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## THE JURISPRUDENCE OF THE SECOND AND FOURTEENTH AMENDMENTS

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### I. INTRODUCTION: CONTEMPORARY FEDERAL AND STATE GUN CONTROL LEGISLATION AS A CONSTITUTIONAL ISSUE

Holding a restrictive housing ordinance invalid under the due process clause of the fourteenth amendment, the United States Supreme Court has recently reaffirmed certain "specific guarantees elsewhere provided in the Constitution," *i.e.*, "the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on."<sup>1</sup> This language however, appears to clarify little else about a subject which the high court has rarely spoken—the right to keep and bear arms. In its opinion, the Court seemed to be placing the right to bear arms recognized in the second amendment on a level of significance equal to the rights protected by the first and fourth amendments and implying that this right, since it is posed in a discussion of the rights incorporated into the fourteenth amendment, is protected from state infringement. Contrariwise, a decade ago the Supreme Court dismissed an appeal seeking to

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<sup>1</sup> Moore v. East Cleveland, 431 U.S. 494, 502 (1977).

invalidate New Jersey's Gun Control Act which involved registration but not prohibition, for want of a "substantive federal question."<sup>2</sup>

In its entire history, the Supreme Court has spoken only rarely and sketchily on the meaning and applicability of the right to keep and bear arms, but the rapidly escalating and comprehensive forms of firearms control, regulation, and prohibition at both federal and state levels must at some point provoke a more definitive response by the Court. Since, after all, the right—whatever its scope and construction—is guaranteed in the Bill of Rights, at some point the Court may no longer be able to avoid (a) defining more precisely the meaning of the second amendment, and (b) determining whether the right is protected not only from federal deprivation through the second amendment, but also whether the fourteenth amendment guards the right from state infringement. The objective of this article is to provide just such a definition and determination and thereby to contribute a comprehensive jurisprudence of the right to keep and bear arms.

While both federal and state courts may perhaps indefinitely defer deciding such matters as the precise nature of the third amendment's proscription of the quartering of soldiers since no case or controversy seems likely to arise, increasingly restrictive forms of gun control legislation which have been or (pg.2) may be enacted prompt the exposition of the constitutional limits of such legislation. The possible conflict of the presently escalating firearms control legislation at both state and federal levels with both constitutional and statutory provisions as well as the common law itself, makes resolution of the nature of the right to have arms appropriate. Not only must this conflict be resolved in terms of the requirements of the second and fourteenth amendments (and possibly the ninth and tenth), but also in terms of state constitutions and civil rights laws which either contain no explicit provisions protecting the right to possess arms or which have provisions which differ in wording from the second amendment. Indeed, the definitional parameters of a right to keep and bear arms protected by the fourteenth amendment, if such right exists, may differ from state provisions even where the language of those provisions is identical with the second amendment, since federal standards for protection of fundamental rights may be held to be more stringent than standards set by the states.<sup>3</sup>

The federal gun control legislation of 1968 provided severe penalties for acts which are only *mala prohibita* rather than *mala in se*.<sup>4</sup> For example, it is an offense for a non-firearms dealer to sell or give any firearm to a resident of a state other than his own; technically, a father who presents the family rifle to his son who resides in another state is subject to imprisonment of five years and a fine of \$5,000.00.<sup>5</sup> Generally, firearms can be bought, sold, or otherwise transferred by non-licensed persons only within one's home state. Persons who engage in the business of buying or selling arms or ammunition must acquire a federal firearms license, although what constitutes "engaging" in such business has never been defined, subjecting innocent-minded citizens to arrest by agents of the Bureau of Alcohol, Tobacco and Firearms.<sup>5.1</sup> Possession of shotguns with a barrel of less than

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<sup>2</sup> Burton v. Sills, 53 N.J. 86, 248 A.2d 521 (1968), *appeal dismissed*, 384 U.S. 812 (1969) (*mem.*).

<sup>3</sup> State constitutional provisions on the right to keep and bear arms are reproduced in Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATHOLIC U.L. REV. 53, 80-84 (1966).

State legislative history may suggest that even where its wording differs, a state provision may be intended to provide a meaning identical with Amendment II. See A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 273-77 (1974).

<sup>4</sup> Federal laws are compiled in FEDERAL LAWS AND REGULATIONS (1979) (Bur. Alcohol, Tobacco, Firearms) and FEDERAL FIREARMS LAWS (undated) (Nat. Rifle Assoc.).

<sup>5</sup> Gun Control Act of 1968, 18 U.S.C. §§ 922(a)(5) & 924(a) (1976).

<sup>5.1</sup> D. HARDY, THE B.A.T.F.'S WAR ON CIVIL LIBERTIES (1979).

eighteen inches, guns that fire more than once with a single depression of the trigger, and other arms which are harmless in themselves may subject an individual to ten years imprisonment and a \$10,000.00 fine.<sup>6</sup> An absolute prohibition of mere possession of firearms is mandated against those under indictment for or convicted of a felony, veterans (pg.3) who received dishonorable discharges, mental incompetents, illegal aliens, citizens who renounced their citizenship, and unlawful users of drugs—including marijuana.<sup>7</sup>

The states and some localities have passed a great variety of regulations concerning the possession, ownership, and carrying of firearms.<sup>8</sup> Little uniformity exists in regard to whether permits to purchase and/or carry as well as registration and/or licensing are required. Some states, such as New Mexico, Georgia, Oregon and Virginia, have very liberal policies in respect to the freedom to purchase, possess, and carry firearms; of these, few regulations exist other than the prohibition of sale to minors and the requirement that a permit be acquired for carrying a concealed weapon outside of one's home. While Florida prohibits carrying pistols and rifles, even though unloaded, unless engaged in such activities as hunting or target practice,<sup>9</sup> California only makes it unlawful to carry loaded guns if not carried for a legitimate purpose;<sup>10</sup> yet in the former state a handgun carried in a glove compartment is not readily accessible and thus not concealed,<sup>11</sup> while in the latter state a handgun carried in a trunk is considered concealed.<sup>12</sup> While most states prohibit convicted felons from possessing firearms, some require that the crime must have been violent, others remove the disability after a certain number of years; exceptional cases exist in Texas, which permits possession at one's residence,<sup>13</sup> and Oregon, which does not disarm persons convicted of felonies related to marijuana possession.<sup>14</sup>

Should the Supreme Court render a significant and extensive opinion concerning the right to keep and bear arms, as it seems bound to do in the future, it will perhaps concern the arms prohibition laws of New York City, Massachusetts, or Washington, D.C., which involve the most stringent control over a traditional liberty which, after all, is specifically provided for in the Bill of Rights. In New York City, which requires burdensome licensing procedures (pg.4) for the possession of arms, it is common knowledge that permits for bearing handguns are never granted except to those who show unique need—usually the rich and well-connected. Massachusetts requires a firearm identification card or license to possess any arm, including a BB gun; one who illegally carries a handgun (even if unloaded) on his person or under his control in a vehicle risks a *mandatory* sentence of one year imprisonment (a sentence not required for manslaughter), while anyone who merely possesses a shotgun with a barrel of less than eighteen inches, a harmless act in itself, may

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<sup>6</sup> 26 U.S.C. §§ 5845, 5861 & 5871 (1976).

<sup>7</sup> 18 U.S.C. § 922(d)(6)(H) (1976). *See also* Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. Appendix, §§ 1201-02 (1976).

<sup>8</sup> State laws and local ordinances are partially reproduced annually in the Code of Federal Regulations, pursuant to 18 U.S.C. § 921(a)(19) and 27 C.F.R. § 178; the same are published annually by the Bureau of Alcohol, Tobacco and Firearms in FIREARMS: STATE LAWS AND PUBLISHED ORDINANCES; and are summarized in a series of pamphlets published by the National Rifle Association, YOUR STATE FIREARMS LAWS (undated). *See also* FIREARMS LAWS AND COURT DECISIONS (undated) (Nat. Rifle Assoc.).

<sup>9</sup> FLA. STAT. §§ 790.05, .06, & .25 (1976).

<sup>10</sup> CAL. PENAL CODE § 12031 (1969).

<sup>11</sup> Sutton v. State, 327 So.2d 234 (Fla. Dist. Ct. App. 1976).

<sup>12</sup> People v. Williams, 184 Cal.2d 673, 7 Cal. Rptr. 604 (1960).

<sup>13</sup> TEX. PENAL CODES ANN. § 46.05 (1976).

<sup>14</sup> OR. REV. STAT. § 166.270(2)(b) (1979).

receive life imprisonment.<sup>15</sup> In the District of Columbia, no person may possess a handgun not registered as of September 24, 1976; all guns, except those at a place of business, must be disassembled or locked, thereby preventing protection of family at home; and any arm which may fire over twelve shots without reloading, including common boyhood-type .22 caliber rifles, is considered a machine gun.<sup>16</sup> Some other states and localities require identification cards for possession of firearms, limit the number of firearms an individual may possess, define BB guns as "guns" in the normal sense and thereby prohibit possession by minors and felons, and/or prohibit sale of blank guns used for track and other sporting events.

As the objective of this article is to provide a broad jurisprudential view of the right to keep and bear arms, it will commence with a review of some of the classical philosophical influences on the founding fathers; preceded by an analysis of the English political theory and constitutional and common law theories regarding the right to possess arms; and, will continue with an exposition of the concept of the armed people as expressed in the theory and praxis of the American Revolution and the debate over the adoption of the Constitution. Next, the development of the right to keep and bear arms in the nineteenth century will be assessed via an investigation of antebellum state cases; the experiences of the War Between the States and Reconstruction, as expressed in the Congressional debates over the fourteenth amendment and civil rights legislation; and a review of the four Supreme Court cases which in that century discussed the second amendment. Reflecting twentieth century thought concerning the nature of the individual right, if any, to have firearms, the article proceeds to investigate state and federal court opinions decided both before and after *United States v. Miller*;<sup>17</sup> the meaning of the *Miller* case itself; and, federal cases since the gun control legislation of 1968. A critical analysis of judicial policy and logic and the future of the right to keep and bear arms concludes the article.<sup>(pg.5)</sup>

## II. ORIGINS OF THE SECOND AMENDMENT

### A. *The Elementary Books of Public Right*

According to Thomas Jefferson, the authority of the Declaration of Independence rested in part on "the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, & c."<sup>18</sup> Since the same philosophical influences gave rise to the Bill of Rights, the meaning of the second amendment may be defined initially by reference to the classical republican theorists of ancient Greece and Rome and seventeenth century England as well as to the absolutist theorists of the same periods whose positions were rejected by the founding fathers.

While recognizing that only "the armed multitude" can abolish oligarchy and establish democracy<sup>19</sup> and that tyranny overcomes democracy by disarming the commoners,<sup>20</sup> Plato favored a disarmed populace as essential to his ideal state—monarchy and extreme hierarchy.<sup>21</sup> A proponent

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<sup>15</sup> MASS. ANN. LAWS ch. 269, § 10 (Michie/Law. Co-op).

<sup>16</sup> D.C. CODE ANN. §§ 6-1802, 6-1872, 6-1802(10).

<sup>17</sup> *United States v. Miller*, 307 U.S. 174 (1939).

<sup>18</sup> T. JEFFERSON, *LIVING THOUGHTS* 42 (J. Dewey ed. 1940).

<sup>19</sup> PLATO, *REPUBLIC* 275 (E. Cornford trans. 1945).

<sup>20</sup> *Id.* at 295.

<sup>21</sup> *Id.* at 125-29; PLATO, *LAWS* 218 (T. Saunders trans. 1970).

of constitutional democracy, Aristotle asked of such a state: "are farmers and craftsmen to have no share in government...? Are they or are they not to possess arms...?"<sup>22</sup> Aristotle also criticized Hippodamus, in whose ideal state "the farmers have no arms, the workers have neither land nor arms; ... mak[ing] them virtually the servants of those who do possess arms."<sup>23</sup> Aristotle held that having arms is a requisite for true citizenship and participation in the policy, while tyranny rests on a mistrust and hence disarming of the people.<sup>24</sup>

In addition to advocating the right of citizens to have arms for public defense against tyranny,<sup>25</sup> Cicero, the leading exponent of Roman republicanism, upheld the legal right to carry arms for self defense. Arguing that the right of self defense is derived from nature and that arms-bearing is justified absent criminal intent, Cicero stated:(pg.6)

Indeed, even the wisdom of the law itself ... permits self-defense, because it does not actually forbid men to kill; what it does, instead, is to forbid the bearing of a weapon with the intention to kill. When, therefore, an inquiry passes beyond the mere question of the weapon and starts to consider the motive, a man who has used arms in self-defense is not regarded as having carried them with a homicidal aim.<sup>26</sup>

The lessons of the Roman experience with respect to the association of an armed populace with a republic and a standing army with tyranny, were explicated by Niccolo Machiavelli, who in turn influenced the republicans of both 1688 and 1766. Civic virtue, argued Machiavelli, is promoted by the existence of citizen soldiers who provide their own weapons,<sup>27</sup> while a ruler expresses distrust for his subjects by disarming them.<sup>28</sup> It has been averred that "the Second Amendment to the Constitution ... affirms the relation between a popular militia and popular freedom in language directly descended from that of Machiavelli...."<sup>29</sup>

The leading seventeenth century defender of absolutism was Jean Bodin, who, as a student of Plato, influenced the monarchists Thomas Hobbes and Sir Robert Filmer, and was attacked by Algernon Sidney and John Locke. Attributing "sedition" to free speech and arms possession by commoners, which "translated the sovereignty from the nobility into the people,"<sup>30</sup> Bodin attacked "the immoderate liberty of speech" and observed that "the most visual way to prevent sedition, is to take away the subjects' arms...."<sup>31</sup> In fact, Bodin recommended enactment of a law which would forbid the subjects "upon pain of death to carry weapons" to prevent sedition.<sup>32</sup>

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22 ARISTOTLE, POLITICS 68 (T. Sinclair trans.).

23 *Id.* at 79.

24 *Id.* at 136, 157-58, 218, 272.

25 CICERO, DE OFFICIIS *passim* (1921); CICERO, MURDER TRIALS 279-90 (M. Grant trans. 1975).

26 CICERO, SELECTED POLITICAL SPEECHES 222 (M. Grant trans. 1969).

27 MACHIAVELLI, DISCOURSES 492 (L. Walker trans.) (1970); MACHIAVELLI, THE ART OF WAR 33 (R. Farnsworth trans. 1965).

28 MACHIAVELLI, THE PRINCE 38 (L. Ricci trans. 1952).

29 J. POCOCK, THE MACHIAVELLIAN MOVEMENT 528 (1975).

30 J. BODIN, THE SIX BOOKS OF COMMONWEALE 544 (R. Knolles trans. 1606).

31 *Id.* at 542-43.

32 *Id.* at 106.

John Locke's refutation of monarchical absolutism did not specifically discuss the private ownership of arms, but his theory rests upon the natural right to defend life, liberty, and property from private criminals or oppressive government, which obviously presupposes the means to do so.<sup>33</sup> Algernon Sidney was more specific in contending that in a popular government "the body of the People is the public defense, and every man is armed and disciplined...."<sup>34</sup> The monarch's subversion of the English constitution, (pg.7) Sidney contended, was effected through the disarming of the populace.<sup>35</sup>

### B. *The English Common Law and Bill of Rights*

Charles II beheaded Sidney for his beliefs and decreed in 1670:

That all and every Person and Persons not having Lands and Tenements ... of the clear yearly Value of one hundred Pounds *per annum* ... or having Lease or Leases ... of the clear yearly Value of one hundred and fifty Pounds, other than the Son and Heir of an Esquire, or other Person of higher Degree ... are hereby declared to be Persons by the Laws of this Realm not allowed to keep ... any Guns, Bows ... or other Engines aforesaid; but shall be and are hereby prohibited to have, keep or use the same.<sup>36</sup>

As Blackstone observed concerning the above legislation, "prevention of popular insurrections and resistance to the government, by disarming the bulk of the people ... is a reason oftner meant than avowed by the makers of the forest and game laws."<sup>37</sup> Ever since the Assize of Arms of Henry II (1181) and subsequent Acts had directed every freeman to provide himself with arms, the English people felt some measure of popular sovereignty through a militia system unhampered by a standing army.<sup>38</sup> While one could be convicted of carrying arms in public places with the intent to "terrify the King's subjects," the common law recognized the right of "Gentlemen to ride armed for their Security."<sup>39</sup>

It is not surprising that the English Bill of Rights complained that James II had subverted "the Laws and Liberties of this Kingdom" in part "by causing several good Subjects, being Protestants, to be disarmed, at the same Time when Papists were both armed and employed, contrary to Law."<sup>40</sup> Accordingly, an act was declared<sup>41</sup> "That the Subjects which are Protestants, may have arms for their

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<sup>33</sup> J. LOCKE, OF CIVIL GOVERNMENT 153-54, 170-95 (1955).

<sup>34</sup> A. SIDNEY, DISCOURSES CONCERNING GOVERNMENT 157 (1698).

<sup>35</sup> *Id.* at 420.

<sup>36</sup> An Act for the Better Preservation of the Game, 22 Car. II, ch. 25, § 3 (1670). *See also* J. MALCOLM, DISARMED: THE LOSS OF THE RIGHT TO BEAR ARMS IN RESTORATION ENGLAND (1980).

<sup>37</sup> 2 BLACKSTONE, COMMENTARIES 412 (1803).

<sup>38</sup> 1 W. STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND 470-71, 633-35 (6th ed. 1873); 2 W. STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND 290-94(4th ed. 1896).

<sup>39</sup> *Rex v. Knight*, 87 Eng. Rep. 75, 75-76 (K.B.); 90 Eng. Rep. 330 (K.B. 1686).

<sup>40</sup> An Act Declaring the Rights and Liberties of the Subject, 1 W. & M., ch. 2 (1689).

<sup>41</sup> *Id.*

defence suitable to their Condition, and as are allowed by Law."<sup>42</sup> Thus, the Bill of Rights recognized as one of the absolute rights of (pg.8) Englishmen "the right of having and using arms for self preservation and defence."<sup>43</sup> While most provisions of the Bill of Rights related to governmental duties, only two—the right to petition and "the right of Protestant subjects to carry arms for their own defence"—were expressed as "rights of the individual."<sup>44</sup>

### C. *The American Revolution and the Second Amendment*

The American Revolution was prompted by British policy that appeared to infringe on the natural rights of individuals as defined in what Jefferson termed "the elementary books of public right" and the rights of English subjects as set forth at common law and in the Bill of Rights. The concepts of the right to keep and bear arms and of the armed populace as militia were formulated as early as 1774 by George Mason. Mason, along with George Washington, organized independent militia companies in Fairfax County not subject to the control of Virginia's royal governor for protection "of our Civil-rights, & Liberty."<sup>45</sup> In 1775, Mason drafted a resolution "that a well regulated Militia, composed of gentlemen freeholders, and other freemen, [was] the natural strength and only stable security of a free Government," whose members were to "provide themselves" with arms and ammunition.<sup>46</sup> The Virginia Declaration of Rights of June 12, 1776, which also came from Mason's pen, included the following provision in § 13: "That a well regulated Militia, composed of the body of the People, trained to Arms, is the proper, natural, and safe Defense of a free State...."<sup>47</sup>

Thomas Jefferson, at the same time that he was arguing for an armed revolution in the Declaration of Independence, proposed that "no freeman shall be debarred the use of arms...."<sup>48</sup> The Bills of Rights of Pennsylvania, North Carolina, Vermont, and Massachusetts, adopted during the Revolution, all cited a specific right to bear arms. The Revolution was a people's war the victory of which would have been uncertain without the American tradition of the individual right to keep and bear arms.<sup>49</sup>

When the Constitution was proposed in 1787, sympathetic pamphleteers promised that the right to bear arms, like the right to free speech, would not be (pg.9) infringed despite its lack of a bill of rights. Alexander Hamilton predicted that while they would not undergo formal militia exercises, "the people at large" nonetheless would be "properly armed and equipped" to the extent that they could defend their rights against threats by military establishments.<sup>50</sup> A regular army of the federal government, James Madison argued, "would be composed of a militia amounting to near half a

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<sup>42</sup> *Id.* St. George Tucker distinguished the Second Amendment, in which the right to have arms exists "without any qualification as to their condition or degree, as in the case of the British government." 1 BLACKSTONE, COMMENTARIES 144 n.40 (1803).

