Antifederalists since, as federal law was supreme, "the Declarations of Rights in the separate States are no security."⁷⁰

In response to the concerns of the Antifederalists regarding the standing army, the division of power over the militia, and "the demand for a bill of rights [which] constituted a common ground on which citizens from every section of the Republic could take a stand,"⁷¹ a political compromise developed in the course of the ratification process in which the Federalists agreed (at no political cost given the popular sentiment) to support amendments to the Constitution in the First Congress declaring "the great rights of mankind"⁷² in exchange for the Antifederalists dropping their demands for changes to the basic framework of the federal government as then outlined in the Constitution.

⁶⁴ See 307 U.S. at 179-82.

⁶⁵ That article I, section 8, clause 16 of the Constitution delegated to Congress only the power "[t]o provide for organizing, arming, and disciplining, the Militia...." indicates that the Framers intended to give Congress the same type of authority that the States then had, i.e. to require that members of the militia possess and learn to use their own arms. In fact, the first federal militia statute did precisely that. See *supra* note 54.

⁶⁶ 3 J. ELLIOTT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 379 (2d ed. Philadelphia, 1836) (quoting G. Mason).

⁶⁷ U.S. CONST. amend X. This Antifederalist fear is distinguishable from an additional fear that Congress might go further than failing to provide for arming the militia and attempt actually to disarm the people. It was in response to these dual fears that the Virginia ratifying convention proposed the following amendment:

Seventeenth, 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 defense 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.

Notably, the right to keep and bear arms clause of the Virginia proposal was viewed as a separate and distinct right and was not in any way tied to or restricted by the militia clause.

⁶⁸ The Federalists (the name that was given to those supporting the Constitution) viewed a federal Bill of Rights guaranteeing personal rights as out of place in what they saw as essentially a contract among sovereign states. Moreover, they viewed a federal Bill of Rights as unnecessary since the federal government was a government of expressly delegated and therefore, limited, powers, none of which would have allowed it to infringe individual liberties. Thus, Tench Coxe sarcastically 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." *Addresses to the Citizens of Pennsylvania*, 4 (Philadelphia, 1787).

⁶⁹ R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791 79 (1955).

⁷⁰ *Id.* at 61 (citing G. MASON, OBJECTIONS TO THIS CONSTITUTION OF GOVERNMENT).

⁷¹ *Id.* at 140.

⁷² *Id.* at 201.

Consequently, when the First Congress met, Madison (who, to win election to the House had become a supporter of a Bill of Rights), drew up proposed amendments based upon proposals made by the state ratifying conventions (proposals which found their source in the state declarations of rights)⁷³ and submitted them to the First Congress. When he submitted them, as his notes make clear, he intended that the amendments "relate 1st to *private* rights."⁷⁴ (pg.79)

His notes also make clear (in that they contain a list of objections to the English Bill of Rights of 1689: "1. Mere act of parlt. 2. No freedom of press — Conscience [.] G1. Warrants — Habs. corpus [.] Jury in Civil Causes — criml. [] attainders — *arms to Protessts.*"), that he viewed the English Bill of Rights as too narrow.⁷⁵

One of the proposed amendments⁷⁶ concerned the right to keep and bear arms. In its original form, as proposed by Madison, the second amendment (the fourth proposed amendment) read: "The right of the people to keep and bear arms shall not be infringed; a 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."⁷⁷

Significantly, when considering the proposed amendment, the First Senate soundly rejected a proposal to insert the phrase "for the common defense" after the words "bear arms," thereby emphasizing that the purpose of the second amendment was not primarily to provide for the common defense, but to protect the individual's right to keep and bear arms for his own defense.⁷⁸ Moreover, when Madison initially put forth his plan for amending the Constitution, which plan was "calculated to secure the *personal rights* of the people ...,"⁷⁹ because of the Constitution's "omission of (pg.80) guards in favor of rights & liberties,"⁸⁰ he designated the amendments as inserts between sections of the existing Constitution. He did not designate the right to keep and bear arms as an amendment to the militia clauses of Article I, section 8 or section 10; rather, the right to keep and

⁷³ Since the federal Bill of Rights was modeled on the state guarantees, it is apparent that the same rights were being protected, albeit from a different government. As a result, it is absurd to argue that the right to keep and bear arms, as found in the second amendment, protects a state from the federal government when that same right, as guaranteed in the state constitutions, protected individuals from the state. Viewing a right to keep and bear arms provision as protecting the state's right to have a militia results, moreover, in the ludicrous proposition that the state constitutions protect a state from infringing upon its power to have a militia.

⁷⁴ 12 MADISON PAPERS 193-94 (Rutland ed. 1979) (emphasis added).

⁷⁵ *Id.*

⁷⁶ 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 I and II through X have repeatedly been held to secure fundamental individual rights, it is logical that the second amendment also secures a fundamental individual right. The word "people," moreover, as used in the first, fourth, ninth and tenth amendments, has consistently been construed to mean individual.

⁷⁷ The language concerning religiously scrupulous persons demonstrates Madison's, and the Antifederalists', concern with an individual's liberty of conscience and as such is evidence that the amendments were intended to secure the rights of individuals.

⁷⁸ J. GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES 450 (1971).

