

FEDERAL AND STATE CONSTITUTIONAL GUARANTEES TO ARMS

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I. INTRODUCTION

The second amendment to the United States Constitution guarantees that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."¹ In addition, the constitutions of all but seven states guarantee a right to bear arms.² This enumerated and explicit right has generated public attention and controversy over its meaning and scope.

The 200th anniversary of the Bill of Rights is nearing. The purpose of its guarantees was to enunciate a set of fixed rights that may not be trespassed upon by any branch of government. A constitutional right differs from a right conferred by the common law or by statute in that it is guarded from infringement by any branch of government.³ The Constitution was not adopted as a means of enhancing the efficiency with which government officials conduct their affairs. Rather, it was meant to provide a bulwark against infringements that might otherwise be justified as necessary expedients of governing.⁴ While a court must give due consideration to the needs of the other branches of government, the court's role is to ensure that restraints on governmental power are enforced. Establishing the protected boundaries of a right, by analyzing the four corners of the guarantee, becomes indispensable.⁵ While bright boundary lines cannot always be drawn, this is a more (pg.60) principled approach to constitutional interpretation than merely paying no attention to plain words or history and applying elastic labels of "valid exercise of the police power"⁶ or

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¹ U.S. CONST. amend. II.

² California, Iowa, Maryland, Minnesota, New Jersey, New York, and Wisconsin do not have a specific guarantee to bear arms. The 43 state constitutional guarantees to arms are reprinted in the appendix to this article. See Dowlut & Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U.L. REV. 177 (1982).

³ See *United States v. Brewster*, 408 U.S. 501, 508 (1972); *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (1795).

⁴ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866); *In re Public Util. Comm'r*, 201 Or. 1, 26, 268 P.2d 605, 617 (1954).

⁵ "Interpretivism" is defined as judges deciding constitutional issues by confining themselves to enforcing norms that are stated clearly or implicitly in the written Constitution. J. ELY, *DEMOCRACY AND DISTRUST I* (1980). "Noninterpretivism" is where courts go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document. *Id.*

⁶ What constitutes a valid exercise of the police power depends more on the predilection of judges than on the imperative language of a constitutional guarantee. Forbidding possession *simpliciter* of a blackjack, without limitation as to place, time, purpose, or use, is a valid exercise of the police power. *People v. Brown*, 253 Mich. 537, 539, 542-43, 235 N.W. 245, 246-47 (1931); *State v. Kessler*, 289 Or. 359, 372, 614 P.2d 94, 100 (1980) (right to bear arms guarantees possession of a billy club under the Oregon Constitution); cf. *Barnett v. State*, 72 Or. App. 585, 695 P.2d 991 (1985) (per curiam) (statute forbidding possession

"reasonable regulation"⁷ whenever a constitutional challenge is made, or even denying the existence of a right by interpreting it in such a fashion that it becomes an intangible abstraction.⁸

This article will examine the historical conditions and development of the right to arms, and rules on the interpretation of constitutional rights, to demonstrate its meaning and scope. It will also present that its interpretation by some courts is inaccurate.

II. HISTORICAL BACKGROUND & FRAMERS' INTENT

The Framers were aware that at common law the carrying of arms was unlawful only if it appeared to be *malo animo*⁹ and "to terrify the King's subjects."¹⁰ On July 24, 1780, the Recorder of London gave the following exposition on the right to bear arms:

The right of his majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of this kingdom, not only as a *right*, but as a *duty*; for all the subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to (pg.61) assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of the public peace. And that this right, which every Protestant most unquestionably possesses *individually*, *may*, and in many cases *must*, be exercised *collectively*, is likewise a point which I conceive to be most clearly established by the authority of judicial decisions and ancient acts of parliament, as well as by reason and common sense.

From the proposition, that the possession and the use of arms, to certain purposes, is lawful, it seems to follow, of necessary consequence, that it cannot be unlawful *to learn to use them* (for such lawful purposes) with *safety and effect*.