<sup>43</sup> 1 BLACKSTONE, 144 (1803).

<sup>44</sup> G. JELLINEK, THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS 49 (1901).

<sup>45</sup> 1 MASON, PAPERS 210-11 (1970).

<sup>46</sup> *Id.* at 212, 215-16.

<sup>47</sup> *Virginia Declaration of Rights*, THE AMERICAN BEGINNINGS 4 (J. Kilpatrick ed. 1961).

<sup>48</sup> *Proposed Virginia Constitution*, THE JEFFERSON CYCLOPEDIA 51(1900).

<sup>49</sup> H. LEE, MEMOIRS OF THE WAR (1869); J. SHY, A PEOPLE NUMEROUS AND ARMED (1976); Marina, *Militia, Standing Armies, and the Second Amendment*, 2 LAW & LIBERTY 1 (1976).

<sup>50</sup> J. MADISON, A. HAMILTON, & J. JAY, THE FEDERALIST PAPERS 184-85 (New Rochelle n.d.).

million citizens with arms in their hands."<sup>51</sup> Referring to "the advantage of being armed, which the Americans possess over the people of almost every other nation," Madison wrote: "Notwithstanding the military establishments in the several kingdoms of Europe ... the governments are afraid to trust the people with arms."<sup>52</sup> If the people were armed, "the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it."<sup>53</sup>

The Constitution should not be ratified without a Bill of Rights, urged Richard Henry Lee, who contended that "to preserve liberty, it is essential that the whole body of the people always possess arms...."<sup>54</sup> An architect of the second amendment, Lee rejected the concept of a select militia akin to today's National Guard:

A militia, when properly formed, are in fact the people themselves, and render regular troops in a great measure unnecessary.... [T]he constitution ought to secure a genuine and guard against a select militia, by providing that the militia shall always be kept well organized, armed, and disciplined, and include ... all men capable of bearing arms; and that all regulations tending to render this general militia useless and defenceless, by establishing select corps of militia, or distinct bodies of military men, not having permanent interests and attachments in the community to be avoided.<sup>55</sup>

The most complete exposition of the Constitution without a bill of rights to take place in the state ratification conventions was in Virginia. Cognizant that only force can protect the public liberty, Patrick Henry averred: "the great object is, that every man be armed.... Everyone who is able may have a gun."<sup>56</sup> George Mason wished to preserve a militia of all people, rich and (pg.10) poor: "Who are the militia? They consist now of the whole people, except a few public officers."<sup>57</sup> Picturing the apprehensions of Henry and Mason as unwarranted, James Madison assured the assembly that a standing army would be unnecessary as a result of the existence of militias.<sup>58</sup> The Constitution could not result in oppression, according to Zachariah Johnson, because "the people are not to be disarmed of their weapons, [t]hey are left in full possession of them."<sup>59</sup>

New Hampshire, the first state to ratify the Constitution, recommended that it include a Bill of Rights, including a provision that "Congress shall never disarm any citizen unless such as are or have been in actual rebellion."<sup>60</sup> Samuel Adams proposed a Bill of Rights in the Massachusetts convention with these provisions: "and that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people

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<sup>51</sup> *Id.* at 299.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 300. See Webster, *An Examination of the Federal Constitution*, PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 56 (P. Ford ed. 1888).

<sup>54</sup> R. LEE, LETTERS FROM THE FEDERAL FARMER 170 (1788).

<sup>55</sup> *Id.* at 169.

<sup>56</sup> 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 386 (2d ed. 1836).

<sup>57</sup> *Id.* at 425-26.

<sup>58</sup> *Id.* at 413.

<sup>59</sup> *Id.* at 646.

<sup>60</sup> 1 ELLIOT, DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS IN CONVENTION ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (1928).



of the United States, who are peaceable citizens, from keeping their own arms...."<sup>61</sup> The proposals adopted by the Pennsylvania minority included the following: "[T]hat the people have a right to bear arms for the defense of themselves, their state, or the United States, and for killing game, and no law shall be enacted for disarming the people except for crimes committed or in a case of real danger of public injury from individuals,...."<sup>62</sup>

Virginia suggested the following provision: "That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided...."<sup>63</sup> In a similar statement of ratification, New York declared the following interconnected propositions:

That the powers of government may be reassumed by the people whensoever it shall become necessary to their happiness....

That the people have a right to keep and bear arms; that a well regulated militia, including the body of the people *capable of bearing arms*, is the proper, natural, and safe defence of a free state.<sup>64</sup> (pg.11)

Similar or identical provisions were recommended by the Rhode Island<sup>65</sup> and North Carolina<sup>66</sup> conventions.

It is easy to understand why the Bill of Rights as adopted contained the well-known provision in Article II: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." That the term "militia" meant all the people was evident from the version of the amendment that passed the House of Representatives, *to wit*: "A well regulated militia, composed of the body of the People, being the best security of a free State, the right of the People to keep and bear arms, shall not be infringed,..."<sup>67</sup> The phrase concerning the body of the people was not contained in the Senate version, which was ratified, since this meaning of "militia" had been evident to all since the adoption of the Virginia Declaration of Rights in 1776. Further, the reference to "the people" in the second amendment left no doubt as to who possessed the right just as it is clear that each individual is part of "the people" referred to in the first, fourth, ninth and tenth amendments. However, the specific rejection by the Senate of a proposal to add "for the common defense" after "to keep and bear arms"<sup>68</sup> was meant to preclude any construction that arms bearing was restricted to militia use and to common defense against foreign aggression or domestic tyranny, for some proposals for the amendment added other purposes, such as individual self defense or hunting. In sum, in the *weltanschauung* of 1789, the second amendment recognized an individual right to keep and bear arms for a variety of purposes.

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<sup>61</sup> DEBATES OF THE MASSACHUSETTS CONVENTION OF 1788, 86-87 (Boston 1856).

<sup>62</sup> E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 12 (1957).

<sup>63</sup> 3 ELLIOT 659.

<sup>64</sup> 1 ELLIOT 327-328.

<sup>65</sup> *Id.* at 335.

<sup>66</sup> 4 ELLIOT 244.

<sup>67</sup> DUMBAULD at 214.

<sup>68</sup> 2 B. SCHWARTZ, THE BILL OF RIGHTS 1153-54 (1971).

### III. ANTEBELLUM JUDICIAL CONSTRUCTION

#### A. Antebellum State Cases

Although the Supreme Court had never construed the second amendment prior to the *Dred Scott*<sup>69</sup> decision in 1857, judicial opinion stressed the need for an armed populace to counter the threat of tyranny, whether its source was foreign or domestic. Chief Justice Story stressed the significance of the second amendment in these words:<sup>(pg.12)</sup>

The militia is the natural defense of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of the republic; since it offers a strong moral check against 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.<sup>70</sup>

"The right of the citizens to bear arms in defense of themselves and the state, shall not be questioned,"<sup>71</sup> a provision of the Kentucky Constitution, provided the occasion for perhaps the first state judicial opinion on the nature and source of the right to bear arms in the case of *Bliss v. Commonwealth*.<sup>72</sup> Defendant appealed his conviction for having worn a sword cane concealed as a weapon by asserting the unconstitutionality of an act prohibiting concealed weapons. The court held that, "[w]hatever 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."<sup>73</sup> Observing that wearing concealed weapons was considered a legitimate practice when the constitutional provision was adopted, the court reasoned:

The right existed at the adoption of the constitution; it had then no limits short of the moral power of the citizens to exercise it, and it in fact consisted in nothing else but in the liberty of the citizens to bear arms. Diminish that liberty, therefore, and you necessarily restrain the right; and such is the diminution and restraint, which the act in question most indisputably imports, by prohibiting the citizens wearing weapons in a manner which was lawful to wear them when the constitution was adopted.<sup>74</sup>

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<sup>69</sup> *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

<sup>70</sup> 3 J. STORY, COMMENTARIES ON THE CONSTITUTION 746 (1833); *see also* W. RAWLE, A VIEW OF THE CONSTITUTION 125-26 (1829).

<sup>71</sup> 12 Ky. (2 Litt.) 90 (1822).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 91-92.

<sup>74</sup> *Id.* at 92.

Whether carrying and wearing dangerous weapons constituted an affray at common law was the issue in the Tennessee case of *Simpson v. State*.<sup>75</sup> This court, in citing Blackstone, answered this in the negative stating that violence, which terrifies the people must also be present. The prosecutor, citing Serjeant (pg.13) Hawkins,<sup>76</sup> argued that an affray could exist where one is armed with unusual weapons which naturally cause terror to the people, but the court rejected these "ancient English statutes, enacted in favour of the king, his ministers, and other servants" which provided that "no man ... except the king's servants, & c. shall go or ride armed by night or by day."<sup>77</sup> In noting that the same statute also provided that "persons of quality are in no danger of offending against this statute by wearing their common weapons," the court, by implication, seemed resentful of "royal privilege" and, while rejecting the existence of a common law abridgement of the right to bear arms,<sup>78</sup> held in the alternative that any such abridgement would be abrogated by the state constitution:

The freemen of this state have a right to keep and to bear arms for their common defence. 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....<sup>79</sup>

Despite this broad language, the subsequent Tennessee case of *Aymette v. State*<sup>80</sup> originated the interpretation that the arms which could be possessed were those of ordinary military weapons or weapons which contributed to the common defense, since the Tennessee Constitution guaranteed the people the right to keep and bear arms "for their common defense." These words were defeated in the ratification of the second amendment, implying that the amendment would not be so limited; still, other state courts interpreted "for their common defense" to be not only combined defense as a militia, but self defense. And yet, *Aymette* supports the right of each individual to bear the types of arms used in "civil warfare" in part to prevent domestic tyranny: "If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights, etc. by those in authority."<sup>81</sup>

Anticipating the three basic lines of disagreement that have characterized twentieth century analyses of the second amendment, the separate opinions rendered in *State v. Buzzard*,<sup>82</sup> an Arkansas case, argued these interpretations (pg.14) of a concealed weapons statute: (1) the individual citizen may bear arms suitable for militia use; (2) the right to bear arms applies only to the militia; and (3) the individual citizen may bear arms of any variety. Since two judges determined that the defendant bore a concealed weapon suitable for militia use, the conviction was upheld. Interestingly, all three interpretations seemed to assume that the second amendment applied to the states in addition to the state provision, which provided "that the free white men of this State shall have a right to keep and

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<sup>75</sup> 13 Tenn. (5 Yer.) 356 (1833).

<sup>76</sup> Bk. 1, ch. 28, sec. 4, which particularly regards the Statute of Northampton of 2 Edw. 3, Ch. 3 (1328).

<sup>77</sup> 13 Tenn. (5 Yer.) at 358.

<sup>78</sup> 13 Tenn. (5 Yer.) at 359.

<sup>79</sup> *Id.* at 360.

<sup>80</sup> 21 Tenn. (2 Hum.) 154 (1840).

<sup>81</sup> *Id.* at 158.

<sup>82</sup> 4 Ark. (2 Pike) 18 (1842).

bear arms in their common defense."<sup>83</sup> The dissenting opinion, which took position (3) above, made the difficult-to-assail argument as follows: "Now, I take the expressions 'a well regulated militia being necessary for the security of a free State,' and the terms 'common defense,' to be the reasons assigned for the granting of the right, and not a restriction or limitation upon the right itself, or the perfect freedom of its exercise."<sup>84</sup>

The classic antebellum opinion which held that the right of the individual to possess arms was protected from both state and federal infringement, but that the manner in which arms could be borne was a proper subject for regulation, was *Nunn v. State*.<sup>85</sup> An ambiguous Georgia statute proscribed breast pistols but not horseman's pistols, which were not worn openly. While upholding the proscription of concealed weapons, the courts said that the state constitutions "confer no *new rights* on the people which did not belong to them before," that no legislative body in the Union could deny citizens the privilege of being armed to defend self and country, and that the colonial ancestors had this right which "is one of the fundamental principles, upon which rests the great fabric of civil liberty...."<sup>86</sup>

Anticipating twentieth century selected incorporation by referring to the first, fourth, and fifth amendments as binding on both state and federal governments, the court reasoned:

The language of the second amendment is broad enough to embrace both Federal and State governments—nor is there anything in its terms which restricts its meaning ... Is this a right reserved to the *States* or to *themselves*? It is not an unalienable right, which lies at the bottom of every free government? We do not believe that, because the people withheld this arbitrary power of disfranchisement from Congress, they ever intended to confer it on the local legislatures. This right is too dear to be confided to a republican legislature.<sup>87</sup> (pg.15)

The Georgia court explained the relation between individual arms possession and militia by reference to the fact that "in order to train properly that militia, the unlimited right of the *people* to *keep* and *bear* arms shall not be impaired,"<sup>88</sup> and added that both constitutional and natural rights were at stake. Contending that the state governments were prohibited from violating the rights to assembly and petition, to be free from unreasonable searches and seizures, to an impartial jury in criminal prosecutions, and to assistance of counsel, the court continued:

Nor is the *right* involved in this discussion less comprehensive or valuable: 'The right of the people to bear arms shall not be infringed.' The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of

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<sup>83</sup> *Id.* at 34.

<sup>84</sup> *Id.* at 35 (Lacy, J. , dissenting).

<sup>85</sup> 1 Ga. 243 (1846).

<sup>86</sup> *Id.* at 249.

<sup>87</sup> *Id.* at 250 (emphasis in original).

<sup>88</sup> *Id.* at 251 (emphasis in original).

a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right*....<sup>89</sup>

In many of the antebellum states, free and/or slave blacks were disarmed by law in order to maintain their servile condition. State legislation which prohibited the bearing of arms by blacks was held to be constitutional owing to the lack of status of African Americans as citizens—despite the fact that the United States Constitution and most state constitutions referred to arms bearing as a right of "the people" rather than "the citizen." In *State v. Newsom*,<sup>90</sup> the Supreme Court of North Carolina upheld an act to prevent free persons of color from carrying firearms on the ground that the free people of color were not considered as citizens. The court also stated: "In the second article of the amended Constitution, the States are neither mentioned nor referred to. It is therefore only restrictive of the powers of the Federal Government."<sup>91</sup> In *Cooper v. Savannah*,<sup>92</sup> Georgia found a similar provision constitutional on the grounds that "Free persons of color have never been recognized here as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office."<sup>93</sup> (pg.16)

While the above courts, in order to deny arms to blacks, took the restrictive view uncharacteristic of antebellum judicial opinion that only "citizens" had the right to bear arms and that the second amendment did not apply to the states, most courts assumed that the Bill of Rights protected this right from state deprivation. Louisiana took the view that a statute prohibiting the carrying of concealed weapons was not against the second amendment, reasoning that the right to carry arms openly "places men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defense of themselves, if necessary, and of their country...."<sup>94</sup>

While upholding the validity of a statute which classified non-malicious homicide with certain deadly weapons (in this case, a bowie knife) as murder and homicide with other weapons as manslaughter, the Texas high court in *Cockrum v. State*<sup>95</sup> explained that the object of the second amendment was that "the people cannot be effectually oppressed and enslaved, who are not first disarmed."<sup>96</sup> This court continued in reference to the Texas Bill of Rights:

The right of a citizen to bear arms, in lawful defense of himself or the state, is absolute. He does not derive it from the state government, but directly from the sovereign convention of the people that framed the state government. It is one of the 'high powers' delegated directly to the citizen, and 'is excepted out of the general powers of government.' A law cannot be passed to infringe upon or impair it, because it is above the law, and independent of the law-making power.<sup>97</sup>

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<sup>89</sup> *Id.* (emphasis in original).

<sup>90</sup> 27 N.C. 203 (1844).

<sup>91</sup> *Id.* at 207.

<sup>92</sup> 4 Ga. 68 (1848).

<sup>93</sup> *Id.* at 72.

<sup>94</sup> *State v. Chandler*, 5 La. Ann. 489, 490 (1850); *See also State v. Jumel*, 13 La. Ann. 399 (1858).

<sup>95</sup> 24 Tex. 394 (1859).

<sup>96</sup> *Id.* at 401.

<sup>97</sup> *Id.* at 401-02.

## B. *Dred Scott and the Citizens' Rights*

Just as virtually the only antebellum state cases which limited the right to have arms functioned to disarm blacks, the ruling of the Supreme Court in *Dred Scott v. Sanford*<sup>98</sup> conceded that if African Americans were considered part of the people, then they could carry arms anywhere. If members of the African race were "citizens," argued Chief Justice Taney, they would be "entitled to the privileges and immunities of citizens" and would be exempt from the special "police regulations" applicable to them:<sup>(pg.17)</sup>

It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies...; and it would give them the full liberty of speech...; to hold public meetings upon political affairs, and *to keep and carry arms wherever they went.*<sup>99</sup>

It is clear that the Supreme Court included among the rights of every citizen the right to have arms wherever one goes; it is equally evident that in granting citizenship to African Americans via the thirteenth and fourteenth amendments, blacks were later guaranteed the fundamental rights of all citizens. The court's language also suggests that the right to have and carry arms anywhere is a right and privilege of national citizenship which the states could not infringe any more than the federal government—in effect, the second amendment was made applicable to the states.

Explaining further that as a citizen "the Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved," the Chief Justice stated: "Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel anyone to be a witness against himself in a criminal proceeding."<sup>100</sup> Obviously, "the people" here included all citizens, for the meaning of the term would not reasonably shift from signifying only the active militia in the case of the right to bear arms, to every individual citizen in respect to the right to a jury trial.

In a separate passage, Justice Taney did discuss the militia, using as an example the laws of New Hampshire of 1815 and 1855 which restricted enrollment in the militia to "free white citizens."<sup>101</sup> Justice Curtis, dissenting, referred to the Act of Congress of May 17, 1792, directing the enrollment of "every free, able-bodied, white male citizen" in the militia, to demonstrate that "colored persons ... have been debarred from the exercise of particular rights or privileges extended to white persons, but ... always in terms which, by implication, admit they may be citizens."<sup>102</sup> How one could be a citizen without having the citizen's rights is unclear, and the dissenting Justice in a later statement apparently approved Acts of Congress preventing the sale of firearms to Indians.<sup>103</sup><sup>(pg.18)</sup>

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<sup>98</sup> 60 U.S. (19 How.) 393 (1857).