⁷⁹ Comments of contemporary writers make this point crystal clear. For example: "Last Monday a string of amendments were presented to the lower House; these altogether respected *personal liberty*...." Letter from William Grayson to Patrick Henry, June 12, 1784, 3 PATRICK HENRY 391 (1951) (emphasis added); "[The Amendments] will effectually secure *private rights*...." William L. Smith to Edward Rutledge, Aug. 9, 1789, Letters of William L. Smith to Edward Rutledge, 79 SO. CAR. HIST. MAG. 14 (1968) (emphasis added); and "The whole of that Bill [of Rights] is a declaration of the right of the people at large or considered as individuals ... [i]t establishes some *rights of the individual* as unalienable and which consequently, no majority has a right to deprive them of." Albert Gallatin to Alexander Addison, Albert Gallatin Papers 2 (Oct. 7, 1789) (available in N.Y. Hist. Soc.) (emphasis added).

⁸⁰ 12 PAPERS OF JAMES MADISON 201, 258 (Univ. of Va. Press, 1978).

bear arms was 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."⁸¹ While the first clause of Section 9 is concerned with slavery, clauses 2 and 3 (which the right to keep and bear arms was to follow) were devoted to the few individual rights expressly protected in the original Constitution relating to suspension of habeas corpus, bills of attainder, and *ex post facto* laws.⁸²

Adding further weight to the proposition that the second amendment guaranteed an individual right is the fact that appearing in the final version of the second amendment 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."⁸³ When it is understood that "discipline" refers to the "training effect of experience,"⁸⁴ it is plain that by using the term "well-regulated" the Framers had in mind not only the individual ownership and possession of firearms, but also practice and training with such firearms so that each person could become experienced and competent in their use.

This conclusion is in complete accord with comments on the rights protected by the Constitution made by a leading constitutional commentator.

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 (pg.81) to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrollment of all who are fit to perform military duty or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guarantee might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. *The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for that 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.⁸⁵

Likewise, in an opinion by one state's Chief Justice, it was held: "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,

⁸¹ *Id.*

⁸² It has been suggested the right to keep and bear arms was not viewed by the Framers as an important right since it was found in the constitutions of only four states prior to the federal constitutional convention. By that logic, however, the first amendment right to free speech (found in only 2 state constitutions), right to assembly (found in only 4 state constitutions), right to petition (found in only 5 state constitutions), and prohibition on the establishment of religion (found in only 1 state constitution) would also have been viewed as unimportant, an obviously fallacious conclusion. Indeed, only the right to the free exercise of religion and a free press were found in a majority (but not all) of the state constitutions. See, B. SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* 87 (1977).

⁸³ I OXFORD ENGLISH DICTIONARY 741 (compact ed. 1971).

⁸⁴ *Id.*

⁸⁵ T. COOLEY, *GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 298-99 (3d ed. 1898) (emphasis added).

and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed or broken in upon, in the smallest degree...."⁸⁶

The proposals made by the state ratifying conventions (while initially rejected in many cases, but upon which Madison drew in preparing his proposed amendments) further demonstrate that the Framers of the second amendment were concerned with, and guaranteed, an *individual* right to keep and bear arms. For example, among a group of 15 proposals (which eventually found their way into the Bill of Rights in the first, second, fourth, fifth, sixth, eighth, and tenth amendments) submitted by a minority of the Pennsylvania delegates at the ratifying convention on December 12, 1787, was 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
(pg.82) *individuals*....⁸⁷

Likewise, in Massachusetts, Samuel Adams proposed an amendment requiring that the "Constitution be never construed to authorize Congress to ... prevent the people of the United States, who are peaceable citizens, from keeping their own arms."⁸⁸ 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."⁸⁹ Judge Robert Sprecher has thus aptly noted that "history does not warrant concluding ... that a person has a right to bear arms solely in his function as a member of the militia."⁹⁰

The passage of time has not altered the need for individuals to exercise their right to keep and bear arms, even in the context of the common defense. Indeed, one court has recently observed that individual marksmanship is an important skill even in the nuclear age.⁹¹ In the Second World War, moreover, the unorganized militia proved a successful substitute for the National Guard, which was federalized and activated for overseas duty.⁹² Members of the unorganized militia, many of whom belonged to gun clubs and whose ages varied from 16 to 65, served without pay and provided their own arms.⁹³ In fact, it was necessary for the members of the unorganized militia to provide their own arms since the U.S. government not only could not supply sufficient arms to the militia but "turned

⁸⁶ Nunn v. State, 1 Ga. 243, 251 (1846).

⁸⁷ E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 12 (1957) (emphasis added).

⁸⁸ DEBATES OF THE MASSACHUSETTS CONVENTION OF 1788 86-87 (Pierce & Hale eds. Philadelphia, 1856) (emphasis added).

⁸⁹ 1 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (J. Elliot ed., Philadelphia, 1836) (emphasis added). A newspaper article written by Tench Coxe explaining the importance of each proposed amendment, stated: "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 country, might pervert their power to the injury of their fellow-citizens, *the people are confirmed by the next article in their right to keep and bear their private arms.*" The Federal Gazette and Philadelphia Evening Post, June 18, 1789, No. 68 of vol. II, at 2, col. 1. (emphasis added). This article was sent to Madison and was also reprinted in the New York Packet, June 23, 1789, at 2, cols. 1-2, and in the Boston Massachusetts Centinel, July 4, 1789, at 1, col. 2.

⁹⁰ Sprecher, *The Lost Amendment*, 51 A.B.A. J. 554, 557 (1965).

⁹¹ Gavett v. Alexander, 447 F. Supp. 1035, 1046-48 (D.D.C. 1979).