....

The lawful purposes, for which arms may be used, (besides immediate self-defence,) are, the suppression of violent and *felonious* breaches of the peace, the assistance of the civil magistrate in the execution of the laws, and the defence of the

simpliciter of a blackjack infringes right to arms).

⁷ What is "reasonable" depends upon the eye of the beholder. *Compare* *Matthews v. State*, 237 Ind. 677, 685-87, 148 N.E.2d 334, 338 (1958) (requiring a license to carry a pistol, either openly or concealed, away from one's abode or fixed place of business is a reasonable regulation of the right to bear arms) *and* *Schubert v. DeBard*, 398 N.E.2d 1339, 1341 (Ind. Ct. App. 1980) (license to carry a pistol must be given to any responsible adult who lists bearing arms for self-protection as a reason) *with* *State v. Kerner*, 181 N.C. 574, 578-79, 107 S.E. 222, 225 (1921) (licensing statute voided) *and* *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139 (W. Va. 1988) (licensing statute overly broad).

⁸ *City of Salina v. Blaksley*, 72 Kan. 230, 231-32, 83 P. 619, 620 (1905) (the right to bear arms refers to people as a collective body and applies only to members of the organized state militia or some other military organization provided by law). This view has been used to judicially repeal the right to bear arms because no individual is entitled to enjoy it and soldiers do not need it. *Cf.* *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1060-61 (1990) ("The people" has same meaning in Bill of Rights).

⁹ *Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686).

¹⁰ *Rex v. Knight*, 87 Eng. Rep. 75, 76 (K.B. 1686); *cf.* *Simpson v. State*, 13 Tenn. (5 Yer.) 356, 359-61 (1833) (Tennessee Constitution protects right to bear arms "without any qualification whatsoever as to their kind or nature" or the consequence of "terror to the people to be incurred thereby").

kingdom against foreign invaders. Whenever these occasions occur, the use of arms becomes not only the right, but the duty, of every Protestant able to bear them.¹¹

A common English jury instruction on bearing arms also explains the understanding and scope of this right:

You will see what the Bill of Rights says upon that subject. It provides that, "The subjects which are Protestants may have arms for their defence suitable to their conditions, and as allowed by law." But are arms suitable to the condition of people in the ordinary class of life, and are they allowed by law? A man has a clear right to arms to protect himself in his house. A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is travelling or going for the ordinary purposes of business. But I have no difficulty in saying you have no right to carry arms to a public meeting, if the number of arms which are so carried are calculated to produce terror and alarm¹²

The peaceful carrying of arms is "[s]o remote from a breach of the peace ... that at common law it was not an indictable offense, nor any offense at all."¹³ The Framers were also aware of England's plutocratic (pg.62) game laws and other clever measures by the crown to disarm dissidents and suspect classes.¹⁴

The crown infringed the colonists' right to arms in the New World by disarmament attempts. British troops during the Revolutionary War did not confine their seizures to the colonists' armories and magazines. They also seized the arms of individual civilians.¹⁵ For example, Bostonians were forced to surrender 1,778 muskets, 973 bayonets, 634 pistols, and 38 blunderbusses.¹⁶ The July 6, 1775, *Declaration of the Causes and Necessity of Taking Up Arms*¹⁷ by the Continental Congress included the complaint that General Gage disarmed the inhabitants of Boston.¹⁸

¹¹ W. BLIZZARD, *DESULTORY REFLECTIONS ON POLICE: WITH AN ESSAY ON THE MEANS OF PREVENTING CRIMES AND AMENDING CRIMINALS* 59-63 (1785). Accordingly, principled decisions have rejected efforts to limit the right to arms to a collective right. *State v. Dawson*, 272 N.C. 535, 546, 159 S.E.2d 1, 9 (1968); *see also* *People v. Nakamura*, 99 Colo. 262, 264-65, 62 P.2d 246, 246-47 (1936).