<sup>99</sup> *Id.* at 417 (emphasis added).

<sup>100</sup> *Id.* at 449-50.

<sup>101</sup> *Id.* at 415.

<sup>102</sup> *Id.* at 587.

<sup>103</sup> *Id.* at 631 (referring to the Acts of March 30, 1802 (2 Stat. 139 ch. 13 (1802)) and March 26, 1804 (2 Stat. 283 ch. 38 (1804)).

The truly significant portion of *Dred Scott* for purposes of this article is its averment that if African Americans were citizens, they would have the right "to keep and carry arms wherever they went."<sup>104</sup> And it was the Reconstruction Amendments which were soon to make them citizens.<sup>105</sup>

#### IV. THE INTENT OF THE FRAMERS OF AMENDMENT XIV

The objective of the following portion of this article is to provide an investigation into the congressional deliberations which pertained to the issue of whether the fourteenth amendment imposed the second amendment upon the states. The methodology will be to trace the discussion of the meaning of the fourteenth amendment from its inception in the ideals embodied in the thirteenth amendment and the Civil Rights Act of 1866, through the enforcement legislation—including the Anti-Ku Klux Klan Act of 1871 and the Civil Rights Act of 1875—which sought to make the amendment a reality. Given the unanimity of opinion concerning state regulation of privately held arms by the legislators who framed the fourteenth amendment and its enforcement legislation, it is surprising that judicial opinions and scholarly articles fail to analyze the Reconstruction debates.<sup>106</sup> (pg.19)

##### A. Arms and Slavery

Having won their national independence from England through armed struggle, it became increasingly demonstrative to pre-Civil War Americans that the technological development of the gun had egalitarian propensities. It likewise was clear to both proponents and opponents of slavery that an armed black population meant the abolition of slavery, although plantation slaves were often trusted with arms for hunting.<sup>107</sup> This sociological fact explained not only the legal disarming of

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<sup>104</sup> ARISTOTLE, POLITICS 68 (T. Sinclair trans.)

<sup>105</sup> "What was the fourteenth article designed to secure? ... [T]hat the privileges and immunities of citizens of the United States shall not be abridged or denied by the United States or by any State; defining also, what it was possible was open to some question after the *Dred Scott* decision, who were citizens of the United States." CONG. GLOBE, 40th Cong., 3rd Sess., 1000 (Feb. 8, 1869) (Remarks of Senator George F. Edmunds).

<sup>106</sup> While it "cannot turn the clock back to 1868 when the Amendment was adopted," *Brown v. Board of Education*, 347 U.S. 483, 492 (1954), the Supreme Court is compelled to interpret Amendment XIV and Reconstruction legislation in accord with the Congressional intent. *Lynch v. Household Fin. Corp.*, 401 U.S. 538, 549(1972); *Monell v. Department of Social Serv.*, 436 U.S. 658 (1978) ("fresh analysis of debate on the Civil Rights Act of 1871") *Id.* at 665, (justified overruling *Monroe v. Pape*, 365 U.S. 167 (1961)). Cf. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 44-45, 57-58, 119-20 (1949) (while contending that the Bill of Rights in general was not intended to apply to the states, cited references to the second amendment in congressional debates support incorporation. Fairman's argument that total incorporation may not have been intended makes sense in regard to the fifth amendment right to a grand jury in felony cases since some Northern states had never required indictment by a grand jury; in the case of the second amendment, virtually all state constitutions protected the right to keep arms.)

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

<sup>107</sup> *E.g.*, D. HUNDLEY, SOCIAL RELATIONS IN OUR SOUTHERN STATES 361 (1860). Blacks were experienced enough in the use of arms to play a significant, though unofficial, role as Confederate soldiers, some even as sharpshooters. H. BLACKERBY, BLACKS IN BLUE AND GRAY 1-40 (1979), J. Obatala, *Black Confederates*, PLAYERS 13ff. (April, 1979). In Louisiana, the only state

blacks noted above but also the advocacy of a weapons culture by abolitionists. Having employed the instruments for self defense against his pro-slavery attackers, abolitionist and Republican Party founder Cassius Marcellus Clay wrote that "'the pistol and the Bowie knife' are to us as sacred as the gown and the pulpit."<sup>108</sup> And it was John Brown who argued that "the practice of carrying arms would be a good one for the colored people to adopt, as it would give them a sense of their manhood."<sup>109</sup>

The practical necessities of the long, bloody Civil War, demanding every human resource, led to the arming of blacks as soldiers. While originally they considered it a "white man's war," United States authorities by 1863 were organizing black regiments on a wide scale. At the same time, black civilians were forced to arm themselves privately against mob violence. During the anti-draft riots in New York, according to a Negro newspaper of the time, "The colored men who had manhood in them armed themselves, and threw out their pickets every day and night, determined to die defending their homes.... Most of the colored men in Brooklyn who remained in the city were armed daily for self-defense."<sup>110</sup> (pg.20)

Toward the end of the war Southerners began to support the arming and freeing of slaves willing to fight the invaders, and the Virginia legislature, on passing a bill providing for the use of black soldiers, repealed its laws against the bearing of arms by blacks.<sup>111</sup> One opponent of these measures declared: "What would be the character of the returned negro soldiers, made familiar with the use of firearms, and taught by us, that freedom was worth fighting for?"<sup>112</sup> Being evident that slaves plus guns equaled abolition, the rebels were divided between those who valued nationhood over slavery and those who preferred a restored union which might not destroy the servile condition of black labor.

Before the end of the war, as the movement began for the complete abolition of slavery via the thirteenth amendment, members of Congress recognized the key role that the bearing of arms was already playing in the freeing of the slaves. In debate over the proposed amendment, Representative George A. Yeaman (Unionist, Ky.) contended that whoever won the war, the abolition of slavery was inevitable due to the arming of blacks:

Let proclamations be withdrawn, let statutes be repealed, let our armies be defeated, let the South achieve its independence, yet come out of the war ... with an army of slaves made freemen for their service, who have been contracted with, been armed and drilled, and have

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in the Union to include blacks in the militia, substantial numbers of blacks joined the rebellion furnishing their own arms. M. Berry, *Negro Troops in Blue and Gray*, 8 LOUISIANA HISTORY 165-66 (1867).

<sup>108</sup> THE WRITINGS OF CASSIUS MARCELLUS CLAY 257 (H. Greeley ed. 1848).

<sup>109</sup> W. E. B. DUBOIS, JOHN BROWN 106 (1909).

<sup>110</sup> J. MCPHERSON, THE NEGRO'S CIVIL WAR, 72-73 (1965). While all may be fair in love and war, experiences during the conflict suggest that deprivation of one right is coupled with deprivation of others. When the secession movement began, Lincoln suspended *habeas corpus* and enstated the disarming of citizens and military arrests in Maryland and Missouri. In the latter state, the death penalty was enstated by union officers for those caught with arms, and after an order was issued to arm the militia by random seizures of arms, the searches provided the occasion for general looting. See 3 WAR OF THE REBELLION 466-67; R. BROWNLEE, GRAY GHOSTS OF THE CONFEDERACY 37, 85 & 170 (1958). The situation became so harsh for Northerners themselves that the Northern Democratic Platform of 1864 declared in its fourth resolution against the suppression of free speech and press and the denial of the right of the people to bear arms in their defense .

<sup>111</sup> 61 THE WAR OF THE REBELLION, ser. 1, pt. 2, 1068, 1315 (1880-1901); R. DURDEN, THE GRAY & THE BLACK 250 (1972).

<sup>112</sup> R. DURDEN, *supra* note 6, at 169.



seen the force of combination. Their personal status is enhanced.... They will not be returned to slavery.<sup>113</sup>

At the same time, members of the slavocracy were planning to disarm the freedmen. Arguing for speedy adoption of the thirteenth amendment, Representative William D. Kelley (R., Penn.) expressed shock at the words of an anti-secessionist planter in Mississippi who expected the Union to restore slavery. Kelley cited a letter from a brigadier general who wrote: "'What,' said I, 'these men who have had arms in their hands?' 'Yes,' he said, 'we should take the arms away from them, of course.'"<sup>114</sup> (pg.21)

The northern government won the war only because of the arming of the slaves, according to Senator Charles Sumner (R., Mass.), who argued that necessity demanded "first, that the slaves should be declared free; and secondly, that muskets should be put into their hands for the common defense.... Without emancipation, followed by the arming of slaves, rebel slavery would not have been overcome."<sup>115</sup>

### B. *The Civil Rights Act of 1866*

After the war was concluded, the slave codes, which limited access of blacks to land, to arms, and to the courts, began to reappear in the form of the black codes,<sup>116</sup> and United States legislators turned their attention to the protection of the freedmen. In support of Senate Bill No. 9, which declared as void all laws in the rebel states which recognized inequality of rights based on race, Senator Henry Wilson (R., Mass.) explained in part: "In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages on them...."<sup>117</sup>

When Congress took Senate Bill No. 61, which became the Civil Rights Act of 1866,<sup>118</sup> Senator Lyman Trumbull (R., Ill.), Chairman of the Senate Judiciary Committee, indicated that the bill was intended to prohibit inequalities embodied in the black codes, including those provisions which "prohibit any negro or mulatto from having fire-arms."<sup>119</sup> In abolishing the badges of slavery, the bill would enforce fundamental rights against racial discrimination in respect to civil rights, the rights to contract, to sue and engage in commerce, and equal criminal penalties. Senator William Saulsbury (D., Del.) added:(pg.22)

In my State for many years, and I presume there are similar laws in most of the southern States, there has existed a law of the State based upon and founded in its police power,

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<sup>113</sup> CONG. GLOBE, 38th Cong., 2nd Sess., 171 (Jan. 9, 1865).

<sup>114</sup> *Id.* at 289 (Jan. 18, 1865).

<sup>115</sup> CONG. GLOBE, 39th Cong., 1st Sess., 674 (Feb. 6, 1866). *But see Id.* at 3215 (June 16, 1866) (allegation by Rep. William E. Niblack (D. Ind.) that the majority of Southern blacks "either adhered from first to last to the rebellion or aided and assisted by their labor or otherwise those who did so adhere".)

<sup>116</sup> W. E. B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 167, 172 & 223 (1962).

<sup>117</sup> CONG. GLOBE, 39th Cong., 1st Sess. 40 (Dec. 13, 1865).

<sup>118</sup> Civil Rights Act, 14 Stat. 217 (1866). A portion of this act survives as 42 U.S.C. § 1982 (1976): "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

<sup>119</sup> CONG. GLOBE, 39th Cong., 1st Sess., 474 (Jan. 29, 1866).

which declares that free negroes shall not have the possession of firearms or ammunition. This bill proposes to take away from the States this police power....<sup>120</sup>

The Delaware Democrat therefore, opposed the bill contending that if a time should come when "a numerous body of dangerous persons belonging to any distinct race" endangered the state, "the State [would] not have the power to disarm them without disarming the whole population."<sup>121</sup> Thus, the bill would have prohibited legislative schemes which in effect disarmed blacks but not whites. Still, supporters of the bill were soon to contend that arms bearing was a basic right of citizenship and personhood.

In the meantime, the legislators turned their attention to the Freedmen's Bureau Bill. Representative Thomas D. Eliot (R., Mass.) attacked an Opelousas, Louisiana ordinance which deprived blacks of various civil rights by including the following provision: "No freedman who is not in the military service shall be allowed to carry fire-arms, or any kind of weapons, within the limits of the town of Opelousas without the special permission of his employer ... and approved by the mayor or president of the board of police."<sup>122</sup> And Representative Josiah B. Grinnell (R., Iowa) complained: "A white man in Kentucky may keep a gun; if a black man buys a gun he forfeits it and pays a fine of five dollars, if presuming to keep in his possession a musket which he has carried through the war."<sup>123</sup> Yet the right of blacks to have arms existed partly as self defense against the state militia itself, which implied that militia needs were not the only constitutional basis for the right to bear arms. Senator Trumbull cited a report from Vicksburg, Mississippi which stated: "Nearly all the dissatisfaction that now exists among the freedmen is caused by the abusive conduct of this militia."<sup>124</sup> Rather than restore order, the militia would typically "hang some freedman or search negro houses for arms."<sup>125</sup>

As debate returned to the Civil Rights Bill, Representative Henry J. Raymond (R., N.Y.) explained of the rights of citizenship:<sup>(pg.23)</sup>

Make the colored man a citizen of the United States and he has every right which you or I have as citizens of the United States under the laws and Constitution of the United States.... He has a defined *status*; he has a country and a home; a right to defend himself and his wife and children; a right to bear arms....<sup>126</sup>

Representative Roswell Hart (R., N.Y.) further stated: "The Constitution clearly describes that to be a republican form of government for which it was expressly framed.... [a] government ... where 'no law shall be made prohibiting a free exercise of religion;' where 'the right of the people to keep and

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<sup>120</sup> *Id.* at 478.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 517.

<sup>123</sup> *Id.* at 651.

<sup>124</sup> *Id.* at 941.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 1266.

bear arms shall not be infringed;'...."<sup>127</sup> He concluded that it was the duty of the United States to guarantee that the states have such a form of government.<sup>128</sup>

Representative Sidney Clarke (R., Kansas) referred to an 1866 Alabama law providing: "That it shall not be lawful for any freedman, mulatto, or freeperson of color in this State, to own firearms, or carry about his person a pistol or other deadly weapon."<sup>129</sup> This same statute made it unlawful "to sell, give, or lend fire-arms or ammunition of any description whatever, to any freedman, free negro, or mulatto...."<sup>130</sup> Clarke also attacked Mississippi, "whose rebel militia, upon the seizure of the arms of black Union soldiers, appropriated the same to their own use:"<sup>131</sup>

Sir, I find in the Constitution of the United States an article which declares that 'the right of the people to keep and bear arms shall not be infringed.' For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in their local laws....<sup>132</sup>

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

Nearly every white man in that State that could bear arms was in the rebel ranks. Nearly all of their able-bodied colored men who could reach our lines enlisted under the old flag. Many of these brave defenders of the nation paid for the arms with which they went to battle.... The 'reconstructed' State authorities of Mississippi were allowed to rob and disarm our veteran soldiers....<sup>133</sup> (pg.24)

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

### *C. The Fourteenth Amendment*

The need for a more solid foundation for the protection of freedmen as well as white citizens was recognized, and the result was a significant new proposal—the fourteenth amendment. A chief exponent of the amendment, Senator Jacob M. Howard (R., Mich.), in referring to "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as freedom of speech and of the press; ... *the right to keep and to bear arms* ..." <sup>134</sup> argued that the adoption of the fourteenth amendment was necessary to protect these rights against state legislation. "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."<sup>135</sup>

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<sup>127</sup> *Id.* at 1629.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 1838.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 1839 (Ironically, Clarke's home state, Kansas, adopted measures to prohibit former Confederates from possessing arms).

<sup>134</sup> CONG. GLOBE, 39th Cong., 1st Sess., 2765 (1866).

<sup>135</sup> *Id.* at 2766 (emphasis added).

The fourteenth amendment was viewed as necessary to buttress the objectives of the Civil Rights Act of 1866. Representative George W. Julian (R., Ind.) noted that the Act:

is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. South Carolina has the same enactments.... Cunning legislative devices are being invented in most of the States to restore slavery in fact.<sup>136</sup>

It is hardly surprising that the arms question was viewed as part of a partisan struggle: "As you once needed the muskets of the colored persons, so now you need their votes," explained Senator Sumner to his fellow Republicans in support of black suffrage in the District of Columbia.<sup>137</sup> At the opposite extreme, Representative Michael C. Kerr (D., Ind.), an opponent of black suffrage and of the fourteenth amendment, attacked a military ordinance in Alabama that set up a volunteer militia of all males between ages 18 and 45 "without regard to race or color" on these grounds:<sup>(pg.25)</sup>

Of whom will that militia consist? Mr. Speaker, it will consist only of the black men of Alabama. The white men will not degrade themselves by going into the ranks and becoming a part of the militia of the State with negroes.... Are the civil laws of Alabama to be enforced by this negro militia? Are white men to be disarmed by them?<sup>138</sup>

Kerr predicted that the disfranchisement of white voters and the above military measure would result in "a war of races."<sup>139</sup>

#### *D. The Anti-Ku Klux Klan Act*

Although the fourteenth amendment became law in 1868, within three years the Congress was considering enforcement legislation to suppress the Ku Klux Klan. The famous report by Representative Benjamin F. Butler (R., Mass.) on violence in the South, assumed that the right to keep arms was necessary for protection against not only the militia but also against local law enforcement agencies. Noting instances of "armed confederates" terrorizing the Negro, the report stated that "in many counties they have preceded their outrages upon him by disarming him, in violation of his right as a citizen to 'keep and bear arms,' which the Constitution expressly says shall never be infringed."<sup>140</sup> The congressional power based on the fourteenth amendment to legislate to prevent states from depriving any citizen of life, liberty, or property, justified the following provision of the Committee's anti-KKK bill:

That whoever shall, without due process of law, by violence, intimidation, or threats, take away or deprive any citizen of the United States of any arms or weapons he

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<sup>136</sup> *Id.* at 3210.

<sup>137</sup> CONG. GLOBE, 39th Cong., 2d Sess., 107 (1866).

<sup>138</sup> CONG. GLOBE, 40th Cong., 2d Sess., 2198 (1868).

<sup>139</sup> *Id.*

<sup>140</sup> H.R. REP. No. 37, 41st Cong., 3rd Sess. 3 (1871).

may have in his house or possession for the defense of his person, family or property, shall be deemed guilty of a larceny thereof, and be punished as provided in this act for a felony.<sup>141</sup>

Representative Butler explained the purpose of this provision in these words:

Section eight is intended to enforce the well-known constitutional provision guaranteeing the right in the citizen to 'keep and bear arms,' and provides that whoever shall take away, by force or violence, or by threats and intimidation, the arms and weapons which any person may have for his defense, shall be deemed (pg.26) guilty of larceny of the same. This provision seemed to your committee to be necessary, because they had observed that, before these midnight marauders made attacks upon peaceful citizens, there were very many instances in the South where the sheriff of the county had preceded them and taken away the arms of their victims. This was specially noticeable in Union County, where all the negro population were disarmed by the sheriff only a few months ago under the order of the judge...; and then, the sheriff having disarmed the citizens, the five hundred masked men rode at night and murdered and otherwise maltreated the ten persons who were in jail in that county.<sup>142</sup>

The bill was referred to the Judiciary Committee, and when later reported as H.R. No. 320 the above section was deleted—apparently because its proscription extended to simple individual larceny over which Congress had no constitutional authority and because state or conspiratorial action involving the disarming of blacks would be covered by more general provisions of the bill. Supporters of the rewritten anti-KKK bill continued to show concern over the disarming of freedmen. Senator John Sherman (R., Ohio) stated the Republican position: "Wherever the negro population preponderates, there [the KKK] hold their sway, for a few determined men ... can carry terror among ignorant negros ... without arms, equipment, or discipline."<sup>143</sup>

Further comments clarified that the right to arms was a necessary condition for the right of free speech. Senator Adelbert Ames (R., Miss.) averred: "In some counties it was impossible to advocate Republican principles, those attempting it being hunted like wild beasts; in others, the speakers had to be armed and supported by not a few friends."<sup>144</sup> Representative William L. Stoughton (R., Mich.) exclaimed: "If political opponents can be marked for slaughter by secret bands of cowardly assassins who ride forth with impunity to execute the decrees upon the unarmed and defenseless, it will be fatal alike to the Republican party and civil liberty."<sup>145</sup>

Section 1 of the bill, which was taken partly from Section 2 of the Civil Rights Act of 1866 and survives today as 42 U.S.C. § 1983, was meant to enforce Section 1 of the fourteenth amendment by establishing a remedy for deprivation, under color of state law, of federal constitutional rights of *all* people, not only former slaves. This portion of the bill provided:(pg.27)

That any person, who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the

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<sup>141</sup> CONG. GLOBE, 42nd Cong., 1st Sess. 174 (1871) (introduced as "an act to protect loyal and peaceable citizens in the South ...", H.R. NO. 189).