⁹² *U.S. Home Defense Forces Study*, 32, 34 (Office of the Asst. Sec'y of Defense, March, 1981).

⁹³ *Id.* at 58, 62-63.

out to be an Indian giver" by recalling rifles.⁹⁴ The 15,000 (pg.83) volunteer Maryland Minute Men brought their own rifles, shotguns, and pistols to musters.⁹⁵ And all over the country individuals armed themselves in anticipation of threatened invasion.⁹⁶ Thus, 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."⁹⁷ Likewise, in Europe, when the Germans were attempting to occupy Warsaw, the commander of the Jewish Fighting Organization noted, "Our weapons consisted of revolvers (one revolver for every man)."⁹⁸ Another partisan in the same resistance movement wrote of "the first weapon shipment — about ten pistols — received from the Polish underground"⁹⁹

As a final note on the history of the second amendment, it should be observed that the fact that the right to keep and bear arms is joined with language expressing one of its purposes in no way permits a construction which limits or confines the exercise of that right. Like the first amendment right of free assembly, which has as its stated purpose "petition[ing] the Government for a redress of grievances," and which the Supreme Court has used to invalidate statutes requiring disclosure of organization membership lists, whether or not the organization intends to petition the Government,¹⁰⁰ the right to keep and bear arms cannot be interpreted into nonexistence by limiting it to one of its purposes.¹⁰¹ To hold otherwise is to violate the principle that "[c]onstitutional provisions for the security of a person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance."¹⁰² The Supreme Court (pg.84) 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 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.¹⁰³

III. SUPREME COURT INTERPRETATION

⁹⁴ M. SCHIEGEL, *VIRGINIA ON GUARD* 131 (1949).

⁹⁵ Baker., *I Remember — "The Army" With Men from 16 to 79*, *Baltimore Sun* (Mag.), Nov. 16, 1975, at 46.

⁹⁶ *To Arms*, *TIME*, Mar. 30, 1942, no. 13, at 39.

⁹⁷ Levy, *Guerrilla Warfare*, *PENGUIN AND INFANTRY JOURNAL* 55 (1942).

⁹⁸ M. BARKAI, *THE FIGHTING GHETTOS* 30 (1962).

⁹⁹ *Id.* at 42, 46.

¹⁰⁰ *NAACP v. Alabama*, 357 U.S. 449 (1958).

¹⁰¹ The Supreme Court has also relied on the right of assembly to protect the ability to organize unions without government interference, despite that activity being wholly unrelated to petitioning the government. *See Thomas v. Collins*, 323 U.S. 516 (1945). The right of assembly has also been invoked to protect a Chamber of Commerce's informing people of the advantages and disadvantages of joining a union. *See NLRB v. American Pearl Button Co.*, 149 F.2d 311 (8th Cir. 1945).

¹⁰² *Boyd v. United States*, 116 U.S. 616, 635 (1886).

¹⁰³ *State v. Kessler*, 289 Or. 359, ___, 614 P.2d 94, 95 (1980).

In *United States v. Cruikshank*,¹⁰⁴ the first case in which the Supreme Court had the opportunity to interpret the second amendment, the Court plainly recognized that the right of the people to keep and bear arms was a right which existed prior to the Constitution when it stated 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."¹⁰⁵ The indictment in *Cruikshank* charged, *inter alia*, a conspiracy by Klansmen to prevent blacks from exercising their civil rights, including the bearing of arms for lawful purposes. The Court held, however, that because the right to keep and bear arms existed independent of the Constitution, and the second amendment guaranteed only that the right to keep and bear arms shall not be infringed *by Congress*, the federal government had no power to punish a violation of the right by a private individual; rather, citizens had "to look for their protection against any violation *by their fellow-citizens*" of their right to keep and bear arms to the police power of the state.¹⁰⁶ Thus, the second amendment did not apply in *Cruikshank* since the violation alleged was by fellow-citizens, not the federal government.

In *Presser v. Illinois*,¹⁰⁷ although the Supreme Court affirmed the holding in *Cruikshank* that the second amendment, standing alone, applied only to action by the federal government, it nonetheless (pg.85) found the states without power to infringe upon the right to keep and bear arms.

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.*¹⁰⁸

The idea of the armed people maintaining "public security" mentioned in this passage from *Presser* was based upon the common law concept that individuals had the right and, in fact, the duty, not only to resist malefactors, such as robbers and burglars, but to aid in the enforcement of criminal laws and to use deadly force, if necessary, to do so.¹⁰⁹ Disarming individuals would, of course, deprive them of their ability to protect themselves and others, and of their ability to perform their duty to maintain "public security" (or, in the words of the second amendment, the "security of a free State").¹¹⁰ Likewise, disarming individuals would deprive them of their ability to perform "their duty

¹⁰⁴ 92 U.S. 542 (1876).

¹⁰⁵ *Id.* at 553 (emphasis added). It is thus clear that the Supreme Court viewed the right to keep and bear arms, like the right peaceably to assemble, as "an attribute of citizenship under a free government" and thus a fundamental right. *Id.* at 551.

¹⁰⁶ *Id.* at 553 (emphasis added). What the Supreme Court was making clear was that far from having the power to violate the right to keep and bear arms, it was the *obligation* of the states to *protect* an individual's right to keep and bear arms by punishing other individuals who deprived him of that right.

¹⁰⁷ 116 U.S. 252 (1886).

¹⁰⁸ *Id.* at 265 (emphasis added).

