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The Right to Keep and Bear Arms for Private and Public Defense

Author Unknown

The second amendment of the constitution of the United States recites that “a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.” Similar provisions will probably be found in the constitutions of most of the states. Thus the constitution of Texas declares that “every person shall have the right to keep and bear arms in the lawful defence of himself or the state, under such regulations as the (pg.260) legislature may prescribe.” Art. 1, § 13. So the present constitution of Tennessee provides that “the citizens of this state have a right to keep and bear arms for their common defence; but the legislature shall have power by law to regulate the wearing of arms with a view to prevent crime.” These and similar provisions in the constitutions of other states have been discussed in

several cases, and with the apparently growing habit of legislatures to restrict the wearing of arms, their exposition assumes increasing importance. The provision in the federal constitution does not appear ever to have received exposition in the Supreme Court of the United States, but the state tribunals have furnished a series of interesting decisions upon the subject, referring either to the federal or to the state constitution.

1. The first of these appears to have been *Bliss v. Commonwealth*, 2 Littell, 90, determined in the Court of Appeals of Kentucky in 1822, and relates to the question we shall consider first—the manner of carrying weapons. The constitution of Kentucky provided “that the right of the citizens to bear arms in defence of themselves and the state shall not be questioned.” It was held that a statute providing that “any person in this commonwealth, who shall hereafter wear a pocket-pistol, dirk, large knife, or sword in a cane, concealed as a weapon, unless when travelling on a journey, shall be fined in any sum not less than one hundred dollars,” etc. This statute was held to be in conflict with the constitutional guaranty, and hence void—one of the three judges dissenting. The court said : “That the provisions of the act in question do not import an entire destruction of the right of the citizens to bear arms in defence of themselves and the state, will not be controverted by the court; for though the citizens are forbid wearing weapons concealed in the manner described in the act, they may nevertheless, bear arms in any other admissible form. But to be in conflict with the constitution it is not essential that the act should contain a prohibition against bearing arms in every possible form. It is the right to bear arms in defence of the citizens and the state that is secured by the constitution, and whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution. If, therefore, the act in question imposes any restraint upon the right, immaterial what appellation may be given to the act, whether it be an act regulating the manner of bearing arms or any other, the consequence, in reference to the constitution, is precisely the same, and its collision with that instrument equally obvious.” And the court further on declare that “in principle there is no difference between a law prohibiting the wearing of concealed arms and a law forbidding the wearing of such as are exposed.”

And, therefore, the defendant having been convicted and fined for carrying a sword concealed in a cane, the judgment was reversed.

The next case in order of time appears to have been *The State v. Mitchell*, 3 Blackf. 229, determined in the Supreme Court of Indiana in 1833. The ruling is diametrically opposed to that in the Kentucky case. The report does no more than mention the point ruled in the briefest terms, but it would seem that the Indiana constitutional provision was simply "that the people have a right to bear arms for the defence of themselves and the state." And the statute (*Laws of Ind.*, ed. of 1831, p. 192) which was held not in derogation of this provision provided that "every person, not being a traveller, who shall wear or carry any dirk, pistol, sword in a cane, or other dangerous weapon concealed, shall, upon conviction thereof, be fined in any sum not exceeding one hundred dollars."

This ruling was followed by the Supreme Court of Alabama in 1840, in *The State v. Reid*, 1 Ala. 612. The provision of the Alabama constitution was almost identical with that of Indiana. It provided that "every citizen has the right to bear arms in defence of himself and the state." And it was held that this provision was not infringed by a statute which provided that "if any person shall carry concealed about his person any species of fire-arms, or any bowie-knife, Arkansas tooth-pick, or any other knife of the like kind, dirk, or other concealed weapon, the person so offending shall, on conviction thereof, before any court having competent jurisdiction, pay a fine of not less than fifty nor more than five hundred dollars," etc. The statute was held not in conflict with the constitutional provision. And this ruling was reaffirmed in *Owen v. The State*, 31 Ala. 387. The Supreme Court of Alabama in the former case say: "The constitution, in declaring that 'every citizen has the right to bear arms in defence of himself and the state,' has neither expressly nor by implication denied the legislature the right to enact laws in regard to the manner in which arms shall be borne. The right guaranteed to the citizen is not to bear arms upon all occasions and in all places, but merely 'in defence of himself and the state.' The terms in which this provision is phrased seem to us necessarily to leave with the legislature the authority to adopt such regulations of police as may be dictated by the safety of the people and the advancement of public morals." And further on they say: "We do not desire to be

understood as maintaining that in regulating the manner of bearing arms, the authority of the legislature has no other limit than that of its own discretion. A statute which, under pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional. But a law which is intended merely to promote personal security, and to put down lawless aggression and violence, and to that end inhibits the wearing of certain weapons in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others, does not come in collision with the constitution." And the court also say: "Under the provision of our constitution, we incline to the opinion that the legislature cannot inhibit the citizen from bearing arms openly, because it authorizes him to bear them for the purpose of defending himself and the state, and it is only when carried openly that they can be effectively used for defence." 1 Ala. 616, 617, 619.

The distinction here taken in regard to the manner of carrying or wearing weapons, has been followed in several later cases. Thus in *Nunn v. The State*, 1 Kelly, 243, decided in 1846, the Supreme Court of Georgia held that a statute of that state, so far as it sought to suppress the practice of carrying certain weapons secretly, was valid, inasmuch as it did not deprive the citizen of his natural right of self-defence, or of his constitutional right to keep and bear arms; but that so (pg.261) much of it as prohibited the wearing of certain arms openly, was unconstitutional and void. To the same effect, see *Stockdale v. The State*, 32 Ga. 225, and the very thoroughly considered case of *The State v. Buzzard*, 4 Ark. 18. So it has been held in several cases in Louisiana, that a statute prohibiting the carrying of concealed weapons did not infringe the right of the people to keep and bear arms, but was simply a measure of police, prohibiting only a particular mode of bearing arms which is found dangerous to the peace of society. *The State v. Jumel*, 13 La. An. 399; *The State v. Smith*, 11 La. An. 633; *The State v. Chandler*, 5 La. An. 489. The same conclusion was reached by the Supreme Court of Tennessee in 1840 in *Aymette v. The State*, 2 Humph. 154, but upon somewhat different grounds, as we shall see further on; and is also supported by *Andrews v. The State*, 3 Heiskell (Tenn.) 165.

2. A second branch of the question relates to the kind of weapon, the carrying of which is within the constitutional guaranty. By far the most instructive case on this branch of the question is *Aymette v. State*, 2 Humph. 154. The constitution of Tennessee in force at that time provided that "the free white men of this state shall have a right to keep and bear arms for their common defence." And the question considered by the court was whether this constitutional provision was violated by a statute which provided "that if any person shall wear any bowie-knife, or Arkansas tooth-pick, or other knife or weapon that shall in form, shape or size resemble a bowie-knife, or Arkansas tooth-pick, under his clothes, or keep the same concealed about his person, such person shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined," etc. GREEN, J., in an able opinion traces the constitutional provision to its origin in the English Bill of Rights, Stat. 1 W. & M., ch. St. 2, ch. 2, cl. and then makes the following observations upon its policy and scope: "As the object for which the right to keep and bear arms is secured, is of a general and public nature, to be exercised by the people in a body for their common defence, so the arms, the right to keep which is secured, are those which are usually employed in civilized warfare, and that constitute the ordinary military equipment. If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights by those in authority. They need not, for such a purpose, the use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin. These weapons would be useless in war. They could not be employed advantageously in the common defence of the citizens. The right to keep and bear them is not, therefore, secured by the constitution." It was accordingly held that the statute was not in derogation of the state constitution.

But by far the most elaborate discussion of the question will be found in *Andrews v. The State*, 3 Heiskell, 165, determined in the Supreme Court of Tennessee in 1871. The state was ably represented, and the synopsis of the argument of the attorney-general should not be overlooked. The court possessed the weight of being composed of six judges; but unfortunately they were by no means unanimous, either as to the result, or as to the reasoning by which the result was reached. The provision of the present constitution of Tennessee is

that “the citizens of this state have a right to keep and bear arms for their common defence; but the legislature shall have power by law to regulate the wearing of arms with a view to prevent crime.” Const. of Tenn., art. 1, § 26. The material provision of the statute whose validity was disputed was that “it shall not be lawful for any person to publicly or privately carry and dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver.” Act of Tenn., June 11, 1870; 2 Tho. & S. Code, § 4756 a. It was held that this statute was not in derogation of the constitution of the state, except so far as it restrained the keeping of arms “in the ordinary mode known to the court.” In this result four of the judges concurred. FREEMAN, J., delivered the opinion of the court, in which the question is discussed at great length. NICHOLSON, Ch. J., and DEADERICK, J., concurred in the general views expressed by him; but SNEED, J., dissented from so much of the opinion as questioned the right of the legislature to prohibit the wearing of arms of any description, or sought to limit the operation of the act of 1870. On the other hand, NELSON, J., dissented with much force, holding that the act was in derogation of the constitutional right to bear arms, and in derogation of the natural and inalienable right of self-defence. While it is difficult to say precisely what this long case does decide, it may be fairly said to be an affirmance of *Aymette v. State*, supra; and no doubt the following sentences represent the views of all of the four concurring judges, except SNEED, J., who goes further in support of the power of the legislature to regulate the wearing of arms: “What, then, is he [the citizen] protected in the right to keep and thus use? Not everything that may be useful for offence or defence; but what may (pg.274) properly be understood or included under the title of arms, taken in connection with the fact that the citizen is to keep them as a citizen. Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defence of his own liberties, as well as of the state. Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained, we would hold that the rifle of all descriptions, the shot-gun, the musket and repeater are such arms; and under the constitution, the right to keep such arms cannot be infringed or forbidden by the legislature. Their use, however, may be subordinated to such regulations and

limitations as are or may be authorized by the laws of the land, passed to subserve the general good, so as not to infringe the right secured, and the necessary incidents to the exercise of such right.” *
 ** “We hold, then, that the act of the legislature in question, so far as it prohibits the citizen, either publicly or privately, to carry a dirk, sword-cane, Spanish stiletto, belt or pocket pistol, is constitutional. As to the pistol designated as a revolver, we hold this may or may not be such a weapon as is adapted to the usual equipment of the soldier, or the use of which may render him more efficient as such; and therefore hold this to be a matter to be settled by evidence, as to what character of weapon is included in the designation ‘revolver.’”
 *** “We know there is a pistol of that name [revolver] which is not adapted to the equipment of the soldier, yet we also know that the pistol known as the ‘repeater’ is a soldiers’ weapon—skill in the use of which will add to the efficiency of the soldier. If such is the character of the weapon here designated, then the prohibition of the statute is too broad to be allowed to stand consistently with the views herein expressed. * * * As we have said, the statute amounts to a prohibition to keep and use such weapon for any and all purposes. It therefore, in this respect, violates the constitutional right to keep arms, and the incidental right to use them, in the ordinary mode of using such arms, and is inoperative.”

We must not here overlook the early Tennessee case of *Simpson v. The State*, decided by the Supreme Court of Tennessee in 1833, and reported in 5 Yerger, 356. The only question in that case was the sufficiency of an indictment for an affray which charged that the defendant, “with force and arms, at, etc., being arrayed in a warlike manner, then and there, in a certain public street and highway situate, unlawfully, and to the great terror of divers good citizens of the state, then and there being, an affray did make,” etc. It was held that this indictment did not sufficiently charge an affray. The court consisted of four judges, among them Judge GREEN, who delivered the opinion of the court in *Aymette v. The State*, supra, and also Judge CATRON, afterwards one of justices of the Supreme Court of the United States, who, two years before, had delivered the opinion of the court in the famous *Grainger* case (5 Yerg. 459) expounding the law of self-defence; and with these were associated Judges WHYTE and PECK. WHYTE, J., delivered the

opinion of the court, PECK, J., dissenting. Two reasons were given for holding the indictment insufficient. The first was that in order to constitute an affray there must be, 1st, fighting; 2d, and between two or more persons, 3d, and in some public place so as to cause terror to the people. Now the indictment did not charge fighting, nor fighting between two or more persons. It was therefore held insufficient. It is difficult to conceive how there can be fighting, unless there be at least two persons, unless it be between a man and a beast; but we are stating accurately the reasoning of the court. The second reason, and the one with which we have to do, is embodied in the following language of Judge WHYTE: "But suppose it to be assumed on any ground that our ancestors adopted and brought over with them this English statute [2 Edw. III.] or portion of the common law, our constitution [of 1796] has completely abrogated it. It says 'that the freemen of this state have a right to keep and to bear arms for their common defence.' (Art 11, § 29.) It is submitted that this clause of our constitution fully meets and opposes the passage or clause in Hawkins of 'a man's arming himself with dangerous and unusual weapons,' as being an independent ground of affray, so as of itself to constitute the offense cognizable by indictment. By this clause of the constitution an express power is given and secured to all the free citizens of the state to keep and bear arms for their defence, without any qualification whatever as to their kind or nature; and it is conceived that it would be going much too far to impair by construction or abridgment a constitutional privilege which is so declared. Neither, after so solemn an instrument hath said the people may carry arms, can we be permitted to impute to the acts thus licensed such a necessarily consequent operation as terror to the people to be incurred thereby. We must attribute to the framers of it the absence of such a view." In *Aymette's case*, supra, Judge GREEN characterized the above language as "only an incidental remark of the judge who delivered the opinion, and therefore entitled to no weight." To enable the reader to judge how far this declaration of law by Judge WHITE was necessary to the determination of the question in the case, it should be remarked that it is an argument put forth to obviate the force of the following language of Sergeant Hawkins: "But granting that no bare words in the judgment of law carry with them so much terror as to amount to an affray, yet it seems

certain that in some cases there may be an affray where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people, which is said always to have been an offence at common law, and is strictly prohibited by many statutes.” (Hawk. P. C. Book 1, ch. 28, § 4, Leach’s ed.)

The latest case upon this branch of the subject appears to be *English v. The State*, 35 Tex. 473. The statute considered in that case (Act of 12 April, 1871, 2 Pasch. Dig. Laws, art. 6512) provides with certain exceptions that “any person carrying on or about his person, saddle, or in his saddle-bags, any pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife, or any other kind of knife manufactured or sold for the purpose of offence or defence, unless he has reasonable grounds for fearing an unlawful attack on his person, and that such grounds of attack shall be immediate and pressing; or unless having or carrying the same on or about his person for the lawful defence of the state, as a militia-man in actual service, or as a peace officer or policeman, shall be guilty of misdemeanor,” etc. The second section provides that “any person charged under the first section of this act who may offer to prove by way of defence that he was in danger of an attack on his person, or unlawful (pg.275) interference with his property, shall be required to show that such danger was immediate and pressing, and was of such a nature as to alarm a person of ordinary courage; and that the weapon so carried was borne openly and not concealed beneath his clothing; and if it shall appear that this danger had its origin in a difficulty first commenced by the accused, it shall not be considered a legal defence.” Section 3 provides that the governor may, by proclamation, exempt the frontier counties from the operation of the act. The remaining sections contain provisions which it is not necessary to notice. It will be seen that this statute is much stronger than any which we have previously cited. With certain restricted exceptions, it effectually prohibits the bearing of all small arms, whether openly or concealed, on horseback or on foot. It is doubtful whether so sweeping a statute can be sustained in the light of any of the adjudications already quoted. But the late Supreme Court of Texas nevertheless did, in *English v. The State*, supra, declare that it is neither in conflict with the second amendment of the federal constitution, nor with the

provision of the constitution of that state quoted at the beginning of this article. The court (WALKER, J.) say: "The word 'arms,' in the connection we find it in the constitution of the United States, refers to the arms of a militia-man or soldier, and the word is used in its military sense. The arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, holster-pistol and carbine; of the artillery, the field-piece, siege gun and mortar, with side-arms. The terms dirks, daggers, slung-shots, sword-canes, brass-knuckles and bowie-knives belong to no military vocabulary. Were a soldier on duty found with one of these things about his person he would be punished for an offence against discipline. The act referred to makes all necessary exceptions, and points out the place, the time and manner in which certain deadly weapons may be carried as a means of self-defence; and these exceptional cases, in our judgment, fully cover all the wants of society. There is no abridgment of the personal rights, such as may be regarded as inherent and inalienable to man, nor do we think his political rights are the least infringed by any part of this law." The court also understand the word "arms" in the Texas constitution as having the same import and meaning which it has in the second amendment of the federal constitution; and they hold that the legislature may regulate the right to bear arms without taking it away, and that this has been done by the act under consideration.

3. A third question is, whether the natural right of self-defence will under any circumstances justify the carrying of a particular weapon, and in a particular manner, when such carrying is forbidden by statute. "In reason," says Mr. Bishop, "there may be circumstances in which the right of self-defence will justify the carrying of a concealed weapon for the purpose; and should such a case arise (and it must be an extreme one, out of the ordinary course of things, or it could not arise), doubtless this should be held to be an exception, engrafted by the common law upon the general terms of the statute." *Bish. Stat. Crimes*, § 789. This view would seem to be entirely consistent with reason, and unavoidable. When we reflect on the question of what is termed the right of self-defence, we shall see that it is a most comprehensive right; that it is one and the same thing with the right to "life, liberty and the pursuit of happiness," which our fathers asserted in the Declaration of Independence. It

would seem to follow from what has been said upon the subject by various writers that while society may regulate this right of self-defence so as to promote the safety and good of its members, yet any law which should attempt to take it away, or materially abridge it, would be the grossest and most odious form of tyranny. Thus, Sir Michael Foster says: "The right of self-defence in these cases [cases of felonious attacks upon person, habitation, or property] is founded in the law of nature, and is not, nor can be, superseded by any law of society; for, before societies were formed, *** the right of self-defence resided in individuals; it could not reside elsewhere; and since, in cases of necessity, individuals incorporated into society cannot resort for protection to the law of society, that law with great propriety and (pg.286) strict justice, considereth them as still in that instance under the protection of the law of nature." (Foster Crown Law, 273-4. See also 2 Rutherford's Institutes, ch. 16; Grotius' De Jure Belli et Pacis, lib. 2 cap. 1; Gray v. Coombs, 7 J. J. Marshall, 478; Isaacs v. State, 25 Tex. 174; Com. v. Riley, Thacher's Crim. Cas. 471; United States v. Holmes, 1 Wallace, Jr. 1.) It is within common experience that there are circumstances under which to disarm a citizen would be to leave his life at the mercy of a treacherous and plotting enemy. If such a state of facts were clearly proven, it is obvious that it would be contrary to all our notions of right and justice to punish the carrying of arms, although it may have infringed the letter of some statute. To do so would be to make the law what it never was intended to be, an instrument of cruelty and injustice. Such a case might clearly be said to fall within that class of cases in which the previously existing common law interpolates exceptions upon subsequently enacted statutes. See Bish. Stat. Crimes, §§ 7, 123, 131, 141, 351-359, 362, 789.

Turning to the adjudications, we find it declared in one case, under an Indiana statute, probably the same already cited (ante, 260), that if a person, not being a traveller, carry a concealed weapon, he is guilty of an indictable offense and his motive for carrying the weapon is immaterial. *Walls v. The State*, 7 Black. 572. A similar ruling was made in *Cutsinger v. Commonwealth*, 7 Bush. Ky. 392. But these cases do not help our enquiries, because the defendants did not claim to have carried the weapons for the purpose of defence against any threatened or impending injury, but, in one case, for

the purpose of exhibiting it as a curiosity, and in the other, for the purpose of conveying it to another person.

In *Hopkins v. Commonwealth*, 3 Bush, Ky. 480, there was sufficient proof that the defendant, on a certain day, carried a pistol concealed about his person, and the defendant attempted to excuse the act by proving that he had been shot at by strangers more than two years before, and that “for precautionary security of self-defence” against a like attack he had carried a pistol ever since. The court (ROBERTSON, J.) said: “These facts were wholly irrelevant, as there was neither proof nor cause for apprehension of any such impending danger; and, therefore, there was no error in refusing to admit another witness to the same facts.”

Another ground of error urged in the same case, was that the court should not have given the following instruction: “If the jury believe from the evidence that the defendant * * * carried a pistol concealed about his person, and that he had no reasonable ground to believe, and did not believe, that his person was in danger of great bodily harm, they should punish him by a fine,” etc. To understand the force of this instruction, it should be observed that the Kentucky statute against carrying concealed weapons, in force at that time, made the carrying of such weapons lawful “where the person has reasonable grounds to believe that his person, or the person of some of his family, or his property, is in danger from violence or crime.” 1 Stanton’s Code, p. 414. The defendant’s counsel insisted that the defendant was rightfully the best judge of the necessity or prudence of carrying a concealed pistol for self-defence, and was the only person who could know whether he in fact apprehended danger; and hence objected to so much of the instruction as required reasonable grounds for apprehension. The court, however, did not see the instruction in this light. Judge ROBERTSON said: “Were this erroneous, the salutary law against the pestilent and alarmingly prevalent habit among all classes, and especially among young men and even boys, of wearing concealed arms, through false and cowardly pride, and through mock chivalry, might soon become practically a dead letter. A statute so beneficent, and so often and so easily evaded, should be vigilantly upheld and stringently enforced by the judiciary, for repressing a dishonorable and mischievous practice, which, licensed or unlicensed, leads almost daily to causeless

homicides and disturbances, which would otherwise never be perpetrated; and to that end, the accused should always be required to prove that he carried a concealed weapon only for the purpose of defending himself or family or property against an impending attack, reasonably apprehended, and which, if attempted, would justify the use of some such means of defence. But the superfluous addition of the words, 'and did not believe that his person was in danger,' relieves the instruction from the counsel's criticism, and makes it more favorable to the appellant than he had a right to demand or expect." Although this ruling was necessary in view of the terms of the Kentucky statute, yet it is thought that it would be the same on general principles; for it is in strict analogy with that numerous class of cases which makes the fears of a reasonable man, and not the fears actually entertained, the test of the justification of the degree of force and kind of weapon employed in one's defence. (Selfridge's case, 1 Self-Defence Cases, 1; Sullivan's case, *ib.* 65; Shorter's case, *ib.* 258; and many others.)

In one of the cases in Tennessee, already quoted, *Andrews v. The State*, 3 Heiskell, 165, 188, there are considerable dicta on the question whether a man can defend himself against an indictment for carrying arms forbidden to be carried by law, by showing that he carried them in self-defence. While admitting the question to be one of "some little difficulty," the learned judge who delivered the opinion of the court says: "The real question in such case, however, is not the right of self-defence, as seems to be supposed (for that is conceded by our law to its fullest extent), but the right to use weapons or select weapons for such defence, which the law forbids him to keep or carry. If this plea could be allowed as to weapons thus forbidden, it would amount to a denial of the right of the legislature to prohibit the keeping of such weapons; for if he may lawfully use them in self-defence, he may certainly provide them and keep them for such purpose, and thus the plea of right of self-defence will draw with it, necessarily, the right to keep and use everything for such purpose, however pernicious to the general interest or peace or quiet of the community. Admitting the right of self-defence in its broadest sense, still, on sound principles, every good citizen is bound to yield his preference as to the means to be used, to the demands of the public good; and where certain weapons are forbidden to be

kept or used by the law of the land, in order to the prevention of crime—a great public end—no man can be permitted to disregard this general end, and demand of the community the right, in order to gratify his whim or wilful desire, to use a particular weapon in his particular self-defence. The law allows ample means of self-defence without the means which we have held may be rightfully (pg.287) proscribed by this statute, The object being to banish these weapons from the community by an absolute prohibition, for the prevention of crime, no man's particular safety, if such case could exist, ought to be allowed to defeat this end. Mutual sacrifice of individual rights is the bond of all social organizations, and prompt and willing obedience to all laws passed for the general good is not only the duty, but the highest interest of every man in the land. * * * We admit that extreme cases may be put where the rule may work harshly, but this is the result of all general rules—that they may work harshly sometimes in individual cases. By our system, however, allowing the attorney-general to enter a nolle prosequi with the assent of the court, there is but little danger of the law being enforced in any such cases to the detriment of any one; and if such case should occur, an application to executive clemency may fairly be presumed to be the remedy provided by the constitution to meet all such exigencies.” The court, therefore, hold that the testimony tending to prove “that there was a set of men in the neighborhood of defendant during the time he carried his pistol and before, seeking the life of defendant,” was properly rejected, because it did not appear what the character of the weapon was, and it may have been such a weapon as could not be properly carried at all, and if so, the testimony would be no defence to the indictment. Comparing the above with that part of this case which was quoted on page 274 of our last number, it is seen that it decides that a man may not, even in his necessary defence, carry, either publicly or privately, a dirk, sword-cane, Spanish stiletto, belt or pocket-pistol, but that he may carry such arms for his private defence as are adapted to the equipment of the soldier. Much as we respect the general views of the learned judge and the commendable desire to promote peace and public order which his opinion manifests, yet we do not think that either his reasoning or his conclusion on this particular branch of the question can be commended. It entirely confounds the right of arming one's self for

private defence against a threatened danger, with the policy of the constitution of Tennessee, which guarantees the right of bearing certain arms in order to educate the citizen for military duty. If a citizen is obliged to perform a journey where he is in danger of being attacked by highwaymen, or by assassins who seek his life, he may, if he have the arms used by a militiaman, arm himself with them;—we suppose he may even take a cannon along with him, if he have one. But if he have not, and cannot procure any of the weapons which are used in civilized warfare, he must go unarmed. Besides, in attempting to distinguish between the weapons which he may and may not use, the learned court descend into distinctions altogether too nice to be of any practical value. A belt or pocket-pistol may not be worn, but a “repeater” may. What is a large “repeater” but a belt-pistol, and what is a small “repeater” but a pocket-pistol? According to these distinctions, we suppose if the citizen have no other arms than an old-fashioned “pepper-box,” he must needs leave it at home—to carry it to defend himself against the attack of a highwayman will be an indictable offence (and we don’t know but it ought to be)—but he may lawfully carry a far more formidable and dangerous weapon—a cavalry-revolver, Colt or Remington. In short, before he may lawfully take with him any weapon for his personal defence, he must debate and settle in his mind whether such a weapon would be appropriate to the equipment of a soldier, and if it would, he may lawfully carry it for the purpose of defending himself; otherwise not. That such conclusions do not commend themselves to reason, need scarcely to be suggested. Nor do we perceive any ground for the distinction which the learned judge attempts to draw between the right of self-defence and the means by which that right may be secured. If the means are prohibited or withheld, can any one say that the right is of any substantial value? We think that upon this branch of the case the views of Judge NELSON, in his dissenting opinion, are much to be preferred. “I hold,” said that learned judge, “that when a man is really and truly endangered by a lawless assault, and the fierceness of the attack is such as to require immediate resistance in order to save his own life, he may defend himself with any weapon whatever, whether seized in the heat of conflict, or carried for the purpose of self-defence.”