¹² I REPORTS OF STATE TRIALS (NEW SERIES) 601-02 (1970). The jury instruction was given by Justice Bayley. *Id.* For a detailed discussion of the English background of this right, *see generally* J. MALCOLM, *ARMS FOR THEIR DEFENCE* (1990).

¹³ *Judy v. Lashley*, 50 W.Va. 628, 634, 41 S.E. 197, 200 (1903). In accord is *Town of Lester ex rel. Richardson v. Trail*, 85 W. Va. 386, 389, 101 S.E. 732, 733 (1919) ("It was not a violation of the common law to carry a pistol about one's person; it is only made so by statute.").

¹⁴ *See generally* Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 1982 DET. C.L. REV. 789 (1982); Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559 (1986); Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983); Whisker, *Historical Development and Subsequent Erosion of the Right to Keep and Bear Arms*, 78 W. VA. L. REV. 171 (1976).

¹⁵ R. FROTHINGHAM, *HISTORY OF THE SIEGE OF BOSTON AND OF THE BATTLES OF LEXINGTON, CONCORD AND BUNKER HILL* 95 (6th ed. 1903).

¹⁶ *Id.*

¹⁷ *The Declaration of the Causes and Necessity of Taking Up Arms* (1775), *reprinted in* DOCUMENTS OF AMERICAN HISTORY 92, 94 (5th ed. 1949).

¹⁸ *Id.*

It is against this background that the Anti-federalists demanded a Bill of Rights and proposed 186 amendments; discounting duplications, 80 substantive proposals emerged.¹⁹ Initially the Constitution was ratified without amendments, but it was ratified with the understanding that a bill of rights would be immediately submitted to the people.²⁰

When the state conventions were voting to adopt the Federal Constitution, in seven states proposals on arms surfaced, either majority or minority proposals. For example, the minority in Pennsylvania, on December 15, 1787, was the first to offer fifteen guarantees. These proposals eventually found their way into the first, second, fourth, fifth, sixth, eighth and tenth amendments.

²¹ Proposal seven guaranteed

That the people have a right to bear arms for the defence [sic] of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil (pg.63) power."²²

Massachusetts' minority, lead by Samuel Adams, proposed

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 of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defence of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceful and orderly manner, the federal legislature, for a redress of grievance; or to subject the people to unreasonable searches and seizures of their persons, papers or possessions."²³

New Hampshire's majority simply proposed that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion."²⁴ Virginia presented

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 [sic] of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power."²⁵

¹⁹ E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 32 (1957). The figure becomes 210 if New York's preliminary recitals are added.

²⁰ *Ullmann v. United States*, 350 U.S. 422, 426-27 (1956).

²¹ E. DUMBAULD, *supra* note 19, at 50-56.

²² *PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788*, 422 (1888).

²³ *DEBATES AND PROCEEDINGS IN THE MASSACHUSETTS CONVENTION* 86-87 (1856).

²⁴ 1 *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 326 (1836) [hereinafter 1 *DEBATES ON ADOPTION*]. The minority proposals from the conventions in Pennsylvania and Massachusetts are not found in the above source.

²⁵ 3 *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 659 (1836) [hereinafter 3 *DEBATES ON ADOPTION*]; cf. *VIRGINIA DECLARATION OF RIGHTS* art. 13 (1776) (mentions militia but no right of people to keep and bear arms).

Patrick Henry exhorted the convention that "[t]he great object is, that every man be armed Every one who is able may have a gun."²⁶ Another Virginian, Zachariah Johnson, said: "The people are not to be disarmed of their weapons. They are left in full possession of them."²⁷ George Mason supplied for future generations the common understanding of the term *militia*: "I ask, Who are the militia? They consist now of the whole people, except a few public officers."²⁸ New York demanded "[t]hat 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 [sic] of a free (pg.64) state."²⁹

North Carolina and Rhode Island, citing the lack of a Bill of Rights, initially did not ratify the Constitution and included a right to arms as a condition of ratification. North Carolina³⁰ copied Virginia's proffer on arms and Rhode Island³¹ copied that of New York.