¹⁰⁹ That common law concept is embodied in the main body of the Constitution: one of the duties of the militia is "to execute the Laws of the Union." U.S. CONST. art. I, § 8, cl. 15.

¹¹⁰ U.S. CONST. amend II.

to the general government," i.e. the duty to contribute to the common defense, a duty which can most effectively be carried out if individuals are familiar with the use of firearms.¹¹¹

Presser, moreover, plainly suggests that the second amendment applies to the States through the fourteenth amendment and thus that a State cannot forbid individuals to keep and bear arms. To understand why, it is first necessary to fully appreciate the statutory scheme the Court had before it.

The statute under which *Presser* was convicted did not forbid individuals to keep and bear arms but rather forbade "bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by (pg.86) law...."¹¹² Thus, the Court concluded that the statute did not infringe or have the effect of infringing the right to keep and bear arms, adding, in what is virtually dictum, that:

a conclusive answer to the contention that this amendment [*i.e.* the second amendment] prohibits the legislation in question lies in the fact that the amendment [*i.e.* the second amendment] is a limitation only upon the power of Congress and the National Government, and not upon that of the states.¹¹³

No mention was made at this point in the opinion whether the second amendment, *through the fourteenth amendment*, is a limitation upon the power of the states.

In what was, however, a clear step toward applying certain provisions of the Bill of Rights to the states through the fourteenth amendment, the Court went on to discuss the Privileges and Immunities Clause of the fourteenth amendment. It first noted that "[i]t is only the privileges and immunities of citizens of the United States that the clause relied on was intended to protect."¹¹⁴ The Court thus viewed the issue to be decided as "had [the defendant] a right as a citizen of the United States, in disobedience of the state law, to associate with others as a military company, and to drill and parade with arms in the towns and cities of the State?"¹¹⁵ The Court responded to its question by stating that if the defendant "had any such privilege he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred."¹¹⁶ Bearing in mind that it had already held that the substantive right to keep and bear arms was not infringed by the Illinois statute since the statute did not prohibit the keeping and bearing of arms but rather prohibited military-like exercises by armed men, the Court proceeded to address the question of whether *Presser's* first amendment right peaceably to assemble and to petition the government for a redress of grievances, which "was an attribute of national citizenship" and thus a privilege and immunity protected against abridgment by the states, was abridged by the Illinois statute.¹¹⁷ The Court held, as it did with regard to the second amendment, that *Presser's* first amendment (pg.87) rights were not

¹¹¹ Richard Henry Lee of Virginia, commenting on the proposed adoption of the Constitution, wrote that "to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them...." LETTER FROM THE FEDERAL FARMER TO THE REPUBLICAN 124 (W. Bennett ed. 1975).

¹¹² 116 U.S. at 264.

¹¹³ *Id.* at 265.

¹¹⁴ *Id.* at 266.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

substantively abridged.¹¹⁸ Nonetheless, it is entirely clear that the Court viewed the right peaceably to assemble and to petition the government for a redress of grievances as attributes of national citizenship because they are protected by the first amendment. It is clear also that it viewed the right to keep and bear arms as an attribute of national citizenship because it is protected by the second amendment. Thus, it is plain that the Court viewed such rights as applying to the States through the Privileges and Immunities Clause of the fourteenth amendment,¹¹⁹ and would have invalidated the Illinois statute under either the first or second amendment had it determined that the statute either abridged the right peaceably to assemble or infringed the right to keep and bear arms.¹²⁰ (pg.88)

In *United States v. Miller*,¹²¹ 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 test by which to measure the constitutionality of statutes relating to firearms. The holding of the Court in *Miller*, however, should be viewed as only a partial guide to the meaning of the second amendment,¹²² primarily because neither defense counsel nor defendants appeared before the Supreme Court, and no brief was 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.¹²³

¹¹⁸ *Id.* at 252. Likewise, the Court, in *In re Kemmler*, 136 U.S. 436 (1890), held that because the eighth amendment prohibition of cruel and unusual punishment was a privilege and immunity of a citizen of the United States, it applied to action by the states. Since, however, the particular statute under consideration "did not inflict cruel and unusual punishment" the Court did not "perceive that the State [had] abridged the privileges and immunities of the petitioner...." 136 U.S. at 449. Only three provisions of the Bill of Rights, all of which are related to judicial proceedings, have expressly been held by the Court *not* to be privileges and immunities of citizens of the United States and thus applicable to the states through the Privileges and Immunities Clause: the seventh amendment right to trial by jury in suits at common law (*Walker v. Sauvinet*, 92 U.S. 90 (1876)); sixth amendment right to jury of twelve jurors (*Maxwell v. Dow*, 176 U.S. 581 (1900)); and the fifth amendment exemption from compulsory self-incrimination (*Twining v. New Jersey*, 211 U.S. 78 (1908) *overruled*, *Malloy v. Hogan*, 378 U.S. 1 (1964)).

¹¹⁹ Such a view would have been entirely compatible with the intentions of the Framers of the fourteenth amendment. For example, Senator Jacob M. Howard's speech of May 23, 1866, introducing the fourteenth amendment in the Senate, which received front page press coverage the following day, included his explanation that the fourteenth amendment would compel the States to respect "these great fundamental guarantees:" "the personal rights guaranteed and secured by the first eight amendments of the United States Constitution; such as ... the right to keep and bear arms...." CONG. GLOBE, 39th Cong., 1st Sess., pt. 3, 2765; NEW YORK TIMES, May 24, 1866, at 1, col. 6; NEW YORK HERALD, May 24, 1866, at 1, col. 3; and the PHILADELPHIA INQUIRER, May 24, 1866, at 8, col. 2.