In the principal Alabama case which we have already

quoted, *The State v. Reid*, 1 Ala. 612, 619, the question, it will be remembered, arose on a constitutional provision which guaranteed the right to bear arms “in defence of himself and the state.” The court thought that in view of that provision it would not be competent for the legislature to prohibit the wearing of arms openly, because “it is only when worn openly that they can be efficiently used for defence.” And they also say: “We will not undertake to say that if in any case it should appear to be indispensable to the right of defence that arms should be carried concealed about the person, the act ‘to suppress the evil practice of carrying weapons secretly’ should be so construed as to operate a prohibition in such case.” The right to bear arms when threatened with, or having good reason to apprehend an attack, or travelling or setting out on a journey, was subsequently recognized in Alabama by statute. Ala. Code, 1852, § 3274; *Owen v. State*, 31 Ala. 388.

In Texas, as we have already seen (ante, p. 274), it has been held within the power of the legislature to prohibit the carrying of all small arms, notwithstanding a constitutional provision similar to that of Alabama, guaranteeing the right to carry arms for the defence of one’s self, as well as for the defence of the state.

Such appears to be the unsatisfactory state of the authorities on this branch of the question. On the one hand, as long as the machinery which society has afforded for the prevention of private injuries remains in its present ineffective state, society cannot justly require the individual to surrender and lay aside the means of self-protection in seasons of personal danger; and it will be in vain that the laws of society denounce penalties against the citizen for arming himself when his life is menaced by the attacks of wild beasts, of highwaymen, or of dangerous and persevering enemies. On the other hand, the peace of society and the safety of peaceable citizens plead loudly for protection against the evils which result from permitting other citizens to go armed with dangerous weapons, and the utmost that the law can hope to do is to strike some sort of balance between these apparently conflicting rights.

4. We shall take leave of this subject by briefly considering whether the second amendment of the constitution of the United States is restrictive upon the states. This amendment provides that “a well-regulated militia being necessary to the security of a free state,

the right of the people to keep and bear arms shall not be infringed.” Mr. Bishop suggests that, “though most of the amendments are restrictions on the general government alone, this one seems to be of a nature to bind both the state and the national legislatures; and doubtless it does.” Of the same view was the Supreme Court of Georgia in *Nunn v. The State*, 1 Kelly, 243, where the question was discussed at considerable length, and where a statute of that state was held in part invalid because in conflict with this amendment. In the three Louisiana cases already quoted, the subject was discussed solely with reference to this amendment to the federal constitution, and it seems to have been taken for granted that it is restrictive upon the states. *State v. Chandler*, 5 La. An. 489; *State v. Smith*, 11 La. An. 633; *State v. Jumel*, 13 La. An. 399. So in the Arkansas case, *The State v. Buzzard*, 4 Ark. 18, all the judges appear to have understood this amendment as applicable to the states; and Judge DICKINSON supposes it to pertain to the power possessed by the general government of organizing, arming and disciplining the militia. He says this provision of the federal constitution “is but an assertion of that general right of sovereignty belonging to independent nations, to regulate their military force.”

This view of Judge DICKINSON contains the only plausible reason we have met with for supposing that this amendment is binding upon the states. The decisions of the Supreme Court of the United States, expounding the early amendments of the federal constitution, leave little room to doubt that none of the first ten amendments apply to the states, but that all of them are merely restrictive upon the federal power. Thus, in *Barron v. The City of Baltimore*, 7 Pet. 243, 247, it was held that an act of the Maryland legislature, which it was alleged deprived the plaintiff in error of his property without just compensation, was not void as being in conflict with the fifth amendment of the federal constitution. Chief Justice MARSHALL, delivering the unanimous judgment of the court, said: “The question presented is, we think, of great importance, but not of much difficulty. The constitution was ordained and established by the people of the United States themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution provided such limitations and restrictions

on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The power they conferred on this government was to be exercised by itself, and the limitations on power, if expressed in general terms, are naturally and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes.” This language would be equally decisive if applied to any of the first ten amendments. Again, in *Fox v. The State of Ohio*, 5 How. 410, 434, it is declared that the prohibitions contained in the amendments to the federal constitution “were not designed as limits upon the state governments in reference to their own citizens. They are exclusively restrictions upon federal power, intended to prevent interference with the rights of the states and of their citizens.” “Such, indeed,” said Mr. Justice DANIEL, in delivering the opinion of the court, “is the only rational and intelligible interpretation which these amendments can bear, since it is neither probable nor credible that the states should have anxiously insisted to engraft upon the federal constitution restrictions upon their own authority—restrictions which some of the states regarded as the sine qua non of its adoption by them.” So, also, it was held in *Smith v. The State of Maryland*, 18 How. 71, 76, that the provision of the fourth amendment of the federal constitution which prohibits the issuing of a warrant, “but upon probable cause, supported by oath or affirmation,” had no application to the process of the state courts. Language equally decisive will be found in *Withers v. Buckley*, 20 How. 84, 90; *Twichell v. The Commonwealth*, 7 Wall. 321, and in other cases decided by the same court.

In view of these decisions of the only court whose interpretations of the federal constitution are binding and decisive, there would seem to remain no doubt that if the question should ever arise in that court it would be held that the second amendment of the federal constitution is restrictive upon the general government merely, and not upon the states, and that every state has power to regulate the bearing of arms in such manner as it may see fit, or to restrain it altogether.

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The Constitutional Right to Keep and Bear Arms

Lucilius A. Emery

THE federal and most of the state constitutions contain a provision guaranteeing to the people “the right to keep and bear arms.” Judge Cooley in his well-known and standard work on Constitutional Limitations, published in 1868, wrote of this provision: “How far it may be in the power of the legislature to regulate the right we shall not undertake to say. Happily there neither has been nor, we may hope, is there likely to be much occasion for an examination of that question by the courts.” That hope is now fast disappearing. The greater deadliness of small firearms easily carried upon the person, the alarming frequency of homicides and felonious assaults with such arms, the evolution of a distinct class of criminals known as “gunmen” from their ready use of such weapons for criminal purposes, are now pressing home the question of the

reason, scope, and limitation of the constitutional guaranty of a right to keep and bear arms,—of the extent of its restraint upon the legislative power and duty to prohibit acts endangering the public peace or the safety of the individual.

The guaranty does not appear to have been of a common-law right, like that of trial by jury. On the contrary, it was as early as 1328 declared by the Statute of Northampton, 2 Edw. III, ch. 3, that no man should “go nor ride armed by night or by day in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere upon pain,” etc. Such conduct was probably regarded as tending to terrify peaceful people and to provoke breaches of the peace. At any rate, it was indictable under the common law. Naturally the Statute of Northampton and the practice under it became the common law of the English colonies in America.¹ Further, a statute of 22 Car. II, ch. 25, § 3, provided that no person who had not lands of the yearly value of £100 other than the son and heir of an esquire or other person of higher degree, should be allowed even to keep a gun. Whatever the purpose of this statute, whether to preserve game or the public peace, (pg.474) yet read in connection with the earlier statute of Edward III, it shows that a right to keep and bear arms was not regarded as a fundamental right of every Englishman.

On the other hand, from very early times landed proprietors were required to have in readiness, according to their degree and estate, specified arms and equipments and men-at-arms at their own expense for military service when required by the government. These landed proprietors, with their tenants and retainers thus armed, constituted the military forces, the milites, the militia of the kingdom. At the time of the restoration of the monarchy in the person of Charles II, no other armed force was recognized as lawful.

That king, however, having seen during his exile in France the autocratic power of a king possessing a standing army independent of the people and under his sole control, began himself to form the nucleus of such an army by organizing a body of soldiers as guards of his court and person, and armed, equipped, and paid out of the royal revenues. His successor, James II, increased this nucleus into a regular army for general military service, greatly to the dissatisfaction of his subjects, Whig and Tory alike. Finally, after the suppression of Monmouth's rebellion, he caused many of

his Protestant subjects of militia status to be deprived of their arms on the plea that it was necessary for the preservation of the peace and the security of the government. In the Declaration of Rights proclaimed by the Convention Parliament after the flight of James, these acts were recited as having been on his part an “endeavor to subvert and extirpate the laws and liberties of this kingdom” and as “contrary to law.” In the subsequent statutory Bill of Rights based on that Declaration, it was enacted “That the raising or keeping a standing army within the kingdom in time of peace unless it be with the consent of parliament is against the law.” It was also enacted in the next clause “That the subjects which are Protestants may have arms for their defense suitable to their condition, and as allowed by law.”

It is quite evident from the foregoing that in the seventeenth century in England the assertion of the right of Protestant subjects to have arms was to preserve “the laws and liberties of the Kingdom” and not at all to enable a subject to violate them.

In the American colonies, with their small revenues and beset (pg.475) as they were with savage and other enemies, it was deemed necessary that every man of military age and capacity should provide himself with arms and be ready to bear them in defense of himself and his neighbors and the colony at large. Accordingly every man of military age and capacity was enrolled for military service and was required by law to provide and keep at his own expense specified arms and equipments for such service. The colonies had no other means of defense against foreign or domestic enemies, as they maintained no standing armies whatever. The only regular troops in the colonies were those sent out from England and under the direct command of royal instead of colonial officers. The presence of these troops in times of peace was very distasteful to the people of the colonies. One of the grievances recited in the Declaration of Independence was that the king had kept among the people of the colonies in times of peace standing armies without the consent of their legislatures.

Through their long controversies with the king and Parliament as to their respective rights, the people of the colonies had become familiar with English political history and the various charters of English liberties, including the Bill of Rights of the time

of William and Mary. In this list the clauses relating to standing armies and the right of the subjects to have arms for their defense were closely related. This right and a reliance on a citizen soldiery or militia were coupled together in their thought and experience, and we find that connection more or less clearly expressed in the American Bills of Rights.

In the federal Bill of Rights the language is: "A well-regulated militia being necessary for the security of a free state, the right of the people to keep and bear arms shall not be infringed." The fear that standing armies may be dangerous to "the laws and liberties" of the people is expressed in the constitutional provision that no appropriation of money for raising and supporting armies shall be for more than two years, and that there should be no quartering of soldiers on the people in time of peace.

In the Massachusetts Bill of Rights the language is: "The people have a right to keep and bear arms for the common defense, and as in times of peace armies are dangerous to liberty, they ought not to be maintained without consent of the legislature." In that of Connecticut: "Every citizen has a right to bear arms in defense (pg.476) of himself and the state." In that of Pennsylvania: "The right of the citizens to bear arms in defense of themselves and the state shall not be questioned." In that of South Carolina: "The people have a right to keep and bear arms for the common defense." In that of Virginia: "A well-regulated militia composed of the body of the people is the proper, natural, and safe defense of a free state." In some of the states the language is condensed into "The right of the people to keep and bear arms shall not be infringed."

But, however concise the language of the provision, it should be construed in connection with the well-known objection to standing armies and the general belief in the need and sufficiency of a well-regulated militia for the defense of the people and the state. Thus construed it is a provision for preserving to the people the right and power of organized military defense of themselves and the state and of organized military resistance to unlawful acts of the government itself, as in the case of the American Revolution. To quote Bishop, Statutory Crimes, § 793: "In reason the keeping and bearing of arms has reference to war and possibly also to insurrections where the forms of war are so far as possible observed." The phrase

itself, “to bear arms,” indicates as much. The single individual or the unorganized crowd, in carrying weapons, is not spoken of or thought of as “bearing arms.” The use of the phrase suggests ideas of a military nature.

From the foregoing premises I think there are deducible several propositions as to the power of the legislature to restrict and even forbid carrying weapons by individuals, however powerless it may be as to the simple possessing or keeping weapons.

The constitutional guaranty of a right to bear arms does not include weapons not usual or suitable for use in organized civilized warfare, such as dirks, bowie knives, sling shot, brass knuckles, etc., and the carrying of such weapons may be prohibited. Only persons of military capacity to bear arms in military organizations are within the spirit of the guaranty. Women, young boys, the blind, tramps, persons non compos mentis, or dissolute in habits, may be prohibited from carrying weapons. All persons may be forbidden to carry concealed weapons. Military arms may not be carried in all places even by persons competent to serve in the militia. They may be excluded from courts of justice, polling places, school houses, churches, religious and political meetings, legislative halls and the like. So the carrying of even military arms in street parades and other public demonstrations may be forbidden.² In *Presser v. Illinois*, 116 U.S. 264, in speaking of a statute of Illinois, the court said:

“We think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms.”

Lastly, I submit that the right guaranteed is not so much to the individual for his private quarrels or feuds as to the people collectively for the common defense against the common enemy, foreign or domestic. The guaranty is to insure the safety of the people, their “laws and liberties,” against assaults from any source or quarter, but not to give individuals singly or in groups uncontrollable means of aggression upon the rights of others. Granting that the individual may carry weapons when necessary for his personal defense or that

of his family or property, it is submitted that he may be forbidden to carry dangerous weapons except in cases where he has reason to believe and does believe that it is necessary for such defense. In fine, I venture the opinion that, without violence to the constitutional guaranty of the right of the people to bear arms, the carrying of weapons by individuals may be regulated, restricted, and even prohibited according as conditions and circumstances may make it necessary for the protection of the people.

Lucilius A. Emery.

MAINE

1. Bishop, STATUTORY CRIMES, § 784.
2. Commonwealth v. Murphy, 166 Mass. 171, 44 N.E. 138 (1896).

Legal and Historical Aspects of the Militia

S.T. Ansell

Since the President's call of the organized militia, or National Guard, of the several states into the service of the United States on June 18th last, I have frequently represented the military officers made respondents in the numerous habeas corpus proceedings brought on various grounds of alleged invalidity, usually minority, for the release of some member of the forces subjected to the call. I have found among eminent counsel and judges alike a lack of definite and discriminating comprehension, frankly acknowledged, as to what our militia is, and its relation, when called into federal service, to the Army of the United States. Indeed, more than once I was asked from the bench, "What is the militia anyway?" The gist of what I have attempted to say in response to such questions

may be of general professional interest, especially in this moment of reawakened interest in our military establishment.

MILITIA AN ANGLO-SAXON INSTITUTION

History and law concur in showing that the militia is an Anglo-Saxon institution. They also show beyond question that, as such, the militia from its obscure origin in Saxon times has been composed of all subjects and citizens capable of bearing arms, regardless of age or parental authority. The militia system has never recognized as affecting those parental rights over minors which are recognized in the civil relations. True it may be that from the earliest times the State has designated as liable to service those between certain ages; but this has always been a selection, made out of the entire body of the militia, of those best fitted and circumstanced to receive the training and to render the service with least disturbance to the normal economic and industrial life of the State, not for the purpose of recognizing or establishing in the parent a right to avoid a minor son's obligation to serve. Such ages of selection have always been well below twenty-one, the age of majority in the private relations, and in all periods those younger than the minimum age limit, if desirous and physically able to serve, have been permitted to do so at the option of the Government.

As an Anglo-Saxon institution the militia in its essentials and basic principles is common alike to both England and the United States. As an institution it expresses the fundamental conception of the relations of freemen to their State. For fifteen centuries it has been a fundamental principle of Anglo-Saxon government—a fact that seems to be quite generally ignored—that every citizen capable of bearing arms owes, in return for his liberty and protection, the duty of personal service to protect and defend his government in time of need. At its base it is an obligatory and not a volunteer system, though, chiefly perhaps because the ordinary need of the State requires the service of far less than the number available, in England until recently, and here as well, the service seems to have been regarded not as a bounden duty but as necessarily voluntary, as, of course, it is under the policy legislatively established. The Colonists brought with them here the militia system indigenous to

the land of their origin. While England has turned away from that system in her present peril, as history shows she has so frequently done in like crises, the American Government on the contrary by the recent enactment of the National Defense Act has the more firmly embraced that system, including the modifying departures from basic principle, and has sought to find therein its chief reliance and protection against apprehended national dangers. Of course, England has never been troubled by that prominent constitutional feature of our own militia system—divided control over it by the states and the nation.

THE MILITIA OF ENGLAND

Like many another Anglo-Saxon institutions, the militia has passed through the historic cataclysms of England-in-the-making for fifteen centuries, and has, consequently, been modified by them but not basically changed. Until recently the system in its essentials remained as it was in its origin. The Anglo-Saxon maintained an allodial theory of land ownership, which was the measure of the military service he was obliged to render when called upon by the king in the three contingencies of *trinoda necessitas*. Military quotas were assigned, usually one soldier to every five hydes (a land measure); the freeholder of more than five hydes was compelled to furnish a substitute for each additional five, and, if the land was granted to tenants, the obligation to serve ran with the land. In the earliest Saxon times <pg.473>there was no age-selected class, but in the days of Alfred the obligation was primarily imposed upon those between sixteen and sixty years of age. Aspiring youths frequently commenced, however, to prepare for their military duties at an earlier age. Such age limits imposed no limitation upon the State in favor of the parent. Such was not its purpose. It was imposed for the State's own benefit.¹This Anglo-Saxon system, which recognized no parental right to which the State deferred, but which asserted its right to the military service of all regardless of other relations, reached its highest development under King Alfred.²

The particular system established by Alfred succumbed with the introduction into England, upon the Conquest, of a system of feudal military service, which itself, however, soon declined and was

supplanted by the Anglo-Saxon system resurrected in a somewhat different form but without substantial change. Dependence for security at home thus again reverted to the posse comitatus armed for military service. This force was called the militia, and the system thus organized and which remained until very recent times was one, "the general scheme of which," as Blackstone said, "was to discipline a certain number of the inhabitants of every county."³ All men capable of bearing arms, regardless of age, were liable for service and were enrolled for such service, and from them volunteers or drafted men were trained and constituted what were known as "Trained Bands," the forerunner of the organized as distinguished from reserve militia. These "Trained Bands" were known and established in all American colonies. In the organization immediately after the Conquest, both law and history are obscure as to the designated age of the militia, if any, to be selected first for training and service; but in theory, and perhaps in practice, every subject capable of bearing arms, regardless of his age, was compelled to furnish himself with arms and present himself prepared for the maintenance of the king's peace.⁴ A century afterwards a fresh "assize" of arms was ordered by <pg.474>the Statute of Wynton, which enacted that every man between the ages of fifteen and sixty, practically the ages prescribed by Alfred, should be assessed and sworn to keep armor for the protection of his lands and goods.⁵ The Statute of Winchester⁶ declared the age of the selected militia as between fifteen and sixty; so also did the Article of Inquiry of 1306.⁷ The Statute of Winchester was directed to be observed and kept by 5 Henry IV, chap. 3.⁸ Such was the situation, as regards designated ages, at the time of the settlement of the Colonies. From 1306 to 1860 the system, of course, underwent many reorganizations,⁹ but the essential principles remained the same. It has always been a rule of English law applicable to all military service that "an enlistment is a valid contract, although entered into by a person under twenty-one years of age, who, by ordinary rules of law, except where modified by statute, cannot, as a general rule, contract any engagement."¹⁰

THE MILITIA OF THE UNITED STATES

When the Anglo-Saxon stream divided, the militia system of that time came with us. No other American institution bears a

closer resemblance to its ancient English ancestor than our militia. An examination of historic state documents of the colonies shows that all the essentials of the English system were established here. Just as the Second Amendment of our Constitution was borrowed from the Bill of Rights of 1688, so did our colonial legislatures adopt the militia laws of the Motherland. The laws of the Colonies as a rule made no mention of the age of those required to render military service, though an exception is found in Massachusetts where it was provided “that every person, with certain specified exceptions, above the age of sixteen is required to serve in a military capacity.”¹¹ Clearly the purpose <pg.475>was, then, as it has been ever since, to designate those first liable, and not to create or recognize parental authority.

In such a sense the term “militia” must have been used in the several clauses of the Constitution granting a federal control over it.¹² As was said in Lodge’s FEDERALIST: “Of course, it was necessary for the legislature to form out of the whole body of militia a selected corps of moderate extent upon such principles as will really fit them for service in case of need.”¹³ Madison, also, in the FEDERALIST, refers to a militia of half a million citizens, evidencing the sense in which he understood the term.¹⁴ The Constitution, in like manner, used the term “militia” in its common-law and colonial sense.¹⁵

In this country it is generally prescribed, for purposes of organization, that those who compose the militia shall be citizens between eighteen and forty-five years, but it is our view, for reasons suggested and upon the authorities discussed hereinafter, that such a designation of age limits, in and of itself, establishes no parental rights as against the state and has nothing to do with parental consent. An examination of the militia laws of the United States and the several states shows convincingly that, notwithstanding such a prescription of age limits, if parental consent is to be required, it must be so declared by statute.¹⁶ Of course, all state law upon the subject of militia organization, <pg.476>including age limits, is in abeyance, since the National Defense Act so completely covers that field. Federal law alone governs.¹⁷

MILITIA AS DISTINGUISHED FROM FEDERAL ARMY

The militia is an English institution and was established and

maintained in the Colonies and later in the several states prior to the adoption of the Constitution. It is a state as distinguished from a federal institution.¹⁸ Federal control over the militia is established by the Constitution wherein it provides that Congress shall have power:

“To provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasions.”¹⁹

“To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.”²⁰

“The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States.”²¹

And in the amendments it is provided:

“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.”²²

“No person shall be held to answer for capital or otherwise <pg.477>infamous crime unless on a presentment and indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger....”²³

The militia is not a federal army even when employed in federal service. The Army of the United States is exclusively a federal institution, raised, maintained, and governed directly and exclusively

by the federal power under the following constitutional grants:

“That Congress shall have power to provide for the common defense”²⁴

“Congress shall have power to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years.”²⁵

“Congress shall have power to make rules for the government and regulation of the land and naval forces.”²⁶

“The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States”²⁷

These powers of Congress are plenary and exclusive, and the armies resulting from their exercise are the Armies of the United States. Such armies may be raised as Congress sees fit, by voluntary enlistment or compulsory draft, and they may exist as a regular establishment standing ready and available for service at all times and in all places, or temporarily for more or less definite periods and purposes. The Armies of the United States known to us in the course of our history are the Regular Army, the Volunteer Army, and, as applying to those raised compulsorily, the Drafted Army. The classification is in no sense descriptive or scientific. The Regular Army is the professional, standing establishment, continuously existing in peace and war, and, with reference to the method of obtaining the services of the citizens composing it, is as much a volunteer army as the Volunteer Army itself; the Volunteer Army is the army which Congress habitually raises for time of war to supplement the Regular Army, its existence is limited to the duration of the war, and it <pg.478>is composed of volunteers, hence the designation which would apply with equal appropriateness to the regular establishment; the Drafted Army, composed of all whose services are compelled instead of volunteers.²⁸ These armies exist solely according to the will

of Congress and are available to perform the national will whenever and wherever ordered, without limitation as to place or otherwise.²⁹ From such army, or armies, the Constitution sharply differentiates the militia.

The militia is not a part of the “land forces” of the United States which Congress may govern and regulate under clause 14, section 8, Article 1, of the Constitution, for special provision is made or the government of such part of it as may be employed in the service of the United States in clause 16 of the same section. Neither is the militia a part of the “land forces” of the United States as the term is used in the Fifth Amendment, which excepts cases arising in such forces from the requirement of grand jury proceedings; for, in addition, the exception is expressly made applicable to the militia, when in actual service, in time of war or public danger. It is not a part of the Army of the United States of which the Constitution makes the President Commander-in-Chief;³⁰ for the same clause expressly makes him Commander-in-Chief also of “the militia of the several States when called into the actual service of the United States.” It is primarily a state and citizen soldiery rather than a national and professional soldiery. It is primarily a state institution. The United States has only a limited control over it for the limited purposes expressed by the Constitution. It cannot be used, therefore, as a national soldiery for the general military purposes. Its federal use as such is limited to home service.³¹ The course of legislation and judicial decision has always marked the distinction.³²<pg.479>

THE NEW NATIONAL GUARD

This new force created by the National Defense Act of 1916 must be considered in its relation to (1) the militia, and (2) the Federal Army. The term National Guard denominating this new force must not be confused with the same term heretofore commonly adopted by the several states and recognized by the Dick bill.

The militia, as indicated, when defined in the most general sense and as the term is used in the Constitution, has reference to the whole body of arms-bearing citizens. Of course, Congress and, in the absence of federal legislation, the several states may further restrict the term in a legislative sense by prescribing age limits, qualifications

and the like, as Congress formerly did in section 1 of the Dick bill,³³ and has more recently done in the National Defense Act as follows:

“The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age, except as hereinafter provided, not more than forty-five years of age...”³⁴

The militia, thus legislatively defined, was divided by the Dick bill into (1) Organized Militia, that part of the militia arranged in the military organizations and known as the National Guard of the State, Territory or the District of Columbia, or as otherwise denominated by local law; and (2) Reserve Militia, consisting of all militia not so organized. The corresponding terminology of the National Defense Act is (1) the National Guard, and (2) the Unorganized Militia.

But “the National Guard” under the National Defense Act³⁵ is something more than was the National Guard, or organized militia, of the several states under the Dick bill.³⁶ Under that bill National Guard, or any other local designation, was simply alter nomen for organized militia; but the National Guard under <pg.480>the recent National Defense Act consists of the organized militia of the several states not in that single, simple status as such, but with an additional federal status required of it whereby it assumes new and onerous obligations to render military service to the Federal Government, the exact scope and extent of which are not easily determined from the language of the act; that is, the National Guard under the Hay bill has the status of the National Guard under the Dick bill, plus the new status of so-called federalization created by the new bill. The National Guard, then, is organized militia placed in a special federal status. The grave question is: Whence came the federal power to impose the new and additional status of the militia of the several states? Is the source of authority to be found in the “power” to provide for organizing, arming and disciplining the militia,³⁷ or in the power “to raise and support armies?”³⁸ Or is it not to be found at all? Is

the National Guard still but the militia of the several states subject only to the limited constitutional use of the federal government, or is it indeed an army of the United States over which the power of Congress is unlimited? The question is fundamental, and though it received scant consideration in Congress, it may be expected to persist, if not to plague. I do no more than suggest the query with its train of constitutional difficulties, whichever way it be looked at. The lawyer disposed to consider it will encounter a host of difficulties in endeavoring to keep the authority exercised by Congress within the scope of its power over the militia as such, and a task almost or quite as strenuous in attempting to reconcile what Congress did with what it can do under its power to raise armies. The act is prickly with doubt, and it is not over-cautious to say that it will be a long time before judicial authority will have shown the way of handling it with assurance.