The seven state proposals cover all of the traditional uses of arms. They show an awareness of crime, too. However, they consistently guaranteed a right to arms. They also did not intend to restrict this right to military purposes, for it would be pointless to guarantee a right to keep and bear arms to the people if the only purpose was to allow a state to have a militia. It is characteristic of a militia to be armed. Even in the proposals from New York, North Carolina, Rhode Island, and Virginia the arms right stood by itself as a declarative independent clause. The task of the Framers, then, was to attempt to please everyone in drafting what became the second amendment, since there was a faction in favor of the militia and a faction that wanted a guarantee for the people to possess arms for all traditional purposes.

During the fall and winter of 1787-88, the supporters of the Constitution expounded its meaning and benefits in a series of newspaper articles, afterwards published in book form as *The Federalist*.³² James Madison wrote that "the advantage of being armed" was a condition "the Americans possess over the people of almost every other nation."³³ He charged that the despots of Europe were "afraid to trust the people with arms," and envisioned a militia amounting to near half a million citizens "with arms in their hands."³⁴

The right to arms was also expounded in pamphlets. Noah Webster wrote that:

Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States. A military force, at the command of Congress, can execute no laws, but such as the people

²⁶ 3 DEBATES ON ADOPTION, *supra* note 25, at 386.

²⁷ *Id.* at 646.

²⁸ *Id.* at 425. OHIO CONST. art. IX, § 1 provides for a broad-based militia. If the people are disarmed, the constitutional militia in effect is disarmed.

²⁹ 1 DEBATES ON ADOPTION, *supra* note 24, at 328.

³⁰ 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 244 (1836) [hereinafter 4 DEBATES ON ADOPTION].

³¹ 1 DEBATES ON ADOPTION, *supra* note 24, at 335.

³² A. HAMILTON, J. MADISON & J. JAY, *THE FEDERALIST PAPERS* (1961).

³³ *THE FEDERALIST* No. 46, at 299 (J. Madison) (C. Rossiter ed. 1961).

³⁴ *Id.* The population in 1790 was 3,929,214. R. CURRENT, T. WILLIAMS & F. FREIDEL, *I AMERICAN HISTORY: A SURVEY* 470 (3d ed. 1971). Since the state militias *in toto* would not have amounted to half a million, Madison must have had in mind virtually all males capable of bearing arms to serve as a deterrent to oppression.

perceive to be just and constitutional; for (pg.65) they will possess the *power*, and jealousy will instantly inspire the *inclination* to resist the execution of a law which appears to them unjust and oppressive.³⁵

Richard Henry Lee opined that "to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them"³⁶

The *Federal Gazette & Philadelphia Evening Post*, of June 18, 1789,³⁷ in an article entitled *Remarks on the First Part of the Amendments to the Federal Constitution, Moved on the 8th Instant in the House of Representatives*, explained the right to keep and bear arms:

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms.³⁸

This contemporary exposition must be given great weight. It demonstrates that the common understanding of the people and framers was to guarantee an individual right to arms.³⁹

Recently, a July, 1789, proposed Bill of Rights, in Roger Sherman's handwriting, was discovered in James Madison's papers.⁴⁰ It mentioned the militia, but omitted any reference to a right of the people to keep and bear arms:

The militia shall be under the government of the laws of the respective States, when not in the actual Service of the united [sic] States, but such rules as may be prescribed by Congress for their uniform organization & discipline shall be observed in officering and training them, but military Service shall not be required of persons religiously scrupulous of bearing arms.⁴¹

The Framers' decision not to adopt it indicates they felt it was inadequate. The Framers also rejected efforts to exclude persons who had (pg.66) religious scruples against bearing arms from the second amendment's guarantee to keep and bear arms:

This declaration of rights, I take it, is intended to secure the people against the maladministration of the Government; if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed. Now, I am apprehensive, sir, that this clause would give an opportunity to the people in

³⁵ PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 51, 56 (1888). The jury system also serves as a deterrent to oppression. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972).