<sup>142</sup> See H.R. REP. No. 37, *supra* note 26, at 7-8.

<sup>143</sup> CONG. GLOBE, 42nd Cong., 1st Sess. 154 (1871).

<sup>144</sup> *Id.* at 196 (1871).

<sup>145</sup> *Id.* at 321 (1871).

jurisdiction of the United States to the deprivation of any rights, privileges, or immunities to which ... he is entitled under the Constitution or laws of the United States, shall ... be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....<sup>146</sup>

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

it will be noted that by the first section suits may be instituted without regard to amount or character of claim by any person within the limits of the United States who conceives that he has been deprived of any right, privilege, or immunity secured him by the Constitution of the United States, under color of any law, statute, ordinance, regulation, custom, or usage of any State. This is to say, that if a police officer of the city of Richmond or New York should find a drunken negro or white man upon the streets with a loaded pistol flourishing it, & c., and by virtue of any ordinance, law, or usage, either of city or State, he takes it away, the officer may be sued, because the right to bear arms is secured by the Constitution, and such suit brought in distant and expensive tribunals.<sup>147</sup>

The Tennessee Democrat thus assumed that the right to bear arms was absolute, deprivation of which created a cause of action against state agents under Section 1 of the anti-KKK bill. In the minds of the bill's supporters, however, the second amendment, as incorporated in the fourteenth amendment, recognized a right to keep and bear arms safe from state infringement—not a right to commit assault or otherwise engage in criminal conduct with arms by brandishing them about so as to endanger others. Contrary to the Congressman's exaggerations, the proponents of the bill had the justified fear that the opposite development would occur, *i.e.*, that a black or white man of the wrong political party would legitimately have or possess arms and a police (pg.28) officer of the city of Richmond or New York who was drunken with racial prejudice or partisan politics would take it away, perhaps to ensure the success of an extremist group's attack. Significantly, none of the congressman's colleagues disputed his assumption that state agents could be sued under the predecessor of § 1983 for deprivation of the right to keep arms.

Representative William D. Kelley (R., Penn.), speaking after and in reply to Representative Whitthorne, did not deny the argument that Section 1 allowed suit for deprivation of the right to possess arms, but emphasized the arming of the KKK. He referred to "great numbers of Winchester rifles, and a particular species of revolving pistol" coming into Charleston's ports. "Poor men, without visible means of support, whose clothes are ragged and whose lives are almost or absolutely those of vagrants, are thus armed with new and costly rifles, and wear in their belts a brace of

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<sup>146</sup> *Id.* at 68 app. Passed as the Enforcement Act, 17 Stat. 13 (1871), § 1 survives as 42 U.S.C. § 1983 (1976): "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

The action for conspiracy to deprive persons of rights or privileges under 42 U.S.C. § 1985 (1976) derives from the same act.

<sup>147</sup> CONG. GLOBE, 42nd Cong., 1st Sess. 337 (1871).

expensive pistols."<sup>148</sup> These weapons are used against Southern Republicans, whose constitutional rights must thereby be guaranteed by law and arms.

However, like Congressman Whitthorne, Representative Barbour Lewis (R., Tenn.) also decried the loss of state agents immunity should the bill pass:

By the first section, in certain cases, the judge of a state court, though acting under oath of office, is made liable to a suit in the Federal court and subject to damages for his decision against a suitor, however honest and conscientious that decision may be; and a ministerial officer is subject to the same pains and penalties....<sup>149</sup>

Tennessee Republicans and Democrats alike thus agreed that what is today § 1983 provided an action for damages against state agents in general for deprivation of constitutional rights.

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

Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States. Those eight amendments are as follows:<sup>(pg.29)</sup>

#### ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

#### ARTICLE II

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

These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment. The words of that amendment, 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' are an express prohibition upon every State of the Union....<sup>150</sup>

This is a most explicit statement of the incorporation thesis by the architect of the fourteenth amendment. Although Representative Bingham based his theory of incorporation on the privileges and immunities clause and not the due process clause as did subsequent court decisions,

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<sup>148</sup> *Id.* at 339.

<sup>149</sup> *Id.* at 385.

<sup>150</sup> *Id.* at 84.

Representative Bingham could hardly have anticipated the judicial metaphysics of the twentieth century in this respect. In any case, whether based on the due process clause or on the privileges and immunities clause, the legislative history supports the view that the incorporation of amendments I through VIII was clear and unmistakable in the minds of the framers of the fourteenth amendment

In contrast with the above legal analysis, some comments on the enforcement of the fourteenth amendment returned to a discussion of the power struggle between Republicans and unreconstructed Confederates. While Republicans deplored the armed condition of white Southerners and the unarmed state of black Southerners, Democrats argued that the Southern whites had been disarmed and were endangered by armed carpetbaggers and negro militia. Thus, Representative Ellis H. Roberts (R., N.Y.) lamented the partisan character of KKK violence:

The victims whose property is destroyed, whose persons are mutilated, whose lives are sacrificed, are always Republicans. They may be black or white ... [yet the] weapons [of the rebellious whites] are often new and of improved patterns; and however poor may be the individual member he never lacks for arms or ammunition.... [I]n many respects the Ku Klux Klan is an army, organized and officered, and armed for deadly strife.<sup>151</sup> (pg.30)

Representative Boyd Winchester (D., Ky.) set forth the contrary position, favorably citing a letter from an ex-governor of South Carolina to the reconstruction governor regretting the latter's "Winchester-rifle speech" which "fiendishly proclaimed that an instrument of death, in the hands of the negroes of South Carolina, was the most effective means of maintaining order and quiet in the State."<sup>152</sup> Calling on the governor to "disarm your militia," the letter referred to the disaster which resulted "when [the governor] organized colored troops throughout the State, and put arms into their hands, with powder and ball, and denied the same to the white people."<sup>153</sup> The letter cited numerous instances where the "colored militia" murdered white people. According to Representative Winchester, it was the arming of blacks and the disarming of whites which resulted in white resistance: "It would seem that wherever military and carpet-bagger domination in the South has been marked by the greatest contempt for law and right, and practiced the greatest cruelty toward the people, Ku Klux operations have multiplied."<sup>154</sup>

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

Then the Ku Klux fired on them through the window, one of the bullets striking a colored woman ... and wounding her through the knee badly. The colored men then fired on the Ku Klux, and killed their leader or captain right there on the steps of the colored men's house.... [T]here he remained until morning when he was identified, and proved to be 'Pat Inman,' a constable and deputy sheriff....<sup>155</sup>

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<sup>151</sup> *Id.* at 413.

<sup>152</sup> *Id.* at 422.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* Historical accounts of abuses by black militias dominated by carpetbaggers and of the disarming of Southern whites are reviewed in O. SINGLETARY, *NEGRO MILITIA & RECONSTRUCTION* (1963) and C. BOWERS, *THE TRAGIC ERA* (1929).

<sup>155</sup> *Id.* at 445.



By contrast, Representative Samuel S. Cox (D., Ohio) assailed those who "arm negro militia and create a situation of terror;" exclaimed that South Carolinians "actually clamored for United States troops to save them from the rapacity and murder of the negro bands and their white allies;" and saw the Klan as the South's only defense: "Is not repression the father of revolution?" The congressman compared the Klan with the French Jacobins, Italian Carbonari, and Irish Fenians.<sup>156</sup> Representative John Coburn (R., Ind.) saw the situation in an opposite empirical light—deploring both state and private disarming of blacks: "How much more oppressive is the passage of a law that (pg.31) they shall not bear arms than the practical seizure of all arms from the hands of the colored men?"<sup>157</sup>

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

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

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

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

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[I]t is to protect and secure to him in these rights, privileges, and immunities this bill is before the house.<sup>158</sup>

Representative Horatio C. Burchard (R., Ill.), while generally favoring the bill insofar as it provided against oppressive state action, rejected the interpretation by Dawes and Bingham regarding the definition of "privileges and immunities," which Burchard felt were contained only in articles IV, V, and VI rather than I through VIII. However, Burchard still spoke in terms of "the application of their eight amendments to the States,"<sup>159</sup> and in any case Dawes had used the terms "*rights, privileges and immunities.*" The anti-Klan bill finally was passed along partisan lines as An Act to Enforce the Provisions of the Fourteenth Amendment.<sup>160</sup>

### E. *The Civil Rights Act of 1875*

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<sup>156</sup> *Id.* at 453.

<sup>157</sup> *Id.* at 459.

<sup>158</sup> *Id.* at 475-76 (emphasis added).

<sup>159</sup> *Id.* at 314.

<sup>160</sup> 17 Stat. 13, 42nd Cong., 1st Sess., ch. 22 (1871).

After passage of the anti-Klan bill, discussion concerning arms persisted as interest developed toward what became the Civil Rights Act of 1875, now 42 U.S.C. § 1984. A report on affairs in the South by Senator John Scott (R., (pg.32) Penn.) indicated the need for further enforcement legislation: "[N]egroes who were whipped testified that those who beat them told them they did so because they had voted the radical ticket, and in many cases made them promise that they would not do so again, and wherever they had guns took them from them."<sup>161</sup>

Following the introduction of the civil rights bill, the debate over the meaning of the privileges and immunities clause returned. Senator Matthew H. Carpenter (R., Wis.) cited *Cummings v. Missouri*,<sup>162</sup> a case contrasting the French legal system, which allowed deprivation of civil rights, "among these of the right of voting, ... of bearing arms," with the American legal system, averring that the fourteenth amendment prevented states from taking away the privileges of the American citizen.<sup>163</sup>

Senator Allen G. Thurman (D., Ohio) argued that the "rights, privileges, and immunities of a citizen of the United States" were included in amendments I through VIII. Reading and commenting on each of these amendments, he said of the second: "Here is another right of a citizen of the United States, expressly declared to be his right—the right to bear arms; and this right, says the Constitution, shall not be infringed."<sup>164</sup> After prodding from John A. Sherman (R., Ohio), Thurman added the ninth amendment to the list.<sup>164</sup>

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

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

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

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

The right to the writ of *habeas corpus*; of peaceable assembly and of petition; ... *to keep and bear arms*; ... from being deprived of the right to vote on account of race, color or previous conditions of servitude.<sup>165</sup> (pg.33)

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

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<sup>161</sup> S. REP. No. 41, 42nd Cong. 2d Sess. 35 (1872).

<sup>162</sup> 71 U.S. 277, 321 (1866).

<sup>163</sup> CONG. GLOBE, 42nd Cong., 2d Sess. 762 (1872).

<sup>164</sup> *Id.* at App. 25-26. On amendment IX as a source of an individual right to keep and bear arms, *see generally* Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URBAN L. J. 31, 49-50 (1976). *See also* 2 CONG. REC. 384-85 (1874) (statement by Rep. Robert Q. Mills (D. Tex.) that amendment XIV adopts Bill of Rights privileges).

<sup>165</sup> CONG. REC. App. 241 (1874) (emphasis added).

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

And the instant the fourteenth amendment became a part of the Constitution, every State was at that moment disabled from making or enforcing any law which would deprive any citizen of a State of the benefits enjoyed by citizens of the United States under the first eight amendments to the Federal Constitution.<sup>166</sup>

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

The framers of the fourteenth amendment and of the civil rights acts of Reconstruction, rather than predicating the right to keep and bear arms on the needs of an organized state militia, based it on the right of the people individually to possess arms for protection against any oppressive force—including racist or political violence by the militia itself or by other state agents such as sheriffs. At the same time, the militia was understood to be the whole body of the people, including blacks. In a discussion concerning the Civil Rights Act of 1875, Senator James A. Alcorn (R., Miss.) defined the militia in these terms: "The citizens of the United States, the *posse comitatus*, or the militia if you please, and the colored man composes part of these."<sup>167</sup> Every citizen, in short, was a militiaman. With the passage of the fourteenth amendment, the right and privilege of individuals to keep and bear arms was protected from both state and federal infringement.

## V. THE SUPREME COURT SPEAKS

Despite the fact that the fourteenth amendment did not exist when Chief Justice Marshall wrote the opinion in *Barron v. Baltimore*,<sup>168</sup> which held the (pg.34) Bill of Rights inapplicable to the states, the precedential influence of this case remained long after 1868 to the extent that selective incorporation by the Supreme Court did not begin until the turn of the century—only to be more fully developed in the 1960s. However, antebellum state courts were far more progressive, having held fundamental rights guaranteed in the Bill of Rights as protected from state deprivation. Even the notion of selective incorporation, whereby some Bill of Rights freedoms were considered applicable to the states, was originated by state courts. The opinion in the Texas case of *English v. State*,<sup>169</sup> in assuming that the second amendment applied to the states, referred to the right to keep and bear arms as a "personal right" which was "inherent and inalienable to man."<sup>170</sup> Owing to the fundamental character of the right, the court approvingly cited the following from *Bishop's Criminal*

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<sup>166</sup> *Id.* at 242 (emphasis added).

<sup>167</sup> *Id.* at 304. The antebellum exclusion of blacks from the armed people as militia was commented on by Sen. George Vickers (D. Md.), who recalled a 1792 law passed by Congress: "That every free able-bodied white male citizen shall be enrolled in the militia." Vickers added that as late as 1855 New Hampshire "confined the enrollment of militia to free white citizens." CONG. GLOBE, 41st Cong., 2nd Sess. 1558-59 (1870). Exclusion of a right to bear arms by blacks was further evidence of their lack of status as citizens. *See* H.R. REP. No. 22, 41st Cong., 3d. Sess. 7 (1871), citing *Cooper v. Savannah*, 4 Ga. 68 (1848) (not entitled to bear arms or vote).

<sup>168</sup> 32 U.S. (7 Pet.) 464 (1833).

<sup>169</sup> 35 Tex. 473 (1872).

<sup>170</sup> *Id.* at 477.

*Law*: "[T]hough most of the amendments are restrictions on the general government alone, not on the States, this one seems to be of a nature to bind both the State and National Legislatures, and doubtless it does."<sup>171</sup>

Implicit rejection of the applicability to the states of the Bill of Rights via the fourteenth amendment was initiated in the *Slaughterhouse Cases*,<sup>172</sup> the first Supreme Court opinion to construe the Reconstruction amendment. This now discredited opinion was soon followed by *United States v. Cruikshank*,<sup>173</sup> which remains the primary precedent for the proposition that the fourteenth amendment implies no right to keep and bear arms. Actually, the Court decided nothing of the kind, and *Cruikshank* is susceptible to the interpretation that the right to bear arms is a fundamental right.

The defendants in *Cruikshank* were convicted under the Enforcement Act of 1870<sup>174</sup> of conspiracy to deprive Levi Nelson and Alexander Tillman, both "of African descent and persons of color," of their rights to free speech and to keep and bear arms as guaranteed by the first and second amendments. The Court decided in reference to the first amendment that it "was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone."<sup>175</sup> Regarding the seizure of complainant's arms by the alleged conspirators, the Court stated:

The second and tenth counts are equally defective. The right there specified is that of bearing arms for a lawful purpose. This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this ... (pg.35) 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 'powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police'....<sup>176</sup>

This passage may be reduced to two propositions. First, that bearing arms was not a right granted by the Constitution, but existed independently of that charter since this right long antedated the Constitution. Using similar language, the Court, only two pages before, had explained more fully its meaning in reference to the first amendment:

The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It 'derives its source ... from those laws whose authority is acknowledged by civilized man throughout the world.' It is found wherever civilization exists. It was not, therefore, a right granted to the people by the

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<sup>171</sup> *Id.* at 475, citing 2 BISHOP, CRIMINAL LAW 124.

<sup>172</sup> 83 U.S. (16 Wall.) 36 (1873).

<sup>173</sup> 92 U.S. 542 (1876).

<sup>174</sup> 16 Stat. 140 (1870).

<sup>175</sup> 92 U.S. 542, 552 (1876).

<sup>176</sup> *Id.* at 553.

Constitution. The government of the United States when established found it in existence, with the *obligation on part of the States to afford it protection*.<sup>177</sup>

Thus, while the first and second amendments only applied to the federal government, the rights of the people to assemble publicly and to bear arms were basic to the kind of free civilization which the states were bound to protect.

The second proposition embodied in the Court's language was that the second amendment (like the first) only restricted the powers of the national government in the sense that private infringement of the right could be remedied only in the state courts. Far from denying that the states need not respect any right to keep and bear arms, the Court averred that municipal legislation and internal police rather than federal authority must protect this right. By analogy, the Justices reasoned that: "It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself."<sup>178</sup> The federal courts could not prosecute defendants accused of conspiracy to deprive complainants of their freedom of action and their firearms for these violations were common law crimes actionable only at the local level.<sup>(pg.36)</sup>

Lastly, the *Cruikshank* Court could not offer relief on the basis of the fourteenth amendment because private conspiracy rather than state action was involved:

The Fourteenth Amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the State upon the fundamental rights which belong to every citizen as a member of society.<sup>179</sup>

The rights to free assembly and possession of arms were considered fundamental rights of the citizen, but the encroachment by the state on these rights was not an issue in *Cruikshank* since no state action was alleged and thus, complainants were denied relief.

Whatever its constitutional grounds, the Supreme Court chose not to protect the black's rights to free speech and possession of arms, and *Cruikshank* came to symbolize, and perhaps to hasten, the end of Reconstruction. "Firearms in the Reconstruction South provided a means of political power for many. They were the symbol of the new freedom for blacks.... In the end ... the blacks were effectually disarmed."<sup>180</sup> The black historian W. E. B. DuBois contended that arms in the hands of blacks, and hence possible economic reform, aroused fear in North and South alike, resulting in such decisions as *Cruikshank* which made the fourteenth amendment an instrument of protection for corporations rather than freedmen.<sup>181</sup> Justice Thurgood Marshall recently referred to *Cruikshank* in these terms: "The Court began by interpreting the Civil War Amendments in a manner that sharply curtailed their substantive protections."<sup>182</sup>

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<sup>177</sup> *Id.* at 551 (emphasis added).

<sup>178</sup> *Id.* at 553-54.

<sup>179</sup> *Id.* at 554.

<sup>180</sup> L. KENNETT & J. ANDERSON, *THE GUN IN AMERICA* 155 (1975).

<sup>181</sup> W. E. B. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA* 482, 489, 691 (1977).

<sup>182</sup> *University of Cal. Regents v. Bakke*, 438 U.S. 265, 391 (1978) (citations omitted).