S. T. ANSELL.

MAJOR AND JUDGE ADVOCATE, U. S. A.

END NOTES

1. See Turner, *History of the Anglo-Saxons*, Vol. IV, chap. 54; Samuel, *History of the British Army*, p. 4; Ms. Studies of the subject by Major I. L. Hunt, Judge Advocate, U. S. A., available to me through his kindness.
2. Blackstone, *Commentaries* (ed. Cooley) Book I, chap. 13, pp. 410, 413.
3. *Ibid.*, p. 413.
4. (1154) 27 Henry II.
5. Clode, *Military Forces of the Crown*, Vol. I, p. 31, citing the Statute of Winchester.
6. (1285) 13 Edw. I, chap. 6; 1 St. Realm, p. 97.
7. 1 St. Realm, p. 246.
8. (1403) 2 St. Realm, p. 144.

9. (1661) 13 Chas. II, chap. 6; (1662) 14 Chas. II, chap. 3; (1663) 15 Chas. II, chap. 4; (1757) 30 Geo. II, chap. 25; (1761) 2 Geo. III, chap. 20; (1802) 42 Geo. III, chap. 90; (1852) 15 and 16 Vict., chap. 75.

10. British War Office, *Manual of Military Law* (1914) p. 191, citing Clode, *Military Forces of the Crown*, Vol. II, p. 34; *Rex v. Rotherfield Greys* (1823) 1 B & C, 349, 350; *Rex v. Hardwick* (1821) 5 B & Ald. 176.

11. (1694) *General Laws and Liberties of Massachusetts*.

12. See Elliot, *Debates*, Vol. II, pp. 312-368, et passim.

13. P. 171.

14. No. 46.

15. See Story, *Commentaries on the Constitution*, Vol. II, sec. 1207; *Opinion of the Justices* (1866) 14 Gray (Mass.) 614; *Ex parte Coupland* (1862) 26 Tex. 387, 396; *Kneedler v. Lane* (1863) 45 Pa. St. 238; Cooley, *Constitutional Principles*, p. 100; Kent, *Commentaries*, p. 265.

16. Looking for the present at the state constitutions and laws it will be seen that the constitutions of the following states prescribe the age limits of eighteen and forty-five years, without mention of parental consent: Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, North Dakota, Ohio, Oregon, Michigan, Missouri, Montana, South Dakota, Utah, Virginia, Washington, Wyoming.

The constitutions of the following states make no mention of age limits: Alabama, California, Connecticut, Delaware, Louisiana, New Jersey, Nebraska, Nevada, Pennsylvania, Rhode Island, Texas, Vermont, West Virginia, Wisconsin.

Statutes of the following states prescribe age limits without mention of parental consent: California, District of Columbia, Florida, Georgia, Arizona, Arkansas, Hawaii, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, North Dakota, Pennsylvania, Ohio, Oklahoma, Tennessee, Rhode Island, Utah, Vermont, Virginia, Washington, Wisconsin, Wyoming.

Statutes of the following states require parental consent for

the enlistment of a minor: Connecticut, Idaho, Louisiana, Illinois, Maryland, Nebraska, North Carolina, New Hampshire, New York, South Dakota, Texas, Oregon, West Virginia.

17. *Houston v. Moore* (1820) 5 Wheat. (U.S.) 1.

18. See Thorpe, *Federal and State Constitutions and Colonial Charters*, passim; *Articles of Confederation*, Art. VI; Watson, *The Constitution*, Vol. I, p. 690; see generally *Houston v. Moore* (1820) Wheat. (U.S.) 1; *Luther v. Borden* (1849) 7 How.(U.S.) 1; *Martin v. Mott* (1827) 12 Wheat. (U.S.) 19; Elliott, *Debates*, Vol. II, pp. 292-309; *FEDERALIST*, No. 29.

19. Art. I, sec. 8, cl. 15.

20. Art. I, sec. 8, cl. 16.

21. Art II, sec. 2, cl. I.

22. Amend., Art. II.

23. Amend., Art. V.

24. Art. I, sec. 8, cl. 1.

25. Art. I, Sec. 8, cl. 12.

26. Art. I, sec. 8, cl. 16.

27. Art. II, sec. 2, cl. I.

28. Such armies constitute what is known as the "Army of the United States" in Art. II, sec. 2, cl. 1, *supra*; "armies" in Art. I, sec. 8, cl. 12, *supra*; and "land forces" in Art. I, sec. 8, cl. 16 and Amend., Art. V, *supra*.

29. *Tarble's Case* (1871) 13 Wall. (U.S.) 397, 408; *Dines v. Hoover* (1857) 20 How. (U.S.) 65; *Johnson v. Sayre* (1895) 158 U.S. 109, 114; *in re Grimley* (1890) 137 U.S. 147, 153; *Ex parte Milligan* (1866) 4 Wall. (U.S.) 2, 139; *United States v. Sweeney* (1894) 157 U.S. 281, 284.

30. Art. II, sec. 2, cl. 1.

31. 27 Op. Atty. Gen. 322.

32. *A. Gt. So. R. R. v. United States* (1914) 49 Ct. Cl. 522; *McClaghry v. Deming* (1902) 186 U.S. 49, 51, 58; *Kneedler v. Lane* (1863) 45 Pa. St. 238; *McCall's Case* (1863) 5 Phil. 259, Fed. Cas.

8669; *Burroughs v. Peyton* (1864) 16 Gratt. (Va.) 470, 483; *Dunne v. People* (1897) 94 Ill. 120.

33. (1903) 32 St. at L. 775.

34. Sec. 57.

35. Sec. 1

36. Sec. 57

37. Art. I, Sec. 8, cl. 16

38. Art I, sec. 8, cl. 12

The Lost Amendment

by Robert A. Sprecher*

THE WISDOM OF THE Founding Fathers has proved to have been “infinite” enough to enable the United States for almost the first two hundred years of its history to exist and prosper under its 1789 Constitution with remarkably few amendments. Insofar as the tremendous scientific and technological advances during this time have resulted in a constantly shifting economy and in vastly changed political and social environments, the framework of the original document has proved durable enough to encompass great flexibility through the device of judicial interpretation.

Even before, but especially since, the advent of ever-

potential atomic warfare, can any continuing meaning be derived from the Second Amendment? It provides that: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”

Does the Second Amendment guarantee extend to the keeping and bearing of arms for purely private purposes not connected with the maintenance of a militia? Do the citizens of the United States now need, or will they ever need, the “right” (as opposed to any possible duty) to bear arms either for private purposes or for maintaining a militia?

Except for the Third Amendment, prohibiting the quartering of soldiers in private houses, no amendment has received less judicial attention than the second. However, courts have been confronted with none or few Third Amendment cases because there is universal agreement as to its meaning and desirability,¹ whereas the Second Amendment is not at all clear in its meaning and reasonable minds have differed widely as to the desirability of any assigned interpretation. Lacking the thorough judicial treatment accorded most of the guarantees of the Bill of Rights, the history of both the right (or duty) to bear arms and of the militia becomes important.

Plato, observing in about 340 B.C. that “no man can be perfectly secure against wrong ... and cities are like individuals in this”, counseled that

... Wherefore the citizens ought to practise war—not in time of war, but rather while they are at peace. And every city which has any sense, should take the field at least one day in every month, and for more if the magistrates think fit, having no regard to winter cold or summer heat; and they should go out en masse, including their wives and their children ... and they should have tournaments, imitating in as lively a manner as they can real battles.²

About the same time Aristotle noted that oligarchies prevailed where the land was adapted for cavalry or heavy infantry

since only the rich could afford horses or cannon, while democracies existed in countries suitable for the light arms owned by most citizens.³ “Citizen soldiers” early became identified with democratic government.

Rousseau looked back in history and found that

... all the victories of the early Romans, like those of Alexander, had been won by brave citizens, who were ready, at need, to give their blood in the service of their country, but would never sell it. Only at the siege of Veii did the practice of paying the Roman infantry begin.... [The mercenaries’] swords were always at the throats of their fellow-citizens, and they were prepared for general butchery at the first sign. It would not be (pg.555) difficult to show that this was one of the principal causes of the ruin of the Roman Empire.⁴

Machiavelli detected a similar pattern in Italy:

[Mercenaries] are useless and dangerous ... disunited, ambitious and without discipline, unfaithful, valiant before friends, cowardly before enemies; they have neither the fear of God nor fidelity to men....

... the ruin of Italy has been caused by nothing else than by resting all her hopes for many years on mercenaries....⁵

Adam Smith concluded in *The Wealth of Nations* that:

Men of republican principles have been jealous of a standing army as dangerous to liberty.... The standing army of Caesar destroyed the Roman republic. The standing army of Cromwell turned the Long Parliament out of doors.⁶

Mercenaries and standing armies began to be identified with

imperialism, suppression of individual liberty and, eventually, moral and economic decay. Toynbee ascribed as one cause of the breakdown and disintegration of civilizations the “suicidalness of militarism”.⁷

As in the history of Greece, Rome, Italy and other European countries, English history traces a similar parallel development of the concept of a “militia” in place of mercenaries or standing armies, and the right (or duty) of individual citizens to keep and bear arms.

Blackstone recorded that King Alfred (871-899) first organized a national militia in Anglo-Saxon England and “by his prudent discipline made all the subjects of his dominion soldiers”.⁸ Throughout feudal England, and indeed from 1066 to 1660, “knight service” required a lord to do military service in the King’s host accompanied by the number of knights required by his tenure, a duty which was in the late stages fulfilled by the payment of money instead of service. Thus arose a concept of “duty to bear arms”.⁹

For a long time after the Norman conquest in 1066, the authority of the monarch was almost unlimited. “Inroads were gradually made upon the prerogative, in favor of liberty, first by the barons, and afterwards by the people, till the greatest part of its most formidable pretensions became extinct.”¹⁰ Among the other rights and promises extracted from King John by the twenty-five barons at Runnymede on June 15, 1215, was that “And immediately after the re-establishment of peace we will remove from the kingdom all foreign-born soldiers, crossbow men, servants, and mercenaries who have come with horses and arms for the injury of the realm.”¹¹

After Magna Charta the monarchy was held reasonably in restraint until Charles I (1625-1649) tried to govern through the army and without Parliament, a reign followed by the rigorous military rule of Oliver Cromwell.¹² Charles II (1660-1685) maintained a peacetime standing army of 5,000 and James II (1685-1688) increased this number to 30,000 in his fight against Parliament and the people.¹³

The English Bill of Rights, presented to William and Mary in 1688 as a protest against grievances committed by James II, complained that he had endeavored to “subvert and extirpate the

protestant religion, and the laws and liberties of this kingdom.... 6. By causing several good subjects, being protestants, to be disarmed, at the same time when papists were both armed and employed, contrary to law”, whereupon it was declared:

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.

7. That the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law.¹⁴

Not only was the English Bill of Rights largely declarative of rights which were conceived to have existed theretofore,¹⁵ but those rights persisted in England long beyond their religious significance, so that in 1765 when Blackstone catalogued the methods by which the absolute rights of man (personal security, personal liberty and private property) were secured, he listed:

1. The constitution, powers and privileges of parliament;

2. The limitation of the king’s prerogative, by well-defined bounds, which cannot be legally exceeded, except by the consent of the people;

3. The right of everyone to apply to courts of justice for the redress of injuries;

4. By petition for redress; and

5. By bearing arms for defense and these must be “suitable to [the] condition and degree [of the subject], and such as are allowed by law”.¹⁶

Blackstone epitomized the common law view of militias and standing armies as it existed immediately prior to the American Revolution:

In a land of liberty, it is extremely dangerous to make a distinct order of the profession of arms ... no man should take up arms, but with a view to defend his country and its laws; he puts not off the citizen when he enters the camp. The laws ... [of England] know no such state as that of a perpetual standing soldier, bred up to no other profession than that of war....

Nothing then ... ought to be more guarded against in a free state than making the military power ... a body too distinct from the people... [I]t should wholly be composed of natural subjects; it ought only to be enlisted for a short and limited time; the soldiers also should live intermixed with the people....¹⁷

By the time of the American Revolution, the term “militia” had a well-defined meaning. In 1776 Adam Smith wrote that “In a militia, the character of the labourer, artificer, or tradesman, predominates over that of the soldier; in a standing army, that of the (pg.556) soldier predominates over every other character; and in this distinction seems to consist the essential difference between those two different species of military force.”¹⁸ It was that portion of the manpower of a society which is enrolled on military rosters and is at least partially trained for local defense in short terms of service.¹⁹ The Supreme Court of the United States said that “the militia comprised all males physically capable of acting in concert for the common defense” and “ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time,” together with a supply of ammunition therefor, a blanket, knapsack and canteen.²⁰

Also by the time of the Revolution it was apparent that free citizens had some kind of a right to bear arms, but it was not as unassailable a right as, for example, the right to a jury trial. It has been said that “Weapon bearing was never treated as anything like an absolute right by the common law.”²¹ Such statements are based primarily upon the Statute of Northampton of 1328 which declared

that no man should “go nor ride armed by night or by day in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere”.²² Blackstone commented: “The offense of riding or going armed with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land, and is particularly prohibited by statute.... By the laws of Solon, every Athenian was finable who walked about the city in armor.”²³ This was part of the common law which was adopted by the various states.²⁴

British troops were quartered at Boston from 1768 until the Revolutionary War to harass and intimidate the people. The Battle of Lexington on April 19, 1775, occurred while the British were marching to Concord to seize the colonists’ arms.²⁵ The Declaration of the Causes and Necessity of Taking Up Arms of July 6, 1775, cited as one cause of war: “The inhabitants of Boston ... accordingly delivered up their arms, but in open violation of honour, in defiance of the obligation of treaties, which even savage nations esteemed sacred...”²⁶

Even the Englishman Tom Paine, who had watched the first motley citizen army line up in Philadelphia Commons in 1775, some with only sticks as weapons, less than a year later wrote that “The Continent hath at this time the largest body of armed and disciplined men of any power under Heaven; and is just arrived at that pitch of strength, in which no single colony is able to support itself, and the whole, when united, is able to do anything.”²⁷

A year later the Declaration of Independence protested that George III had “affected to render the military independent of, and superior to the civil power”.²⁸

The right to bear arms was secured in the early constitutions of Virginia (1776),²⁹ North Carolina (1776),³⁰ New York (1777)³¹ and Massachusetts (1780)³² in the context of the militia, but the constitutions of Pennsylvania (1776) and Vermont (1777) contained identical provisions which secured an absolute right to bear arms: “That the people have a right to bear arms for the defense of themselves and the State...”³³

Some of the states did not adopt a constitutional provision regarding the right to keep and bear arms, but of those which did, many granted that right to the individual for the purpose of defending “himself and the state”, thereby apparently intending that the individual might bear arms in his own (pg.557) private defense.³⁴ At the same time the Articles of Confederation, approved in 1781, provided that “every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred”.³⁵

“There was a protracted controversy in the Constitutional Convention over whether there should be a standing army or whether the militia of the various states should be the source of military power.”³⁶ The Constitution as agreed upon by the convention on September 17, 1787, contained provisions designed to keep military power under the civilian control of Congress, the President and the people, and under the dual control of the Federal Government and the states:

The Congress shall have Power ...
To raise and support Armies, but no Appropriation
of money to that Use shall be for a longer Term
than two Years; ...³⁷

To provide for calling forth the Militia to execute
the laws of the Union, suppress Insurrections and
repel invasions;...³⁸

To provide for organizing, arming, and disciplining,
the Militia, and for governing such Part of them
as may be employed in the Service of the United
States, reserving to the States respectively, the
Appointment of the Officers, and the Authority
of training the Militia according to the discipline
prescribed by Congress;...³⁹

The President shall be Commander in Chief ... of the Militia of the several States, when called into the actual Service of the United States...⁴⁰

During the struggle over ratification of the Constitution by the states, Alexander Hamilton considered how the provisions for the militia might best be implemented. After dismissing as impracticable the arming and training of every citizen, he concluded:

The attention of the government ought particularly to be directed to the formation of a select corps of moderate extent, upon such principles as will really fit them for service in case of need. By thus circumscribing the plan, it will be possible to have an excellent body of well-trained militia, ready to take the field whenever the defence of the State shall require it. This will not only lessen the call for military establishments, but if circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens. This appears to me the only substitute that can be devised for a standing army, and the best possible security against it, if it should exist.⁴¹

On June 8, 1789, James Madison introduced his proposed amendments, which included:

The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of

bearing arms shall be compelled to render military service in person.⁴²

In view of the parallel history of the militia and the right (or duty) to bear arms, it is not surprising that the Second Amendment as adopted coupled the two ideas in a single sentence. But history does not warrant concluding that it necessarily follows from the pairing of the concepts that a person has a right to bear arms solely in his function as a member of the militia.

(This is the first of two installments of Mr. Sprecher's winning essay on the Second Amendment and the right to bear arms. The second installment will appear in the July, 1965, issue.)

*[ed: from text callout, which included photo, on page 556] Robert A. Sprecher is the fourth winner of the Weaver essay prize. He was educated at Northwestern University (A.B. 1938, J.D. 1941) and practices in Chicago. He is a member of the Illinois State Board of Law Examiners and has been Chairman of the National Conference of Bar Examiners.

END NOTES

1. Miller, *The Constitution* 646 (1893).
2. Plato, *Laws* viii:829 (Jowett transl.).
3. Aristotle, *Politics*, Book VI, Chapter 7.
4. Rousseau, *Discourse on Political Economy* (38 GREAT BOOKS 380).
5. *The Prince*, Chapter XII (23 GREAT BOOKS 18).
6. Book V, Chapter 1, Part 1 (39 GREAT BOOKS 308).
7. 1 TOYNBEE, *A STUDY OF HISTORY* 336 (2 vol. ed.).
8. 1 BLACKSTONE, *COMMENTARIES* *409.
9. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 333

10. (1929). THE FEDERALIST No. 26, at 160 (Modern Library ed. 1937) (Hamilton).
11. SOURCES OF OUR LIBERTIES 19 (Perry ed. 1959), hereafter cited as SOURCES. The quotation is Chapter 51 of the original Magna Charta, but it was omitted from subsequent reissues, together with several other chapters deemed unnecessary after King John's death in 1216. Id. at 4-5.
12. Reid v. Covert, 354 U.S. 1, 24-26 (1957).
13. THE FEDERALIST No. 26, at 161 (Modern Library ed. 1937) (Hamilton).
14. SOURCES 245-246.
15. 3 MACAULAY, THE HISTORY OF ENGLAND 1311 (Fifth ed. 1913-1915).
16. 1 BLACKSTONE, COMMENTARIES *143-144.
17. Id. at *408, *414.
18. THE WEALTH OF NATIONS, Book V, Chapter 1, Part 1 (39 GREAT BOOKS 304).
19. 15 ENCYC. BRIT. 484 (1961).
20. United States v. Miller, 307 U.S. 174, 179, 180-182 (1939). The Court also noted at 178-179 that "The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion."
21. United States v. Tot, 131 F.2nd 261,266 (3rd Cir. 1942), rev'd on other grounds, 319 U.S. 463.
22. 2 Edw. 3, c. 3.
23. 4 Blackstone, Commentaries *149
24. See State v. Workman, 35 W. Va. 367, 372, 14 S.E. 9, 11 (1891).

For example, Illinois has a statute providing “That the common law of England ... and all statutes or acts of the British Parliament made in aid of, and to supply the defects of the common law” prior to the 1607 “shall be the rule of decision and shall be considered as of full force until repealed by legislative authority.” ILL. REV. STAT. ch. 28, § 1. 25 1 COMMAGER, DOCUMENTS OF AMERICAN HISTORY 89-90 (3d ed. 1943). 26 SOURCES 298.).

25. 1 COMMAGER, DOCUMENTS OF AMERICAN HISTORY 89-90 (3d ed. 1943).

26. SOURCES 298.

27. Common Sense, THE SELECTED WORKS OF TOM PAINE 31 (Modern Library ed. 1937). Adam Smith may have explained the reason for the success of the American Revolutionary War militia when he wrote in THE WEALTH OF NATIONS, Book V, Chapter 1, Part 1 (39 GREAT BOOKS 305): “A militia, however, in whatever manner it may be either disciplined or exercised, must always be much inferior to a well-disciplined and well-exercised standing army.... A militia of any kind, it must be observed, however, which has served for several successive campaigns in the field, becomes in every respect a standing army.” George Washington often became frustrated with the militia: “... [They] come in, you cannot tell how; go, you cannot tell when, and act, you cannot tell where, consume your provisions, exhaust your stores, and leave you at last at a critical moment.” Nevertheless, without them (they constituted 165,000 of his 396,000 troops), victory would have been impossible. 15 ENCYC. BRIT. 485 and 16 ENCYC. BRIT. 146 (1961).

28. Reid v. Covert, supra note 12, at 27 and 29.

29. VA. CONST. (June 12, 1776): “Sec. 13. That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State...”.

30. N.C. CONST. (December 4, 1776): “XVII. That the people have a right to bear arms, for the defence of the State”

31. N.Y. CONST. (1777). A militia was to be kept in readiness for service in time of peace, as well as in war. SOURCES 309-310.

32. MASS. CONST. (October 25, 1780): “XVII. The people have a right to keep and bear arms for the common defence...”.
33. PA. CONST. art. XIII (August 16, 1776); VT. CONST. art. XV (July 8, 1777).
34. For a catalogue of state constitutional provisions, see McKenna, *The Right To Keep and Bear Arms*, 12 MARQ. L. REV. 138, 138-141 (1928).
35. Art. 6, para. 4.
36. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 268 (1960) (dissenting opinion).
37. Art. I, § 8, cl. 12.
38. Art. I, § 8, cl. 15.
39. Art. I, § 8, cl. 16.
40. Art. II, § 2.
41. *The Federalist* No. 29 at 179 (Modern Library ed. 1937)(Hamilton)
42. Sources 421-422

The Lost Amendment (II)

by Robert A. Sprecher

II

In 1833 Justice Story wrote:

The militia is the natural defence 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 citizen to keep and bear arms has justly been considered, as the palladium⁴³ 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.

And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How is it practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.⁴⁴

Since the adoption of the Second Amendment, the Supreme Court has had only four direct occasions to construe it. In 1876 in *United States v. Cruikshank*, 92 U.S. 542, the Court, in holding defective an indictment under the Enforcement Act of 1870 charging a conspiracy to prevent Negroes from bearing arms for lawful purposes, said that the right of the people to keep and bear arms “is not a right granted by the Constitution” and

... The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their

fellow-citizens of the rights it recognizes to [the state power of] ... internal police....⁴⁵

In 1886 the Supreme Court in *Presser v. Illinois*, 116 U.S. 252, held that an Illinois statute which forbade bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, did not infringe the right of the people to keep and bear arms. Although the Court quoted the above language from the *Cruikshank* case, it then proceeded to cast some doubt on whether the Second Amendment restricts only the Federal Government, saying:

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 (pg.666) from performing their duty to the general government.⁴⁶

In 1894 in *Miller v. Texas*, 153 U.S. 535, the Supreme Court held that a Texas statute prohibiting the carrying of dangerous weapons on the person did not violate the Second Amendment since “the restrictions of these amendments [the Second and Fourth Amendments] operate only upon the Federal power, and have no reference whatever to proceedings in state courts”.⁴⁷ In a dictum in *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897), the Court observed that “the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons...”.

In 1939 the Supreme Court upheld in *United States v. Miller*, 307 U.S. 174, the National Firearms Act of 1934 insofar as it imposed limitations upon the use of a sawed-off shotgun. The Court for the first time in 150 years had the opportunity to pass squarely on the nature of the right to keep and bear arms and it said:

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.⁴⁸

Mr. Justice Black has recently written that “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 [*italics added*].”⁴⁹

The course taken by the Supreme Court in recent years in its attitude toward the Bill of Rights foreshadows a possible enlargement of the scope of the right to keep and bear arms if the Court should become convinced that an enlargement serves some sound public purpose.

The Supreme Court had held in 1833 in an opinion by Chief Justice Marshall that the Bill of Rights restrained the Federal Government only and not the states.⁵⁰ The ratification of the Fourteenth Amendment in 1868 raised the question whether it did not have the effect of preventing state, as well as federal, invasion of the rights enumerated in the first eight amendments. Until recently, the answer was in the negative.⁵¹

Beginning as early as 1925, however, the Supreme Court itself has cast considerable doubt about that answer. In that year *Gitlow v. New York*, 268 U.S. 652, overruled *Prudential Insurance Company v. Cheek*, 259 U.S. 530 (1922), and began a long series of decisions which hold that each First Amendment protection—the freedoms of speech, press, religion, assembly, association and petition for redress of grievances—is immune from state invasion through the Fourteenth Amendment.⁵²

In 1961 *Mapp v. Ohio*, 367 U.S. 643, overruled *Palko v. Connecticut*, 302 U.S. 319 (1937), and the Fourth Amendment’s right of privacy against search and seizure has been declared enforceable against the states through the Fourteenth Amendment.

In 1963 *Gideon v. Wainwright*, 372 U.S. 335, overruled *Betts v. Brady*, 316 U.S. 455 (1942), and the right to counsel in all criminal cases was made obligatory on the states by the Fourteenth Amendment.

In 1964 *Malloy v. Hogan*, 378 U.S. 1, overruled *Twining v. New Jersey*, 211 U.S. 78 (1908), and *Adamson v. California*, 332 U.S. 46 (1947), the Court stating: “We hold today that the Fifth Amendment’s exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States.”⁵³

Mr. Justice Harlan’s dissent in *Malloy v. Hogan* stated:

... While it is true that the Court deals today with only one aspect of state criminal procedure, and rejects the wholesale “incorporation” of such federal constitutional requirements, the logical gap between the Court’s premises and its novel constitutional conclusion can, I submit, be bridged only by the additional premise that the Due Process Clause of the Fourteenth Amendment is a shorthand directive to this Court to pick and choose among the provisions of the first eight Amendments and apply those chosen, freighted with their entire accompanying body of federal doctrine, to law enforcement in the States.⁵⁴

There exists, then, the possibility that the Supreme Court could determine that the Second Amendment declares a right which may not be infringed by either the Federal Government or by the states. Furthermore, it would not be difficult for the Court, in view of the kinds of arms which now exist, to convert the Second Amendment into an absolute right to bear arms, unhampered by any concept of arms for militia use only.