³⁶ LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 124 (1978).

³⁷ The Fed. Gazette, June 18, 1789, at 2, col. 1.

³⁸ *Id.*; see also Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-91*, 10 N. KY. L. REV. 13 (1982) (focusing on newspaper exposition of the right to keep and bear arms).

³⁹ "Great weight has always been attached, and very rightly attached, to contemporaneous exposition." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 418 (1821).

⁴⁰ See Mitgang, *Handwritten Draft of a Bill of Rights Found*, N. Y. Times, July 29, 1987, at A1, col. 4.

⁴¹ *Id.*

power to destroy the Constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms.⁴²

On Wednesday, September 9, 1789, a motion in the Senate to insert "for the common defence" next to the words "bear arms" was defeated.⁴³ This underscores a refusal to limit the right to military purposes.

These events demonstrate that the Framers had two separate objectives in mind: (1) recognize the importance of a militia to a free state⁴⁴ and (2) guarantee a right to keep arms and bear arms for traditionally lawful purposes.⁴⁵

This interpretation is supported by an early decision of the Georgia Supreme Court, which used the second amendment to void a state statute at a time when the state constitution was silent on the right to (pg.67) bear arms.⁴⁶ Hawkins Nunn was charged with "having and keeping about his person, and elsewhere, a pistol, the same not being such a pistol as is known and used as a horseman's pistol."⁴⁷ The court discussed extensively the right to keep and bear arms:

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

....

... We do not believe that, because the people withheld this arbitrary power of disfranchisement from Congress, they ever intended to confer it on the local legislatures.

....

... The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by

⁴² 1 ANNALS OF CONG. 778 (1789) (Representative Gerry of Massachusetts).

⁴³ JOURNAL OF THE FIRST SESSION OF THE SENATE 77 (1820).

⁴⁴ Virtually all males were subject to militia duties. A New York statute of May 6, 1691, subjected males from 15 to 60 to militia duties. 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 231 (1894). A 1705 Virginia statute subjected males from 16 to 60 to militia duties. 3 LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 335 (1823). In its obsolete form pertaining to troops, *regulated* is defined as "properly disciplined." 7 OXFORD ENGLISH DICTIONARY 380 (1933). In turn, *discipline* in relation to arms is defined as "training in the practice of arms." 3 OXFORD ENGLISH DICTIONARY 416 (1933). Hence, a well-regulated militia means one that has had training or that at least is composed of people who have had training in arms.

⁴⁵ Four state constitutions had a specific provision on arms: Pennsylvania, Vermont, North Carolina, and Massachusetts. "That the people have a right to bear arms for the defence [sic] of themselves and the State" PA. CONST. art. XIII; VT. CONST. ch. I, art. XV. Those provisions were construed in *Commonwealth v. Ray*, 218 Pa. Super. 72, 78-79, 272 A.2d 275, 278-79 (1970), *vacated on other grounds*, 448 Pa. 307, 292 A.2d 410 (1972), and *State v. Rosenthal*, 75 Vt. 295, 55 A. 610 (1903), to guarantee a right to bear arms for self-protection. "That the people have a right to bear arms for the defence [sic] of the State" N.C. CONST. Bill of Rights § 17. In *State v. Huntley*, 25 N.C. (3 Ired.) 418, 422-23 (1843), the court interpreted this provision broadly: "For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun." *Id.* "The people have a right to keep and bear arms for the common defence [sic]...." MASS. DECL. OF RIGHTS art. XVII (1780). The right to arms was judicially repealed in *Commonwealth v. Davis*, 369 Mass. 886, 343 N.E.2d 847 (1976). The people would not have ratified the second amendment if they suspected it did not guarantee rights they already enjoyed. The ninth amendment protects rights found in state bills of rights when the Federal Bill of Rights was adopted. *Massachusetts v. Upton*, 466 U.S. 727, 737 (1984) (Stevens, J., concurring). It also protects life and private personality. *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

⁴⁶ See *Nunn v. State*, 1 Ga. 243 (1846).