Likewise, as the Supreme Court recognized in *Bartkus v. Illinois*, 359 U.S. 121, 124-25 (1959), that the states perceived the fourteenth amendment to protect the individual right to keep and bear arms from state deprivation, is evidenced by the fact that every state with a constitutional provision inconsistent therewith was duly amended after its adoption and the fact that the constitutions of all other states were consistent with an individual right to keep and bear arms.

¹²⁰ *Miller v. Texas*, 153 U.S. 535 (1894) cites *Presser* to the effect that the second and fourth amendments "operate only upon the Federal power," thereby not deciding whether the rights to keep and bear arms and to be secure against unreasonable searches and seizures as guaranteed by those amendments applied to the states through the fourteenth amendment. In fact, the Court noted, "If the Fourteenth Amendment limited the power of the States as to such rights, as pertaining to the citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court." *Id.* at 538.

¹²¹ 307 U.S. 174 (1939).

¹²² 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 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*, S. Doc. No. 92-82, 92d Cong., 2d Sess. (1973).

¹²³ In constitutional adjudication, *stare decisis* has less force than in statutory analysis. *Monell v. Dept. of Social Services*, 436 U.S. 658, 695 (1978). Thus, a court owes "less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations." *Id.* at 709 n.6 (Powell, J. concurring). Moreover, "[t]hat an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date." *Powell v. McCormack*, 395 U.S. 486, 546-47 (1969). On one occasion, the Court branded a whole line of decisions it had pursued for nearly a century "an unconstitutional assumption

The heart of the Court's decision is found in the following statement:

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.¹²⁴

This conclusion, that for the keeping and bearing of a firearm to be constitutionally protected, the firearm's possession or use must have some reasonable relationship to the preservation of a well regulated (pg.89) militia, is, however, an unjustified limitation upon the rights guaranteed by the second amendment and is based upon the Court's failure to consider fully the common law and the history of the second amendment as well as its misinterpretation of cited authorities.¹²⁵ As the discussions of the common law and the history of the second amendment demonstrate, the second amendment was also intended to guarantee the right of each individual to have arms for his own defense.¹²⁶

With respect to the authorities cited by the Court in support of its position that the second amendment's guarantee was limited to "ordinary military equipment" or weapons whose use "could contribute to the common defense," the Court cited *Aymette v. State*.¹²⁷ In *Aymette*, however, which involved a bowie knife, not a firearm,¹²⁸ 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 (pg.90) court thus reasoned that not all objects which could conceivably be used as weapons were protected by the Tennessee Constitution,

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." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (citing *Black & White Taxi Cab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1927) (Holmes, J., dissenting)).

¹²⁴ 307 U.S. at 178 (emphasis added).

¹²⁵ Because of the question of whether a short-barrelled shotgun met that test, a matter of which the Court would not take judicial notice, the Court remanded the case to the trial court. Had the trial court had the opportunity to take evidence on the military value of short-barrelled shotguns, it would have found them protected by the second amendment since such shotguns (the modern descendant of the blunderbuss) were military issue in both World Wars, Korea, and Vietnam. Likewise, handguns are considered by the armed forces of every nation to be an important arm. W.H.B. SMITH, *SMALL ARMS OF THE WORLD: A BASIC MANUAL OF SMALL ARMS* (E. Ezell, ed. 11th rev. ed. 1977). Thus, in what has become a heated controversy in Congress, the armed forces are currently soliciting offers for the purchase of 217,439 9mm pistols with a *maximum* length of 8.7 inches. *Service Pistol Update*, AM. RIFLEMAN, Sept. 1981, 30.

¹²⁶ In *State v. Dawson*, 272 N.C. 535, 659 S.2d 1, 9, 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. Moreover, because the ninth amendment ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.") is a recognition of the "inherent natural rights of the individual" and presupposes the existence of personal rights which stem from natural law and common law, the right of self-defense may be viewed as protected by the ninth amendment as well as the second amendment. *See* B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 19 (1955).

¹²⁷ 21 Tenn. (2 Hum.) 154 (1840).

¹²⁸ *Aymette* did not address the question of whether pistols were arms in a constitutional sense. Two subsequent Tennessee cases, however, clarified *Aymette* and struck down laws which prohibited the carrying of handguns. *Andrews v. State*, 50 Tenn. 165 (1871) held that "the pistol known as the repeater is a soldier's weapon" and was constitutionally protected; it was followed by *Glascock v. City of Chattanooga*, 157 Tenn. 518, 11 S.W.2d 678 (1928) (which held that "Army or Navy pistols" as well as pistols generally were constitutionally protected).

but only those weapons "such as usually employed in civilized warfare."¹²⁹ Such a limitation is not, however, applicable with regard to the second amendment because the first Senate had 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, including handguns, which could be carried by individuals.¹³⁰ Even accepting, however, the existence of a militia or common defense nexus, the *Aymette* court held that "[t]he citizens have an unqualified right to *keep* the weapon" and, adopting the common law, to bear it except to "terrify the people, or for purposes of private assassination."¹³¹

One of the chief values of *Miller* 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"¹³² 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."¹³³ *Miller* is also significant (pg.91) for its implicit rejection of the view that the second amendment, in addition to guaranteeing the right to keep and bear only certain types of arms, also guarantees the right only to those individuals who are members of the militia. Had the Court viewed 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, much as it did with regard to the military value of a short-barrelled shotgun. That it did not discuss this point indicates 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.