In *Cases v. United States*, 131 F.2d 916 (1942), the Court of Appeals for the First Circuit, in upholding the constitutionality of the Federal Firearms Act of 1938, stated:

Apparently, then, under the Second Amendment, the federal government can limit the keeping and bearing of arms by a single individual as well as

by a group of individuals, but it cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia.⁵⁵

The court found that the rule of the Miller case⁵⁶ was outdated “because of the well known fact that in the so called ‘Commando Units’ some sort of military use seems to have been found for almost any modern lethal weapon”. (pg.667) The court also speculated that under the Miller rule Congress could not regulate “the possession or use by private persons not present or prospective members of any military unit, of distinctly military arms, such as machine guns, trench mortars, anti-tank or anti-aircraft guns, even though under the circumstances surrounding such possession or use it would be inconceivable that a private person could have any legitimate reason for having such a weapon”.

III

The rights of the individual citizen would be little different today if the Second Amendment did not exist. It has become lost for several reasons: the word “militia” long ago passed from common language; citizens rely almost wholly upon the processes of government—courts and law enforcement agencies—to protect their rights; and the rights of the other first eight amendments have been given so much judicial and popular attention that the Second Amendment has been all but overlooked.

Perhaps the people have lost a valuable right and privilege which should be cherished rather than forgotten. Perhaps the Founding Fathers, as they so often seem to have done, gave the people an enduring right which changing history does not outmode but merely places in a new context—often more compelling than the old.

What considerations could lead the Supreme Court to determine that the rights guaranteed by the Second Amendment are protected against state as well as federal infringement, and that those rights are dual—to guarantee a “well regulated Militia” and to guarantee an individual right to keep and bear arms, separate and apart from the needs of the militia?

1. The United States maintains a large peacetime standing army and what once were called State militias are now an integral

part of that army. For more than one hundred years acts of Congress had prohibited a national militia, nor could the Federal Government use state militias unless permitted by state authorities. State militias provided significant forces for the 1812, Mexican, Civil and Spanish-American Wars. By 1896 most states had renamed the militia “the national guard”. In 1903 Secretary of War Elihu Root procured the enactment of laws whereby the Federal Government assisted the states in organizing, training and equipping state national guards. In 1916 the national guard became a component part of the national peace establishment subject to call into the Army of the United States. In 1933 the “National Guard of the United States” was created and became a part of the Army of the United States at all times.⁵⁷

Almost each peacetime year finds an increased National Guard enrollment and, while these forces are available to “repel invasions”, particularly in the important work of maintaining and operating antimissile sites,⁵⁸ in time of war outside of the United States these former state militias are called into active service. Therefore, the states must provide for civil defense and many of them have formed stand-by home guard units for activation when the National Guard is in active service.⁵⁹ Thus militias (by whatever name) are as important as ever, and perhaps more so in the atom-and-missile age to “repel invasions”.

With the urgent need for civil defense and particularly if the “stand-by home guard” is ever incorporated into the national army, is it not important that as wide a base of the citizenry as possible be armed and somewhat trained? Armed and trained citizens may not prevent an atomic attack but they can preserve internal order after one.⁶⁰

2. Chief Justice Warren has written that the “subordination of the military to the civil ... is so deeply rooted in our national experience that it must be regarded as an essential constituent of the fabric of our political life”. He has also noted that “military men throughout our history have not only recognized and accepted this relationship in the spirit of the Constitution, but they have also cheerfully co-operated in preserving it”.⁶¹

If history and forecast both indicate that the future holds continuously larger standing armies and the continuous swallowing up of state militias by the federal army, can we always passively rely

upon “cheerful” military leaders who will eschew the vast powers placed in their hands?

3. Up to this time neither the Federal Government nor the states have shown any particular ability or effectiveness in suppressing or controlling organized crime. A great cry of despair has arisen because it has suddenly become apparent that the “average citizen” will either retreat or quietly stand by while his fellow-citizen is attacked, maimed, raped or murdered. Before decrying this national apathy, it might be well to consider what happens to the person who intervenes. If the criminal is “organized” in the sense that he is acting as part of a group (most criminals are and the bystander has no way of distinguishing those who are not), his interference can not only lead to his own murder on the spot, but his interference or witnessing or testifying or even co-operating with the police can lead to his own murder or that of members of his family, or to constant harassment and threats, which can be equally terrifying and disastrous. The efforts of law enforcement agencies to “protect” a witness are not only ineffective but, even when effective, are as debilitating as exposure to the criminal--the witness and his family (immediate and sometimes remote) are spirited away, often to another state, where they spend the rest of their lives in mortal fear and hiding.⁶² This is the current reward for courage and for compassion toward one’s fellow-man.

Perhaps the odds in favor of the individual citizen should be improved. (pg.668) Perhaps the spirit of the Second Amendment should be revived. We have come to rely so heavily on the law that often we are helpless in the face of those who operate outside the law. Do we need the fact and spirit of a well-armed citizenry, a little self-help and some of the bravado of the Old West where, when two individuals stood face to face, each one had at least a chance for survival? Actually, we are traveling in the opposite direction; today many states make it a crime for a citizen to defend himself or his home with a deadly weapon against the attacker or invader. The concern for the rights of the criminal has brought us to the rather horrifying situation that if organized crime decrees one’s death, neither the law nor the victim can do much about it. Hamilton argued for the guarantees of the Second Amendment to protect, among other things, against “the ravages and depredations of the Indians”.⁶³

Should we protect ourselves against the ravages and depredations of organized crime through the Second Amendment and perhaps at the same time halt the decaying moral effect of national apathy?

4. Does danger lurk in any consideration to broaden the concept of individual arms bearing? The federal and state restrictions on the right are substantial.

The National Firearms Act of 1934 levies a heavy tax on all transfers of machine guns, rifles, sawed-off shotguns and silencers, and requires the registration of all weapons not transferred in conformity with the act.⁶⁴ The Federal Firearms Act of 1938 regulates the movement in interstate commerce of all firearms and ammunition larger than .22 caliber, licenses all dealers and prohibits shipment to or receipt by criminals or the movement of stolen weapons.⁶⁵ Every state has some form of statute regulating either the possession, carrying, purchase, sale or pledging of firearms.⁶⁶ Criminal law doctrines militate heavily against the wrongful use of weapons. For example, the deadly weapons doctrine presumes that the commission of an unlawful act with a deadly weapon is performed with malice aforethought.⁶⁷

Furthermore, it is the opinion of police experts that criminals obtain firearms regardless of regulation. The assassination of a President with a mail-order rifle and the subsequent killing of a police officer with a mail-order pistol may cast doubt upon the advisability of expanding the right to keep arms, but a person such as an assassin would probably obtain a firearm regardless of statutory restrictions, since he would not be concerned about the violation of statutes.⁶⁸ On the other hand, the security of the President in motorcades through large cities may best be assured by the deputizing of armed citizens along the entire route. It is conceivable that an armed witness in Dallas might have been alert enough after the first shot to have prevented the fatal shot.

5. The few modern writers on the subject of the right to keep and bear arms are sharply divided as to whether the right is personal or relates solely to the militia. Some conclude that the right runs only "to the people collectively for the common defense against the common enemy, foreign or domestic"⁶⁹ and "has reference only to matters of common defense and relates to military affairs and not

to private brawls”.⁷⁰ One commentator questions whether any such right exists and whether “the Constitution would protect the right to keep and bear arms, if there were such a right, but that it does not exist”.⁷¹

On the other hand, one writer finds that “the affirmative side of the use of firearms by the private citizen is substantial.... Hunting and target-shooting are popular and wholesome recreations.... There is still much need for self-help, especially against robbery and burglary.... A valuable military asset lies in the reservoir of persons trained to use small arms.”⁷² And he concludes that the “Supreme Court has admitted there are exceptions to the right to bear arms” [italics added], thus impliedly recognizing the right and that “the logical result is that the terms militia and people were thought to be separate in nature and preserving two distinct rights”.⁷³

6. The key seems to lie in the fact that the Second Amendment differs from the other first eight amendments in that it is not a right which people enjoy per se—that is, the average person does not derive any inherent satisfaction from the mere keeping of a firearm and perhaps most people would rather not keep one—but it is a right which tends to insure, protect and guarantee the other and fundamental rights to life, liberty and property. If we can always be certain that the law will enforce the fundamental rights, the Second Amendment becomes superfluous. Hamilton was not convinced that we could always rely upon the law (and this means the law among nations as well as within the United States). He wrote that “The idea of governing at all times by the simple force of law (which we have been told is the only admissible principle of republican government), has no place but in the reveries of those political doctors whose sagacity disdains the admonitions of experimental instruction.”⁷⁴

The Universal Declaration of Human Rights of the United Nations, adopted in 1948, does not refer to any “right to bear arms”, yet it declares, among other things that:

ARTICLE 3

Everyone has the right to life, liberty and security of person.

ARTICLE 4

No one shall be held in slavery or servitude; ...

ARTICLE 12

No one shall be subjected to arbitrary interference with his private family, home or correspondence, nor to attacks upon his honor and reputation...

ARTICLE 13

1. Everyone has the freedom of movement and residence....

ARTICLE 17

2. No one shall be arbitrarily deprived of his property.

These rights are protected by law. Article 12 concludes, “Everyone has the right to the protection of the law against such interference or attacks”, and Article 8 provides that “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.”

If we can ever be certain that we have for all time reached the ideal of universal existence based upon law, world disarmament would follow and the Second Amendment would be without any meaning. Until that happens, the Second Amendment may prove to have been another remarkable insight by the Founding Fathers into our needs for a long period of history. We should find the lost Second Amendment, broaden its scope and determine that it affords the right to arm a state militia and also the right of the individual to keep and bear arms.

END NOTES

43. The Palladium was a statue of Pallas Athena which stood on the citadel of Troy, on which the safety of the city was supposed to depend. Hence, the word came to mean anything believed to afford effectual protection or safety. *THE AMERICAN COLLEGIATE DICTIONARY* (1954). The word palladium was frequently used in Colonial times. Hamilton, for example, said that “the friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if

there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.” THE FEDERALIST No. 83, at 542-543 (Modern Library ed. 1937) (Hamilton).

44. 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1890, pages 746-747 (1833).

45. 92 U.S. at 553.

46. 116 U.S. at 265.

47. 153 U.S. at 538

48. 307 U.S. at 178.

49. Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 873 (1960).

50. *Barron v. Mayor of Baltimore*, 7 Pet. 243.

51. Decisions that guarantees provided by the first eight amendments were not safeguarded against state action by the Fourteenth Amendment:

First Amendment: *United States v. Cruikshank*, 92 U.S. 542, 551 (1876); *Prudential Insurance Company v. Cheek*, 259 U.S. 530, 543 (1922).

Second Amendment: *Presser v. Illinois*, 116 U.S. 252, 265 (1886).

Fourth Amendment: *Weeks v. United States*, 232 U.S. 383, 398 (1914).

Fifth Amendment: *Hurtado v. California*, 110 U.S. 516, 538 (1884) (requirement of grand jury indictments); *Palko v. Connecticut*, 302 U.S. 319, 328 (1938) (double jeopardy).

Sixth Amendment: *Maxwell v. Dow*, 176 U.S. 581, 595 (1900) (Jury trial).

Seventh Amendment: *Walker v. Sauvinet*, 92 U.S. 90, 92 (1876) (jury trial). Eighth Amendment (prohibition against cruel and unusual punishment): *In re Kemmler*, 136 U.S. 436, 448-449 (1890); *McElvaine v. Brush*, 142 U.S. 155, 158-159 (1892); *O’Neil v. Vermont*, 144 U.S. 323, 332 (1892).

52. See *New York Times Company v. Sullivan*, 376 U.S. 254 (1964).

53. 378 U.S. at 6.

54. 378 U.S. at 15.
55. 131 F.2d at 922; cert. denied 319 U.S. 770 (1943) sub nom. Velazquez v. United States.
56. *United States v. Miller*, 307 U.S. 174 (1938).
57. 15 ENCYC. BRIT. 484; 16 ENCYC. BRIT. 145 (1961).
58. See, for example, ENCYC. BRIT. yearbooks for 1962, 1963 and 1964 under “National Guard”.
59. 1964 ENCYC. BRIT. YEARBOOK 786.
60. No one yet has challenged the constitutionality under the Second Amendment of Section 92 of the Atomic Energy Act of 1954 making it unlawful “for any person to transfer or receive in interstate or foreign commerce, manufacture, produce, transfer, acquire, possess, import, or export any atomic weapon”. 42 U.S.C. § 212.
61. Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 186 (1962). See also, *Reid v. Covert*, 354 U.S. 1, 23: “The tradition of keeping the military subordinate to civilian authority may not be so strong in the minds of this generation as it was in the minds of those who wrote the Constitution.”
62. See, for example, Arnbrister, *The Price of Getting Involved*, *Saturday Evening Post*, September 26, 1964, page 81.
63. THE FEDERALIST No. 24, at 151 (Modern Library ed. 1937) (Hamilton).
64. 26 U.S.C. Chapter 53.
65. 15 U.S.C. §§ 901-909.
66. For a catalogue of all state laws regulating the possession and use of firearms, see Note, *Restrictions on the Right To Bear Arms: State and Federal Firearms Legislation*, 98 U. PA. L. REV. 905 (1950).
67. Oberer, *The Deadly Weapon Doctrine—Common Law Origin*, 75 HARV. L. REV. 1565 (1962).
68. The Warren Commission apparently made no recommendation regarding the restriction of the availability of firearms.

69. Emery, *The Constitutional Right To Keep and Bear Arms*, 28 HARV. L. REV. 473, 477 (1915).
70. Haight, *The Right To Keep and Bear Arms*, 2 BILL OF RIGHTS REV. 31, 42 (1941).
71. McKenna, *The Right To Keep and Bear Arms*, 12 MARQ. L. REV. 138, 149 (1928).
72. Note, *Restrictions on the Right To Bear Arms: State and Federal Firearms Legislation*, 98 U. PA. L. REV. 905, 905-906 (1950).
73. Hays, *The Right To Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381, 405-406 (1960).
74. THE FEDERALIST No. 28, at 171 (Modern Library ed. 1937) (Hamilton).

The “Assault Weapon” Panic

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Persons who claim that the Second Amendment protects only “sporting guns” implicitly assert that protection of recreational hunting and target shooting was seen by the authors of the Bill of

Rights as some particularly important activity to a free society. The framers, as the “sporting gun” theory goes, apparently intended to exalt sports equipment used in recreational hunting to a level of protection not enjoyed by equipment for any other sport. It is true that the framers did see sport hunting as an activity better suited for building good character than other sports.¹ Nevertheless, it is difficult to believe that the Framers would follow an amendment guaranteeing speech, assembly, and the free exercise of religion with an amendment protecting sporting goods.

Moreover, to the extent that there is a real conflict between public safety and sports equipment, public safety should win. Except for shooting in Department of Civilian Marksmanship programs, which have been created to enhance civil preparedness, recreational use of “assault weapons” does not directly enhance public safety.² Hence, if “assault weapons” posed a substantial threat to public safety, control would be in order because protecting many people from death is more important than enjoying sports.

One reason that “assault weapon” bans are improper is that government statistics prove that “assault weapons” are no more threat to public safety than any other gun; the “safety vs. sports” conflict is non-existent.

Reflecting a sports-based theory of gun ownership, “assault weapon” prohibitionists claim that these guns have no purpose except to kill. As a factual matter, the claims are incorrect. The guns, as detailed in this section, are frequently used for sports. And ironically, the guns have the distinction of being the only firearms ever designed to wound rather than to kill. But even if the gun prohibitions’ claim were correct, it would do nothing to militate for a ban on the guns.

Only if all killing were wrong would a gun made for killing be illegitimate.³ American law clearly guarantees the natural right to self-defense, including the right to take an aggressors’ life if necessary. Semiautomatics do not deserve Constitutional protection because they are sometimes used for hunting. Rather, they deserve protection because they are militia guns _ because they are made for personal and national defense, as the next section elaborates.

The Second Amendment of the United States Constitution states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be

infringed.”⁴

Supports of “assault weapon” prohibition argue that the Second Amendment only grants to states a right to maintain a militia. Under this theory, the “right of the people to keep and bear arms” is infringed by laws which disarm states, but not laws which disarm people. The “right of the people” is said to be a “collective right,” which (like “collective property” in Communist nations) can never be possessed by any individual because it belongs to everyone at once.

In contrast, the theory which has been accepted six times by the Supreme Court,⁵ is compelled by the text of the Second Amendment itself,⁶ is held by approximately 89% of the American people,⁷ is supported by the large majority of scholarship,⁸ and which comports with original intent⁹ is the individual rights theory. Under this theory, the “right of the people” to bear arms recognizes a right of individual people to own guns.¹⁰ The discussion below attempts to show how the framers’ objection of protecting the states’ “well-regulated militias” was carried out by the recognition of “the right of the people to keep and bear arms.”

This Issue Paper has thus far presented two contrasting views of semiautomatic “assault weapons.” This Paper has argued that so-called “assault weapons” are no more deadly or dangerous than other semiautomatics and other guns. If this Paper’s contention is correct, then an “assault weapon” ban would violate the right to bear arms because it would ban certain guns which are not logically different from other guns. The ban would also violate the equal protection clause of the Fourteenth Amendment, which requires that legislative classifications be rational, and based on real differences, rather than on hysteria or misinformation.

In contrast, gun prohibition advocates suggest that the semiautomatics which they call “assault weapons” are true “weapons of war” and not “sporting weapons.” If the prohibitionists’ theory is correct, then “assault weapon” prohibition is again unconstitutional, for the historical and judicial record shows that the core aim of the Second Amendment was to ensure that weapons of war would be in the hands of ordinary American citizens. The history and evolution of the Second Amendment clearly shows that weapons of war _ and not sports equipment _ are at the heart of the right to bear arms.

In 1982, the Senate Subcommittee on the Constitution evaluated the historical record, and unanimously concluded that the Second Amendment recognizes an individual right to bear arms. The Subcommittee noted that when James Madison drafted the second amendment, he "did not write upon a blank tablet."¹¹ The British history that predated the Bill of Rights affirmed not only an individual right, but also a duty, to own firearms.¹² Britain's great expositor of the common laws, Sir William Blackstone, called the right to bear arms the "fifth auxiliary right of the subject," which would allow citizens to vindicate all the other rights.¹³ He explained the right as an instrument to permit violent revolution: "in cases of national oppression, the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people."¹⁴ The duties for which the British right to bear arms was intended _ national defense against unjust rulers, national defense against foreign governments, and local defense against crime _ obviously required the use of anti-personal weapons, and not sports equipment.

The English colonies in America quickly established an individual right and duty to bear arms that paralleled the developments in England.¹⁵ In 1658, the Virginia House of Burgesses required every householder to have a functioning firearms.¹⁶ The legislatures in Virginia and the other colonies did not require persons to have guns so that those persons could enjoy a right sporting life. Instead, the purpose was to have a citizenry which could be called to militia duty to fight in numerous Indian wars.¹⁷ Additionally, in both Great Britain and America, citizens were required to participate in anti-crime patrols such as night watch and to obey the commands of sheriffs to pursue fleeing felons. Lastly, as a practical matter, citizens had to possess arms for their own personal protection from Indians or criminals, since public safety agencies were few and far between. The weapons that were most useful for these colonial purposes were weapons of war, and not guns designed for sports (although in practice there was no distinction, and almost all guns served multiple purposes).

Colonial recognition of the right and duty to bear arms helped precipitate the break with England. When the number of British soldiers increased in the colonies, colonists asserted their

right to own firearms in order to defend their liberties. As the New York Journal Supplement proclaimed in 1769, "It is a national right which the people have reserved for themselves, confirmed by their Bill of Rights, to keep arms for their own defense.

The outbreak of hostilities came at Lexington and Concord, when the British commander from Boston was informed that the Americans owned cannons, and the British marched on Concord to seize the American armory there.¹⁸ (It was also a dispute over weapons of war _ and not sporting guns _ that sparked the Texan Revolution against Mexico. When Mexican dictator Santa Ana's forces attempted to confiscate a small cannon from settlers in Gonzales, the settlers raised a flag that said "Come and Take It," and the Texas Revolution began.¹⁹)

The Revolutionary War strengthened the colonists' beliefs about the importance of an individual right to bear arms.²⁰ The militia arose wherever the British deployed. Thus, the American side developed a tactical mobility to match the British mobility at sea. As historian Daniel Boorstin put it, "The American center was everywhere and nowhere _ in each man himself."²¹ With every American a militiaman, the British could triumph only by occupying the entire United States, and that task was far beyond their manpower resources. The Americans never really defeated the British; the war could have continued long past Yorktown. After seven years of winning most of the battles but getting no closer to winning the war, the British simply gave up.

The guns with which the American militia helped win the American Revolution were weapons of war. Particularly effective was the long-range Kentucky Rifle, which enabled American sharpshooters to snipe at British officers.

After the successful revolution the maintenance of a citizen militia was a primary concern of the framers of the Constitution.²² General Washington's Inspector General, Baron Von Steuben, proposed a "select militia" of 21,000 that would be given government issue arms and special government training.²³ When the proposed Constitution was presented for debate, anti-Federalists complained that it would allow for the withering of the citizen militia in favor of the virtual standing army of a "select militia."²⁴ Richard Henry Lee, in his widely-read Letters from the Federal Farmer to the Republican,

warned ratifies that a select militia had the same potential to deprive civil liberties as a standing army, for if "one fifth or one eighth part of the people capable of bearing arms should be made into a select militia," the select militia would rule over the "defenseless" rest of the population. Therefore, wrote Lee, "the Constitution ought to secure a genuine, and guard against a select militia... 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."²⁵

Federalists promoting the new Constitution allayed fears of select militias and Congress' broad powers to "raise armies" under Article I, section 8. They reasoned that Americans would have nothing to fear from federal power since American citizens were universally armed.²⁶ Noah Webster, in the first major Federalist pamphlet, attempted to calm Pennsylvania anti-Federalists:

Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any bands of regular troops that can be, on any pretense, raised in the United States.²⁷

The Federalist Papers looked to the state militias, comprised of the armed populace, as the ultimate check on government. As James Madison put it, "the ultimate authority... resides in the same people alone." Madison predicted that no federal government could become tyrannical, because if it did, there would be "plans of resistance" and an "appeal to trial by force." A federal standing army would surely lose that appeal, because it "would be opposed by a militia amounting to near half a million citizens with arms in their hands." Exalting "the advantage of being armed, which the Americans possess over almost every other nation," Madison contrasted the American government with the European dictatorships, which "are afraid to trust the people with arms."²⁸

Alexander Hamilton explained that "If the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self-defense which is paramount to all positive forms of government..."²⁹ Hamilton reassured skeptical anti-Federalists that no standing army, however

large, could oppress the people, for the federal soldiers would be opposed by state militias consisting of “a large body of citizens, little if at all inferior to them in discipline and the use of arms, who stand ready to defend their rights and those of their fellow citizens.”³⁰

Many delegates to the state conventions that ratified the Constitution expressed discontent over the Federalists’ assurances about existing protection of the right to possess arms.³¹ New Hampshire provided the key ninth vote that ratified the Constitution only after receiving assurance that a Bill of Rights would be drafted with a protection for the right of individuals to own firearms.³² The New Hampshire delegates suggested that the new Bill of Rights provision be worded as follows: “Congress shall never disarm any citizen unless such as are or have been in Actual Rebellion.”³³

At the Virginia convention, Patrick Henry had stated, “Guard with jealous attention the public liberty. Suspect everyone who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are ruined... The great object is that every man be armed... Everyone who is able may have a gun.”³⁴ During the ratification process five state conventions demanded protection of the right of citizens to bear arms, more than demanded protection of free speech.³⁵ The sentiment of Patrick Henry and the other state convention delegates was not fear that the federal government might regulate sports equipment too severely.

The first Congress delegated the duty of writing a Bill of Rights to James Madison. Madison obtained copies of state proposals and attempted to combine them in a succinct passage that all state delegates would accept.³⁶ The original intent of the second amendment remained consistent with the intentions of the states that demanded it.

Madison’s use of the phrase “well-regulated militia” was not a code word for the National Guard (which did not even exist). The phrase was not esoteric, but had a commonly-accepted meaning. Before independence was even declared, Massachusetts patriot Josiah Quincy had referred to “a well-regulated militia composed of the freeholder, citizen and husbandman, who take up their arms to preserve their property as individuals, and their rights as freemen.”

³⁷ “Who are the Militia?” asked George Mason of Virginia. He

answered his own question: "They consist now of the whole people."

³⁸ The same Congress that passed the bill of Rights, including the Second Amendment and its militia language, also passed the Militia Act of 1792. That act enrolled all able-bodied white males in the militia and required them to own arms.

Although the requirement to arm no longer exists, the definition of the militia has stayed the same; section 311(a) of title 10 of the United States Code declares, "The militia of the United States consists of all able-bodied males at least 17 years of age and... under 45 years of age." The next section of the code distinguishes the organized militia (the National Guard) from the "unorganized militia." The modern federal National Guard was specifically raised under Congress's power to "raise and support armies," not its power to "Provide or organizing, arming and disciplining the militia." ³⁹

James Madison wrote the Second Amendment in order to prevent the right to bear arms from vesting only in "select militias" like state national guard units. The Second Amendment was written to secure an individual right to bear arms that provided an ultimate check on government and any of its "select" militias. ⁴⁰

The core of the Second Amendment therefore was that state militias _ comprised of individual citizens bringing their own guns to duty _ would have the power to overthrow a tyrannical federal government and its standing army. The weapons that would be most suited to overthrow a dictatorial federal government would, of course, be weapons of war, and not sports equipment.

To persons accustomed to think of the "right to bear arms" as a privilege to own sporting goods, it must seem incredible that the authors of the Second Amendment meant to ensure that the American people would always own weapons of war. But that is precisely what the historical record demonstrates. The only commentary available to Congress when it ratified the Second Amendment was written by Tench Coxe, one of James Madison's friends. Coxe explained:

The powers of the sword are in the hands of the yeomanry of America from sixteen to sixty. The militia of these free commonwealths, entitled and accustomed to their arms, when compared with any possible army, must be tremendous and irresistible. Who are the militia? Are they not ourselves... Congress have no power to disarm the militia. Their swords,

and every other terrible implement of the soldier, are the birth-right of an American... [T]he unlimited power of the sword is not in the hands of either the federal or state governments, but, where I trust in God it will ever remain, in the hands of the people. ⁴¹

This original intent of the Second Amendment has nothing to do with sports, and only a little to do with personal defense against criminals. The text of the Second Amendment itself highlights the implausibility of the claim that the Amendment refers to sporting equipment rather than to devices made for injuring or killing other persons. “Arms,” says Webster’s Dictionary are “a means (as a weapon) of offense or defense; esp. FIREARM.” ⁴² Sporting equipment that is not a means of offense or defense is not within the category of “arms,” and hence cannot be what the “right to bear arms” refers to. The Second Amendment guarantees a popular militia in order to provide for “the security of a free state.” – ensuring that there will always be a force capable of overthrowing a domestic tyrant, or of resisting an invasion by a foreign one. The weapons best suited for this purpose are not weapons particularly suited for duck hunting; the weapons at the heart of the Second Amendment are weapons of war.