Unlike the fact pattern in *Cruikshank*, state action was involved in *Presser v. Illinois*,<sup>183</sup> the second Supreme Court decision to treat the issue regarding the relation between the second amendment and the states. Presser was indicted under an Illinois act for parading a body of four hundred men with rifles through the streets of Chicago without having a license from the governor. The participants were members of *Lehr and Wehr Verein*, a corporation of German immigrants whose stated objectives were education and military exercise to promote good citizenship. The Court upheld the finding of guilty against defendant's claim that the state legislation violated the second amendment:<sup>(pg.37)</sup>

We think 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. But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States. It was so held by this court in the case of *United States v. Cruikshank*....<sup>184</sup>

In short, the Court held that the armed paraders went beyond the individual right of keeping and bearing weapons, and in the alternative and more generally, that the second amendment does not apply to the states. The former proposition was explained further in the Court's rejection of a first amendment right of assembly applicable to Presser's band:

The right voluntarily to associate together as a military company, or to drill or parade with arms, without, and independent of, an act of Congress or law of the State authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law.<sup>185</sup>

Thus, *Presser* does not apply to the issue of the right of individuals to keep and bear arms, but is directly applicable to situations involving essentially private armies.<sup>186</sup>

This latter proposition, that *Cruikshank* "held" that the second amendment is not a limitation on the states, ignored the fact that *Cruikshank* did not involve state infringement of rights. And while *Presser* was thereby really the first Supreme Court decision to hold the second amendment inapplicable to the states, it made no mention of whether the fourteenth amendment might guarantee a right to keep and bear arms. Still, *Presser* upheld the concept of an arms bearing population on article I, section 8 grounds:

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,

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<sup>183</sup> 116 U.S. 252 (1886).

<sup>184</sup> *Id.* at 265.

<sup>185</sup> *Id.* at 267. The nineteenth century Court's view, that assembly for purpose of petition was inapplicable to the states, has been long since overruled.

<sup>186</sup> The issue of whether an organized militia may be constituted only by a government is beyond the scope of this study, but the Court's proscription fails to take account of the definition of the militia as the whole body of the people which may act against a despotic government. See 3 J. STORY, COMMENTARIES ON THE CONSTITUTION 746 (1833).

in view of this prerogative of the General Government ... the States (pg.38) cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government.<sup>187</sup>

In short, even if the second amendment did not apply to the states, the right to keep and bear arms existed for all citizens capable of bearing arms, and this right could not be infringed by the states. However, this principle did not prevent the Court from affirming the conviction of the German nationalist leader, just as in the earlier precedent the Court found no reason to protect the freedman's rights. This affirmation might lead the legal realist to the sociological conclusion that *Cruikshank* and *Presser* reflected the fear of established American ethnic groups to the challenges of blacks and foreigners.<sup>188</sup>

*Miller v. Texas*,<sup>189</sup> the final opinion by the high Court to rule directly on the second amendment in respect to its non-application to the states, clarified that its predecessor cases both refrained from deciding whether the fourteenth amendment included a prohibition of state infringement on the right to keep and bear arms. Convicted of murder and sentenced to death, defendant Miller "claimed that the law of the State of Texas forbidding the carrying of weapons, and authorizing the arrest without warrant of any person violating such law ... was is [*sic*] conflict with the 2nd and 4th Amendments to the Constitution...."<sup>190</sup> While assuming that the restrictions of these amendments operate only upon the federal power, the Court left open the possibility that the right to keep and bear arms and the right against warrantless arrests or unreasonable seizures may apply to the states through the fourteenth amendment: "[I]f the 14th amendment limited the power of the States as to such rights, as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court."<sup>191</sup> Rather than rejecting incorporation of the second and fourth amendments into the fourteenth, the Supreme Court refused to decide the claim because its powers of adjudication were limited to the review of errors timely objected to in the trial court, thereby precluding it from hearing such novel arguments. In sum, the careful distinction (pg.39) drawn by the *Miller* Court between rights based solely on provisions in the Bill of Rights and those based on the fourteenth amendment and the Court's reliance on *Cruikshank* and *Presser*, demonstrate that none of the three cases resolved the issue of whether the fourteenth amendment prohibited the states from infringing upon the right to keep and bear arms. Indeed, dictum in *Cruikshank* suggests that although this right was not within the federal conspiracy statute, the right to bear arms, like the right to free speech, is a fundamental right which existed prior to the Constitution and which every free civilization is bound to respect.

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<sup>187</sup> 116 U.S. 252, 265 (1886).

<sup>188</sup> Cf. Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381, 405 (1960): "[T]he *Presser* and *Cruikshank* decisions were the children of the War Between the States and 'Black Republican Reconstructionism.'" This suggests the sociological explanation that the decisions were reactions to Southern and black threats to Northern and white political power.

<sup>189</sup> 153 U.S. 535 (1894).

<sup>190</sup> *Id.* at 538.

<sup>191</sup> *Id.*

While *Cruikshank*, *Presser*, and *Miller* were the only nineteenth century Supreme Court cases where the nature of the right to bear arms was at issue, the case of *Robertson v. Baldwin*,<sup>192</sup> which considered whether compulsory service of deserting seamen constituted involuntary servitude, treated arms bearing as a fundamental and centuries-old right which could not be infringed. Referring to the seaman's contract as an exception to the thirteenth amendment, Justice Brown, who delivered the opinion of the Court, analogized:

The law is perfectly well settled that the first ten amendments to the constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons....<sup>193</sup>

In this striking passage, the Supreme Court recognized the right to bear arms as having existed "from time immemorial," having been handed down as a guarantee of Englishmen long predating its formal expression in the second amendment, and as being part of "the fundamental law." That the prohibition of carrying concealed weapons did not infringe upon this right indicates that the Court viewed the right as belonging to individuals, for such issue is not relevant to an organized militia. The Court's reference to concealed (pg.40) weapons legislation referred to state statutes concerning the manner in which private persons carried handguns and other small weapons in public; there certainly were no statutes prohibiting active militiamen from carrying concealed weapons. The Court's pronouncement also suggests that the individual right to carry weapons openly, by being basic to our system of government, was protected from both federal and state infringement—otherwise, it would be ludicrous to speak of state statutes prohibiting carrying concealed weapons as not infringing on the right to bear arms, for by definition *no* state statute could infringe on this right if the right was protected only from federal infringement and was not part of the fundamental law.<sup>194</sup>

## VI. THE STATE COURTS RESPOND

The Supreme Court did not return to the subject of the second amendment until it heard the case of *United States v. Miller*<sup>195</sup> in 1939, but in intervening years several significant state opinions were rendered, some of which were cited with authority in *Miller*. The Texas Supreme Court, after

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<sup>192</sup> 165 U.S. 275 (1897).

<sup>193</sup> *Id.* at 281-82. That the Constitution did not create new rights, but perpetuated common law rights, including the right to keep and bear arms, was typically expressed in T. FARRAR, *MANUAL OF THE CONSTITUTION* 59, 145 (1867).

<sup>194</sup> The dissenting opinion of Justice Harlan, by arguing that specific guarantees preclude infringement via exceptions, would by implication prohibit legislation against carrying concealed weapons. *See* 165 U.S. 275, 302 (1897) (Harlan, J., dissenting).

<sup>195</sup> 307 U.S. 174 (1939).



its progressive holding in *English v. State*<sup>196</sup> that the second amendment involved a fundamental right which applied to both state and federal legislatures, reversed itself in *State v. Duke*<sup>197</sup> by reverting to the *Barron v. Baltimore*<sup>198</sup> view that the Bill of Rights was inapplicable to the states. Even so, the court held that the defendant could not be constitutionally convicted for carrying a six-shooter pistol. The term "arms" is more comprehensive than only "arms of the militiaman or soldier" under the Texas Constitution: "The arms which every person is secured the right to keep and bear ... must be such arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self defense...."<sup>199</sup>

The Arkansas case of *Fife v. State*<sup>200</sup> considered the constitutionality of an act which prohibited the carrying of easily concealed pocket pistols but not larger handguns. While holding the act valid under a state constitution which (pg.41) guaranteed the right to bear arms for the "common defense," the court added that the second amendment protects the individual right to possess "the army and navy repeaters, which, in recent warfare, have very generally superseded the old-fashioned holster, used as a weapon in the battles of our forefathers."<sup>201</sup> While restricting the "protected" arms to those typical for militia use, by indicating that one function of the second amendment was to provide such arms to all citizens to overthrow a domestic tyranny, it clarified that all citizens were militiamen:

[T]he arms which it guarantees American citizens the right to keep and bear, are such as are needful to, and ordinarily used by a well regulated militia, and such as are necessary and suitable to a free people, to enable them to resist oppression, prevent usurpation, repel invasion, etc., etc.<sup>202</sup>

The West Virginia case of *State v. Workman*<sup>203</sup> also resulted in upholding an act designed to prevent the carrying of certain concealed weapons such as brass knuckles, small pistols, and billies as were commonly used in brawls and street fights. Yet, the court still upheld second amendment protection for individual possession of arms such as would aid the people to revolt to protect the public liberty, claiming that "the weapons of warfare to be used by the militia, such as swords, guns, rifles, and musket,—arms to be used in defending the state and civil liberty" could be borne by the people.<sup>204</sup>

While the West Virginia high court thus assumed in the above analysis that the second amendment applied to the states without explicitly so holding, the Supreme Court of Idaho in *In re*

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<sup>196</sup> 35 Tex. 473 (1872).

<sup>197</sup> 42 Tex. 455 (1875).

<sup>198</sup> 32 U.S. 464 (1833).

<sup>199</sup> 42 Tex. at 458.

<sup>200</sup> 31 Ark. 455 (1876).

<sup>201</sup> *Id.* at 460-61.

<sup>202</sup> *Id.* at 458. *Cf.* *Wilson v. State*, 33 Ark. 557, 560, 34 Am. Rep. 52 (1878): "If cowardly and dishonorable men sometimes shoot unarmed men with army pistols or guns, the evil must be prevented by the penitentiary and gallows, and not by a general deprivation of a constitutional privilege."

<sup>203</sup> 35 W. Va. 367, 14 S.E. 9 (1891).

<sup>204</sup> *Id.* at 369, 14 S.E. at 11.

*Brickey*<sup>205</sup> held that the carrying of firearms was protected from state deprivation by the federal constitution as well as by their state provision which insured the right to bear arms for security and defense:

Under these constitutional provisions, the legislature has no power to prohibit a citizen from bearing arms in any portion of the state of Idaho, whether within or without the corporate limits of cities, towns, and villages. The legislature may, as expressly provided in our State constitution, regulate the exercise of this right, (pg.42) but may not prohibit it.... But the statute in question does not prohibit the carrying of weapons concealed, which is of itself a pernicious practice, but prohibits the carrying of them in any manner in cities, towns and villages. We are compelled to hold this statute void.<sup>206</sup>

Yet in *Salina v. Blaksley*<sup>207</sup> the Supreme Court of Kansas in upholding a conviction for carrying a revolver while intoxicated, took the restrictive view that the intent of the relevant state provision and amendment II was to guarantee arms possession for defense and security and "the right to bear arms as a member of the state militia."<sup>208</sup> Contrariwise, the court treated the federal provision as applicable to the states and agreed that "the legislatures can regulate the mode of carrying deadly weapons, provided they are not such as are ordinarily used in civilized warfare."<sup>209</sup> The exclusively collectivist approach taken in *Salina* that the relevant constitutional provisions only referred to the right to bear arms in a military organization provided for by law "went further than any other case,"<sup>210</sup> except for the opinion of one concurring judge in the early Arkansas case of *State v. Buzzard*.<sup>211</sup> This approach appears incongruous in that the members of a military organization constitutionally provided for by law would hardly need a special constitutional right to bear arms.

Affirming a directed verdict for defendant who was prosecuted for carrying a pistol after being threatened with violence, the Supreme Court of North Carolina in *State v. Kerner*<sup>212</sup> referred to the right to keep and bear arms as "a sacred right based upon the experience of the ages in order that the people may be accustomed to bear arms and ready to use them for protection of their liberties or their country when occasion serves."<sup>213</sup> Historically, "'pistol' ex vi termini is properly included within the word 'arms,' and that the right to bear such arms cannot be infringed."<sup>214</sup> The constitutional guarantee extended to arms which the individual could keep and bear, not to war planes or cannons:(pg.43)

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<sup>205</sup> 8 Idaho 597, 70 P. 609 (1902).

<sup>206</sup> *Id.*

<sup>207</sup> 72 Kan. 230, 83 P. 619 (1905).

<sup>208</sup> *Id.* at 232, 83 P. at 620. The only case cited in support of this interpretation actually held only that "no independent military company has a constitutional right to parade with arms in our cities...." *Commonwealth v. Murphy*, 166 Mass. 171, 173, 44 N.E. 138 (1896).

<sup>209</sup> 83 P. at 620.

<sup>210</sup> *Strickland v. State*, 137 Ga. 1, 72 S.E. 260, 262 (1911).

<sup>211</sup> 4 Ark. 18 (1843).

<sup>212</sup> 181 N.C. 574, 107 S. E. 222 (1921).

<sup>213</sup> *Id.* at 575, 107 S.E. at 223.

<sup>214</sup> *Id.* at 576, 107 S.E. at 224.

It is true that the invention of guns with a carrying range of probably 100 miles, submarines, deadly gases, and of airplanes carrying bombs and other modern devices, have much reduced the importance of the pistol in warfare except at close range. But the ordinary private citizen, whose right to carry arms cannot be infringed upon, is not likely to purchase these expensive and most modern devices just named. To him the rifle, the musket, the shotgun, and the pistol are about the only arms which he could be expected to 'bear,' and his right to do this is that which is guaranteed by the Constitution.<sup>215</sup>

In short, the arms that the individual is guaranteed the right to bear are those which can be purchased, kept, and borne. Further, this individual right was guaranteed for the purpose of enabling the people to protect themselves against invasions of their liberties. It was "the common people," since they were "accustomed to the use of arms," who won the Revolution, and not only is the right not dependent on the select militia, but it exists in part for defense against the militia: "In our own state, in 1870, when Kirk's militia was turned loose and the writ of habeas corpus was suspended, it would have been fatal if our people had been deprived of the right to bear arms and had been unable to impose an effective front to the usurpation."<sup>216</sup>

The right to bear arms "should be construed to include all 'arms' as were in common use, and borne by the people as such when this provision was adopted."<sup>217</sup> "The intention was to embrace the 'arms,' an acquaintance with whose use was necessary for their protection against the usurpation of illegal power—such as rifles, muskets, shotguns, swords, and pistols."<sup>218</sup> The *Kerner* court expressed its consciousness of the need of the poor and the unpopular "to acquire and retain a practical knowledge of the use of fire arms" as follows:

This is not an idle or an obsolete guaranty, for there are still localities, not necessary to mention, where great corporations, under the guise of detective agents or police forces, terrorize their employees by armed force. If the people are forbidden to carry the only arms within their means, among them pistols, they will be completely at the mercy of these great plutocratic organizations. Should there be a mob, is it possible that law-abiding citizens could not assemble with their pistols carried openly and protect their persons and their property from unlawful violence without going before an official and obtaining license and giving bond?<sup>219</sup> (pg.44)

The Michigan Supreme Court in *People v. Zerillo*<sup>220</sup> held that not only individual citizens but also unnaturalized foreign-born residents were protected under the state constitutional provision: "Every person has a right to bear arms for the defense of himself and the state."<sup>221</sup> The court viewed the policy issue as follows:

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 577, 107 S.E. at 224.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 577-78, 107 S.E. at 225.

<sup>219</sup> *Id.*

<sup>220</sup> 219 Mich. 635, 189 N.W. 927 (1922).

<sup>221</sup> *Id.* at 638-39, 189 N.W. at 928.

Firearms serve the people of this country a useful purpose wholly aside from hunting, and under a constitution like ours, granting ... to *every person* the right to bear arms for the defense of himself and the state,... the Legislature has ... no power to constitute it a crime for a person, alien, or citizen, to possess a revolver for the legitimate defense of himself and his property.<sup>222</sup>

The same court explained the provision further in the 1931 case of *People v. Brown*,<sup>223</sup> which upheld the sentence of life imprisonment of a recidivist felon convicted of possessing a blackjack. Reviewing the nature of the historical militia as being "composed of all able-bodied men," the Michigan Supreme Court rejected (a) the view that individuals may bear only such arms as are customary in the militia and (b) the extreme view taken in *Salina* that only military organizations were protected by the Constitution. The court reasoned:

When the bulwark of state defense was the militia, privately armed, there may have been good reason for the historical and military test of the right to bear arms. But in this state the militia, although legally existent and composed of all able-bodied male citizens..., is practically extinct and has been superseded by the National Guard and reserve organizations.... The historical test would render the constitutional provision lifeless.

The protection of the Constitution is not limited to militiamen nor military purposes, in terms, but extends to every person to bear arms for the defense of himself as well as of the state.<sup>224</sup>

## VII. *UNITED STATES V. MILLER*

The nearest the Supreme Court has come to a direct construction of the meaning of the second amendment was the case of *United States v. Miller*<sup>225</sup> (pg.45) in which the Court reversed a district court judgment which held the National Firearms Act of 1934<sup>226</sup> invalid as violative of the second amendment.<sup>227</sup> Defendants had been convicted of transporting in interstate commerce a shotgun having a barrel less than eighteen inches without having in their possession the stamp-affixed written order required under the Act, which was the first federal statute ever passed, which regulated, through taxation and registration, the keeping and bearing of certain arms.

Since the defendant-appellees made no appearance on appeal, the Supreme Court was only apprised of the cases and arguments which the United States attorneys brought to its attention, and thereby failed to benefit from hearing the adverse views necessary to render a balanced opinion.<sup>228</sup> Even so, the opinion of the Court, delivered by Justice McReynolds, stands for the proposition that the United States government cannot regulate the right to keep and bear arms suitable for militia use

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<sup>222</sup> *Id. See* *People v. Nakamura*, 99 Colo. 262, 62 P.2d 246 (1936) (rejection of collectivist argument).

<sup>223</sup> 253 Mich. 537, 235 N.W. 245 (1931).

<sup>224</sup> *Id.* at 540, 235 N.W. at 246.

<sup>225</sup> 307 U.S. 174 (1939).

<sup>226</sup> National Firearms Act of 1934, 26 U.S.C. § 1132c (1934) (current version at 26 U.S.C. § 5801 (1976)).

<sup>227</sup> 26 F. Supp. 1002, 1003 (W.D. Ark. 1939).

<sup>228</sup> "But I think we owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations." *Monell v. Dep't of Social Services*, 436 U.S. 658, 709 n.6 (1978) (Powell, J., concurring) (overruling *Monroe v. Pape*, 365 U.S. 167 (1961) after reexamination of Reconstruction debates).

but can regulate possession of arms unsuitable for militia use. The Court began the opening of its brief analysis of the second amendment in these terms:

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. *Aymette v. State*, 2 Hump. 154, 158.<sup>229</sup>

The italicized portions above do *not* indicate that possessing the "sawed-off" shotgun was unprotected by the second amendment, but only that no evidence was presented on the matter and the facts were not of such common knowledge that judicial notice could be taken.<sup>230</sup> Most significantly, the Court assumed that the weapon had not been shown to be "ordinary military equipment" which "could contribute to the common defense"—had such evidence been shown, the Court's wording implies that its possession by an individual would be protected.<sup>(pg.46)</sup>

This assumption is further made explicit by reference to the *Aymette*<sup>231</sup> case, which stated with respect to the right of each individual to bear arms: "If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights, etc."<sup>232</sup> Even so, the Tennessee Constitution's guarantee of the people's right "to keep and bear arms for their common defense" contained the very qualification explicitly rejected when the second amendment was ratified, and thus the Supreme Court's restriction to individual possession of military arms was misguided.