Finally, *Miller* also recognized, in the discussion at 179-182, that each able-bodied individual had not only a duty to assist in the common defense but, indeed, the legal *obligation to possess* the arms necessary to undertake that common defense.¹³⁴ For example, the Court noted that in

¹²⁹ 21 Tenn. (2 Hum.) at 158.

¹³⁰ *State v. Workman*, 35 W.Va. 367, 14 S.E. 9, 11 (1891), stands alone as the only case that has ever held that no type of pistol is an arm in a constitutional sense. The court, however, cited no cases to support its position and failed to clarify whether "guns" means handguns suitable for militia use. Interestingly, the court's only authority, *BISHOP ON STATUTORY CRIMES*, § 792 (1873), held that the second amendment applied to the states and protected arms used in warfare. Moreover, the cases cited by *BISHOP* held that handguns are constitutionally protected arms.

Hill v. State, 53 Ga. 473, 474 (1874) did not go as far as *Workman* and recognized that "guns of every kind, swords, bayonets, horseman's pistols, etc." are constitutionally protected arms. *English v. State*, 35 Tex. 473, 476 (1872), which went even less far, held that among constitutionally protected arms are the "musket, ... holster pistols and carbine...." *Pierce v. State*, 42 Okla. Crim. 272, 275 P. 393 (Okla. Ct. Crim. App. 1929), cited *Ex Parte Thomas*, 21 Okla. 770, 97 P. 260 (1908), which cited with approval a case holding that "horsemen's pistols" and "holster pistols" are constitutionally protected arms. 97 P. at 263-64.

¹³¹ 21 Tenn. (2 Hum.) at 160 (emphasis added). 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 theater or a church with drawn swords, guns, and fixed bayonets to the terror of the audience. *Id.*

¹³² 307 U.S. at 179.

¹³³ *Id.* (emphasis added).

¹³⁴ *Id.* at 179-82. The first federal militia statute enacted on May 8, 1792, implemented the intentions of the Framers and plainly reflects that handguns were understood to be arms in a constitutional sense. Thus, 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...." *See also In re Brickey*, 8 Idaho 597, 70 P. 609 (1902) and *State v. Rosenthal*, 75 Vt. 295, 55 A. 610 (1903). As a noted historian observed regarding colonial times: "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

Massachusetts the law 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 possess their own firearms at their own expense, and to appear bearing said arms when so notified.¹³⁵ (pg.92)

In sum, it is clear that *Miller*, even with its limitations, supports the view that the second amendment guarantees an individual right to keep and bear arms, including handguns.¹³⁶ As aptly put by Mr. Justice Black, in discussing *Miller* and the second amendment, "Although the Supreme Court has held this amendment to include only arms necessary to a well-regulated militia, as so construed its prohibition is absolute."¹³⁷

IV. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT APPLIES THE GUARANTEES OF THE SECOND AMENDMENT TO THE STATES

In addition to guaranteeing the right to keep and bear arms against state infringement through the Privileges and Immunities Clause of the fourteenth amendment, modern developments in the analysis of the Due Process Clause dictate that the right to keep and bear arms applies to the states through that clause.¹³⁸

Commencing in 1925, the Supreme Court began to retreat from the position that the fourteenth amendment did not bind the states to honor the guarantees of every provision of the Bill

pockets, and many of these small arms were also carried by military officers." G. NEUMANN, *THE HISTORY OF WEAPONS OF THE AMERICAN REVOLUTION* 150-51 (1967). Moreover, the Court in *Miller* observed that the second amendment was concerned with arms "of the kind in common use at the time." 307 U.S. at 179. Thus, while including handguns, rifles, shotguns, and muskets, which are all ordinarily possessed by private individuals and are capable of being used for individual defense, such instrumentalities as cannons, trench mortars, and antitank guns, which cannot be carried by individuals (a significant criterion given the fact that the second amendment speaks not only of the right to keep arms, but to bear them as well, implying that the type of arm protected is one which is capable of being carried), would not be included. Neither would bombs, which, although they could be carried by an individual, are not defensive instrumentalities.

¹³⁵ *Miller*, 307 U.S. at 179. The Virginia Militia Statute (An Act for Settling the Militia), 3 VA. STAT. AT LARGE FROM 1619 335-342 (Wm. Hening ed. 1823), required even those who were exempted from militia service to keep arms (including pistols) and ammunition. A like requirement was found in the New York militia statute which required "That all persons though freed 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." A Bill for the settlement of the Militia (passed October 27, 1684) I THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION (Albany, 1894). See also Act for regulating the Militia, Nov. 29, 1693, I ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY 1692-1714 (Boston, 1869); "An Act for the better security of the inhabitants by obliging the male white persons to carry firearms to places of public worship," 19 COLONIAL RECORDS OF STATE OF GEORGIA PART I, 1768-1773 at 138 (Every white male inhabitant who is or shall be liable to bear arms in the militia has to have and carry to church a rifle or pistol), and An act for regulating the militia (1741) 8 COLONIAL RECORDS OF CONNECTICUT FOR 1735-1743.