Under some theories of Constitutional interpretation, the language, common understanding, and intent of Constitutional provisions may be ignored by courts based on a judge’s personal determinations of appropriate social policy. For example, when a lower federal court upheld Morton Grove’s handgun prohibition, the court declared that the intent of the Second Amendment was “irrelevant.” ⁴³

The United States Supreme Court, however, has never claimed that original intent is “irrelevant,” and the thrust of the most recent Supreme Court jurisprudence is to place the greatest emphasis upon the people’s intent and the text of the Constitution. The leading (and only) Supreme Court case dealing with which weapons are protected by the Second Amendment falls squarely within the tradition of textual analysis and original intent. In the 1939, case *United States v. Miller*, ⁴⁴ Jack Miller was charged under section 11 of the 1934 “National Firearms Act” with the unlawful transportation of an unregistered “sawed-off” shotgun

in interstate commerce.⁴⁵ The federal district court quashed the indictment on the grounds that section 11 of the National Firearms Act violated the Second Amendment.⁴⁶ The prosecutor appealed directly to the Supreme Court, and the Court produced its most thorough analysis of the meaning of the Second Amendment.⁴⁷ Instead of defining the militia as a select group such as the national guard, the Court unanimously defined "militia" as "all males physically able of acting in concert for the common defense."⁴⁸ The Court went on to note that these militiamen were expected "to appear bearing arms supplied by themselves."⁴⁹

Even though the Court recognized an individual right to bear arms, the justices still had to decide what types of "arms" individuals had a right to bear. The Court suggested that militia arms would consist of "the kind in common use at the time."⁵⁰ that had "some reasonable relationship to the preservation of efficiency of a well-regulated militia."⁵¹ Since the defendant had not briefed this issue (he had disappeared while free pending appeal), the Court was presented with no evidence that a sawed-off shotgun had any value to the militia. The Court wrote:

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.⁵²

Although the Court held that this particular case did not present a violation of the Second Amendment, the unanimous opinion recognized an individual right to bear arms which were "part of the ordinary military equipment" or which "could contribute to the common defense" – weapons of war. For the anti-gun lobbies to mouth their epithet "weapons of war" to concede that semiautomatics are protected arms under the Supreme Court's Miller test.

Concluding that the Second Amendment protects the right of American people to own arms which have a reasonable relationship to the maintenance of a well-regulated militia – that is, weapons

of war _ does not prove that all “assault weapon” prohibitions are necessarily unconstitutional. The Second Amendment, like the rest of the Bill of Rights, was historically seen as only a limit on federal power, and not a restraint on state or local governments. Thus, the Second Amendment, standing alone, would only prevent federal “assault weapon” prohibitions or other infringement.

The individual rights recognized in the Bill of Rights have only become enforceable against state and local governments through the 14th Amendment, which forbids states (and localities, which are subdivisions of states) to violate fundamental human rights.

In the 1876 case *United States v. Cruikshank*, the Supreme Court ruled the right peaceably to assemble and the right to bear arms were not protected against state interference by the Fourteenth Amendment’s requirement that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”⁵³ The court reasoned that the clause only applied to “privileges or immunities” that arose from citizenship in the United States (such as the right to interstate travel). The Court said the peaceable assembly and bearing arms were not rights which arose as a result of American citizenship; rather, they were fundamental human rights which were found “wherever civilization exists.” The First and Second Amendments, the Court said, had not granted a right to assemble or a right to bear arms, but had merely recognized the existence of those rights.⁵⁴

When California’s “assault weapon” prohibition was challenged as violating the Second Amendment, the federal trial court, relying on *Cruikshank*, ruled that the Second Amendment could not be violated by state-level gun control, since the Second Amendment only restricts the federal government.⁵⁵

While *Cruikshank* has never been formally overruled, the federal trial court’s reliance on it was dubious. *Cruikshank* dates from an era when the Supreme Court refused to hold any of the freedoms recognized in the Bill of Rights enforceable against the states. In the 20th century, the Supreme Court, while never overruling the 19th century “privileges and immunities” decisions, has relied on another provision of the 14th Amendment to make the Bill of Rights enforceable against the states.

The 14th Amendment forbids any state to deprive a person

of “life, liberty, or property without due process of law.” The Court has interpreted this phrase to mean that there can be no state deprivations of life, liberty, or property which violate certain rights recognized by the Bill of Rights. Thus, in *DeJonge v. Oregon*, the Court held that the First Amendment right to peaceably assemble was made applicable against the states by the Fourteenth Amendment’s “due process” clause. In *Moore v. East Cleveland*, the Court stated, in dicta, that the right to bear arms was also enforceable against the states via the 14th Amendment’s due process clause.⁵⁶ *Moore v. East Cleveland* more closely followed the intent of the framers of the 14th Amendment than did the *Cruikshank* case, since the historical record shows that the right to bear arms was one of the rights which the framers were most intent on making applicable against state government.⁵⁷

A distinct Constitutional provision, not discussed by the Fresno court, provides an additional reason to doubt the Constitutionality of state (or local) gun prohibitions. Article I, section 8 of the Constitution grants the Congress the authority to call forth the militia into national service. Hence, state gun prohibitions deprive the federal government of its ability to summon a militia. In *Presser v. Illinois*,⁵⁸ the Supreme Court stated:

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 provisions in question [the Second Amendment] out of view, prohibit the people from keeping and bearing arms...⁵⁹

Because the Fresno court ignored the clear language of *Presser*, and did not follow the modern Supreme Court’s approach to the 14th Amendment, the case does not appear to be particularly well-reasoned. Regardless of whether the Fresno decision is eventually upheld on appeal, the case is relevant only in the handful of states, including California, which do not have a right to bear arms in their own state Constitution, and which must rely solely on the Second Amendment for protection of citizens’ right to bear arms.

To the extent that state Supreme Courts have confronted the

issue of what types of arms are protected by the state Constitutional right to bear arms, the decisions militate against the Constitutionality of “assault weapon” prohibition.

In 1846, the Georgia⁵⁹ Supreme Court found that, even in the absence of an explicit right to bear arms in the state Constitution, the Georgia legislature had no power to interfere with the right of Georgia citizens to “keep and bear arms of every description.”⁶⁰

After the Civil War, courts addressed the implications of a developing weapons technology. The decades immediately after the Civil War are particularly significant for evaluating the “assault weapon” issue, because it was in these decades that courts confronted rapid-fire, high-capacity weapons capable of causing mass destruction.

The Civil War was by far American’s bloodiest war; no war in American history remotely approaches the mass destruction and widespread death of that terrible conflict. The war witnessed the widespread use of the first type of repeating firearm (the revolver, invented several years before by Col. Samuel Colt) and the Gatling Gun, a hand-cranked ancestor of the machine guns. In the two decades following the war, the high-capacity, rapid-fire rifle (such as the Sharps, Winchester, and Henry models) became ubiquitous. The courts in the post-war years were more personally aware of the killing potential of rapid-fire, high-capacity weapons than any American courts have been before or since.

In the 1871 case *Andrews v. State*,⁶¹ the Tennessee Supreme Court held that, although the Tennessee Constitution did not protect “every thing that may be useful for offense or defense,” the Constitution did protect “the rifle of all descriptions, the shotgun, the musket, and repeater.”⁶² In 1876, the Arkansas Supreme Court stated that protected “arms” included “the unusual arms of the citizen of the country.”⁶³ The court agreed with the Tennessee court’s listing of these arms and noted the addition of the “army and navy repeaters, which, in recent warfare, have very generally superseded the old-fashioned holster, used a weapon in the battles of our forefathers.”

⁶⁴ These early courts _ which were cited by the U.S. Supreme Court in *Miller*_ found that personal sidearms, including new repeating firearms, fell within the reach of constitutional provisions drafted in

times of more simplistic weapons technology.

In 1980, the Oregon Supreme Court approached more modern weapons developments in a similar manner. The court noted that since the era of the Civil War, "The development of powerful explosives, ... combined with the development of mass produced metal parts, made possible the automatic weapons, explosives, and chemicals of modern warfare."⁶⁵ The Oregon Court explained that "the term 'arms' as used by the drafters of the constitution probably was intended to include those weapons used by settlers for both personal and military defense... The term 'arms' would not have included cannon or other heavy ordnance not kept by militiamen or private citizens."⁶⁶ The court concluded that such modern heavy ordnance, used exclusively by the military, would not be considered individual "arms" deserving of constitutional protection.⁶⁷ The Attorney General of Oregon has stated that so-called "assault weapons" fall within the scope of arms protected under the Oregon Supreme Court's test.⁶⁸

Some proponents of "assault weapons" legislation have argued that even if one recognizes an individual right to bear arms, such guns are not the type of arms that individuals have a right to bear. Although the framers might have intended that citizens have a right to possess the single-shot rifles, shotguns, and pistols of their day, the gun prohibitionists assert that the Second Amendment never intended to give citizens the right to own modern small arms such as military-style semiautomatics.⁶⁹

It is true that the Second Amendment never intended to protect the right to own semiautomatics (since such guns did not exist), just as they never intended to protect the right to talk privately on a telephone or to broadcast news on a television (since telephones and televisions did not exist either). To assert that Constitutional protections only extend to the technology in existence in 1791 would be to claim that the First Amendment only protects the right to write with quill pens and not with computers, and that the Fourth Amendment only protects the right to freedom from unreasonable searches in log cabins and not in homes made from high-tech synthetics.

The Constitution does not protect particular physical objects, such as quill pens, muskets, or log cabins. Instead, the Constitution defines a relationship between individuals and the government that is applied to every new technology. For example, in *United States v. Katz*, the Court applied the privacy principle underlying the Fourth Amendment to prohibit warrantless eavesdropping on telephone calls made from a public phone booth — even though telephones had not been invented at the time of the Fourth Amendment.⁷⁰ Likewise, the principle underlying freedom of the press — that an unfettered press is an important check on secretive and abusive governments — remains the same whether the press uses a Franklin press to produce a hundred copies of a pamphlet, or laser printed to produce a hundred thousand.

It is true that an individual who misuses a semiautomatic today can shoot more people than could an individual misusing a musket 150 years ago.⁷¹ Yet if greater harm were sufficient cause to invalidate a right, there would be little left to the Bill of Rights. Virtually every freedom guaranteed in the Bill of Rights causes some damage to society, such as reputations ruined by libelous newspapers, or criminals freed by procedural requirements. The authors of the Constitution knew that legislatures were inclined to focus too narrowly on short term harms: to think only about society's loss of security from criminals not caught because of search restrictions; and to forget the security gained by privacy and freedom from arbitrary searches. That is precisely why the framers created a Bill of Rights — to put a check on the tendency of legislatures to erode essential rights for short-term gains. Since the Constitution was adopted, virtually all of the harms that flow from Constitutional rights have grown more sever:

* Today, if an irresponsible reporter betrays vital national secrets, the information may be in the enemy's headquarters in a new minutes, and may be used to kill American soldiers and allies a few minutes later. Such harm was not possible in an age when information traveled from America to Europe by sailing ship.

* Similarly, an inappropriate leak of information in a superpower crisis could harden negotiating positions, leading at the worst to nuclear war. Previously, a leak might precipitate a war, but

could not destroy the planet.

* As Gary Hart learned the hard way, a single act of gutter journalism can wipe out in a week a decades-long career of public service. In the early years of the Constitution, journalists also printed stories of sex and politics, but the slower movement of information kept one tale of indiscretion from growing to such destructive proportions.

* Correspondingly, a show like "60 Minutes" can wrongfully ruin a person's reputation throughout the nation, a feat no single newspaper could have accomplished before.

* In earlier times, strong community ties and traditional values made young people less susceptible to religious charlatans. But today, freedom of religion can kill people, as we learned at Jonestown.

* Criminal enterprises have always existed, but the proliferation of communications and transportation technologies such as telephones and automobiles makes possible the existence of criminal organizations of vastly greater scale _ and harm _ than before.

The principle underlying the Second Amendment is resistance to federal tyranny. The method of achieving the Second Amendment's goal is for individual citizens to possess arms equal to those possessed by the federal standing army. If the federal standing army possesses muskets, then citizens may own muskets. If the federal standing army own M16 assault rifles, then citizens may own M16 assault rifles.

Persons who find the argument above to be unpersuasive are not without a remedy. If the Constitutional right to bear arms has become inappropriate for modern society, because the people are so dangerous and government so trustworthy, then a Constitutional amendment to abolish or limit the right may be proposed. (Although given the fact that only two states have enacted "assault weapon" legislation, it is doubtful that a proposed amendment would be ratified by many states.) But it is not permissible for legislators or courts to flout an existing Constitutional guarantee, even if they personally think it unimportant.⁷²

So-called "assault weapons," particularly the politically incorrect semiautomatic rifles, are well-suited for personal defense

against criminals.⁷³ More significantly, from a Second Amendment viewpoint, they are well-suited for community defense against dangers both internal and external.

Americans watched in horror when television showed the Cambodian school children killed by a deranged criminal with a Kalshnikov rifle, in a Stockton, California, schoolyard in January 1989. America's "Drug Czar" William Bennett informed the American people the Kalashnikovs were guns made only for drug traffickers, like the Crips and Bloods gangs in Los Angeles. Through Bennett and the television networks, America heard one story about semiautomatic rifles. Another, equally dramatic story, never was heard outside Los Angeles. In May 1988, the Bloods attacked a Los Angeles housing project containing Cambodians. The Cambodians fought back with M1s and Kalashnikovs and drove away the Bloods.⁷⁴

To defend a neighborhood from Bloods on Piru Street, Los Angeles, "some block clubs had to resort to armed guerrilla warfare," reports *The Washington Times*. One block club leader met with Mayor Bradley, the Police Chief Daryl Gates, and with the city attorney (all vocal gun prohibitionists) and achieved nothing. Drug dealers continued to shoot at block club members, but now the block club fired back. After club leader Norris Turner shot and wounded two gang members who had tried to ambush and kill him on the street, Turner threatened to call the media. Police presence increased, and the neighborhood was cleaned up.⁷⁵

The War on Drugs took on a new meaning in September 1989 in Tacoma, Washington, where angry citizens gathered for an anti-crime rally. Spurred by the rally, an off-duty sergeant organized a dozen off-duty Army Rangers and went into free-fire combat with neighborhood crack dealers. Up to 300 rounds of handgun, shotgun, and semiautomatic rifle fire were exchanged. No fatalities resulted, and Washington Governor Booth Gardner praised the gunmen: "They were very good shots. They weren't shooting to harm. They were shooting to make a point, I think." The police mediated a truce, whereby the drug dealers agreed to stop dealing in the streets, and the neighborhood agreed to put away its guns.⁷⁶

Citizens of the United States have often used personal sidearms to aid law enforcement officials in restoring public order.⁷⁷ In 1977, a blizzard in Buffalo, New York, and a flood in Johnstown,

Pennsylvania, both prompted local officials to call for citizens to arm themselves and restore the public order.⁷⁸ In other situations, as in the aftermath of an earthquake or hurricane, there may not even be any public officials around to urge citizens to protect themselves. In the chaotic frontier circumstances of an area after a natural disaster _ or the modern inner city under day-to-day conditions _ a reliable, rugged, easy to operate firearms is the type of arm which is most necessary for the protection of life.

The most recent instance in which people of the United States mobilized "bearing arms supplied by themselves and of the kind in common use at the time" to defend their nation was during the World War II.

After Pearl Harbor the citizen militia was called to duty. Nazi submarines were constantly in action off of the East Coast. On the West Coast, the Japanese seized several Alaskan islands, and strategists wondered if the Japanese might follow up on their dramatic victories in the Pacific with an invasion of the Alaskan mainland, Hawaii, or California. Hawaii's governor summoned armed citizens to man checkpoints and patrol remote beach areas.⁷⁹ Maryland's governor called on "the Maryland Minute Men," consisting mainly of "members of Rod and Gun Clubs, of Trap Shooting Clubs and similar organizations," for "repelling invasion forays, parachute raids, and sabotage uprisings," as well as for patrolling beaches, water supplies, and railroads. Over 15,000 volunteers brought their own weapons to duty.⁸⁰ Gun owners in Virginia were also summoned into home service.⁸¹ Americans everywhere armed themselves in case of invasion.⁸²

After the National Guard was federalized for overseas duty, "the unorganized militia proved a successful substitute for the National Guard," according to a Defense Department study. Militiamen, providing their own guns, were trained in patrolling, roadblock techniques, and guerrilla warfare.⁸³ The War Department distributed a manual recommending that citizens keep guerrilla weapons on hand.⁸⁴

Certainly the militia could not defend against intercontinental ballistic missiles, but it could keep order at home after a limited attack. In case of conventional war, the militia could guard against foreign invasion after the army and the National

Guard were sent into overseas combat. Especially given the absence of widespread military service, individual Americans familiar with using their private weapons provide an important defense resource.⁸⁵ Canada already has an Eskimo militia to protect its northern territories.⁸⁶

It has been more than 40 years since the last invading troops left American soil. No invasion is plausible in the foreseeable future. Is it now possible to state with certainty that America is so omnipotent, and the nuclear umbrella so perfect that America will never again need the militia, and that Americans should jettison their tradition of learning how to use arms that would be useful for civil defense?

In the unlikely event that the United States were ever subjugated by a foreign or domestic tyrant, could citizens actually resist? Recent history suggests that the answer is “yes”.

Of course, ordinary citizens are not going to grab their “Saturday night specials” (or even their “assault weapons”) and charge into oncoming columns of tanks. Resistance to tyranny or invasion would be a guerrilla war. In the early years of such a war, before guerrillas would be strong enough to attack the occupying army head on, heavy weapons would be a detriment, impeding the guerrillas’ mobility. As a war progresses, Mao Zedong explained, the guerrillas use ordinary firearms to capture better small arms and eventually heavy equipment.⁸⁷

The Afghan mujahedeen were greatly helped by the belated arrival of Stinger antiaircraft missiles, but they had already fought the Soviets to draw using a locally made version of the outdated Lee-Enfield rifle.⁸⁸ One clear lesson of this century is that a determined guerrilla army can wear down an occupying force until the occupiers lose spirit and depart – just what happened in Ireland in 1920 and Palestine in 1948 (and American in 1783). As one author put it: “Anyone who claims that popular struggles are inevitably doomed to defeat by the military technologies of our century must find it literally incredible that France and the United States suffered defeat in Vietnam... that Portugal was expelled from Angola; and France from Algeria.”⁸⁹

If guns were not useful in a popular revolution, it would be hard to explain why dictators as diverse as Ferdinand Marcos,

Fidel Castro, Idi Amin, and the Bulgarian communists have ordered firearms confiscation upon taking power.⁹⁰

In sum, American citizens can and do use "assault weapons" successfully to protect themselves against domestic chaos when local police forces cannot or will not protect them. In the unlikely event that Americans were threatened by hostile foreign or domestic governments, "assault weapons" would be useful, and citizen resistance might well prove successful.

If "military" arms, such as the assault rifles carried by the federal standing army, are precisely what the Constitution protects, it may be asked where the upper boundary lies – at grenade launchers, anti-aircraft rockets, tanks, battleships, or nuclear weapons.

To begin with, the phrase "keep and bear" limits the type of arm to an arm that an individual can carry. Things which an individual cannot bear and fire (like crew-served weapons) would not be within the scope of the Second Amendment. Nor would things which bear the individual, instead of being borne by him or her. Thus, tanks, ships, and the like would be excluded.

In addition, if a hand-carried weapon is not "part of the ordinary military equipment" (as the Supreme Court put it in *Miller*), then the weapon might not have a reasonable relationship to the preservation of a well-regulated militia; hence its ownership would not be protected. Since American soldiers do not carry nuclear weapons, such weapons would not be within the scope of the Second Amendment. Perhaps the Supreme Court will one day further elaborate the boundaries of the *Miller* test.

Soldiers do carry real assault rifles (namely M16s), and it would therefore seem that such weapons would fit with the *Miller* test. In early 1991, the Supreme Court declined to hear a case involving the prohibition of machine-guns produced after 1986. *Handgun Control, Inc.* immediately announced that the Supreme Court had validated the ban, although the Court had done so such thing. As the Supreme Court itself has stated, however, a denial of review has no presidential effect and is not a decision on the merits.

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As this Issue Paper is written, the Constitutionality of the 1986 federal ban is unclear. In the case that the Supreme Court

declined to hear, the federal trial court had interpreted the relevant statute as not being a ban, but only a licensing requirement. The trial court had said that if the statute were to be read as a ban, it would be unconstitutional.⁹³ The 11th Circuit Court of Appeals reversed on the statutory interpretation issue, and did not address the Constitutional question.

In the meantime, a federal district court in Illinois found the ban unconstitutional on the grounds that Congress' enumerated powers did not include the banning of firearms.⁹⁴

Even if the machine gun issue remains in a Constitutional limbo, the semiautomatic issue need not. The bias on which machine guns may be considered distinguishable from other guns is their capability of rapid, automatic fire. All semiautomatic firearms lack this capability, and according to the Bureau of Alcohol, Tobacco and Firearms, it is quite difficult to convert semiautomatics to automatic.⁹⁵ In fact, semiautomatic rifles may fire less rapidly than traditional pump action shotguns,⁹⁶ and there is no dispute that traditional pump action shotguns fall within the scope of the right to bear arms.

The "assault weapon" controversy wears the mask of a crime control issue, but it is in reality a moral issue. Regardless of whether "assault weapons" are a serious crime problem, and regardless of whether prohibitions will reduce criminal use of the guns, such weapons have no legitimate place in a civilized society _ or so many gun prohibitionists feel. These prohibitionists do not trust their fellow citizens to possess "assault weapons"; but astonishingly, they do trust the government to possess such guns.

"Government is the great teacher," said the late Justice Brandeis. What lesson does government teach when police chiefs insist that "assault weapons" have no reasonable defensive use, and are evil machines for killing many innocent people quickly _ but that prohibitions on these killing machines should not apply to the police? Are massacres acceptable if perpetrated by the public sector?⁹⁷

The exemption cannot be logically defended. If "assault weapons" can legitimately be used for police protection of self and others, then a ban on those guns cannot be Constitutionally applied to ordinary citizens, because ordinary citizens have a right to bear arms for personal defense, and like police, face a risk of being

attacked by criminals. (And unlike police, ordinary citizens cannot make a radio call for backup that will bring a swarm of police cars in seconds.)

Conversely, are "assault weapons," as some police administrators insist, only made for slaughtering the innocent? If so, such killing machines have no place in the hands of domestic law enforcement. Unlike in less free countries, police in this country do not need highly destructive weapons designed for murdering innocent people.

The arrogance of power manifested by police chiefs such as Daryl Gates in their drive to outlaw semiautomatics for everyone but themselves is reason enough for a free society to reject gun prohibition.⁹⁸

In Maryland, the police staged an illegal warrantless raid on gun rights group's office the night before a gun control referendum.⁹⁹ The pro-Second Amendment protesters picketed at the state capitol, Governor Donald Schaefer's police photographed them.¹⁰⁰ The police-state tactics in Maryland led one newspaper (which favors gun control as a substantive matter), to note "Just because you're paranoid doesn't mean they're not out to get you." The paper labeled the tactics of Governor Schaefer and his police (including the illegal warrantless raid, the photographing of protesters, and a late night surprise visits to a critic's home) a validation of the paranoid world-view allegedly held by proponents of the rightt bear arms.¹⁰¹ Is the Maryland police hierarchy the kind of government agency that should be trusted to disarm citizens, while it keeps "assault weapons" for itself?

After the Tiananmen Square massacre, the response of the National Rifle Association was to purchase print advertisements suggesting the core purpose of the Second Amendment is resistance to tyranny. The response of Chicago police chief LeRoy Martin — a vociferous advocate of gun prohibition — was to accept a paid trip to China from the Communist government. Upon returning, Chief Martin pronounced his admiration for the Chinese system of criminal justice, and suggested that in the United States zones should be created where the Constitution would be suspended. Is LeRoy Martin the kind of police chief who should be trusted to enforce an "assault weapon" ban, while he keeps such weapons for himself?

Of course even despite the excesses of the drug war, most of the Bill of Rights remains intact. Elections will take place as scheduled in 1992, and there is no plausible claim that it would be appropriate to take up arms against the federal government. Can the gun prohibition movement guarantee that this happy state will persist forever?

In 1900, Germany was a democratic, progressive nation. Jews living there enjoyed fuller acceptance in society than they did in Britain, France, or the United States. Thirty-five years later, circumstances had changed. The Holocaust was preceded by the Nazi government's enactment of the strictest gun controls of any industrial nation.¹⁰²

The prospect of a dictatorial American government thirty-five years from now seems almost impossible. What about a hundred years from today? Two hundred? The Bill of Rights attempted to enshrine for all time the principle that the government should not be able to overpower the people. On the 200th anniversary of the Bill of Rights, should that principle be discarded forever? Do government officials like Daryl Gates, Donald Schaefer, and LeRoy Martin inspire confidence that the government may always be trusted?

Before rejecting the United States Constitution's bedrock principle that the people are more trustworthy than the government, it would be wise to consider the words of the late Vice President Hubert Humphrey: "The right of citizens to bear arm is just one more guarantee against arbitrary government, one more safeguard against the tyranny which now appears remote in America, but which historically has proved to be always possible. 103

The asserted major concern of legislators passing "assault weapon" legislation is the criminal misuse of these firearms. Proposed legislation, to be effective must directly target this misuse. Legislators should consider the following proposals:

- A. Fund the appointment of at least one Assistant U.S. Attorney in each District to prosecute felon-in-possession cases involving violent offenses under 18 U.S.C. 924 and relevant sections of the Firearms Owners' Protection Act, Public Law 99-308. More consistent enforcement of existing statutes would

directly target criminal misuse of all firearms. States and localities could also assign prosecutors to felons using firearms to perpetrate violent crimes.

B. Fund the creation of new prison facilities dedicated to violent repeat felony offenders. Reallocate existing prison capacity to that same end. Prison facilities must be adequate to insure that those convicted of the criminal misuse of firearms actually serve the sentences.