The Court proceeded to cite the militia clause of the Constitution<sup>233</sup> and stated that its purpose was "to assure the continuation and render possible the effectiveness of such forces."<sup>234</sup> The Court clearly perceived this militia as the armed people: "The sentiment of this 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."<sup>235</sup> In more detail:

The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that *the Militia comprised all males physically capable of acting in concert for the common defense.* 'A body of citizens enrolled for military discipline.' And further, that ordinarily when called for service *these men were expected to appear bearing arms supplied by themselves* and of the kind in common use at the time.<sup>236</sup>

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<sup>229</sup> *United States v. Miller*, 307 U.S. at 178 (1939) (emphasis added).

<sup>230</sup> *See Arnold v. United States*, 115 F.2d 523, 525 (8th Cir. 1940).

<sup>231</sup> 21 Tenn. (2 Hum.) 154 (1840).

<sup>232</sup> *Id.* at 158.

<sup>233</sup> U.S. CONST. art. I, § 8, cl. 15, 16.

<sup>234</sup> 307 U.S. at 178.

<sup>235</sup> *Id.* at 179.

<sup>236</sup> *Id.* (emphasis added).

Having cited Blackstone<sup>237</sup> to the effect that King Alfred "first settled a national militia," the Court quoted Adam Smith: "Men of republican principles have been jealous of a standing army as dangerous to liberty.... In a militia, the character of the labourer, artificer, or tradesman, predominates over that of the soldier...."<sup>238</sup> A review of the militia acts of the pre-Constitution colonies followed, beginning with these generalizations from the historian Osgood "In all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the *general obligation of all adult male inhabitants to possess arms*.... The possession of arms also implied the possession of ammunition...."<sup>239</sup> (pg.47)

In 1784, the General Court of Massachusetts directed that "all able-bodied men" under sixty years of age be available for the Train Band or Alarm List, and each individual "shall equip himself, and be constantly provided with a good fire arm...."<sup>240</sup> Defining "every able-bodied Male Person" who resided in the state between ages sixteen and forty-five a militiaman, the New York Legislature directed each to "provide himself, at his own Expense, with a good Musket or Firelock" and ammunition.<sup>241</sup> Finally, the General Assembly of Virginia in 1785 declared, "the defense and safety of the commonwealth depend upon having its citizen properly armed," and directed that "all free male persons" between ages of eighteen and fifty be considered members of the militia who were obliged not only to be armed on muster day with a clean musket or rifle, cartridges, a pound of powder, lead, and other equipment, but also to "constantly keep the aforesaid arms, accoutrements, and ammunition...."<sup>242</sup>

The Supreme Court's historical review demonstrated its recognition that the "well regulated militia" referred to in the second amendment meant the whole armed masses, that each private individual had the right and duty to keep and bear arms, and that the people were to provide their own armed protection rather than depend on a militarist and oppressive standing army. The Court not only sanctioned the view that the whole armed population, not simply the organized armed minorities on the payroll of the United States or state governments (i.e., the four branches of the national "armed forces" and the "National Guard"), was responsible for protecting the people's freedom and implied that the standing army was contrary to "the security of a free state" and unconstitutional.

Next, the Court pointed out: "Most if not all of the States have adopted provisions touching the right to keep and bear arms. Differences in the language employed in these have naturally led to somewhat variant conclusions concerning the scope of the right guaranteed."<sup>243</sup> While asserting that these provisions failed to support the defendants in this case, this statement reaffirmed that the right to keep and bear arms was clearly "guaranteed."

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<sup>237</sup> 2 COMMENTARIES ch. 13, 409.

<sup>238</sup> 307 U.S. at 179.

<sup>239</sup> *Id.*

<sup>240</sup> 307 U.S. at 180.

<sup>241</sup> *Id.* at 180-81.

<sup>242</sup> *Id.* at 181-82.

<sup>243</sup> *Id.* at 182.

Perhaps the most significant portion of the brief *Miller* opinion was the footnotes which the Court labeled "some of the more important opinions and comments by writers...."<sup>244</sup> Although virtually all these notes are reviewed in detail above, as approved authorities, they merit summarization here to further clarify the Court's determination in 1939.<sup>(pg.48)</sup>

The note begins by citing *Presser v. Illinois*<sup>245</sup> and *Robertson v. Baldwin*.<sup>246</sup> As seen previously, *Presser* only held that the second amendment did not protect private armies marching through a city without a permit, and asserted that the states could not prevent the armed people from doing their duty as a militia under the Constitution.<sup>247</sup> The latter case, in dictum, viewed the right to keep and bear arms (which it failed to restrict to arms appropriate to a militia) as a fundamental privilege and immunity which antedated the adoption of the Constitution. The *Robertson* Court further implied that an individual right to keep and bear arms was protected from state and federal infringement, since the Court sanctioned regulation of concealed weapons, an issue hardly relevant to the organized militia.<sup>248</sup>

Aside from the above two Supreme Court cases, the *Miller* Court, largely in the aforementioned note, referred to several state cases. In order of appearance, the following were cited:

The Arkansas case of *Fife v. State*,<sup>249</sup> upheld the right of individuals to bear large, but not pocket, pistols to enable the people to resist domestic oppression. It should be noted that the state constitutional provision in question qualified the right to keep and bear arms for the "common defense," a qualification which was defeated in debates over the second amendment. Arguably, possession of concealed pocket pistols is thereby protected by the amendment.

The Georgia case of *Jeffers v. Fair*,<sup>250</sup> upheld the right of the Confederate States of America to conscript men to combat the invasion of their soil from domestic tyranny transformed into foreign invasion. The case discussed the value of the militia in a general manner without exposing directly the second amendment, or its equivalent in the Confederate Constitution, which adopted identical wording.<sup>251</sup>

The Kansas case of *Salina v. Blaksley*,<sup>252</sup> which in dictum stated that the right to bear arms applied to members of the militia, also assumed that the masses were the militia in concluding that only weapons not ordinarily used in civil warfare were not protected by the amendment. In addition, this presupposed the applicability of the second amendment to the states.<sup>(pg.49)</sup>

The Michigan case of *People v. Brown*,<sup>253</sup> not only defined the militia as "all able-bodied men" but went further and determined that each private individual may bear arms which have no militia purpose. *Brown* in turn was partly based on *People v. Zerillo*,<sup>254</sup> which held that the state could not make it criminal for anyone, even an alien, to possess a revolver for self defense.

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<sup>244</sup> *Id.* at 183 n.3.

<sup>245</sup> 116 U.S. 252 (1886).

<sup>246</sup> 165 U.S. 275 (1897).

<sup>247</sup> 116 U.S. at 265, 267.

<sup>248</sup> 165 U.S. at 281-82.

<sup>249</sup> 31 Ark. 455 (1876).

<sup>250</sup> 33 Ga. 347 (1862).

<sup>251</sup> Art. I, § 9, ¶ 13.

<sup>252</sup> 72 Kan. 230, 83 P. 619 (1905).

<sup>253</sup> 253 Mich. 537, 235 N.W. 245 (1931).

<sup>254</sup> 219 Mich. 635, 189 N.W. 927 (1922).

The Tennessee case of *Aymette v. State*,<sup>255</sup> upheld the possession by "the citizens" of arms appropriate for militia use under a state constitution which referred to arms kept "for their common defense"—a restriction non-existent in amendment II.

The Texas case of *State v. Duke*,<sup>256</sup> while averring that the second amendment did not apply to the states, held that large pistols could be carried legitimately, and that the term "arms" was more comprehensive than only the "arms of militiaman or soldier." The types of arms commonly and customarily kept were protected by the state constitutional provision.

The West Virginia case of *State v. Workman*,<sup>257</sup> upheld protection under the second amendment of individual possession of swords, guns, rifles, and muskets to protect civil liberty.

All of the above cases, defining the militia as the whole people, asserted the right of each individual to keep and bear arms with a military use; the same precedents are split on whether second amendment protection extends to weapons not ordinarily used for militia purposes and on whether the amendment applied to the states.

Lastly, the *Miller* Court's note sanctioned Justice Story's exposition of the amendment, which stressed, "the right of the citizen to keep and bear arms has justly been considered, as the palladium of the liberties of the republic," in part to resist the usurpations of rulers. Those who argue that the United States armed forces and National Guard now take the place of the militia have a confidence in standing armies and rulers which Justice Story would have considered naive. Furthermore, the faith presupposed by such advocates in the armed state and their concomitant lack of faith in the armed people, appears curious considering their stress on the militia concept as a limitation on the right to bear arms and their constant reiteration that the Constitution's framers rejected the standing army—all of which such advocates find laudable. Justice Story's comments, endorsed by the Supreme Court, remain valid political philosophy today.<sup>(pg.50)</sup>

The comparable exposition of the second amendment by Judge Thomas M. Cooley was also approved by the Court in the same note:

The right declared was meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of regaining rights when temporarily overturned by usurpation.

\* \* \*

The Right is General—It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent.... But the law may make provision for the enrollment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is that

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<sup>255</sup> 21 Tenn. (2 Hum.) 154 (1840).

<sup>256</sup> 42 Tex. 455 (1875).

<sup>257</sup> 35 W. Va. 367, 14 S.E. 9 (1891).



the people from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose....<sup>258</sup>

Despite Judge Cooley's imploration, the Supreme Court reversed the judgment of the district court and remanded the case for further proceedings. Although the judgment against the right to possess sawed-off shotguns was a default judgment based on the non-appearance of defendants, *Miller* stands for the proposition that the people, in their capacity as individuals, could keep and bear arms appropriate for militia use.

## VIII. FEDERAL AND STATE CASES: FROM *MILLER* THROUGH THE PRESENT

### A. *Post-Miller* Cases

The first lower federal court to exposit *Miller* involved not firearms regulation, but the validity of the Selective Training and Service Act of 1940.<sup>259</sup> Rejecting the defendant's argument that the draft constituted involuntary servitude, the district court in *Stone v. Christenson*<sup>260</sup> relied on *Miller* as authority that the whole people constituted the militia:<sup>(pg.51)</sup>

Stone, ever since he became of a suitable age, has been by Federal law a member of the unorganized militia.<sup>261</sup> By a series of laws, the first of which was adopted soon after the organization of government under the federal constitution, the liability of able-bodied citizens to military service and training under federal authority has been continuously declared.<sup>262</sup>

The court proceeded to cite the Act of May 8, 1792, which provided for the inclusion in the militia of "each and every free able-bodied white male citizen" between ages 18 and 45.<sup>263</sup> It was clarified that "the unorganized militia" was all able-bodied men, not just those registered for such, for Congress, in the Act of 1917<sup>264</sup> "ordered part of the organized militia, the National Guard, into service and the registration of a portion of the unorganized militia."<sup>265</sup>

It was the First Circuit Court of Appeals, in deciding *Cases v. United States*,<sup>266</sup> which began what can only be described as a rebellion by the lower federal courts against the holding in *Miller* that the second amendment guaranteed the right of every individual to keep and bear arms suitable for militia use. The defendant in *Cases*, a Puerto Rican who had earlier been convicted of a crime

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<sup>258</sup> COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 281-82 (2d. ed. 1891) (emphasis added). The court cites 1 COOLEY, CONST. 646 (5th ed.).

<sup>259</sup> Ch. 720, 54 Stat. 885 (1940).

<sup>260</sup> 36 F. Supp. 739 (D. Or. 1940).

<sup>261</sup> Here the court cites *Miller* and also *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181-220. 36 F. Supp. at 742 n.9.

<sup>262</sup> 36 F. Supp. at 742.

<sup>263</sup> 1 Stat. 271. 36 F. Supp. at 742 n.10.

<sup>264</sup> 50 U.S.C. app., § 301(a). 36 F. Supp. at 743 n.16.

<sup>265</sup> *Id.* at 743.

<sup>266</sup> 131 F.2d 916, *cert. denied*, 319 U.S. 770 (1942), *rehearing denied*, 324 U.S. 889 (1945).

of violence, had received into his possession a firearm and ammunition in violation of the Federal Firearms Act.<sup>267</sup> The court began its analysis in relation to the second amendment with the hardly intellectually rigorous argument that the Act "undoubtedly curtails to some extent the right of individuals to keep and bear arms" but this does not imply that the Act is "bad" under the second amendment. The court proceeded to state: "The right to keep and bear arms is not a right conferred upon the people by the federal constitution."<sup>268</sup> By suggesting that only local legislation granted this right and that the second amendment simply prevented "the federal government only from infringing that right," the court, despite its subsequent reference to *Robertson v. Baldwin*<sup>269</sup> failed to recognize that the reason the federal constitution did not establish the right to keep and bear arms was because the right (pg.52) had long antedated the Constitution—which the *Robertson* Court explicitly stated.

The circuit court's analysis of *Miller* was set forth as follows:

Apparently, then, under the Second Amendment, the federal government ... cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia.... At any rate the rule of the *Miller* case, if intended to be comprehensive and complete would seem to be already outdated, in spite of the fact that it was formulated only three and a half years ago, 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. In view of this, if the rule of the *Miller* case is general and complete, the result would follow that, under present day conditions, the federal government would be empowered only to regulate the possession or use of weapons such as a flintlock musket or a matchlock harquebus. But to hold that the Second Amendment limits the federal government to regulations concerning only weapons which can be classed as antiques or curiosities,—almost any other might bear some reasonable relationship to the preservation or efficiency of a well regulated militia unit of the present day,—is in effect to hold that the limitation of the Second Amendment is absolute.<sup>270</sup>

The lower court ended its rejection of the authority of the Supreme Court by complaining that "another objection to the rule of the *Miller* case" is that it failed to prevent the possession of such weapons as machine guns and mortars by individuals who were not members of "any military unit."<sup>271</sup>

The Court of Appeals of the First Circuit was clearly shocked at the Supreme Court's holding because of the potential of an armed populace, a particular threat to the colonial domination over Puerto Rico. A people equipped to prevent domestic tyranny, which Justice Story and most nineteenth-century jurists agreed was a major function of the second amendment, quickly became an "outdated" phenomenon for post-*Miller* federal circuit and district courts. After *Cases*, however, there was a lull in federal judicial treatment of the gun control issue, and the state courts provided most expositions of the amendment for the following two decades.

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<sup>267</sup> §§ 2 (e) and (f), Federal Firearms Act, 52 Stat. 1250, 15 U.S.C. § 901-09.

<sup>268</sup> 131 F.2d at 921.

<sup>269</sup> 165 U.S. 275 (1897).

<sup>270</sup> 131 F.2d at 922.

<sup>271</sup> *Id.*

Not surprisingly, it was the state courts of New York, home of the Sullivan Law, which provided the occasion for further exposition of the amendment. In *Moore v. Gallup*<sup>272</sup> an admittedly law-abiding citizen was denied a license to carry a concealed weapon without any stated justification. The court upheld the denial despite the second amendment (which it held inapplicable to the (pg.53) states) and § 4 of the Civil Rights Law of the State of New York, which was identical to the amendment except for the substitution of "cannot" for "shall not." In a statement which would seem to have strengthened the applicant's position, the court observed that "the second amendment created no right to bear arms, a right which long ante-dated the adoption of the Federal Constitution, having originated in a design to strengthen the national militia, an institution first established by King Alfred."<sup>273</sup> The long-standing character of the right would seem to have caused the court to deem it of more importance to individuals, as would the reference to Judge Cooley's point that the right existed partly to resist oppression.<sup>274</sup> The dissenting opinion emphasized that the Sullivan Law was enacted to make criminal possession of arms difficult, not to harass peaceful citizens who, for the sake of "home defense," should "become proficient in the use of firearms."<sup>275</sup>

Similarly, the New York case of *Application of Cassidy*<sup>276</sup> declared, in upholding the rejection of an application to the bar by an applicant who advocated a right wing private militia to defeat a Communist insurrection, that the second amendment does not grant a license to carry arms."<sup>277</sup>

In sharp contrast, the Municipal Court of the City of New York, Borough of Queens, in *Hutchinson v. Rosetti*<sup>278</sup> ordered the police to return a hunting rifle to one who had used it to defend himself against an angry and prejudiced mob: "Passing for the moment that the law, as a matter of broad policy, frowns on forfeiture, there is the constitutional guarantee of the right of the individual to bear arms. Amendments Art. II."<sup>279</sup> Clearly interpreting the amendment as guaranteeing an individual right against state or federal infringement, the court added that the presumption of innocence and "the elemental right of self-defense" were both basic and long recognized in Anglo American Jurisprudence.<sup>280</sup> "The Constitution permits citizens the right to bear arms."<sup>281</sup>

### B. Federal Cases Since the Gun Control Legislation of 1968

Firearms control legislation passed by Congress in the wake of ghetto uprisings during 1968 greatly enhanced federal regulation and prohibition of (pg.54) arms and has led to a qualitative development in judicial construction of the right to keep and bear arms.

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<sup>272</sup> 45 N.Y.S.2d 63, 267 App. Div. 64, *aff'd*, 294 N.Y. 699 (1945).

<sup>273</sup> 45 N.Y.S.2d at 66.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 69.

<sup>276</sup> 51 N.Y.S.2d 202, 268 App. Div. 202 (1944), *rehear. denied*, 63 N.Y.S.2d 840, 270 App. Div. 1046 (1946), *aff'd*, N.Y. 926, 73 N.E.2d 41 (1947).

<sup>277</sup> *Id.* at 205.

<sup>278</sup> 205 N.Y.S.2d 526, 24 Misc. 949 (1960).

<sup>279</sup> 205 N.Y.S.2d at 529.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

Construction of the 1968 legislation began in earnest in 1971 with *United States v. Synnes*,<sup>282</sup> wherein the Court of Appeals for the Eighth Circuit determined that under the Omnibus Crime Control and Safe Streets Act of 1968,<sup>283</sup> proof that possession of a firearm by a convicted felon occurred in commerce or affected commerce was not necessary. After citing emotional claims about rioting and looting, the court decided that "the right to bear arms is not the type of fundamental right to which the 'compelling state interest' standard attaches."<sup>284</sup> Without mentioning the second amendment, the Supreme Court held in *United States v. Bass*<sup>285</sup> that the government must prove that the firearm was possessed in commerce or affected commerce, which resulted in the vacating of the *Synnes* judgment.<sup>286</sup>

Few of the federal cases in the past decades have contributed to a further understanding of the origins and meaning of the second amendment and its affect on the fourteenth. Typically, the opinions rely on the First Circuit Court of Appeals decision in *Cases*, which is preferred by these courts to the absolutist position taken by the Supreme Court in *Miller*, since the former validates the 1968 legislation while the latter would appear to invalidate much of it. While some of these federal cases involve traditional fourth amendment problems,<sup>287</sup> most relate to buying,<sup>288</sup> selling,<sup>289</sup> and possessing<sup>290</sup> charges under the 1968 legislation. Regarding possession offenses by felons under 18 U.S.C. App. § 1202 (a), more creative defense arguments based on the right to bear arms, the right of an Indian to hunt, the prohibition of bills of attainder (pg.55) and ex post facto laws, and the due process and equal protection clauses, met with a flat rejection by the courts.<sup>291</sup>

Some federal court decisions have been ambiguous in their interpretation of the second amendment and while failing to support the right to possess arms in the manner courts traditionally have done, they suggest arguments in favor of the right. Thus, in *United States v. Gurrola-Garcia*,<sup>292</sup> decided by the Ninth Circuit in 1976, it was stated:

Even if we were to apply Justice Brennan's suggestion that those congressional delegations are invalid which create 'the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions in an area of *protected freedoms*,' *United States v. Robel*,

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<sup>282</sup> 438 F.2d 764 (8th Cir. 1971). *See also* *United States v. Wiley*, 309 F. Supp. 141, *aff'd*, 438 F.2d 773 (8th Cir. 1971); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971).