¹³⁶ Numerous twentieth century cases hold explicitly or implicitly that all handguns, without distinction as to size, are constitutionally protected arms. See *Schubert v. DeBard*, 398 N.E.2d 1339 (Ind. App. 1980) ("handgun"); *Taylor v. McNeal*, 523 S.W.2d 148, 150 (Mo. App. 1975) ("pistols"); *Rinzler v. Carson*, 262 So.2d 661, 666 (Fla. 1972) ("Semi-automatic pistols"); *City of Las Vegas v. Moberg*, 82 N.M. 626, 485 P.2d 737 (N.M. App. 1971) ("pistols"); *State v. Nickerson*, 126 Mont. 157, 247 P.2d 188, 192 (1952) ("revolver"); *People v. Zerillo*, 219 Mich. 635, 189 N.W. 927 (1922) ("revolver"); *State v. Kerner*, 181 N.C. 574, 107 S.E. 222, 224 (1921) ("pistol"); *State v. Rosenthal*, 75 Vt. 295, 55 A. 610 (1903) ("pistol"); *In re Brickey*, 8 Idaho 597, 70 P. 609 (1902) ("revolver"); and *State v. Kessler*, 289 Or. 359, 614 P.2d 94, 89-99 (1980) ("includes those weapons used ... for both personal and military defense.") One vintage case, *Nunn v. State*, 1 Ga. 243 (1846) ("pistols") is in accord with these modern cases.

¹³⁷ Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 873 (1963).

¹³⁸ For a detailed discussion of the debates on the adoption of the fourteenth amendment which made it plain that the fourteenth amendment was intended to apply the guarantees of the second amendment to the states, see Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON U. L. REV. 1, 18-33 (1981).

of Rights by holding the substantive guarantees of the first amendment (pg.93) binding on the states on a case-by-case basis.¹³⁹

In the landmark case of *Palko v. Connecticut*,¹⁴⁰ the Court harmonized the results of these cases by articulating a new test for the content of the Due Process Clause:

[I]mmunities that are as valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.¹⁴¹

Palko thus marks the point at which the Court first discredited and implicitly overruled Reconstruction-era cases which had held that the Due Process Clause of the fourteenth amendment did not apply the guarantees of the Bill of Rights to the states.¹⁴²

The Court initially applied the *Palko* test cautiously.¹⁴³ During (pg.94) the 1960's, however, it began to fill the vacuum created by *Palko*, adopting a broader definition of rights "implicit in the concept of ordered liberty" and upheld every challenge based upon a state violation of the guarantees of the Bill of Rights.¹⁴⁴

¹³⁹ See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of speech and press); *Fiske v. Kansas*, 274 U.S. 380 (1927) (freedom of speech); *Near v. Minnesota*, 283 U.S. 697 (1931) (freedom of the press); *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934) (free exercise of religion); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (freedom of the press); *Herndon v. Lowry*, 301 U.S. 242 (1937) (freedom of assembly). See also *Powell v. Alabama*, 287 U.S. 45 (1932) (limited recognition of right to counsel in a capital case).

¹⁴⁰ 302 U.S. 319 (1937), *overruled*, *Duncan v. Louisiana*, 391 U.S. 145 (1968).

¹⁴¹ 302 U.S. at 324-25 (footnote omitted).

¹⁴² See, e.g., *Hurtado v. California*, 110 U.S. 516 (1884) (fifth amendment right to grand jury indictment not applied through Due Process Clause); *Twining v. New Jersey*, 211 U.S. 78 (1908), *overruled*, *Malloy v. Hogan*, 378 U.S. 1 (1964) (fifth amendment exemption from compulsory self-incrimination not applied through the Due Process Clause); *Maxwell v. Dow*, 176 U.S. 581 (1900) (sixth amendment right to jury composed of twelve jurors not applied through the Due Process Clause); and *Walker v. Sauvinet*, 92 U.S. 90 (1875), (seventh amendment right to jury trial in suits at common law not applied through the Due Process Clause).

¹⁴³ *Palko* itself held that the fifth amendment privilege against double jeopardy was not "implicit in the concept of ordered liberty," so that its denial by the state did not abridge due process. 302 U.S. at 328. *Adamson v. California*, 332 U.S. 46, 54-56 (1947), *overruled*, *Malloy v. Hogan*, 378 U.S. 1 (1964), held that a state prosecutor's comment on the accused's failure to testify in a criminal trial, a practice forbidden under the fifth amendment privilege against self-incrimination, did not violate the Due Process Clause under the *Palko* standard. *Wolf v. Colorado*, 338 U.S. 25 (1949), *overruled*, *Mapp v. Ohio*, 367 U.S. 643 (1961), held that the fourth amendment's guarantee against unreasonable searches and seizures was "implicit in the concept of ordered liberty," but nevertheless declined to apply the federally mandated exclusionary rule to the states. In *Rochin v. California*, 342 U.S. 165 (1952), the Court sustained a compulsory self-incrimination challenge to a conviction based on evidence forcibly removed from the defendant's stomach, commenting that the state's conduct "shocks the conscience" and limiting the decision to its facts. Then, in *Irvine v. California*, 347 U.S. 128 (1954), the Court rejected a fourth amendment challenge to a conviction based upon a flagrantly illegal wiretap of the defendant's bedroom, distinguishing *Rochin* and asserting that *Wolf* controlled. Similarly, in *Breithaupt v. Abram*, 352 U.S. 432 (1957), the Court refused to extend *Rochin* to a conviction based on a blood test performed while the defendant was unconscious. While the specific holdings of *Palko*, *Adamson*, and *Wolf* have been overruled, the *Palko* test of fundamental rights "implicit in the concept of ordered liberty" retains its vitality to this day.