⁴⁷ *Id.*

the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State.⁴⁸

Justice William Paterson, a signer of the Federal Constitution, reminded that

in *England*, the authority of the Parliament runs without limits, and rises above control.... [T]here is no written constitution In *America* the case is widely different: Every State in the Union has its constitution reduced to written exactitude and precision.

... [T]he Constitution is the sun of the political system, around which all Legislative, Executive and Judicial bodies must revolve.⁴⁹

This is a reminder that the Framers embraced Chief Justice Edward Coke's dicta that Parliament is not supreme.⁵⁰ This critical difference is often ignored by commentators and courts.⁵¹(pg.68)

The Framers, at a minimum, wanted to place in the catalog of personal liberty the enjoyment of the common law right to bear arms.⁵² They also wanted to enjoy this right free from the ebb and flow of political passions by placing the arms guarantee beyond the reach of governmental abridgement.⁵³

III. RULES OF INTERPRETATION

The Bill of Rights is a catalog of indispensable liberties. Constitutional rights are to be honored equally.⁵⁴ Fundamental rights enjoy explicit guarantee in the Bill of Rights.⁵⁵ In addition, a constitutional right must be broadly interpreted.⁵⁶ Neither oppressive taxes or fees⁵⁷ nor waiting periods may be imposed on the exercise of a right.⁵⁸ Furthermore, government may not require

⁴⁸ *Id.* at 249-51. The Georgia Constitution of 1861, art. I, § 6, finally adopted a right to arms. The *Nunn* decision establishes the correct meaning of the second amendment. Judge Lumpkin, the author of *Nunn*, started practicing law in 1820, when Jefferson and Madison were still alive. Joseph Henry Lumpkin In Memoriam, 36 Ga. 19 (1867). He studied at the University of Georgia and Princeton University. *Id.* at 20. He died in 1867. *Id.* In view of the times and his age, he probably did not mean children when he used the term "boys" in *Nunn*.

⁴⁹ *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (1795).

⁵⁰ *Dr. Bonham's Case*, 77 Eng. Rep. 646, 652 (1610). American Indians are also claimed to have influenced our Constitution. C. PORTER, *OUR INDIAN HERITAGE* 20-21 (1964).

⁵¹ Mosk, *Gun Control Legislation: Valid and Necessary*, 14 N.Y.L.F. 694, 706-14 (1968); see also *Burton v. Sills*, 53 N.J. 86, 95, 248 A.2d 521, 526 (1968), *appeal dismissed*, 394 U.S. 812 (1969). The British press was subject to licensing. 4 W. BLACKSTONE, *COMMENTARIES* *152.

⁵² *Grosjean v. American Press Co.*, 297 U.S. 233, 248-49 (1936).

⁵³ See *United States v. Brewster*, 408 U.S. 501, 508 (1972); *Bridges v. California*, 314 U.S. 252, 264 n.7 (1941).

⁵⁴ *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 484 (1982); *Ullmann v. United States*, 350 U.S. 422, 428-29 (1956).

⁵⁵ *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973).

⁵⁶ See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308-09 (1965); *Boyd v. United States*, 116 U.S. 616, 635 (1886).

⁵⁷ *Minneapolis Star v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *State v. Kerner*, 181 N.C., 574, 107 S.E. 222 (1921).