<sup>283</sup> 18 U.S.C. § 1202(a)(1) (1976).

<sup>284</sup> 438 F.2d at 771 n.9.

<sup>285</sup> 404 U.S. 336 (1971).

<sup>286</sup> *Synnes v. United States*, 404 U.S. 1009 (1972) (*mem.*).

<sup>287</sup> *United States v. Romero*, 484 F.2d 1324, 1327 (10th Cir. 1973).

<sup>288</sup> *Cody v. United States*, 460 F.2d 34, 36-37 (8th Cir. 1972) (false statement signed certifying non-felon); *United States v. Johnson*, 497 F.2d 548 (4th Cir. 1974) (forgery conviction is felony under 18 U.S.C. § 1202 (c) (2)).

<sup>289</sup> *United States v. Lauchli*, 444 F.2d 1037, 1041 (7th Cir. 1971) (sold sub-machine guns to a Bureau of Alcohol, Tobacco and Firearms agent).

<sup>290</sup> *United States v. Birmley*, 529 F.2d 103 (6th Cir. 1976) (possession of unregistered firearm under 26 U.S.C. § 5861 (d) & 18 U.S.C. § 2); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978) (conviction for possession of unregistered machine gun upheld under 26 U.S.C. §§ 5845 (b) 5861 (d), despite defendant's memberships in Kansas militia, KANS. CONST. art. VIII, § 1, and in "Posse Comitatus," a militia type organization registered with the state).

<sup>291</sup> *United States v. Three Winchester 30-30 Caliber Lever Action Carbines*, 363 F. Supp. 322, 323 (E.D. Wis. 1973), *aff'd*, 504 F.2d 1288, 1290 (7th Cir. 1974) (forfeiture of Indian's hunting rifles). *See also* *United States v. Turcotte*, 558 F.2d 893, 895 (8th Cir. 1977) (Indian convicted under 18 U.S.C. § 922(a)(6) & (h) (1976) of false statement in purchase).

<sup>292</sup> 547 F.2d 1075 (9th Cir. 1976).

389 U.S. 258 ... (1967), ... we would reach the same result.... Certainly the Second Amendment... does not protect the efforts of a person to take munitions across an international border and into a foreign country.<sup>293</sup>

While convicted of the serious sounding crime of attempting to export ammunition, the defendant had simply bought ammunition in Arizona and had tried to cross into Mexico. While denying this as protected under the second amendment the court reaffirmed the guarantee of "the right of the people to keep and bear arms."<sup>294</sup>

While many of the aforementioned cases involved reliance on the second amendment by persons convicted of crimes, some federal cases have been brought by sportsman's groups to invalidate burdensome legislation through declaratory judgments and injunctions. Yet, the actions brought by these law-abiding citizens have been routinely dismissed in opinions not noted for intellectual breadth.<sup>295</sup>

Perhaps the most extreme rejection of the second amendment as a guarantee of individual rights was represented in *United States v. Warin*,<sup>296</sup> decided by the Sixth Circuit Court of Appeals in 1976. A defendant, who was convicted under the National Firearms Act as amended by the Gun Control Act of 1968<sup>297</sup> of possessing an unregistered machine gun, was a firearms designer (pg.56) whose employer developed such arms for government use. Not disputing the district court's finding that Warin, "as an adult male resident and citizen of Ohio, is a member of the 'sedentary militia' of the State," the appeals court nonetheless disagreed that the statute in question violated the militiaman's second amendment rights.<sup>298</sup> Agreeing with *Cases* that "the Supreme Court did not lay down a general rule in *Miller*," despite *Miller's* very general wording, the court went further and declared that "the second amendment guarantees a collective rather than an individual right."<sup>299</sup> For this latter assertion, reliance was placed on recent decisions of courts of appeals without one iota of historical evidence to back up the claim. Indeed, the method in some recent federal decisions has been to use weaker precedents as cited authorities for stronger decisions, and then to re-cite the new precedents established thereby to support even more extreme decisions, rendering the amendment lifeless in many district and appeals court decisions. *Warin's* "methodology" was based on the arbitrary allocation of judicial preferences to some Bill of Rights provisions and not others,<sup>300</sup> and the court revealed its inability to answer the historical arguments offered by the defendant and by *amicus curiae* based on the second amendment, by concluding that such "would unduly extend this opinion...."<sup>301</sup>

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<sup>293</sup> *Id.* at 1079 n.6 (emphasis in original).

<sup>294</sup> *Id.*

<sup>295</sup> *Eckert v. Philadelphia*, 477 F.2d 610 (3d Cir. 1973), *cert. denied*, 414 U.S. 839, 843 (1973) (ordinance regulating purchase and transfer of firearms).

<sup>296</sup> 530 F.2d 103 (6th Cir. 1976), *cert. denied*, 426 U.S. 948(1976).

<sup>297</sup> 26 U.S.C. § 5861(d) (1976).

<sup>298</sup> 530 F.2d at 105.

<sup>299</sup> *Id.* at 106.

<sup>300</sup> "First Amendment rights occupy a 'preferred position' among those guaranteed by the Bill of Rights, ... a position never accorded to Second Amendment rights." *Id.* at 107.

<sup>301</sup> *Id.* at 108.

Despite the above, it is still assumed by some federal courts that the second amendment guarantees an individual the right to keep and bear arms. In *United States v. Bowdach*,<sup>302</sup> the District Court for the Southern District of Florida held concerning 18 U.S.C. app. § 1202(a)(1): "Possession [of a shotgun] by a convicted felon constitutes a criminal offense and in the hands of a felon the shotgun becomes contraband; *possession of the shotgun by a non-felon has no legal consequences. U.S. Const. amend. II.*"<sup>303</sup> The right of any individual non-felon to possess a shotgun without any legal consequences is thus guaranteed by the second amendment—the sole authority cited by the court to protect the right. Further, the district court's holding makes no reference to the requirement that the shotgun be suitable for militia use, much less that its possessor be in the organized militia. The context is clear that no law can constitutionally deprive the individual of his right to possess the type of arm referred to. While it is short on historical analysis, the holding in *Bowdach*<sup>304</sup> (pg.57) is the contemporary federal equivalent of the scholarly antebellum state opinions which viewed the second amendment as protection of an individual right to keep and bear arms, militia-type or otherwise, from any legislative infringement.

### C. State Cases, 1968-1980

It was the civil unrest of the sixties and the legislation which sought to control such unrest, that led to a great increase in the number of state judicial opinions in the third quarter of the decade. The North Carolina case of *State v. Dawson*<sup>305</sup> returned to the old issue of whether it was a common law crime to go armed with unusual and dangerous weapons to the terror of the people. While the defendant had been convicted of breaking and entering and unlawfully shooting into a dwelling, the question of whether a separate offense was constituted by the above was answered in the affirmative by the state's high court. Still, the court stated that "the carrying of a gun, *per se*, constitutes no offense," whether for business or amusement.<sup>306</sup> The North Carolina court also decided: "While the purpose of the constitutional guaranty of the right to keep and bear arms was to secure a well regulated militia and not an individual's right to have a weapon in order to exercise his common-law right of self-defense, this latter right was assumed."<sup>307</sup> Although explicitly upholding the individual's right to keep and bear arms, the court grounded its holding on its fear of "social upheaval" as represented by "night riders or day-time demonstrators" who armed themselves to the terror of the people.<sup>308</sup>

In a thoughtful concurring and dissenting opinion, it was averred that without a constitutional amendment to allow legislation to prohibit carrying concealed weapons, under the language of the state constitution, which originally repeated the language of the second amendment, even this practice could not be prevented, as the right was absolute. Referring to Edward III's proscription of being armed to the people's terror, the judge reflected:

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<sup>302</sup> 414 F. Supp. 1346 (S.D. Fla. 1976), *rehear. denied*, 565 F.2d 163 (5th Cir. 1977).

<sup>303</sup> *Id.* at 1353 and n.11 (emphasis added).

<sup>304</sup> 414 F. Supp. 1346, *rehear. denied*, 565 F.2d 163 (5th Cir. 1977).

<sup>305</sup> 272 N.C. 535, 159 S.E.2d 1 (1968).

<sup>306</sup> 159 S.E.2d at 8.

<sup>307</sup> *Id.* at 9, citing *Hill v. State*, 53 Ga. 472 (1874).

<sup>308</sup> *Id.* at 11.

It was the very fact that the right to bear arms had been infringed in England, and that this is a step frequently taken by a despotic government, which caused the adoption of the provision in the North Carolina Declaration of Rights of 1776 and the insertion in the Federal Bill of Rights of the Second Amendment.<sup>309</sup> (pg.58)

That the right was not only independent of formal militia use, but existed in part to resist an oppressive militia, was indicated in the earlier North Carolina case of *State v. Kerner*: "In our own State, in 1870, when Kirk's militia was turned loose and the writ of *habeas corpus* was suspended, it would have been fatal if our people had been deprived of the right to bear arms, and had been unable to oppose an effective front to the usurpation."<sup>310</sup> Lastly, the fourteenth amendment mandated on the state's Bill of Rights provisions necessary to preserve liberty.<sup>311</sup>

A more striking erosion of the right to possess arms was exemplified in the New Jersey case of *Burton v. Sills*<sup>312</sup> which originated when members of sportsman clubs and gun dealers brought an action to declare unconstitutional the state's Gun Control Law, which had imposed restrictive licensing and permit requirements. Conjuring up an image of "political assassinations, killings of enforcement officers, and snipings during riots,"<sup>313</sup> the court seemed to fear and exaggerate the potential for a revolution. Departing from *Miller* while stating the reverse, the New Jersey Supreme Court restricted the definition of militia to "the active, organized militias of the states," *i.e.*, the National Guard.<sup>314</sup> The court's very use of these adjectives before the word militia indicates its overly narrow, statutory rather than constitutional, definition of the term militia. The *Burton* opinion simply fails to provide a scholarly, historical, and analytical treatment of the subject, which primarily only the antebellum state opinions provided.

Some opinions of state supreme courts in the decade since 1968 have by and large depended on the following arguments in the alternative: The second amendment applies to Congress alone, and thus state firearms regulation cannot infringe on the right; even if the second amendment applies to the states through the fourteenth amendment, then (a) only militia type arms are protected or (b) only the National Guard is protected; and lastly, if the second and fourteenth amendments prevent the states from infringing on an individual right to possess arms, then existing regulatory schemes are within the police power and do not so infringe on any right (including due process or equal (pg.59) protection)<sup>315</sup> as long as not applied arbitrarily.<sup>316</sup> Some of these opinions appear to be based

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<sup>309</sup> *Id.* at 14.

<sup>310</sup> *Id.* at 15.

<sup>311</sup> *Id.*, referring to *Palko v. Connecticut*, 302 U.S. 319 (1937).

<sup>312</sup> 99 N.J.Super. 459, 240 A.2d 432, *aff'd*, 53 N.J. 86, 248 A.2d 521, *appeal dismissed*, 394 U.S. 812 (1969) (*mem.*).

<sup>313</sup> 248 A.2d at 525.

<sup>314</sup> *Id.* at 526-27.

<sup>315</sup> *Harris v. State*, 83 Nev. 404, 432 P.2d 929, 930 (1967) (possession of tear gas gun without permit a felony); *State v. Bolin*, 200 Kan. 369, 436 P.2d 978, 979 (1968) (convicted burglar may not have pistol); *Photos v. Toledo*, 19 Ohio Misc. 147, 250 N.E.2d 916 (1969) (identification may be required for handgun owners); *People v. Marques*, 179 Colo. 86, 498 P.2d 929 (1972) (upheld conviction of felon, earlier convicted of assault with a deadly weapon, for carrying a concealed weapon); *Nebraska v. Skinner*, 189 Neb. 457, 203 N.W.2d 161 (1973) (upheld conviction of possession of handgun by felon); *People v. Evans*, 115 Cal. Rptr. 304, 307, 40 Cal. App. 3d 582 (1974) ("An ex-felon's right to defend himself remains, but he is prevented from the use of firearms"); *Mosher v. Dayton*, 48 Ohio St. 2d 243, 2 Ohio Op. 3d 403, 358 N.E.2d 540, 543 (1976) (upheld ordinance requiring identification card and demonstration of need to acquire handgun, stating where individual rights are supreme, constitutional "language authorizing such intention must be clear and unambiguous.") (*But see* dissent at 544 that "legislation which seeks to restrict one of the fundamental civil rights" should be reasonable and necessary); *Commonwealth v. Davis*, 369 Mass. 886, 343 N.E.2d 847, 848-50 (1976) (upheld statute providing a maximum of life imprisonment for possession of a shotgun with a barrel less than eighteen

on misreadings of nineteenth century Supreme Court cases as well as the *Miller* case, and ignore the scholarly and extensive treatments given the topic by state courts from earliest times until *Miller* era, and seem totally unaware that the framers of the fourteenth amendment agreed that the second amendment was, in fact, incorporated. Even so, negative treatment of the right to keep and bear arms by state courts has been of relatively short duration, while positive treatment has existed for one hundred and fifty years and thereby constitutes a more enduring body of common law and constitutional interpretation.

The swing back toward a favorable judicial treatment of the right to keep and bear arms is already discernable since the close of the turbulent sixties and seventies. Two decisions rendered by state courts during 1980 exhibit an increasing concern to protect the constitutional right to have arms. In *Schubert v. DeBard*,<sup>317</sup> The Court of Appeals of Indiana, Third District, held that the state police superintendent's denial of an application for a license to carry a handgun was wrongful, since self-protection was guaranteed under the following provision of the Indiana Constitution: "The people have a right to bear arms, for the defense of themselves and the State."<sup>318</sup> Since "constitutional language was carefully chosen to express the framer's intention," the court (pg.60) concluded that "our constitution provides our citizenry the right to bear arms for their self-defense."<sup>319</sup> The constitutional guarantee precluded police discretion on whether an applicant "needed" to carry a handgun for self-defense for such "would supplant a right with a mere administrative privilege which might be withheld simply on the basis that such matters as the use of firearms are better left to the organized military and police forces even where defense of the individual is involved."<sup>320</sup>

The identical provision in the Oregon Constitution led the Supreme Court of that state in *State v. Kessler*<sup>321</sup> to invalidate a statute prohibiting possession of a billy club. Rather than imposing its own value judgments regarding "the current controversy over the wisdom of a right to bear arms," the court determined that its task "in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment."<sup>322</sup> The court thereby employed the historical methodology of tracing the right to bear arms from its usage by early mankind to the English Bill of Rights of 1689 and the American Revolution.

Besides "the deterrence of government from oppressing unarmed segments of the population,"<sup>323</sup> the purpose of the right to bear arms included individual self defense which the

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inches in length); *State v. Sanne*, 116 N.H. 583, 364 A.2d 630 (1976) (carrying pistols without license); *Milligan v. State*, 554 S.W.2d 192 (Tex. Crim. App. 1977) (state may prohibit possession of pistol by one convicted of violent felony who is off his premises [a comparatively lenient statute]); and *State v. Sanders*, 357 So.2d 492 (La. 1978) (upheld conviction of felon carrying concealed pistol).

<sup>316</sup> *Guida v. Dier*, 375 N.Y.S.2d 826, 828, 84 Misc.2d 110(1975), *modified on other grounds*, 387 N.Y.S.2d 720, 722, 54 App.Div.2d 86 (1976).

<sup>317</sup> 398 N.E.2d 1339 (1980).

<sup>318</sup> *Id.* at 1341.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> 614 P.2d 94 (Or. 1980).

<sup>322</sup> *Id.* at 95.

<sup>323</sup> *Id.* at 98.



common law recognized as early as 1400.<sup>324</sup> Protected arms therefore included those which were used for personal and military defense: "The term 'arms' was not limited to firearms, but included several handcarried weapons commonly used for defense. The term 'arms' would not have included cannon or other heavy ordnance not kept by militiamen or private citizens."<sup>325</sup>

The strong historical analysis relied on by the *Kessler* court to demonstrate the continuing constitutional and utilitarian viability of the right to bear arms represents a return to traditional American and English common law approaches.<sup>(pg.61)</sup>

## IX. AFTERWARD: JUDICIAL POLICY AND LOGIC AND THE FUTURE OF THE RIGHT TO KEEP AND BEAR ARMS

### A . *Judicial Policy and the Right to Arms*

The legal theorists who contend that the second amendment is "obsolete" because gun control is desirable social policy, implicitly assume that the state's guns will be used legitimately when private individuals are unarmed. Roscoe Pound has asserted: "In the urban industrial society of today a general right to bear efficient arms so as to be able to resist oppression by the government would mean that gangs could exercise an extra-legal rule which would defeat the whole Bill of Rights."<sup>326</sup> Yet, the argument could be made, and was made by the Founding Fathers, that government may become a gang and defeat the Bill of Rights when the people are defenseless.

In an uncharacteristic position Justice Douglas, dissenting in *Adams v. Williams*<sup>327</sup> put complete faith in the police: "There is no reason why all pistols should not be barred to everyone except the police."<sup>328</sup> However, Douglas clarified that his opinion was based on his own arbitrary value judgment: "But if watering down is the mood of the day, I would prefer to water down the second amendment rather than the fourth amendment."<sup>329</sup> Yet, Douglas also wrote: "The closest the framers came to the *affirmative* side of liberty was in the right to bear arms. Yet this too has been greatly modified by judicial construction."<sup>330</sup> Douglas did not anticipate that, should his policy of disarming the people while leaving the police armed be carried out, a powerful police state could strike blows at the right of the people to be secure from unreasonable searches and seizures. Indeed, extensive arms searches in private dwellings were made by the British in their treatment of the American colonies and in their conquest of Scotland and Ireland and the results in terms of invasions of privacy and oppression, were no more productive than those of National Guardsmen and police in the riot torn ghettos of the 1960's. The disastrous consequences to the right to be secured from unreasonable searches and seizures by legislative infringement on the right to keep arms was recognized in the dissenting opinion in *State v. Buzzard*:<sup>331</sup> "Can [the legislature], directly or

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<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> R. POUND, *THE DEVELOPMENT OF CONSTITUTIONAL LIBERTY* 91 (2 ed. 1957).

<sup>327</sup> 407 U.S. 143 (1972).

<sup>328</sup> *Id.* at 150.

<sup>329</sup> *Id.* at 151.

<sup>330</sup> Douglas, *The Bill of Rights is Not Enough*, 38 N.Y.U. L. REV. 207, 233 (1963).