¹⁴⁴ See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (fourth amendment exclusionary rule); *Robinson v. California*, 370 U.S. 660 (1962) (eighth amendment right to freedom from cruel and unusual punishment); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (sixth amendment right to counsel); *Malloy v. Hogan*, 378 U.S. 1 (1964) (fifth amendment right to freedom from self-incrimination); *Pointer v. Texas*, 380 U.S. 400 (1965) (sixth amendment right to confront opposing witnesses); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (sixth amendment right to speedy trial); *Washington v. Texas*, 388 U.S. 14 (1967) (sixth amendment right to compulsory process for witnesses); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (sixth amendment right to jury trial); *Benton v. Maryland*, 395 U.S. 784 (1969) (fifth amendment privilege against double jeopardy). See also *Hunt v. Roth*, 648 F.2d 1148, 1155 (8th Cir. 1981) (eighth amendment prohibition on excessive bail).

In determining whether specific guarantees of the Bill of Rights are so fundamental as to be "implicit in the concept of ordered liberty," the Supreme Court has looked to the history of the right in issue. For example, in *Benton v. Maryland*,¹⁴⁵ Justice Marshall traced the origins of the double jeopardy prohibition "to Greek and Roman times," and found that "[a]s with many other elements of the common law, it was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries."¹⁴⁶

Thus, in light of the fact that every express guarantee of the Bill of Rights that the Court has examined has been held "fundamental" and "implicit in the concept of ordered liberty"¹⁴⁷ for purposes of the Due Process Clause, it is logical and reasonable that the guarantees of the second amendment, which exist to ensure the defense of one's person, family, home, and country, and which constitutes one of the basic tenets of Greco-Roman and Anglo-American tradition, meet that test as well.^(pg.95)

V. FUNDAMENTAL RIGHTS CANNOT BE RESTRICTED BECAUSE OF PUBLIC HOSTILITY TO OR A PERCEIVED LACK OF CURRENT NEED FOR THEIR EXERCISE

The right to keep and bear arms may not be undercut simply because that right may at the moment be unpopular to some.¹⁴⁸ The Supreme Court has held time and again that "constitutional rights may not be denied simply because of hostility to their assertion or exercise."¹⁴⁹

Nor can constitutional rights be made dependent upon a popular consensus that there is a continued need for them. "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...."¹⁵⁰

Indeed, it is precisely because the courts do not allow any contraction of the Bill of Rights that the evils contemplated by the Framers now seem so removed. As Justice Black stated:

Its [the Bill of Right's] provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human

¹⁴⁵ 395 U.S. 784 (1969).

¹⁴⁶ *Id.* at 795. Interestingly, using the test of *Bartkus v. Illinois*, 339 U.S. 121, 124-25 (1959), ("a comparison of the constitutions of the ... states [ratifying the fourteenth amendment] with the Federal Constitution.") the incorporation of the right to keep and bear arms is more historically vindicable than is incorporation of the privilege against double jeopardy.

¹⁴⁷ This is particularly so where the right in question is one of substance rather than procedure. First amendment rights were the first to be recognized as binding on the states, and have been protected most stringently against state infringement.

¹⁴⁸ Even if unpopular to many, the right should not be infringed because it was the purpose of the Bill of Rights to protect the smallest of minorities, the individual, from the tyranny of the majority. As Madison observed:

Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of the private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents....

5 THE WRITINGS OF JAMES MADISON 272 (G. Hunt ed. 1904).

¹⁴⁹ *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963). *See also* *Village of Skokie v. National Socialist Party of America*, 69 Ill. 2d 605, 373 N.E.2d 21(1978).

¹⁵⁰ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat. 304, 326) 562, 564 (1816).

evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many.¹⁵¹

CONCLUSION

From the above discussion, it should be readily apparent that the right to keep and bear arms, as guaranteed by the second amendment, is indeed a fundamental individual right which no amount of historical revisionism can deny. Thus, along with all (pg.96) other rights found in the Bill of Rights, it should be accorded a significant place in American jurisprudence.¹⁵²

¹⁵¹ Adamson v. California, 332 U.S. 46, 89 (1947) (Black, J., dissenting), *overruled*, Malloy v. Hogan, 378 U.S. 1 (1964).

¹⁵² On at least 15 occasions courts have struck down laws which violated the right to keep and bear arms: State v. Blocker, 291 Or. 255, 630 P.2d 824 (1981); State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980); City of Lakewood v. Pillow, 180 Colo. 20, 23, 501 P.2d 744, 745 (1972); City of Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (N.M. App. 1971); People v. Nakamura, 99 Colo. 262, 62 P.2d 246 (1936); Glasscock v. City of Chattanooga, 157 Tenn. 518, 11 S.W.2d 678 (1928); People v. Zerillo, 219 Mich. 635, 189 N.W. 927 (1922); State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921); State v. Rosenthal, 75 Vt. 295, 55 A. 610 (1903); *In re Brickey*, 8 Idaho 597, 70 P. 609 (1902); Wilson v. State, 33 Ark. 557, 34 Am. Rep. 52 (1878); Jennings v. State, 5 Tex. Crim. App. 298 (1878); Andrews v. State, 50 Tenn. 165, 8 Am. Rep. 8 (1871); Nunn v. State, 1 Ga. (1 Kelly) 243 (1846); and Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 13 Am. Dec. 251 (1822).