⁵⁸ *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 449-51 (1983). One state enacted an instant criminal history check for certain firearm purchasers. VA. CODE ANN. §§ 18.2-308.2:2, 52-4.4 (1989).

registration and licensing of persons who exercise constitutional rights⁵⁹ nor chill the exercise of a constitutional right.⁶⁰

The second amendment should be interpreted according to well-established rules governing interpretation of constitutional guarantees when determining if a particular statute is unconstitutional.⁶¹ Reasonable time, place, and manner restrictions may be imposed on the exercise of fundamental rights, provided the restrictions are narrowly tailored.⁶² Courts must balance the justification put forward by the state against the character and magnitude of the asserted injury to the constitutionally (pg.69) protected right.⁶³

The state will always argue that a compelling state interest exists for the enactment of legislation. This may tempt courts to reflexively bow to the interests of the state. The erosion of rights must be avoided by recognizing that the keeping of arms in the home must be given special protection to preserve personal autonomy.⁶⁴ This expectation is buttressed by the rule that the state can take no action which will unnecessarily chill or penalize the assertion of a constitutional right, and the state may not draw adverse inferences from the exercise of a constitutional right.⁶⁵

The bearing of arms in a public place is different from the keeping of arms in the home on account of the home's special zone of privacy. Reasonable time, place, and manner regulations may be placed on bearing arms in a public place.⁶⁶ For example, people may be prevented from bringing arms into court.⁶⁷ However, the peaceful bearing of arms in a motor vehicle or on a street could not be prohibited.⁶⁸ A constitutional right may not be curtailed simply because some people find its exercise disagreeable or offensive.⁶⁹

The framing of the right to arms reveals an awareness of crime. Nevertheless, the guarantee promises that the right "shall not be infringed."⁷⁰ The Framers also knew the obvious: certain persons have always been treated differently and do not enjoy the full array of rights. In accord with this

⁵⁹ See *Thomas v. Collins*, 323 U.S. 516, 538-40 (1945).

⁶⁰ *United States v. Jackson*, 390 U.S. 570, 581 (1968).

⁶¹ *Konigsberg v. State Bar*, 366 U.S. 36, 49 n.10 (1961); *State v. Brown*, 571 A.2d 816, 819 n.7 (Me. 1990); *State v. Dees*, 100 N.M. 252, 669 P.2d 261, 263 (Ct. App. 1983) (first amendment analysis applied to arms statute).

⁶² *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2757-58 (interim ed. 1989). Courts have voided arms laws because of overbreadth. *City of Lakewood v. Pillow*, 180 Colo. 20, 501 P.2d 744 (1972); *Junction City v. Mevis*, 226 Kan. 526, 601 P.2d 1145 (1979); *State v. Blocker*, 291 Or. 255, 630 P.2d 824 (1981); *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139 (W. Va. 1988).

⁶³ *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

⁶⁴ *Welsh v. Wisconsin*, 466 U.S. 740, 748-54 (1984) (home guaranteed special protection). In the area of self-defense, it is now uniformly accepted that in one's home a victim of a crime has no duty to retreat. Cf. LaFond, *The Case for Liberalizing the Use of Deadly Force in Self-Defense*, 6 U. PUGET SOUND L. REV. 237, 251-52 (1983).

⁶⁵ *State v. Rupe*, 101 Wash. 2d 664, 705-06, 683 P.2d 571, 595 (1984) (adverse inference cannot be drawn from exercise of right to arms).

⁶⁶ *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139, 145-49 (W. Va. 1988).

⁶⁷ *Hill v. State*, 53 Ga. 473 (1874).

⁶⁸ *City of Lakewood v. Pillow*, 180 Colo. 20, 501 P.2d 744 (1972); *Watson v. Stone*, 148 Fla. 516, 4 So. 2d 700 (1941); *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921); *City of Las Vegas v. Moberg*, 82 N.M. 626, 485 P.2d 737 (Ct. App. 1971); *State v. Blocker*, 291 Or. 255, 630 P.2d 824 (1981).

⁶⁹ *Texas v. Johnson*, 109 S. Ct. 2533, 2544 (interim ed. 1989); *Cohen v. California*, 403 U.S. 15 (1971); see also *Holland v. Commonwealth*, 294 S.W.2d 83, 85 (Ky. 1956).