C. Reform and streamline probation revocation. If a person already eligible for probation revocation commits a violent armed felony, probation should be revoked immediately. This reform would have prevented a career criminal named Eugene Thompson from perpetrating a murder spree in the suburbs south of Denver in March 1989. 104

D. Create a task force that will exert informal pressure on the entertainment industry to encourage industry officials to reduce the portrayal of criminal misuse of firearms. Beginning in 1983, prime-time television show such as *The A Team*, *Wise Guy*, *Hardcastle & McCormack*, *Riptide*, *21 Jump Street*, and *Miami Vice* have filled American homes with the depiction of criminal misuse of "assault weapons." 105 while direct links between these portrayals and criminal violence may be difficult to establish, at least one study has linked television and movie depictions of "assault weapons" to increased sales of those weapons. 106 Dr. Park Dietz, the specialist in violent behavior who conducted this recent study, called NBC's *Miami Vice* "the major determinant of assault gun fashion for the 1980's." 107 Research by the University of Washington's Brandon Centerwall has found a cause and effect relation between television violence and homicide. 108

A task force could draft voluntary guidelines limiting the depiction of the misuse of military-style semiautomatics, and the task force, along with interested citizens' groups, could exert informal pressure on industry officials to conform to these guidelines.

And at the very least, the film/television industry exemption from existing state and local "assault weapon" bans should be removed. Film-makers who glorify mindless violence encourage far more gun misuse than do ordinary citizens who quietly own a firearm for sports or self-defense. 109

The solutions suggested above will not cure the problem of armed crime. But they will make the problem better, whereas, "assault weapon" prohibition will make the problem worse.

CONCLUSION

"Assault weapon" legislation appears to offer several political advantages. This legislation allow its proponents to appear "tough on crime and drugs," to garner to the applause of the establishment media, and to exploit the political potential latent in the emotion surrounding tragic events such as the Stockton shootings. At the same time, "assault weapon" legislation requires no fiscal outlay.

Unfortunately, "assault weapon" legislation is unconstitutional. Second Amendment jurisprudence establishes an individual right to bear arms that protects the possession of military-style semiautomatics. While "assault weapon" legislation may not unduly impinge the privilege to hunt ducks, it strikes at the heart of the right to defend home, person and property against criminal individuals and criminal governments.

The "assault weapon" controversy poses a litmus test for continued adherence to the principles on which the United States was founded. Shall citizens retain the power claimed in the Declaration of Independence to "alter or abolish" a despotic government?

The claims that certain politically incorrect semiautomatic firearms are machine-guns, are the weapon of choice of criminals, have a uniquely high ammunition capacity, or cause uniquely destructive wounds are a hoax. Although the gun prohibition lobby managed to generate a few months of national panic in early 1989, only two state legislatures decided to adopt "assault weapon" legislation. In one state (California), the Attorney General has found that most of

the law is so ineptly drafted as to be unenforceable. The more that legislatures examine the facts, the more apparent the gun prohibition lobby's fraud becomes. The Great "Assault Weapon" Panic of 1989 deserves a place alongside Senator Joseph McCarthy's list of State Department Communists and the Tawana Brawley kidnapping as one of America's greatest political hoaxes. When hysteria is replaced by analysis, the gun prohibition lobby's fraud becomes apparent.

Despite their "evil" appearance, so-called "assault weapons" are no more dangerous than many non-semiautomatics. According to empirical evidence and police experience, the guns are not the weapons of choice of drug dealers or other criminals. Even if these guns played a significant role in violent crime, sociological evidence suggests that "assault weapon" legislation would not reduce the criminal misuse.

To limit the criminal misuse of firearms, legislators must take the more difficult and costly steps of providing sufficient funding to the prosecutors and prisons that directly confront the problems of firearms misuse. While these measures may not seem as simple as passing a severe "assault weapon" prohibition, an effective firearms policy _ one that preserves basic Constitutional rights _ will be logical, legal, and moral, and well worth the effort.

END NOTES

1. Thomas Jefferson advised his nephew: "Games played with a bat and ball are too violent, and stamp no character on the mind... [A]s to the species of exercise, I advise the gun." J. Foley, *THE JEFFERSON ENCYCLOPEDIA* (1967), at 318. Were Jefferson to visit a high school shooting competition, and then a high school football game where student cheered as a player was slammed to the ground, Jefferson might think his earlier view confirmed.

2. Because of budget constraints, the DCM program will lose its federal subsidy. That the program must become financially self-sufficient does not prove that it is no longer important. Many important federal programs, such as aviation safety and airport construction, are financed by user fees.

3. It might be interesting to ask the anti-gun lobby why a gun designed to kill an innocent game animal is more legitimate than a gun designated to protect an innocent human being against a criminal attack.

4. U.S. CONST. amend. II.

5. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 417 (1857) (If free Blacks were citizens, they would have the right “to carry arms wherever they went.”); *United States v. Cruikshank*, 92 U.S. 542, 551-53 (1876) (The Second Amendment right to bear arms, like the First Amendment right to assemble, was not granted by the Constitution, but was merely recognized by that document, since arms bearing and assembly are both fundamental human rights that are “found wherever civilization exists.”); *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1896) (In this case, the Court wrote “The right of the people to keep and bear arms is not infringed by laws prohibiting the carrying of concealed weapons.” The obvious implication is that laws prohibiting the carrying of unconcealed weapons would violate the Second Amendment, a fact that could only be true if the Amendment recognized an individual right); *United States v. Miller*, 307 U.S. 174 (1938 (discussed extensively below)); *Moore v. East Cleveland*, 431 U.S. 494, 502 (1976) (“the freedom of speech, press, and the religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures” are part of the “full scope of liberty” guaranteed by the Constitution and made applicable against the states by the due process clause of the 14th amendment); *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1061 (1990) (“[T]he ‘people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of the national community or who have otherwise developed sufficient connection with this country to be considered part of the community.”)

6. As the Senate Subcommittee on the Constitution noted in 1982, “The Framers of the Bill of Rights consistently used the words ‘right of the people’ to reflect individual rights _ as when these words were used to recognize the ‘right to the people to peaceably assemble’” in the first amendment.

7. Eighty-nine percent of Americans believe that as citizens they have a right to own a gun, and 87 percent believe the Constitution guarantees them a right to keep and bear arms. J. Wright, P. Rossi, and K. Daly, *UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICAN* 229 (1983), quoting survey conducted by Decision-Making Information Inc.

8. The most recent endorsements of the individual right position appear in Amar, *The Bill of Rights as a Constitution*, 100 *YALE L. J.* 1131, 1164ff (1991) and Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and The Right to Bear Arms*, 139 *U. PENN. L. REV.* 1257 (1991).

Similar conclusions were reached in the overwhelming majority of scholarly writing in the 1980s, of which the following is only a partial list: Levinson, *The Embarrassing Second Amendment*, 99 *YALE L. J.* 637 (1989); S. Halbrook, *A Right To Bear Arms: State and Federal Bills Of Rights And Constitutional Guarantees* (1989); L. Levy, *Original Intent and the Framers' Constitution* 341 (1988); Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 *J. L. & POLY* 1 (1987); Lund, *The Second Amendment, Political Liberty and the Right to Self-Preservation*, 39 *ALA. L. REV.* 103 (1987); Shalhope, *The Armed Citizen in the Early Republic*, 49 *LAW & CONTEMP. PROBS.* 125 (1986); Kates, *A Dialogue on the Right to Keep and Bear Arms* 49 *LAW & CONTEMP. PROBS.* 143 (1986); 4 *Encyclopedia of the American Constitution* 1639-40 (Karst & Levi eds. 1986); Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 *HARV. J. L. & PUB. POLY* 559 (1986); Marina, "Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective" in *Firearms and Violence: Issues of Public Policy* (D. Kates, ed. 1984); Dowlut, *The Current Relevancy of Keeping and Bearing Arms*, 15 *U. BALT. L. REV.* 32 (1984); Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 *MICH L. REV.* 204, 244-52 (1983); Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Perspective*, 10 *HAST. CONST. L. Q.* 285 (1983); Dowlut, *The Right to Arms*, 36 *OKLA. L. REV.* 65 (1983); Senate Subcomm. on the Constitution of the Comm. on the Judiciary, 97th Cong., 2d Sess., *The Right To Keep and Bear Arms*

(1982); Caplan, *The Right of the Individual to Bear Arms*, 1982 DET. COLL. L. REV 789 (1982); Gardiner, *To Preserve Liberty – A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63 (1982); Note, *Gun Control: Is It A Legal and Effective Means of Controlling Firearms in the United States?*, 21 WASHBURN L.J. 244 (1982); Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM HIST. 599 (1982); Cantrell, *The Right to Bear Arms*, 53 WIS. BAR B. 21 (1980).

It appears that only five articles from the last decade which approximate support of the prohibitionist, anti-individual position. Significantly, even one of these rejects the states' right view. Beschle, *Reconsidering the Second Amendment: Constitutional Protection for a Right of Security*, 9 HAMLIN L. REV. 69 (1986) concedes that the Amendment does guarantee a right of personal security, but argues that the right can constitutionally be implemented by banning and confiscating all guns. The others are Fields, *Guns, Crime and the Negligent Gun Owner*, 10 N. KY. L. REV. (1982) (article by a non-lawyer spokesperson for the National Coalition to Ban Handguns); Spannaus, *State Firearms Regulation and the Second Amendment*, 6 HAMLIN L. REV. 383, (1983); Cress, *An Armed Community: The Origins and Meaning of the right to Bear Arms*, 71 J. AM. HIS. 22 (1983); Ehrman & Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?* 15 DAYLTON L. REV. 5 (1990) (employee of Handgun Control, Inc.).

9. Madison's original structure of the Bill of Rights did not place the amendments together at the end of the text of the Constitution (the way they were ultimately organized); rather, he proposed interpolating each amendment into the main text of the Constitution, following the provision to which it pertained. If he had intended the Second Amendment to be mainly a limit on the power of the federal government to interfere with state government militias, he would have put it after Article 1, section 8, which granted Congress the power to call for the militia to repel invasion, suppress insurrection, and enforce the laws; and to provide for organizing, arming, and disciplining the militia. Instead, Madison put the right to bear arms amendment (along with the freedom of speech amendment) in Article I, section 9 – the section that guaranteed individual rights

such as habeas corpus. Donald B. Kates, "Second Amendment," in *Encyclopedia of the American Constitution*, ed. Leonard Levy (New York: MacMillan, 1986), p. 1639. See also Robert Shalhope, "The Ideological Origins of the Second Amendment," 69 *Journal of American History* (December 1982): 599-614; Joyce Malcolm, "The Right of the People to Keep and Bear Arms: The Common Law Tradition," *Hastings Constitutional Law Quarterly* 10 (Winter 1983): 285-314. See also discussion below, and legal scholarship cited in previous note.

10. See, e.g., Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 *HARV. J. L. & PUB. POLY* 559, 560 (1986). This article provides a summary of contemporary interpretations of the Second Amendment and a thorough discussion of the intent of its framers.

11. SENATE SUBCOMM. ON THE CONSTITUTION OF THE COMM. ON THE JUDICIARY, 97th Cong., 2d Sess., *THE RIGHT TO KEEP AND BEAR ARMS* 6 (Comm. Print 1982) [hereinafter *SUMCOMM. ON THE CONSTITUTION*].

12. *Id.* The English background of the individual right to possess weapons dates back to the reign of King Alfred the Great in 690 A.D. Hardy *supra* note 10, at 562. Under King Alfred, every free male was required by law to possess the weapons of an infantryman and serve in the citizen militia (although the word "militia" itself was not used until the late 16th century). In 1181, King Henry II's Statute of Assize of Arms ordered all freemen to bear arms for national defense. The Assize required every freeman to "bear these arms in his [Henry II's] service according to his order and in allegiance to the lord King and his realm." The Assize was based on the old Saxon tradition of the *fyrð*, in which every male aged 16 to 60 bore arms to defend the nation. Statute of Assize of Arms, Henry II, art. 3 (1181); Robert W. Coakley and Stetson Conn, *The War of the American Revolution* (Washington: Center of Military History United States Army, 1975), at 2. Complaining about an increase in crime, Edward I enacted the Statute of Winchester, which required "every man," not just freemen, to have arms. The types of arms required to be owned by the poorest people were *Gisarmes* (a type of pole-ax), knives, and bows. Another anti-crime measure in the statute ordered local citi-

zens to apprehend fleeing criminals, and established night watches. 13 Edward I chapter 6 (1285). By the late 16th century, gun ownership had become mandatory for all adult males _ for anti-crime purposes, and for the defense of the realm. Arms were necessary so that all citizens could join in the *hutesium et clamor* (hue and cry) to pursue fleeing criminals; indeed, citizens were legally required to join in. Any person who witnessed a felony could raise the hue and cry. Frederick Pollock and Frederic W. Maitland, *The History of English Law before the Time of Edward I* (Cambridge: Cambridge University Press, 1911, 2d ed., 1st pub. Cambridge, 1895), II, chapter IX, paragraph 3, pp. 578-80; Blackstone, IV, pp. *293-94; Statute of Winchester, 13 Edward I, chapter 1 & 4; Bradley Chaplin, *Criminal Justice, in Colonial America, 1606-1660* (Athens: University of Georgia Press, 1983), p.31, citing Michael Dalton, *The Country Justice, Containing the Practice of Justices of the Peace out of the Their Sessions* (London: 1619), p. 65, and Ferdinando Pulton, *De Pace Regis Regni Viz A Treatis declaring which be the great and generall offences of The Realme, and the chiefe impediments of the pace of The King and The Kindom* (London: 1609), pp. 152-56. The English Bill of Rights of 1689 recognized a right to bear arms, albeit one subject to limitation. "The subjects which are Protestants may have arms for their defence suitable to their conditions as and allowed by law." Bill of Rights of 1689, 1 William & Mary, sess. 2 chapter 2.

13. "The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2 c. 2. and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." William Blackstone, *Commentaries on the Laws of England, I* (Chicago: University of Chicago Press, 1979) (facsimile of First Edition of 1765-1769), p. 139.

14. Blackstone, IV, p. *82.

15. Hardy, *supra* note 10, at 588.

16. *Id.*

17. Between 1620 and 1775, "almost the entire mail population of

New England actively participated in the militia." Marie Ahearn, *The Rhetoric of War: Training Day, the Militia, and the Military Sermon* (Westport, Connecticut, Greenwood Press, 1989), p. 2.

18. *Essex Gazette*, April 25, 1775, p. 3, col. 3; Coakley and Conn, pp. 25-26.

19. Halbbrook, *The Right to Bear Arms in Texas: The Intent of the Framers of the Bill of Rights*, 41 *BAYLOR L. REV.* 629, 636 (1989).

20. "The experience of the Revolution thus strengthened the colonial perception of a link between individual armament and individual freedom. The colonists, who perceived themselves as staunch Whigs, continued to see free individual armament as Whig dogma." Hardy, 10, at 593.

21. Daniel Boorstin, *The Americans: The Colonial Experience* 370 (1965). See also William Marina and Diane Cuervo, "The Dutch-American Guerrillas of the American Revolution," in ed. Gary North, *The Theology of Christian Resistance: A Symposium*, vol. 2 of *Christianity and Civilization* (Tyler, Texas: Geneva Divinity School Press, 1982): 242-65.

22. Hardy, *supra* note 10, at 600-15.

23. *Id.* at 600.

24. *Id.* at 600-15.

25. W. Bennett, ed., *Letters from the Federal Farmer to the Republican* 21, 22, 124 (1975). Lee sat in the Senate that ratified the Second Amendment. *SUBCOMMITTEE*, *supra* note 11, at 5.

26. Hardy, *supra* note 10, at 599.

27. N. Webster, "An Examination into the Leading Principles of the Federal Constitution," in P. Ford, ed., *Pamphlets on the Constitution of the United States* 56 (1888).

28. *The Federalist*, No. 46 (J. Madison). At the time Madison wrote, "half a million citizens" amounted to almost the entire adult white male population.

29. *The Federalist*, no. 28 (A. Hamilton).

30. *The Federalist*, no. 29 (A. Hamilton).

31. Hardy, *supra* note 10, at 604.

32. H. R. DOC. NO. 398, 69th Cong., 1st Sess. 1026 (1927).

33. *Id.*

34. Quoted in ed. Morton Borden, *The Antifederalist Papers*, vol. 3 (East Lansing: Michigan State University Press), p. 386.

35. “State conventions had made no fewer than five appeals for such a right; such accepted rights as freedom of speech, of confrontation, and against self-incrimination could boast but three endorsements.” Hardy, *supra* note 10, at 604.

36. SUBCOMM. ON THE CONSTITUTION, *supra* note 11, at 6.

37. Quoted in Clinton Rossiter, *The Political Thought of the American Revolution* (New York: Harcourt, Brace and World, 1953), pp. 126-27.

38. Quoted in Borden. 425.

39. House Report No. 141, 73d Cong., 1st sess. (1933), pp. 2-5. Congress did so in order that the National Guard could be sent into overseas combat. The National Guard’s weapons cannot be the arms protected by the Second Amendment, since Guard weapons are owned by the federal government. 32 U.S.C. paragraph 105[a][1].

40. Subcommittee on the Constitution, at 11. “There can be little doubt... that when the Congress and the people spoke of a ‘militia,’ they had reference to the... entire populace capable of bearing arms, and not to any formal group such as what is today called the National Guard... When the framers referred to the equivalent of our National Guard, they uniformly used the term ‘select militia’ and distinguished this from ‘militia’. Indeed, the debates over the Constitution constantly referred to organized militia units as a threat to freedom comparable to that of a standing army, and stressed that such organized units did not constitute, and indeed were philosophically opposed to, the concept of a militia.”

Several states included a similar right to bear arms guarantee in their own constitutions. If the Second Amendment protected only the state uniformed militias against federal interference, a comparable article would be ridiculous in a state constitution.

41. Coxe, *Pennsylvania Gazette*, Feb. 20, 1788, quoted in Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791*, 10 N. KY. L. REV. at 17 (1982).
42. Webster’s Ninth New Collegiate Dictionary 103 (1984).
43. *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169 (N.D. Ill.), *affd.* 695 F.2d 261 (7th Cir., 1982), *cert. denied* 464 U.S. 863 (1983).
44. 307 U.S. 174 (1938).
45. *Id.* at 175.
46. *Id.* at 177.
47. A federal statute at the time allowed appeals directly to the Supreme Court when a federal district court found a federal statute unconstitutional.
48. *Miller*, 307 U.S. at 179.
49. *Id.*
50. *Id.*
51. *Id.* at 178.
52. *Id.* (quoting *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840)).
53. *United States v. Cruikshank*, 92 U.S. 542, 551-53 (1976).
54. The Court’s decision failed to consider *Dred Scott*, where the Court had stated the right to carry arms was included within the “Privileges and Immunities” clause of Article IV, section one of the Constitution.
55. *Fresno Rifle and Pistol Club v. Van de Kamp*, 746 F. Supp. 1415 (E.D. Calif. 1990).
56. *Moore v. East Cleveland*, 431 U.S. 494, 502 (1976) (“the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures” are part of the “full scope of liberty” guaranteed by the Constitution and made applicable against the states by the due process clause of the 14th amendment).
57. *Said Rep.* Sidney Clarke of Kansas, during the debate on the

Fourteenth Amendment, “I find in the Constitution of the United States an article which declared that ‘the right of the people to keep and bear arms shall not be infringed.’ For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in their local laws.” Quoted in David Hardy, “The Constitution as a Restraint on State and Federal Firearm Restrictions,” in D. Kates, ed. *Restricting Handguns: The Liberal Skeptics Speak Out* 181 (1979). For more on the history of the 14th Amendment, see S. Halbrook, *THAT EVERY MAN BE ARMED*, *supra* note 144; Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983).

58. 116 U.S. 252 (1886).

59. *Id.* at 265.

60. 196. *Nunn v. State*, 1 Ga. (1 Kel.) 243, 251 (1846)

61. 50 Tenn. (3 Heisk.) 165 (1871).

62. *Id.* at 179.

63. *Fife v. State*, 31 Ark. 455, 461 (1876).

64. *Id.* at 460-61.

65. *Oregon v. Kessler*, 289 Or. at 369, 614 P. 2d at 99.

66. *Kessler*, 289 Or. at 368, 614 P. 2d at 98.

67. *Id.* The Texas Constitution has also been interpreted to deny a right to possess machine-guns.

68. 204. Oregon Attorney General, Opinion 82-15, Apr. 20, 1990. An Oregon trial court has disagreed, under the rationale that semi-automatics are essentially machine-guns. *Oregon State Shooting Association v. Multnomah County*, no. 9008-04628 (Circuit Court, August 22, 1991). The case is being appealed. The trial court labeled as “dicta” the Oregon Supreme Court’s methodology for evaluation of technological advances in arms in relation to the right to bear arms. The trial court reasoned that the Supreme Court’s methodology had been outlined in a case involving knives, and thus was not binding to a case involving guns.

69. Hearings on H.R. 1154 before the Subcomm. on Trade of the House Comm on Ways and Means, 101st Congress, 1st Sess. 10, at

104. [Herein after called Hearings.] Hon. Charles B. Rangel, National Council For a Responsible Firearms Policy, Inc., stated:

I understand the second amendment and the right to bear arms. I understand the right to protection and all of those issues. I am well aware of the fact that just because a gun is powerful and has lots of fancy features, it does not mean that each and every person who purchases it does so with the intent of taking human lives.

But I also understand the fact that we cannot continue to allow human beings, and not animals, to be hunted down with these weapons. People are being stalked through the street and the neighborhoods and pumped fill of bullets like prey on "Wild Kingdom."

70. 389 U.S. 347.

71. It should be noted that the Stockton murders were not made worse because Patrick Purdy owned a semiautomatic. He fired approximately 10 rounds in six minutes. Anyone who was willing – as Purdy apparently was – to spend some time practicing with guns, could have speedily reloaded even a simple bolt-action rifle, and fired as many shots in the same time period.

Moreover, the medical technology has greatly outstripped firearms in the past two centuries. Because gunshot wounds are much less likely to result in fatality today, a criminal firing a semiautomatic gun for a long period (such as six minutes) today would kill fewer people today than a criminal firing a more primitive gun two hundred years ago.

72 . One clearly obsolete provision of the Constitution is the guarantee of federal jury trials when the amount in controversy exceeds \$20. Due to inflation, a \$20 case today is immensely less significant than a \$20 case from 200 years ago. Today, the \$20 rule impedes judicial efficiency by guaranteeing a jury trial for even the pettiest of cases. Yet no-one suggests that a legislature could simply ignore the 7th amendment because of obsolescence. The only remedy is to propose an amendment.

73. That the guns to be prohibited may sometimes be the best form of self defense does not matter to some advocates of prohibition. As New York City Mayor responded to self defense arguments: "I'm telling you this nonsense that the Constitution entitles us to a weapon to defend ourselves is not an appropriate response to [gun prohi-

bition] legislation. "Council Panel OKs Ban on Assault Weapons," *New York Post*, July 25, 1991.

74. *Los Angeles Times*, May 13, 1988, at II, 3.

75. "Block Clubs Wage the Battle," *Washington Times*, November 25, 1988, p. C6.

76. "Drug Battle Truce," *Rocky Mountain News*, September 29, 1989, p. 4; "Anti-Drug Gun Battle Spurs Demand for Firearms," *Gun Week*, November 3, 1989, p. 9, citing *Spokane Chronicle*.

77. 135 CONG. REC. S 1869-70 (daily ed. Feb. 28, 1989).

78. Hearing, *supra* note 69, at 77.

79. Alan Gottlieb, "Gun Ownership: A Constitutional Right," *Northern Kentucky Law Review* 10 (1982): 138.

80. Governor O'Conor of Maryland delivered a radio address on March 10, 1942, at which he called for volunteers to defend the state: "[T]he volunteers, for the most part, will be expected to furnish their own weapons. For this reason, gunners (of whom there are sixty thousand licensed in Maryland), members of Rod and Gun Clubs, of Trap Shooting and similar organizations will be expected to constitute a part of this new military organization." *State Papers and Addresses of Governor O'Conor*, vol III, p. 618, quoted in Bob Dowlut, "The Right to Bear Arms: Does the Constitution or the Predilection of Judges Reign?" *Oklahoma Law Review* 36 (1985): 76-77, n. 52. See also D. Kates, *Why Handgun Bans Can't Work* 74 (1982), citing Baker, "I Remember 'The Army' with Men from 16 to 79," *Baltimore Sun Magazine*, November 16, 1975, p. 46.

81. M. Schlegel, *Virginia On Guard _ Civilian Defense and the State Militia in the Second World War* (Richmond: Virginia State Library, 1949), pp. 45, 129, 131. According to Schlegel, the Virginia militia "leaned heavily on sportsmen," because they could provide their own weapons. *Ibid.*, p. 129; quoted in bob Dowlut, "State Constitutions and the Right to Keep and Bear Arms," *Oklahoma City University Law Review* 2 (1982): 198.

82. "To Arms," *TIME*, March 30, 1942, p. 1.

83. Office of the Assistant Secretary of Defense, *U.S. Home Defense Study* (March 1981), pp. 32, 34, 58-63, quoted in Dowlut, "State

Constitutions," p. 197.

84. *Id.*

85. A study by the Arthur Little firm found that men who participated in the DCM shooting program before joining the military learned military shooting more speedily than did other recruits. DCM participants who do not join the military are still a national defense resource, since they will be able to use their skills in the event of an emergency of the type detailed in this section.

86. "Far North Has Militia of Eskimos," *New York Times*, April 1, 1986, p. A14.

87. Mao Zedon, *Mao-Tse Tung on Guerrilla Warfare*, translated by S. Griffith (New York: Praeger, 1961), cited in Raymond Kessler, "Gun Control and Political Power," *Law and Policy Quarterly* 5 (1983): 395.

88. "One Year Later, Analysts Groping for Answers to Afghanistan," *Kansas City Times*, December 26, 1980, p. B-3, cited in Kessler, p. 395.

89. Gottlieb, p. 139.

90. For the Philippines, see R. Sherrill, *THE SATURDAY NIGHT SPECIAL* 272 (1973). For Uganda, "Uganda Curbs Firearms," *New York Times*, December 22, 1969, p. 36. For Cuba, see Kessler, p. 382; Crum, "Gun Control Paved Castro's Way," *Conservative Digest*, April 1976, p. 33 (use of Batista's registration lists to facilitate confiscation); Williams, "The Rise of Castro: 'If only we hadn't given up our guns!'", *Medina County Gazette*, October 15, 1978, p. 5. For Bulgaria, see *GUN CONTROL LAWS IN FOREIGN COUNTRIES*, rev. ed. (Washington: Library of Congress, 1976), p. 33. (Upon coming to power Bulgarian communists immediately confiscated all firearms.)

91. *Farmer v. Higgins*, 907 F.2d 1041 (11th Cir. 1990), cert. denied, 111 S. Ct. 753 (1991).