<sup>331</sup> 4 Ark. 5 (1842).

indirectly, invade the sanctuaries of private life and of personal (pg.62) security, by authorizing a public inquisition to search for either open or concealed weapons?"<sup>332</sup>

In *Miranda v. Arizona*<sup>333</sup> Justice White, dissenting, expressed concern for "those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined."<sup>334</sup> The American revolutionaries made not only this assumption but also held as self-evident that guns were necessary for violent self-help from the "public authority." In a word, the armed people may, by natural law, engage in self-defense against all criminals, whether public or private.<sup>335</sup>

In an often cited article by Rohner<sup>336</sup> it is theorized that the militia is obsolete and "the people of the United States" accept the standing army and National Guard as optimum for "security"; this euphemistic language expresses a naive optimism for the armed state and a cynical pessimism for the armed people. His further contention that "the call for an armed citizenry seems confined to reactionary political groups"<sup>337</sup> expresses an assumption that requires further analysis. While right-wing groups have defended the second amendment,<sup>338</sup> legal analysts who have expressed a social philosophy resting on traditional American revolutionary thought have also argued for the original interpretation of the second amendment.<sup>339</sup> Although the National Rifle Association is often depicted as conservative, its philosophy is akin to radical libertarianism. As the critic Robert Sherrill claimed, "The NRA's concept of Armed Citizenry heartily endorses the old anarchist saying, 'The (pg.63) state must never have a monopoly on the instruments of violence'."<sup>340</sup> And if some NRA members hold that the best government governs least and by implication not at all (especially in respect to gun control), the views of those who trust the police with guns, but not the people, more closely parallels the theory of fascism. Thus, it is ironic that espousal of second amendment rights is dismissed as reactionary; on the contrary, it is arguable that those who would restrict access to firearms by those who are not members of the ruling class espouse the "reactionary" view.

The reactionary philosophy implicit in the attack on the second amendment is also evident in its support of victimless crimes, *i.e.*, punishment for mere possession and not criminal use of firearms, and for prior restraint via seizing arms before a crime has been committed (the parallel to preventive detention is clear). It was Beccaria who, in 1764, pointed out:

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<sup>332</sup> *Id.*

<sup>333</sup> 384 U.S. 436 (1966).

<sup>334</sup> *Id.* at 542. *Cf.* *Beard v. United States*, 158 U.S. 550 (1895) (right to use deadly force in self defense).

<sup>335</sup> LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT*, § 228 (1689) (compares government officials who usurp power to "robbers or pirates" and defends the right of violent resistance against them).

<sup>336</sup> 16 CATHOLIC U.L. REV. 53 (1966).

<sup>337</sup> *Id.* at 72.

<sup>338</sup> P. COURTNEY, *GUN CONTROL MEANS PEOPLE CONTROL* (1974). Yet such "reactionaries" have a higher consciousness of the existence of the ruling elite than the ideologists of the status quo who ignore its existence altogether. *See e.g.*, CARL BAKAL, *THE RIGHT TO BEAR ARMS* (New York, 1966). (later reissued as *NO RIGHT TO BEAR ARMS*.)

<sup>339</sup> S. Hays, *The Right to Bear Arms, A Study in Judicial Interpretations*, 2 W. & MARY L. REV. 381 (1960). *See also* J. WHISKER, *OUR VANISHING FREEDOM: THE RIGHT TO KEEP AND BEAR ARMS* (1973) (the author's "conservatism" is akin to the Old Right and New Left). *But see* Feller and Gotting, *The Second Amendment: A Second Look*, 61 N.W. U. L. REV. 46 [ed. note: text missing in original]

<sup>340</sup> R. SHERRILL, *THE SATURDAY NIGHT SPECIAL* 228 (1973). On the N.R.A. philosophy, see R. KUKLA, *GUN CONTROL* (Cater ed. 1973); *THE RIGHT TO BEAR ARMS: AN ANALYSIS OF THE SECOND AMENDMENT* (N.R.A. Institute for Legislative Action) (undated), which makes the rather revolutionary statement at 9: "The guardians of our basic liberties are not formal bodies of police or military.... The guardians of civil liberty are those, each individual, who would enjoy that liberty."

False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns.... The laws that forbid the carrying of arms are laws of such a nature. They disarm only those who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity ... will respect the less important and arbitrary ones ... which, if strictly obeyed, would put an end to personal liberty ... and subject innocent persons to all the vexations that the guilty alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man.<sup>341</sup>

The often state sponsored violence against civil rights organizers in the South's second Reconstruction in the 1950s and 1960s proved anew the utility of the right to keep and bear arms against state infringement.<sup>342</sup> The subsequent outbreak of the ghetto uprisings in the North in the 1960s, which resulted in massive searches and seizures for arms on dubious constitutional grounds by allegedly racist and murderous National Guardsmen and police, prompted the (pg.64) advocacy by many black leaders of the fundamental right to keep and bear arms. In 1964, the Program of the Organization of Afro-American Unity provided:

The Constitution of the United States of America clearly affirms the right of every American citizen to bear arms. And as Americans, we will not give up a single right guaranteed under the Constitution. The history of unpunished violence against our people clearly indicates that we must be prepared to defend ourselves or we will continue to be a defenseless people at the mercy of a ruthless and violent racist mob.

We assert that in those areas where the government is either unable or unwilling to protect the lives and property of our people, that our people are within their rights to protect themselves by whatever means necessary.<sup>343</sup>

The widely circulated Program of the Black Panther Party, whatever its credibility, expressed a common sentiment in the black community in providing: "The Second Amendment to the Constitution of the United States gives a right to bear arms. We therefore believe that all black people should arm themselves for self-defense."<sup>344</sup>

As in the Reconstruction Era, in recent decades state legislatures have passed measures aimed at disarming what they perceived to be a black threat, and Congress, rather than guaranteeing the right to keep and bear arms as in the fourteenth amendment and the Anti-KKK Act, passed the Gun Control Act of 1968, which was in part aimed at controlling the blacks.<sup>345</sup>

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<sup>341</sup> BECCARIA, ON CRIMES AND PUNISHMENT 87-88 (1963).

<sup>342</sup> R. WILLIAMS, NEGROES WITH GUNS (1962) (black armed defense against violence supported or tolerated by local police and F.B.I.); D. Kates, *Why a Civil Libertarian Opposes Gun Control*, CIVIL LIBERTIES REVIEW, June/July 1976, 24-32, & Aug./Sept. 1976, 44-59 (armed self-defense by civil rights organizers against Klan attacks); D. KATES, RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAKS OUT *passim* (1979).

<sup>343</sup> MALCOLM X 337 (Clarke ed. 1969).

<sup>344</sup> B. SEALE, SEIZE THE TIME 68 (1970).

<sup>345</sup> R. SHERRILL, THE SATURDAY NIGHT SPECIAL 280. *See* Gun Control Act, 18 U.S.C. §§ 921-28 (1968); Omnibus Crime Control and Safe Streets Act, 18 U.S.C. App. §§ 1201-03 (1968); and particularly the ironically entitled Civil Rights Act, 18 U.S.C. §§ 231-33 (1968) (the contrast with civil rights acts of a century before, which in part enhanced the right of blacks to protect

The fourteenth amendment was meant to protect not only blacks but also all citizens against state violence and deprivation of rights, and its framers considered the right to keep and bear arms as more fundamental than any other (pg.65) right because it guaranteed one's very existence as well as other liberties. Arms possession was considered a fundamental right for protection against both private and official aggression—such as that sanctioned under color of law or committed by state agents or state militia. Since arms would always exist, including those in the hands of a potentially racist government, all people regardless of race, by the standards of the second and fourteenth amendments, may be armed for self-defense. In view of the logic of its own decisions and of the intent of the framers, the United States Supreme Court would seem logically and historically compelled by the fourteenth amendment to recognize that the fundamental right to keep and bear arms is protected from states' infringement, just as this right is protected from national infringement by the second amendment.

### B. *The Logic of Incorporation and the Fundamental Character of the Right to Arms*

It could be that the Supreme Court's precise analytical treatment in *Miller v. Texas*<sup>346</sup> indicated a growing sensitivity of the Justices toward incorporation of the Bill of Rights in the fourteenth amendment, for the first incorporationist opinion was handed down only three years later when a right to compensation for property taken by the state was recognized. In the early 1920s the Court persisted in its refusal to apply the first amendment to the states<sup>347</sup> but by the mid-1920s had guaranteed freedom of speech from state deprivation.<sup>348</sup> Still, the Court continued to hand down some of its classic anti-incorporationist opinions.<sup>349</sup> Then *Mapp v. Ohio*<sup>350</sup> extended the fourth amendment to the states by applying the exclusionary rule to evidence illegally obtained by state agents, causing the dominos to fall by making most provisions of the Bill of Rights applicable to the states through the fourteenth amendment—right to counsel,<sup>351</sup> self-incrimination,<sup>352</sup> right to

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themselves with arms, is striking).

Senators Dodd and Kennedy and other supporters of the 1968 legislation made sensational references to the Black Muslims and Black Panthers and to the riots in Tampa, Newark, and Detroit in support of disarming urban blacks. See citations in R. KUKLA, GUN CONTROL 89, 93-96, 243, 251-59 (1973). In contrast with racist hysteria, Stanford Research Institute's FIREARMS, VIOLENCE AND CIVIL DISORDERS concluded that "violence by firearms on the part of participants in the disorders of 1967 was substantially exaggerated by the communications media and by public officials," and that most firing was by "trigger-happy Guardsmen" who often exchanged fire with the police rather than with conjured up "snipers." See KUKLA at 251-59.

<sup>346</sup> Chicago B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897).

<sup>347</sup> Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1922).

<sup>348</sup> Gitlow v. New York, 268 U.S. 652 (1925); Fiske v. Kansas, 274 U.S. 380 (1927).

<sup>349</sup> Palko v. Connecticut, 302 U.S. 319, 328 (1938) (fifth amendment—double jeopardy) .

<sup>350</sup> 367 U.S. 643 (1961).

<sup>351</sup> Gideon v. Wainwright, 372 U.S. 335 (1963); Escobedo v. Illinois, 378 U.S. 478 (1964).

<sup>352</sup> Malloy v. Hogan, 378 U.S. 1 (1964).

pre-confession warnings,<sup>353</sup> speedy trial,<sup>354</sup> compulsory process,<sup>355</sup> jury trial,<sup>356</sup> double jeopardy,<sup>357</sup> and so on. (pg.66) While a few rights remain unincorporated (*i.e.*, the right to keep and bear arms, freedom from unconsented quartering of soldiers in houses except during war, indictment by a grand jury,<sup>358</sup> jury trial in civil cases, and reasonable bail) presumably the same principles of construction would apply to both incorporated and unincorporated rights should appropriate cases arise concerning the latter.

Following the logic of previous cases, the Supreme Court could apply the second amendment to the states directly through the due process or privileges and immunities clauses of the fourteenth amendment, or could adopt a broader "penumbra" theory perhaps involving the first, second, fourth, fifth, ninth, tenth, and fourteenth amendments to guard the right to keep and bear arms from state infringement.<sup>359</sup> In view of the debatable proposition that the second amendment guarantees the right to keep and bear arms only for militia uses—a view suggested to some extent in *United States v. Miller*<sup>360</sup> but question-begging in that the militia is legally the whole arms-bearing people<sup>361</sup> and all small arms have conceivable militia uses<sup>362</sup> —the penumbra theory would offer the broadest recognition of the right. Several commentators have argued that the second amendment should be construed as an absolute right protected from state and federal infringement<sup>363</sup> and that the right to keep and bear arms might be considered a fundamental right which should be recognized as part of the fourteenth amendment via selective incorporation.<sup>364</sup> Others have opposed the view that the Supreme Court's analytical framework for incorporation of Bill of Rights provisions in the fourteenth amendment logically encompasses the right to keep and bear arms.<sup>365</sup>

Recent dictum suggests that the right to keep and bear arms is constitutionally protected from state infringement. In *Poe v. Ullman*,<sup>366</sup> before the majority was ready to declare as unconstitutional Connecticut's anti-contraceptive statute, Justice Harlan, dissenting, declared that the first eight amendments fail to limit the scope of due process. Harlan also mentioned the right to keep and bear arms as one of the *specific* guarantees of these first eight amendments (pg.67) provided in the Constitution. The statute was soon overturned in *Griswold v. Connecticut*,<sup>367</sup> which resorted to the penumbra theory to protect zones of privacy from state infringement. Then in *Moore v. East*

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<sup>353</sup> *Miranda v. Arizona*, 384 U.S. 436(1966).

<sup>354</sup> *Klopper v. North Carolina*, 386 U.S. 213 (1967).

<sup>355</sup> *Washington v. Texas*, 388 U.S. 214 (1967).

<sup>356</sup> *Duncan v. Louisiana*, 391 U.S. 145 (1968).

<sup>357</sup> *Benton v. Maryland*, 395 U.S. 784 (1969).

<sup>358</sup> *Malloy v. Hogan*, 378 U.S. 1 (1964); *Hurtado v. California*, 110 U.S. 516 (1884).

<sup>359</sup> *See Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>360</sup> 307 U.S. 174 (1939).

<sup>361</sup> 10 U.S.C. § 311 (a) (1970).

<sup>362</sup> *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942) *cert. denied*, 319 U.S. 770 (1943), *rehear. denied*, 324 U.S. 889 (1945).

<sup>363</sup> Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 873 (1960).

<sup>364</sup> Sprecher, *The Lost Amendment*, 51 A.B.A.J. 665, 666 (1965); Comment, *The Right to Bear Arms*, 31 ALB. L. REV. 74, 79-80(1967). *Cf. Rohner, supra* note 4, at 66-70.

<sup>365</sup> Santee, *The Right to Keep and Bear Arms*, 28 DRAKE L. REV. 423, 433-36 (1976-77).

<sup>366</sup> 367 U.S. 497, 541-43 (1961).

<sup>367</sup> 381 U.S. 479 (1965).

*Cleveland*,<sup>368</sup> which invalidated a zoning ordinance as overly restrictive in its definition of "family," Justice Powell, delivering an opinion in which four justices joined, favorably recalled Harlan's dissent in *Poe* which described the Court's function under the due process clause of the fourteenth amendment:

The full scope of the Due Process Clause cannot be found in or limited by the precise terms of the *specific guarantees* elsewhere *provided in the Constitution*. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; *the right to keep and bear arms*; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints....<sup>369</sup>

The same passage was cited in Justice White's dissenting opinion, which termed Harlan's view "consistent" and "the preferred approach."<sup>370</sup> Should the Court in a future case adopt as its *ratio decidendi* the applicability to the states of the right to keep and bear arms as a specific constitutional guarantee, it would be fully supported by the principles it had previously laid down in the nineteenth century in four specific precedents and in the twentieth century avalanche of analogical incorporationist decisions.

Discussion of the fundamental character of the right to keep and bear arms has arisen more recently in *Lewis v. United States*,<sup>371</sup> where the High Court held that 19 U.S.C. § 1202 (a) (1) of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 prohibits a felon from possessing a firearm even though the felony may be subject to collateral attack based on lack of counsel." The firearm regulatory scheme at issue here is consonant with the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment if there is some 'rational basis' for the statutory distinctions made ... or ... they 'have some relevance to the purpose for which the classification is made.'"<sup>372</sup> Holding that the section meets the rational relation test, the Court stated: "These legislative restrictions on the use of firearms are neither based (pg.68) upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties."<sup>373</sup>

The Court's wording of the holding in *Miller* clearly indicates its understanding that *Miller* upheld a second amendment right of individuals to possess firearms with militia uses. To date, then, the Supreme Court has never held or even suggested that the second amendment merely sanctions a "collective" right for members of the National Guard to have arms while on duty. In dictum, the *Lewis* Court added that "a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm."<sup>374</sup> The Court's mention of prohibitions against voting, holding union office, and the practice of medicine as examples of activities presumably "more fundamental" than possession of a firearm indicates no criteria by which

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<sup>368</sup> 431 U.S. 494, 539 (1977).

<sup>369</sup> *Id.* at 502 (citation omitted) (emphasis added).

<sup>370</sup> *Id.* at 543-44.

<sup>371</sup> 445 U.S. 55 (1980).

<sup>372</sup> *Id.* at 209.

<sup>373</sup> *Id.* at 209 n.8, (quoting *United States v. Miller*, 307 U.S. 174, 178) (1939).

<sup>374</sup> *Id.* at 210.

degrees of fundamentalness may be calculated. Still, the Court's language does imply that it considers possession of a firearm a "fundamental" right.

Depiction of the right to keep and bear arms as a "specific guarantee" in *Moore* and as a "fundamental" right in *Lewis* would seem likely to affect the existing contours of second amendment litigation and to create the need for further and more precise treatment by the Supreme Court of the subject. A further recent development may conceivably prompt more extensive clarification of the second amendment by the courts, namely, the extension of the *Bivens* action to the fifth and eighth amendments. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*<sup>375</sup> the Supreme Court held that a cause of action for damages arises under the Constitution where fourth amendment rights are violated. "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."<sup>376</sup> Concurring with the majority, Justice Harlan added that "federal courts do have the power to award damages for violation of 'constitutionally protected interests,'"<sup>377</sup> a principle which presumably would apply to all interests protected in the Bill of Rights.

During the 1970s, most federal courts who have treated the question extended the *Bivens* rationale to the first, fifth, sixth, eighth, and fourteenth amendments. There have apparently been no reported decisions which pertain (pg.69) to any *Bivens* actions based on the second amendment.<sup>378</sup> The High Court itself finally extended the *Bivens* action to causes under the due process clause of the fifth amendment in *Davis v. Passman*<sup>379</sup> and under the eighth amendment (cruel and unusual punishment) in *Carlson v. Green*.<sup>380</sup> The latter case states: "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court...."<sup>381</sup> The general use of the term "constitutional violation" would presumably include a second amendment violation. Just as more rights guaranteed in the Bill of Rights are increasingly being deemed as incorporated in the fourteenth amendment, the *Bivens* action too is being applied to more of the rights guaranteed in the Bill of Rights. Both of these developments make it all the more appropriate that the High Court rule on the status of the second amendment in regard to its applicability to the states and whether its deprivation gives rise to an action for monetary damages.

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<sup>375</sup> 403 U.S. 388 (1971).

<sup>376</sup> *Id.* at 395.

<sup>377</sup> *Id.* at 399.

<sup>378</sup> *But see* *Tritsis v. Backer*, 501 F.2d 1021 (7th Cir. 1974), a *Bivens* action against agents of Bureau of Alcohol, Tobacco and Firearms for deprivation of rights guaranteed by Amendments IV, V, VI, IX, and XIV. Suit was brought after dismissal of charges for illegally transferring a firearm in violation of 26 U.S.C. § 5861(e). Summary judgment was granted defendants on submission of affidavits supporting reasonable good faith.

A cause of action for damages for deprivation by state agents of the right to bear arms was anticipated in 1871 by Rep. W. C. Whitthorne (D. Tenn.) in debate over the Civil Rights Act, now 42 U.S.C. § 1983. *Bivens* in effect extended the § 1983 action to federal agents.

<sup>379</sup> 442 U.S. 228 (1979).

<sup>380</sup> 446 U.S. 14 (1980).

<sup>381</sup> *Id.* at 18. ("violations of citizens' constitutional rights ... violation by federal officials of federal constitutional rights").