92. *Hopfman v. Connolly*, 471 U.S. 459 (1985).

93. The statute prohibits manufacture of machine-guns for sale to civilians except "under the authority of the United States." The federal district court, noting repeated Congressional statements of intent

not to outlaw any firearms, found the phrase to require the Bureau of Alcohol, Tobacco and Firearms to issue manufacturing licenses to persons who were not otherwise prohibited from manufacture.

94. *United States v. Rock Island Armory* (C. D. Ill. May 2, 1991).

95. In this issue paper, the term “assault rifle” is generally used without quotation marks, since it has a precise and commonly accepted definition. The term “assault weapon” is always used in quotation marks, since there is no definition other than “an amorphous subset of guns which are incorrectly considered to be military firearms.”

96. Legislating against semiautomatic firearms that happen to look like military weapons does not draw any meaningful distinctions between those firearms that are banned as “assault weapons” and those that are not.

97. Massacres do not have to be planned. An inexperienced police officer, under stress and armed with a deadly “assault weapon” could do at least as much damage as an ordinary citizen who went berserk. Of course it would be wrong to deprive all police officers of useful firearms to guard against the unlikely possibility that an officer with no prior record of illegal violence would suddenly lose his bearings and start killing people. The same may be said of ordinary citizens.

98. In the spring of 1989, Philip McGuire testified before the U.S. Senate Subcommittee on the Constitution in favor of Senator Metzenbaum’s S.386. The bill would have given the Bureau of Alcohol, Tobacco and Firearms the discretionary authority to outlaw almost every semiautomatic. Mr. McGuire, a former administrative official with the BATF, assured the Senators that BATF would not abuse its discretionary authority. The assurance was ironic, considering its source.

When Mr. McGuire was Chief of Investigations for BATF, the United States Senate made the finding that “[E]nforcement tactics made possible by current firearms laws [which were later reformed over Mr. McGuire’s strong opposition] are constitutionally, legally, and practically reprehensible... [A]pproximately 75 percent of BATF gun prosecutions were aimed at ordinary citizens who had neither criminal intent nor knowledge, but were enticed by agents into unknowingly technical violations.” Senate Committee on the Judiciary, Sub-

committee on the Constitution, *THE RIGHT TO BEAR ARMS*, 97th Cong., 2d. Sess., S. Doc. No. 2807 (February 1982), at 20-23 (unanimous report).

In 1982, Mr. McGuire was promoted to Associate Director, Law Enforcement, a position which he held until his retirement in 1988. In 1986, Congress enacted the Firearm Owners Protection Act, which narrowed the definition of offenses under the Gun Control Act of 1968, and sharply curtailed the search and seizure authority of BATF. The preamble to the law reining in the enforcement activities under Mr. McGuire's supervision states;

The Congress finds that (1) the rights of citizens (A) to keep and bear arms under the second amendment to the United States Constitution (B) to security against illegal and unreasonable searches and seizures under the fourth amendment (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment and (D) against unconstitutional exercise of authority under the ninth and tenth amendments; require additional legislation to correct existing statutes and enforcement policies...

18 U.S.C.S. paragraph 921 (1990 Supp.), at 149. The only fact that gave Mr. McGuire's promises on non-abusive enforcement by BATF any credibility was that he was no longer with the Bureau.

99. "Gun-control foes' Lawsuit Alleges Warrantless Search," *Wash. Times*, July 17, 1990, at B5; "Pro-gun Groups for Access to Papers Related to '88 Search," *The (Baltimore) Sun*, July 17, 1990.

100. The act which the police said justified the taking of photos was unfurling a banner comparing Governor Schaefer to Hitler, but no photograph shows such a banner. None of the photos showed persons engaging or seeming ready to engage in violent conduct. The photographs were mostly of speakers and persons quietly listening to them. The rally was the only 1991 State House demonstration where police photographed the demonstrators. "Police Photos Taken at State House Rally Irk Gun-Control Foes," *Wash. Times*, Mar. 28, 1991. at B4; "Police Photos and Gun Rally Blasted," *The (Baltimore) Evening Sun*, Mar. 27, 1991, at A1; "Gun Advocates Charge Intimidation," *Montgomery J.*, Mar. 28, 1991, at A1.

101. "Smile! You're on State Police Camera," Montgomery J., Apr. 1, 1991, at A4 (editorial).

102. The Nazi controls were based on a foundation of strict controls enacted by the Weimar government.

103. Quoted in David Hardy, "The Second Amendment as a Restraint on State and Federal Firearm Restrictions," in *Restricting Handguns*, pp. 184-85.

At "assault weapon" hearings in 1989, Representative William Hughes told witness Neal Knox (the lobbyist for the Firearms Coalition), that it was outrageous that Knox and his supporters did not trust the government. Knox shot back that it was outrageous that Hughes did not trust the people.

104. Thompson used a stolen, fully-automatic firearm. The gun prohibition lobby's low regard for truth is evidenced by their advertising assertions that the gun was a semiautomatic.

105. *Austin Amer. Statesman*, Sept. 17, 1989, at A19 col. 2.

106. *Id.* at A19, col. 3. In fact, the study showed that after one episode of *Miami Vice* featured the Bren 10, gun stores were flooded with demands for the unusual weapon and the price has now reached \$1200 per gun. *Id.*

107. *Id.*

108. Homicide rates in the United States, Canada, and South Africa all rose steeply after the introduction of television. Centerwall noted that after television was introduced in Canada, the homicide nearly doubled, even though per capita firearms ownership remained stable. In the United States, the rise in firearms homicide was paralleled by an equally large rise in homicide with the hands and feet. The data therefore implies that the underlying cause of the homicide increase was not a sudden surge in availability of firearms, since there was no surge in availability of hands and feet, and hand and foot homicide rose as sharply as firearms homicide. Centerwall suggested that one mechanism by which television causes homicide, and perhaps other violent crime as well, is simple imitation. He pointed to an ABC news poll of prisoners which asked "have you ever committed a crime you saw on television?" Over one quarter of prisoners remembered a specific crime episode they had imitated. Brandon

Centerwall, "Exposure to Television as a Risk Factor for Violence," 129 *American Journal of Epidemiology* 643-652 (April 1989).

109. There is no First Amendment violation in subjecting the entertainment industry to the same criminal laws that apply to the rest of the population.

The Impact on Crime of State Laws Allowing Concealed Weapon Carrying Among 18-20 Year-Olds

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Each of the 50 states has differing regulations on the carrying of concealed weapons, a variation that provides an opportunity to assess the impact of different provisions. In particular, the states differ regarding the minimum age at which persons become eligible to lawfully carry concealed weapons. Some states require permits for such carrying, and specify a minimum age of eligibility for the

permit, while others require no permit but nevertheless specify a minimum age for carrying. Still others do not specify an explicit age minimum, but rather grant discretion to authorities such as county sheriffs to judge the degree to which a prospective carrier is a "suitable person." In the following analyses, crime and arrest statistics pertaining to 2000 are related to these statutory minimum age for carrying as they existed in the previous year. As of 1999, 14 states had an expressed minimum age of 18 years of age to carry, one state (Vermont) had a minimum of 16, six states had no express minimum (and thus allowed some carrying among 18-to-20 year olds), for a total of 21 states that allowed lawful carrying among some 18-to-20 year olds. On the other hand, seven states forbade concealed carrying altogether, 21 states set 21 as the minimum age, and one (Oklahoma) set 23 as the minimum, for a total of 29 states that completely forbade the carrying of concealed weapons by 18-to-20 year olds (see Table 1 for a complete listing).

METHODS

The strategy for testing for an effect of state carry laws on crime takes advantage of the age-specific character of these legal restrictions. Since the provisions concerning minimum age either prohibit or allow carrying specifically among 18-to-20 year olds, if they affect the frequency of violent crime, they should do so by affecting crime rates among 18-to-20 year olds. We estimate state rates of crime among 18-to-20 year olds by multiplying state crime rates by the fraction of persons arrested for a given crime type who were 18-to-20 years old. Three violent crime rates were analyzed because they are the only crime types committed in significant numbers with firearms: (1) murder and nonnegligent manslaughter (hereafter denoted "homicide" for brevity's sake), (2) robbery, and (3) aggravated assault. Thus, to take Alabama as an example, we estimated the homicide rate among 18-to-20 year olds by multiplying the Alabama homicide rate in 2000 (7.4 homicides per 100,000 population) by the fraction of homicide arrests that 18-to-20 year olds accounted for in Alabama in 2000-2002 (0.1916), giving a homicide rate among 18-to-20 year olds of 1.42. Three years of arrest data, covering 2000-2002, were used because in smaller states

there are too few arrests for any one type of violent crime in any one year to get a reliable estimate of the 18-to-20 year old share of arrests.

In the following regression analyses, three age-specific crime rates were analyzed: (1) the homicide rate among 18-to-20 year olds, (2) the robbery rate among 18-to-20 year olds, and (3) the aggravated assault rate among 18-to-20 year olds. The analysis focused on the year 2000 because this is the most recent Census year with detailed data publicly available (most 2010 Census data are not yet available), and Census years provide data on a wealth of crime-related variables that must be statistically controlled in order to isolate the effect of carry law provisions. A list of these other variables appears in Table 2, and the sources of data for the analysis are reported in the Appendix.

The carry laws prevailing as of 1999, rather than 2000, were used to make sure that they pertained to a time point prior to 2000, the year to which the crime rates pertained. This makes “causal order” clearer, that is, it makes it less likely that any relationship found between carry law provisions and crime rates is due to an effect of crime rates on the enactment or amending of carry law provisions, and more likely that the relationship reflects an effect of the carry law provisions on crime rates.

The statistical procedure used to estimate the relationship between carry law age provisions and crime rates was a variant of ordinary least squares multiple regression, weighted least squares (WLS) regression. This procedure gives differing weights to each of the states, such that states with larger populations are given greater weight. This has the effect of reducing a statistical problem called heteroscedasticity. The weight used in these analyses was the square root of the state’s resident population in 2000.

Only 48 of the 50 states could be included in the analysis because FBI arrest data by age were not available for all of the years from 2000 to 2002 for Florida or Wisconsin (they were missing for 2000 for Wisconsin and for all three years for Florida). It should be noted that it is not essential for present purposes that all arrests be reported to the FBI, since we make no use of the absolute frequency of arrests. Rather, it is only necessary that the 18-to-20 year old share of those arrests reported to the FBI be approximately the same as the 18-to-20 year old share of all arrests for a given type of violent crime, reported or not.

Findings

Table 3 displays the WLS results. Each column of numbers shows the estimated coefficients of a regression equation pertaining to one of the three dependent variables or outcomes, and each row pertains to a particular independent variable that might affect these outcome variables. Each cell of the table shows three numbers. The topmost number is the WLS coefficient. The sign of this number (+ or -) denotes the direction of the association between the independent variable named in the row heading and the dependent variable (crime rate) named in the column heading. A positive coefficient means that a higher value on the independent variable (the possible cause) is associated with higher crime rates, while a negative coefficient means that a higher value on the independent variable is associated with lower crime rates. The size of the coefficient reflects that magnitude of the association. More specifically, it estimates how many units the dependent variable (crime rate) changes if the independent variable increases one unit.

The middle number is the ratio of the coefficient over its standard error, sometimes called a t-ratio. It is the test statistic, used to test whether the regression coefficient is significantly different from zero. The bottom number is the one-tailed statistical significance of the coefficient. A significance under .05 (5%) is generally considered to be “statistically significant,” i.e. not likely to be the product of random chance. Thus, if the bottom number in a given cell is lower than .05, it means that the associated independent variable shown in the row heading has a statistically significant association with the dependent or outcome variable shown in the column heading. Our primary interest is in the estimates shown in the first row of the table, those pertaining to the association of the 1999 state carry laws’ provisions regarding minimum age for concealed carrying with crime rates among 18-20 year olds or the 18-20 year old share of violent crime arrests.

Each regression equation also controlled for additional variables that might affect crime rates and that might also be associated with carry law age provisions. Every equation controlled for the share of the state population that was in the 18-20 age range, regardless of whether this variable was significantly related to the dependent variable. It turned out to make no difference to the key

results whether or not this variable was included in the equations. The rest of the control variables were included in the equation only if they showed a significant relationship with the dependent variable. A generous standard of significance, 20%, was used in deciding whether to retain variables in the equation, to reduce the chances that a potentially important control variable was omitted. A much larger set of potential control variables were tested but found to have no significant association (even at a generous 20% level of significance) with any of the crime rates. All the variables shown in Table 2 that do not appear in Table 3 fall into this category. Collinearity among the independent variables was not a problem – all tolerances were over 0.7 in all equations.

The estimates shown in the first row (labeled CARRY18) of the first three columns of Table 3 indicate that allowing 18-20 year olds to legally carry concealed weapons is not significantly related to rates of any of the three violent crimes that often are committed with guns (homicide, robbery, aggravated assault). Indeed, leaving statistical significance aside, the associations were negative for two of the three violent crime types, indicating that, other things being equal, states allowing 18-20 year old carry have less homicide and aggravated assault among 18-20 year olds than states forbidding it.

CONCLUSIONS

The analysis of state crime and arrest data indicates that provisions in state law prevailing in 1999 that allowed lawful concealed carrying of weapons among 18-20 year olds did not increase rates of murder, robbery, or aggravated assault within that age group. One partial explanation may be that states granting carry permits to persons under age 21 do so only for persons without criminal convictions or other predictors of violent crime, so legal carrying increased only among persons unlikely to commit violent crimes. Another explanation, consistent with research on the frequency and prevalence of defensive gun use (Kleck 2001a; b), is that the deterrent and defensive effects of gun carrying and defensive use among crime victims and prospective victims had crime-reducing effects that counterbalanced any crime-increasing effects. In any case, the best evidence indicates that allowing lawful

concealed carrying of weapons among 18-20 year olds does not, on net, increase murder, robbery, or aggravated assault within this age group.

REFERENCES

- Kleck, Gary. 2001a. "The frequency of defensive gun use." Pp. 213-283 in *Armed*, by Gary Kleck and Don B. Kates. Amherst, NY: Prometheus Books.
- Kleck, Gary. 2001b. "The nature and effectiveness of owning, carrying, and using guns for self- protection." Pp. 285-342 in *Armed*, by Gary Kleck and Don B. Kates. Amherst, NY: Prometheus Books.

Table 1. Classification of the States as to Minimum Age for Lawful Carrying of Concealed Weapons, as of 1999

No Concealed Carrying Allowed: IL, KS, MO, NE, NM, OH, WI

Minimum Age 23: OK

Minimum Age 21: AK, AZ, AR, FL, GA, HA, KY, LA, MA, MI, NV, NC, OR, PA, RI, SC, TN, TX, UT, VA, WA

No express minimum age: AL, CA, CO, CT, NH, NY

Minimum age 18: DE, ID, IN, IA, ME, MD, MI, MN, MT, NJ, ND, SD, WV, WY

Minimum age 16: VT

Statutory citations for these provisions are in the Appendix.

Table 2. Variables in the Analysis (as of 2000 unless otherwise indicated)*

Variable Name	Variable Description	Mean	Standard Deviation
MURD1820	Murder, nonnegligent manslaughters among 18-to-20 year olds per 100,000	1.02	0.51
ROB1820	Robberies among 18-to-20 year olds per 100,000	117.66	61.76
ASLT1820	Aggravated assaults among 18-to-20 year olds per 100,000	35.84	14.27
CARRY18	State law permits 18-20 carry, as of 1999 (1=yes, 0=no)	0.41	0.50
%POP18-20	% of resident population age 18-20	4.41	0.40
POVERTY	% families under the poverty line, 1999	12.17	3.03
BLACK	% African-American	11.55	9.19
HISPANIC	% Hispanic		
PRISONRS	State, federal prisoners per 100,000 resident population	423.26	167.19
DIVORCE	Divorces per 100,000 resident population	4.22	1.17
URBAN	% population residing in urban areas	74.93	13.96
DENSITY	Persons per square mile	0.21	0.25
FOREIGN	% foreign-born	8.60	6.82
INSTATE	% population born in same state	61.02	12.05
LIVLONE	% of population that lives alone	9.73	1.04
MARRIED	% of population married, living with spouse	51.81	2.60

MOVERS	% of population age 5+ that changed residence, 1995-2000	45.61	5.16
OLDPCT	% population age 65 or older	12.29	1.72
POLICE	Sworn full-time police officers per 10,000 population	20.20	4.33
SOUTH	State is in the South (former slave-owning state)	0.32	0.47
WEST	State is in the West Census region	0.24	0.43
UNEMPLOY	% civilian labor force unemployed	5.66	1.01
VETERAN	Military veterans per 1000 population, 1999	89.16	9.76

* Means and standard deviations are based on weighted data, and cover the 48 nonmissing states used in the regression analyses – that is, they exclude Florida and Wisconsin.

Table 3. Weighted Least-Squares Estimates – The Effect of Carry Law Age Provisions on Crime Among 18-to-20 year olds

(coefficient/ratio of coefficient over standard error/1-tailed significance)

<u>Independent Variable</u>	<u>Dependent Variable</u>		
	MURD1820	ROB1820	ASLT1820
CARRY18	-0.116 -1.112 .136	1.006 0.342 .367	-1.624 -0.453 .326
%POP18-20	-0.052 -0.363 .360	-5.405 -1.361 .090	-0.496 -0.102 .460

POVERTY	0.044		1.269		1.434
	2.301		2.366		2.191
	.014		.012		.034
BLACK	0.033	0.611		0.665	
	5.542		3.699		3.298
	.000		.000		.002
URBAN	0.006	0.427		0.357	
	1.561		3.987		2.715
	.063		.000		.004
OLDPCT-0.069					
	-2.252				
	.015				
Constant	0.767		-4.992		-13.158
Adj R2	.575		.447		.341

Appendix - Data Sources

State crime rate data:

U.S. Dept. of Justice, Federal Bureau of Investigation. Crime in the United States - Uniform Crime Reports, 2000. Washington, D. C.: U. S. Government Printing Office.

State arrest data by age, 2000-2002 (available from ICPSR website at <http://www.icpsr.umich.edu/icpsrweb/ICPSR/access/index.jsp>) :

U.S. Dept. of Justice, Federal Bureau of Investigation. Uniform Crime Reporting Program Data [United States]: Arrests By Age, Sex, And Race, 2000 [Computer file]. ICPSR03443-v2. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [producer and distributor], 2006-10-27.

_____. Uniform Crime Reporting Program Data [United States]: Arrests By Age, Sex, And Race, 2001 [Computer file]. Compiled by the U.S. Dept. of Justice, Federal Bureau of Investigation. ICPSR03760-v2. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [producer and distributor], 2006-09-21.

_____. Uniform Crime Reporting Program Data [United States]: Arrests By Age, Sex, And Race, 2002 [Computer file]. ICPSR04443-v2. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [producer and distributor], 2007-03-21.

2000 Census state population counts by single years of age:
<http://www.census.gov/popest/states/asrh/files/SC-EST2009-AGESEX-RES.csv>

State Law Provisions on Minimum Age for Concealed Weapons Carry as of 1999:

1. Alabama. Code of Ala. § 13A-11-75 (1999)
2. Alaska. Alaska Stat. § 18.65.705(1) (1999)
3. Arizona. Ariz. Rev. Stat. § 13-3112(E)(2) (1999)
4. Arkansas. Ark. Stat. Ann. § 5-73-309(1)(B) (1999)
5. California. Cal. Pen. Code § 12050 (1999)
6. Colorado. Col. Rev. Stat. § 18-12-105.1 (1999)
7. Connecticut. Conn. Gen. Stat. § 29-28 (2000)
8. Delaware. 1 Del. Code § 701; 11 Del. Code § 1441(a) (1999)
9. Florida. Fla. Stat. § 790.06(2)(b) (1999)
10. Georgia. Official Code Ga. Ann. § 16-11-129(b)(1) (1999)
11. Hawaii. Haw. Rev. State § 134-9(a) (1999)
12. Idaho. Idaho Code §§ 3302(1)(l), (11) (1999)
13. Illinois. 720 Ill. Compiled Stat. Ann. § 5/24-1(4) (1999)
14. Indiana. Burns Ind. Code Ann. § 35-47-2-3(f)(2) (1999)
15. Iowa. Iowa Code § 724.8(1) (1999)
16. Kansas. Kansas Stat. Ann. § 21-4201(a)(4) (1999)
17. Kentucky. Kentucky Rev. Stat. § 237.110(2)(b) (2000)
18. Louisiana. La. Rev. Stat. § 40:1379.3(C)(4) (1999)

19. Maine. 25 Maine Rev. Stat. § 2003(1)(A) (1999)
20. Maryland. Md. Ann. Code art. 27, § 36E(a)(1) (1999)
21. Massachusetts. Mass. Ann. Laws ch. 140, § 131(d)(iv) (1999)
22. Michigan. Mich. Code Laws § 28.426 (1999)
23. Minnesota. Minn. Stat. §§ 624.713(1)(a), 624.714(5)(a) (1999)
24. Mississippi. Miss. Code Ann. § 45-9-101(2)(b) (1999)
25. Missouri. Rev. Stat. Mo. § 571.030 (1999)
26. Montana. Mont. Code Ann. § 45-8-321(1) (1999)
27. Nebraska. Rev. Stat. Neb. § 28-1202 (1999)
28. Nevada. Nev. Rev. Stat. Ann. § 202.3657(2)(b) (1999)
29. New Hampshire. N.H. Rev. Stat. Ann. § 159:6 (1999)
30. New Jersey. N.J. Stat. §§ 2C:58-3(c)(4), 2C:58-4(c) (1999)
31. New Mexico. N.M. Stat. § 30-7-2 (1999)
32. New York. N.Y. CLS Penal § 400.00(1) (1999)
33. North Carolina. N.C. Gen. Stat. § 14-415.12(a)(2) (1999)
34. North Dakota. N.D. Cent. Code §§ 62.1-02-01(4), 62.1-04-03 (1999)
35. Ohio. Ohio Rev. Code Ann. § 2923.12(A) (1999)
36. Oklahoma. 21 Okl. St. § 1290.9(3) (1999)
37. Oregon. Oregon Rev. Stat. § 166.291(1)(b) (1999)
38. Pennsylvania. 18 Pa. C.S. § 6109(B) (1999)
39. Rhode Island. R.I. Gen. Laws § 11-47-11(a) (1999)
40. South Carolina. S.C. Code Ann. § 23-31-215(A) (1999)
41. South Dakota. S.D. Codified Laws § 23-7-7.1(1) (1999)
42. Tennessee. Tenn. Code Ann. § 39-17-1351(b) (1999)
43. Texas. Tex. Gov't Code 411.172(a)(2) (1999)
44. Utah. Utah Code Ann. § 53-5-704(1) (1999)
45. Vermont. 13 Vermont Stat. Ann. § 4008 (1999)
46. Virginia. Va. Code Ann. § 18.2-308(D) (1999)
47. Washington. Rev. Code Wash. § 9.41.070(1)(c) (1999)
48. West Virginia. W. Va. Code § 61-7-4(a)(3) (1999)
49. Wisconsin. Wis. Stat. § 941.23 (1999)
50. Wyoming. Wyo. State. § 6-8-104(j) (1999)

State and Federal Prisoners:

U.S. Bureau of Justice Statistics. 2001. Prisoners in 2000. BJS Bulletin NCJ 118207 at:

<http://bjs.ojp.usdoj.gov/content/pub/pdf/p00.pdf>

Sworn police full-time employment:

U.S. Department of Justice, Bureau of Justice Statistics. (1998). Directory of Law Enforcement Agencies, 1996: [UNITED STATES] [Computer file]. Conducted by U.S. Dept. of Commerce, Bureau of the Census. ICPSR ed. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [producer and distributor], 1998.

Divorces:

U.S. National Center for Health Statistics. "Provisional Tables on Births, Marriages, Divorces, and Deaths 1998-2000." National Vital Statistics Reports, Volume 49, number 6, available at: http://www.cdc.gov/nchs/data/nvsr/nvsr49/49_06_02_03.pdf.

All other variables:

U. S. Bureau of the Census. "Census 2000 Briefs and Special Reports" website at: <http://www.census.gov/population/www/cen2000/briefs.html>.

Abstract: The Statute of Northampton (1328) has been claimed as an ancient prohibition on civilians carrying deadly weapons in public. Analysis of its history and subsequent interpretation reveals otherwise.

It is commonly believed that the Statute of Northampton (1328) prohibited the carrying of arms by anyone but royal officials, and this understanding should inform judicial interpretation of the arms provisions of the English Bill of Rights (1689) and the U.S. Bill of Rights (1791). There are many defects to this view:

1. The actual intent of the Statute of Northampton;
2. The manner in which the later arms guarantees were understood by both contemporaries and later generations;
3. The manner in which the later arms guarantees were regarded as replacing existing statutory and common laws.

What did the Statute of Northampton (1328) Prohibit?

The Statute of Northampton (1328) explains its purpose in the first paragraph: “whereas offenders have been greatly encouraged, because [the] charters of pardon have been so easily granted in times past, of manslaughters, robberies, felonies, and other trespasses against the peace...”² The language prohibits coming before “the King’s justices, or other of the King’s ministers doing their office, with force and arms” or bringing “force in affray of the peace”³. An exception exists for those assisting the King’s servants “upon a cry made for arms to keep the peace” suggesting that those keeping the peace had a right to be armed.

“Armed” seems to have meant something different in 1328 than it does today. Blackstone’s discussion of the Statute of Northampton compares it to “by the laws of Solon, every Athenian was finable who walked about the city in armour.”⁴ This reference to “armed” as referring to wearing armor persists into the seventeenth century. In at least one source, “armed” means “with armor,” because

the soldiers are described as “some ten only (who had pieces would could reach [the Indians]) shot” and yet later, “they shot only one of ours, and he was armed, all the rest being without arms.”⁵ This definition continues to appear in dictionaries into the eighteenth century.⁶ Even in the nineteenth century, a manual for justices of the peace in Ireland discussing the Statute explains that “A man cannot excuse the wearing of such armour in public.”⁷ Significantly the Statute punishes violators “upon pain to forfeit their armour to the King, and their bodies to prison at the King’s pleasure”⁸ with no mention of forfeiting arms. Even as to wearing arms in the modern sense, this volume is clear that “no wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people...”⁹ Concerning those wearing armor under their clothes: “And persons armed with privy coats of mail, to the intent to defend themselves, against their adversaries, are not within the meaning of this statute, because they do nothing in terror of the people.”¹⁰ At most, the original intent appears to have been to prohibit the wearing of armor by knights and nobles other than royal officials out of concern that wearing armor would terrify common people, by suggesting that combat was imminent.

Other ancient sources confirm that “arms” had a different meaning than current. The *Encyclopaedia Londinensis* (1810) explains that “Arms, in the understanding of the law, are extended to any thing that a man wears for his defence, or takes into his hands or useth in anger to strike or cast at another.”¹¹ Further, the same section explains that the Statute of Northampton and later versions, “Under these statutes none may wear (unusual) armor publicly...”¹²

How Was The Statute Understood?

As the above examples show, there was an understanding that “arms” meant “armor.” Other evidence shows that the Statute was not understood to refer to a general prohibition on carrying arms. Sir John Knight was charged under the Statute of Northampton with carrying arms, but the charges were dismissed. One summary of the case includes the following notes: it did not

apply of course to royal officials or “persons executing his precepts, or themselves endeavouring to keep the peace” (thus excluding otherwise law-abiding persons intent on self-defense or the defense of other innocent parties) and the punishment includes “forfeiting their armour”¹³ (again evidence the Statute was aimed at wearing armor in a manner likely to engender fear).

The Gordon Riots in 1780 London was one of those times when anarchy broke out,¹⁴ and if the Statute of Northampton prohibited private citizens from bearing arms in public, one would expect some use of it or at least mention of it in Parliamentary debate. In the aftermath of those riots, Members of Parliament faulted the government for actions it took and actions it did not take.¹⁵ In particular, the Duke of Richmond objected to

the conduct of the Commander in Chief of the army, for the letters he sent to Colonel Twisleton, who commanded the military force in the City, ordering him to disarm the citizens, who had taken up arms, and formed themselves into associations, for the defence of their lives and properties. These letters he considered as a violation of the constitutional right of Protestant subjects to keep and bear arms for their own defence.¹⁶

Lord Amherst agreed that the disarming order was intended only for the rioters, “but no passage in his letter could be construed to mean, that the arms should be taken away from the associated citizens, who had very properly armed themselves for the defence of their lives and property.”¹⁷

The duality of the contemporary usage was shown by a contemporaneous pronouncement by the Recorder of London—the city’s chief legal officer—when asked if the right to have arms in the English Declaration of Rights protected armed defensive groups as well as armed individuals.

The right of his majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of this kingdom, not only as a right, but as a duty; for all the subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of the public peace. And that right, which every Protestant most unquestionably possesses, individually, may, and in many cases must, be exercised collectively, is likewise a point which I conceive to be most clearly established by the authority of judicial decisions and ancient acts of parliament, as well as by reason and common sense.¹⁸

The agricultural slump after the Napoleonic Wars led to widespread unrest, riots, and assemblies calling for Parliamentary reform.¹⁹ After the so-called Peterloo massacre, the conflict between the right to bear arms and fear of working class unrest led the English courts to distinguish between the differing reasons for bearing arms.²⁰ The courts concluded that there was an individual right to bear arms for self-defense, but there was no right to carry arms to a public meeting if the number of arms "so carried are calculated to produce terror and alarm."²¹

The Seizure of Arms Act, one of the "Six Acts" passed in 1819 by Parliament in response to the unrest, provided for constables to search for and seize arms on the testimony of a single person that they were being kept for a purpose "dangerous to the public peace."²² The Seizure of Arms Act was limited to the industrial areas where riots took place, and with a two-year expiration period.²³ The Seizure of Arms Act made distinctions based on the function of different classes of arms that were to be seized. "Any pike, pike head or spear in the possession of any person or in any house or place" was subject to confiscation, but "any dirk, dagger, pistol or gun or other weapon" was to be seized only if they were possessed for

“any purpose dangerous to the public peace.”²⁴ This distinguished between weapons perceived as offensive and defensive, for even the supporters of the Seizure of Arms Act generally accepted the right to possess arms for self-defense.²⁵ If the Statute of Northampton was still considered a barrier to private citizens carrying arms for self-defense, it is curious that it left no trace in these debates.

There seems to have been a scarcity of the use of deadly force in Colonial America, but mostly because of the cultural traditions of Englishmen, not that the laws prohibited the carrying of arms. Misson de Valbourg in 1695 described the love of fighting in England. After observing that even among adults, minor disputes would turn into fights with large crowds gathered to egg on the participants: “They use neither sword nor stick against a man that is unarmed; and if any unfortunate stranger (for an Englishman would never take it into his head) should draw his sword upon one that had none, he’d have a hundred people upon him in a moment.”²⁶ There was a notion of fair or proportionate use of weapons.

In America, the right of private citizens to carry deadly weapons was well established, as evidenced by the widespread reporting of such actions with no evidence that it was considered criminal. Nathanael Byfield’s account of the overthrow of Governor Andros’s authority in Boston in 1689 described how “the Town was generally in Arms, and so many of the Countrey came in, that there was twenty Companies in Boston, besides a great many that appeared at Charles Town that could not get over (some say fifteen hundred).”²⁷ Governors Andros’s report described how “the greatest part of the people... appeared in arms at Boston... to the number of about two thousand horse and foote...”²⁸ Samuel Prince’s description of the insurrection tells us:

I knew not anything of what was intended, till it was begun; yet being at the north end of the town, where I saw boys run along the street with clubs in their hands, encouraging one another to fight, I began to mistrust what was intended; and, hasting towards the town-dock, I soon saw men running for

their arms: but, ere I got to the Red Lion, I was told that Captain George and the master of the frigate was seized, and secured in Mr. Colman's house at the North End....

None of these accounts is explicit that the "arms" included guns, however. That these men soon took control of a British Navy frigate from its crew strongly suggests that they were armed with guns, not swords or pikes.²⁹

Other accounts of the day are more explicit. A British major, when told to turn over his regiment's "Colours and Drums" reprimanded the insurrectionists; "they threatened to shoot him down...." After taking custody of a number of officials, including the sheriff, this unsympathetic account described a "guard of Musqueteers to prevent all escapes" from the jail. After ordering the governor "and other Gentlemen to withdraw to Mr. Usher's.... Thither they come, guarded with a full company of Musqueteers...."³⁰

When Leisler's forces rebelled against the royal governor in 1689 New York, they were armed with swords and clubs, based on one incident in which they drove four customs commissioners out of the customs collector's office with swords.³¹ Another account for this incident described how Leisler's men fired into the city, "whereby several of his Majesties Subjects were killed and wounded as they passed in the street...."³² Other accounts in that same source, seeking to justify Leisler's actions, reduced the number killed by gunfire from Leisler's men, but do not dispute that it happened.³³

Yet another account in that same source, and one that portrayed Leisler very darkly, described how men under Leisler's command went to him "and threatened to shoot him if he did not head them." (Leisler was believed to have contrived this threat by his men to justify his actions.) Another section described how Leisler "sends severall Armed men, with no other warrant their Swords and Guns" to arrest a prominent merchant.³⁴ There is no mention that this violated any existing English laws about carrying arms in public,

as might be expected from sources hostile to Leisler.

In 1760s North Carolina, a series of conflicts between the Regulators of the back country and the formal government of the tidewater government lead to a number of instances where the Regulators appeared in public places armed with deadly weapons with no sign that officials attempted to arrest them or even considered these actions unlawful. Colonel Spencer's letter to Governor Tryon of April 28, 1768 describes how the Regulators "came up to the Court House to the number of about forty armed with Clubs and some Fire Arms...."³⁵ Nor was there any surprise when pistols appear in the hands of the law-abiding, such as a description of Rev. Whitfield preaching in Massachusetts, "he was attended by many Friends with Muskets and Pistols on Account of the Indians. . . ."³⁶

Pistols appear repeatedly in travel accounts of this period and newspaper stories. They are never identified as surprising, startling, or unusual in the American context. In a few cases, they are explicitly declared to be common. They are often described as being carried by private citizens.

Accounts from the early American Republic show that the carrying of deadly weapons was common in nearly all regions, suggesting that the Statute of Northampton was irrelevant to American law. Dr. James Reynolds was tried for attempted murder in 1799 Philadelphia. The jury found him innocent by reason of self-defense. He was not charged with carrying a pistol, with which he shot James Gallagher, Jr.³⁷

Robert Carleton's account of frontier Indiana Hall discussed the problem of stagecoach robberies and reported that a fellow traveler on the road to Indiana described an earlier journey: "I need hardly say I then traveled with weapons, and as we entered the mountainous country, a brace of pistols was kept loaded usually in a pocket of the carriage." The traveler's earlier journey had been interrupted by highwaymen armed with hammers, axes, and bludgeons, and his threat to use a pistol had driven the robbers away.³⁸

Another traveler in the carriage told Hall of a similar conflict at an inn in the South. “Of course, I barricaded the door as well as possible, and, without noise, examined my pistols—and got out my dirk....”³⁹ A third traveler described a journey from Charleston to Georgetown by stagecoach with slave-dealers: “Their diversion often was, to entice dogs near the stage and then to fire pistol-balls at them....”⁴⁰

Hall later described problems with armed robbers, and explained, “We are not advocates for Lynching, but we do know that where laws cannot and do not protect backwoodsmen, they fall back on reserved rights and protect themselves. Nay, such, instead of laying aside defensive weapons... we know that such woodsmen will go better armed, to slay and not unrighteously on the spot every unholy apostate that maliciously and wilfully strikes down and stamps on God’s image!” [Emphasis in original] In Hall’s grandiloquent language, describing the conflict with legislators who sought imprisonment for robbers, and the backwoodsmen, partial to firearm solutions, “Many neighbours out there will always physic [treat] such with lead pills—at lest till Reformers have prisons prepared fit to hold their pets longer than a few hours!”⁴¹

Pim Fordham, while staying at Princeton, Indiana, in 1817-18, reported that, “Yesterday 8 men on foot armed with pistols and rifles came into the town from Harmony. They had been in pursuit of an absconded debtor from Vincennes.”⁴² There was no problem persuading eight men armed with pistols and rifles to pursue a mere debtor, and Fordham found nothing surprising about them being so armed.

Fordham also described a party in the Illinois Territory that had excluded some “vulgar” party-crashers. Some of Fordham’s party “armed themselves with Dirks (poignards [daggers] worn under the clothes)” to resist another such attempt, but later, “In going away some of the gentlemen were insulted by the rabble, but the rumour that they were armed with dirks and pistols prevented serious mischief.”⁴³ While the antecedent of “they were armed” is unclear, that it prevented serious mischief by “the rabble” suggests

that members of Fordham's party were the ones armed. Pistols were weapons commonly enough carried to be a realistic deterrent to "the rabble."

Fordham described the flatboat men who worked the Mississippi River as a wild and dangerous population. Fordham warned, "But I would advise all travellers going alone down the river, to get one man at least that they can depend upon, and to wear a dagger or a brace of pistols; for there are no desperadoes more savage in their anger than these men." [emphasis added]⁴⁴

The Methodist preacher Peter Cartwright described a journey through the Allegheny Mountains to Baltimore in April, 1820 which shows that pistols were not startling discoveries, even when found lying in the road:

In passing on our journey going down the mountains, on Monday, we met several wagons and carriages moving west. Shortly after we had passed them, I saw lying in the road a very neat pocket-pistol. I picked it up, and found it heavily loaded and freshly primed. Supposing it to have been dropped by some of these movers, I said to brother Walker, "This looks providential;" for the road across these mountains was, at this time, infested by many robbers, and several daring murders and robberies had lately been committed.⁴⁵

Cartwright then recounted his use of this pistol shortly thereafter to defend himself against a robber.⁴⁶ On his return trip, he described his carrying of a pistol to defend himself from robbery during a dispute at a tollgate. The owner of the tollgate "called for his pistols," apparently with the aim of shooting at Cartwright.⁴⁷ In other incidents from the 1820s, Cartwright makes references to pistols in a manner that suggests that they were not at all unusual items, even if the use of them was dramatic.⁴⁸

Cartwright described two young men reduced to deadly enemies as a result of rivalry over a young lady:

They quarreled, and finally fought; both armed themselves, and each bound himself in a solemn oath to kill the other. Thus sworn, and armed with pistols and dirks, they attended camp meeting.⁴⁹

Cartwright did not find the carrying of pistols and dirks surprising. William Oliver Stevens described 1820s Georgia as a place so brutal and lawless that:

[N]o adult male ever went abroad unarmed. Whether it was to attend church, a social affair, or a political meeting, the Georgians carried loaded pistols, bowie knives, and sword canes. The pistols rested in the breast pockets of the coat and could be drawn quickly by both hands.⁵⁰

Charles Haswell described a widely reported 1830 incident in the District of Columbia. A prominent Washington newspaper editor, Duff Green, drew a concealed handgun to deter attack by a New York City newspaper editor at the U.S. Capitol. Haswell's account of subsequent events suggests that instead of regarding this as dastardly, criminal, unrespectable, or surprising, Green's acquaintances good-naturedly ribbed him about the incident.⁵¹ Green appears to have earned no infamy for his actions; two years later he published the 1830 census for the federal government.⁵²

There is no shortage of handguns in private hands in this period, and they appear in acts of violence at the highest levels of American society. The U.S. House of Representatives tried Samuel Houston for "a breach of the privileges of the House of Representatives, by assaulting and beating Mr. Stanbery, a member of that House." The testimony included that Rep. Stanbery "had a consultation with some of my friends, who agreed with me upon the answer which was

sent. It was the opinion of one of my friends (Mr. Ewing, of Ohio,) that it was proper I should be armed; that, immediately upon the reception of my note, Mr. Houston would probably make an assault upon me. Mr. Ewing, accordingly, procured for me a pair of pistols, and a dirk; and, on the morning on which the answer was sent, I was prepared to meet Mr. Houston if he should assault me.”⁵³

An Alabama paper from February 1837 reported a quarrel in Columbus, Georgia, between “Col. Felix Lewis and a Doctor Sullivan, the latter drew a pistol and attempted to shoot the former, when Lewis produced a Bowie knife, and stabbed Sullivan to the heart, who died in two minutes.”⁵⁴ An incident from Missouri involved an Alexander H. Dixon, who drew a sword cane on a man named Flasser. Flasser drew a pistol, and shot Dixon to death.⁵⁵

Near Natchez, Captain Crosly of the steamboat Galenian had a difficulty with one of his passengers, during which Crosly “drew a Bowie knife, and made a pass at the throat of the passenger,” but without causing any injury. Crosly ordered the passenger to leave the boat. As the passenger was leaving, Crosly retrieved a pistol from his cabin, pointed it at the passenger, and accidentally shot him.⁵⁶

Thomas Cather, an Ulster Scot traveler to America in the 1830s, commented on the reluctance of the criminal justice system in the South and West to interfere in violence: “Everyone goes armed with dagger, Boey [Bowie] knife, or pistols, and sometimes with all three, and in a society where the passions are so little under control it is not to be wondered... that murderous affrays should so often take place in the streets.”⁵⁷

In 1831, Arkansas Territorial Governor Pope expressed his concern about passions out of control, arguing that the willingness of juries to reduce murder to manslaughter encouraged killing: “Men should be brought to bridle their passions when life is at stake, and no excuse for shedding blood should be received but that of absolute necessity. The distinction between murder and manslaughter should be abolished in all cases where a dirk, pistol or other deadly weapon

is used, except in cases of self-defense [emphasis in original].”⁵⁸

Frederick Law Olmsted’s description of a not completely concealed Colt revolver on a Kentucky railroad in 1853 strongly suggests that concealed carrying of handguns was at least common, if not widespread:

In the cars in Kentucky a modest young man was walking through with the hand[le] of a Colt out of his pocket-skirt behind. It made some laugh & a gentleman with us called out, “You’ll lose your Colt, Sir.” The man turned and after a moment joined the laugh and pushed the handle into the pocket.

John said, “There might be danger in laughing at him.” “Oh no,” replied our companion, evidently supposing him serious, “he would not mind a laugh.” “It’s the best place to carry your pistol, after all,” said he. “It’s less in your way than anywhere else. And as good a place for your knife as anywhere else is down your back, so you can draw over your shoulder.”

“Are pistols generally carried here?”

“Yes, very generally.”

Allison said commonly, but he thought not generally [emphasis in original].⁵⁹ There are travel accounts and newspaper accounts in large numbers that demonstrate that handguns were commonly carried in at least some parts of the United States, and the presence of handguns is never presented as a surprise.

Kentucky, Louisiana, Indiana, Alabama, Georgia, Virginia, and Arkansas all passed laws between 1813 and 1840 that prohibited the carrying of concealed pistols (among other deadly weapons).⁶⁰ These laws did not apply to openly carried deadly weapons except

in the case of Georgia, leading the Georgia Supreme Court to strike it down for violating the Second Amendment.⁶¹ If the Statute of Northampton was understood to prohibit private citizens from carrying arms, then these bans on concealed carry were completely superfluous.

How the Bill of Rights Made the Statute of Northampton Obsolete

We have seen that whatever the meaning of the Statute of Northampton was in 1328, its relevance to American and English law was apparently zero by the nineteenth century. At least in part, this was because both the English Bill of Rights (1689) and the U.S. Bill of Rights provided strong guarantees of a right to keep and bear arms. As much of the previous literature on this subject demonstrates, the Second Amendment was overwhelmingly understood to protect an individual right to possess and carry deadly weapons before the Civil War. While many state supreme courts held that the Second Amendment limited only the federal government's authority, some recognized it as a limitation on state laws as well, and even many of these decisions recognized that the state constitutional arms guarantees were analogous to the Second Amendment.

In some cases, we have explicit rejections of the validity of the Statute of Northampton with respect to American law because of the subsequent constitutional development. In *Simpson v. State* (1833), the Tennessee supreme court rejected an indictment for affray on the grounds that both English case law in *Serjeant Hawkins* case rejected such a wide reading, but that even if not, "our constitution has completely abrogated it."⁶² Similarly, the North Carolina supreme court rejected that the carrying of deadly weapons was a violation of the Statute of Northampton arguing that it "is to be remembered that the carrying of a gun per se constitutes no offence. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry a gun. It is the wicked purpose—and mischievous result—which essentially constitute the crime."⁶³

Ancient History

The Statute of Northampton is ancient history, a ban on being armored that because of its antique language has been misinterpreted as a ban on private citizens being armed in public. Even if that had been its original purpose, it is as relevant today as 1328's laws allowing press censorship, trial by combat (not repealed in New York until 178664), establishment of the Church, and the use of torture to obtain confessions.

END NOTES

1. Adjunct History Faculty, College of Western Idaho. Mr. Cramer is the author of *CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM* (1999) (cited by Justice Breyer in *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3132 (2010) (Breyer, J., dissenting)), and *ARMED AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE* (2006), and co-author of, among other articles, Clayton E. Cramer & Joseph Edward Olson, *What Did "Bear Arms" Mean in the Second Amendment?*, 6 *GEO. J.L. & PUB. POLY* 511 (2008) (cited by Justice Scalia in *District of Columbia v. Heller*, 554 U.S. 570, 588 (2008)), and Clayton E. Cramer, Nicholas J. Johnson & George A. Mocsary, "This Right is Not Allowed by Governments that Are Afraid of the People": The Public Meaning of the Second Amendment When the Fourteenth Amendment Was Ratified, 17 *GEO.MASON L. REV.* 823 (2010) (cited by Justice Alito in *McDonald*, 130 S. Ct. at 3039 n.21, 3041 n.25, 3043). Mr. Cramer's website is *CLAYTON CRAMER'S WEB PAGE*, <http://www.claytoncramer.com> (last visited Aug. 20, 2013). Funding for this research was provided by Firearms Policy Coalition and The Calguns Foundation.

2. 2 Edw. III, Stat. Northampt. sec. 2.

3. 2 Edw. III, Stat. Northampt., sec 3.

4. William Blackstone, 2 *COMMENTARIES ON THE LAWS OF ENGLAND* 110 (1838).

5. John Winthrop, 1 WINTHROP'S JOURNAL: "HISTORY OF NEW ENGLAND" 1630-1649 191 (J. K. Hosmer, ed., 1908).
6. Thomas Sheridan, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1789), s.v. "to arm" (To furnish with armour of defence, or weapons of offence").
- 7 Leonard MacNally, 1 THE JUSTICE OF THE PEACE FOR IRELAND: CONTAINING THE AUTHORITIES AND DUTIES OF THAT OFFICER (1808), 32.
8. 2 Edw. III, Stat. Northampt., sec 3.
9. MacNally, op cit., note 7.
10. Id.
11. 2 Encyclopaedia Londinesis 201 (1810).
12. Id.
13. Humphry William Woolrych, A PRACTICAL TREATISE ON MISDEMEANOR 221-2 (1842).
14. Malcolm, infra note 14, at 130.
15. Id.
16. Debates in the House of Lords, 49 LONDON MAG. 467, 467 (1780) (emphasis added). See 49 LONDON MAG. 290 (1780) for Lord Amherst's letter ordering disarming of citizens and the response of the Lord Mayor of London Id., at 290, 291 explaining that this disarming should only apply to those suspected of rioting ("for when he speaks of the arms in the hands of the city militia, or other persons authorized by the king to be armed, he certainly includes the arms in the hands of the citizens and housekeepers... and Colonel Twisleton has put the proper construct on those letters, by only taking arms from suspected persons, or those who could not give a good account of themselves.")
17. Id. at 467-68.
18. Malcolm, infra note 14,, at 134 (emphasis added) (quoting

William Blizard, *DESULTORY REFLECTIONS ON POLICE: WITH AN ESSAY ON THE MEANS OF PREVENTING CRIME AND AMENDING CRIMINALS* 59-60 (1785)). Also, see 49 *LONDON MAG.* 290 (1780) for the opinion of the “recorder and counsel... that every housekeeper was a militia-man, and had a right to bear arms...”

19. Joyce Lee Malcolm, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994), at 166 (emphasis added)(quoting William Blizard, *DESULTORY REFLECTIONS ON POLICE: WITH AN ESSAY ON THE MEANS OF PREVENTING CRIME AND AMENDING CRIMINALS* 59-60 (1785)).

20. *Id.* at 166-68.

21. *Id.* at 168. Sixty-seven years later, motivated by similar working class efforts to correct social ills, the United States Supreme Court would make approximately the same distinction. See Clayton E. Cramer, *FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS* (1994), at 128-34 (discussing *Presser v. Illinois*, 116 U.S. 252 (1886), and similar prohibitions on labor union militias).

22. Malcolm, *supra* note 14, at 168.

23. *Id.*

24. Colin Greenwood, *FIREARMS CONTROL: A STUDY OF ARMED CRIME AND FIREARMS CONTROL IN ENGLAND AND WALES* (1972), at 14. Greenwood was Chief Inspector of the West Yorkshire Constabulary at the time he wrote his groundbreaking work on British gun control law.

25. Hansard, 41 *PARLIAMENTARY DEBATES* 695.

26. John Carey, ed., *EYEWITNESS TO HISTORY* 192-3 (1988),.

27. Nathanael Byfield, *AN ACCOUNT OF THE LATE*

REVOLUTION IN NEW-ENGLAND.... (1689), in Charles M. Andrews, ed. *NARRATIVES OF THE INSURRECTIONS: 1675-1690*. 170-3 (1915; reprinted 1959).

28. "Andros's Report of his Administration, 1690," in Andrews, *supra* note 22 at 232.

29. Andrews, *supra* note 22 at 186-90.

30. Andrews, *supra* note 22 at 200, 202.

31. Michael Belesiles, *ARMED AMERICA*, 89 (2001).

32. *A LETTER FROM A GENTLEMAN OF THE CITY OF NEW-YORK TO ANOTHER....* (1698), in Andrews, *supra* note 22, at 369.

33. *LOYALTY VINDICATED FROM THE REFLECTIONS OF A VIRULENT PAMPHLET...* (1698), in Andrews, *supra* note 22, at 391.

34. [Nicholas Bayard], *A MODEST AND IMPARTIAL NARRATIVE OF SEVERAL GRIEVANCES AND GREAT OPPRESSIONS...* (London: n.p., 1690), in Andrews, *supra* note 22, at 333.

35. *7 The Colonial Records of North Carolina*. 722 (William L. Saunders ed. 1890; reprinted 1968).

36. *PENN. GAZETTE*, Aug. 15, 1745.

37. See *THE TRIAL OF WILLIAM DUANE, JAMES REYNOLDS, ROBERT MOORE, AND SAMUEL CUMING FOR RIOT, PHILADELPHIA, PENNSYLVANIA* (1799), reprinted in *7 AMERICAN STATE TRIALS* 676, 680 (John D. Lawson ed., 1917) [hereinafter *TRIAL OF WILLIAM DUANE*].

38. Robert Carleton [Baynard Rush Hall], *1 THE NEW PURCHASE, OR SEVEN AND A HALF YEARS IN THE FAR WEST* 23, 29-30 (1843). 39 [Hall], *supra* note 32, at 1:32-33.

40. [Hall], *supra* note 32, at 1:33.

41. [Hall], *supra* note 32, at 1:231-5.

42. Elias Pim Fordham, PERSONAL NARRATIVE OF TRAVELS IN VIRGINIA, MARYLAND, PENNSYLVANIA, OHIO, INDIANA, KENTUCKY; AND OF A RESIDENCE IN THE ILLINOIS TERRITORY: 1817-1818 (Frederic Austin Ogg, ed., 1906; reprinted 1970), 137.
43. Fordham, *supra* note 34, at 219-20.
44. Fordham, *supra* note 34, 195-6.
45. Peter Cartwright, AUTOBIOGRAPHY OF PETER CARTWRIGHT, THE BACKWOODS PREACHER 200 (1856).
46. Cartwright, *supra* note 39, at 201.
47. Cartwright, *supra* note 39, at 206.
48. Cartwright, *supra* note 39, at 223-225.
49. Cartwright, *supra* note 39, at 238.
50. William Oliver Stevens, PISTOLS AT TEN PACES: THE STORY OF THE CODE OF HONOR IN AMERICA 39-40 (1940).
51. Charles H. Haswell, REMINISCENCES OF NEW YORK BY AN OCTOGENARIAN 244 (New York: Harper & Bros., 1896).
52. Enumeration of the Inhabitants of the United States, 1830 (1832).
53. U.S. Congress, 25 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, 611.
54. Fatal Rencontre at Columbus, Geo., (Tuscumbia) NORTH ALABAMIAN, February 17, 1837, 2.
55. A young man by the name of Alexander H. Dixon..., NASHVILLE DAILY REPUBLICAN BANNER 2, Oct. 13, 1837.
56. "Horrid Rencontre," ..., NASHVILLE DAILY REPUBLICAN BANNER 2, Oct. 7, 1837.
57. Thomas Cather, VOYAGE TO AMERICA: THE JOURNALS OF THOMAS CATHER 143-144 (Thomas Yoseloff ed., 1961;