⁷⁰ U.S. CONST. amend. II.

understanding are decisions holding that a convicted felon may be prevented from voting⁷¹ or holding office in a union.⁷² The collateral consequences of a felony conviction go beyond deprivation of the right to keep and bear arms.⁷³ Infants are also (pg.70) treated differently because the state has a compelling interest in protecting their physical and psychological well-being.⁷⁴ Nevertheless, while courts adhere to these well-known exceptions in construing other constitutional guarantees, the right to arms has often been treated with disfavor. The command that the people have a right to keep and bear arms is simply ignored. Courts simply look at the preamble or precatory language of the second amendment, ignore the rest of the language, and interpret it to guarantee the right of a state to have a military force.⁷⁵ However, the right of a state to have and train military or constabulary forces does not depend on the second amendment right of the people to keep and bear arms.⁷⁶

String citing cases that have upheld even confiscatory arms legislation demonstrates that the analysis is neither penetrating nor robust, but demonstrates a penchant for inaccuracy.⁷⁷ Some judges have even displayed an open animosity for the right to arms. For example, Chief Justice Earl Warren dissented from a holding that a firearm registration statute offended the fifth amendment privilege against self-incrimination because "[t]he impact of that decision on the efforts of Congress to enact much-needed federal gun control laws is not consistent with (pg.71) national safety."⁷⁸ Justice William O. Douglas, joined by Justice Thurgood Marshall, called for the "watering down" of the second amendment in his dissenting opinion in *Adams v. Williams*.⁷⁹ This unfortunately demonstrates that

⁷¹ Richardson v. Ramirez, 418 U.S. 24 (1974).

⁷² DeVeau v. Braisted, 363 U.S. 144 (1960).

⁷³ Burton, Cullen & Travis, *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, FED. PROBATION, Sept. 1987, at 52; *see also* Doe v. Webster, 606 F.2d 1226, 1233-34 (1979); State v. Noel, 3 Ariz. App. 313, 414 P.2d 162, 164-65 (1966). However, there are limits on which offenses may be classified as a felony. *See* United States v. Wulff, 758 F.2d 1121 (6th Cir. 1985); *In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

⁷⁴ Sable Communications v. F.C.C., 109 S. Ct. 2829, 2836 (interim ed. 1989).

⁷⁵ Stevens v. United States, 440 F.2d 144, 149 (6th Cir. 1971); *cf.* ARTICLES OF CONFEDERATION art. VI, para. 4; VA. DECLARATION OF RIGHTS art. 13 (1776). Both mention a militia without any reference to a right of the people to keep and bear arms. The Framers, however, while having these models available, chose not to use them. They wanted to go beyond guaranteeing to a state the right to have a militia; they guaranteed a right to keep and bear arms to the people. Oddly, a state's attempt to use the Constitution's militia clause as grounds for maintaining control over the National Guard has not found favor with the courts. *See* Perpich v. Department of Defense, 110 S. Ct. ____ (1990); Dukakis v. United States Dep't of Defense, 686 F. Supp. 30 (D. Mass. 1988), *aff'd*, 859 F.2d 1066 (1st Cir. 1988) (per curiam), *cert. denied*, 109 S. Ct. 1743 (interim ed. 1989); J.R. GRAHAM, A CONSTITUTIONAL HISTORY OF THE MILITARY DRAFT 11, 19 (1971) (discussing the difference between armies and militia).

⁷⁶ 3 DEBATES ON ADOPTION, *supra* note 25, at 419; *see also* Hamilton v. Regents of Univ. of Cal., 293 U.S. 245, 260 (1934).

⁷⁷ Quilici v. Village of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982) (the opinion oddly stated that the debates surrounding the adoption of the second and fourteenth amendments were irrelevant), *cert. denied*, 464 U.S. 863 (1983); Sandidge v. United States, 520 A.2d 1057, 1057-58 (D.C.), *cert. denied*, 108 S. Ct. 193 (interim ed. 1987). The author of *Quilici* was requested to disqualify himself because "[s]even weeks before the date of oral argument, Judge Bauer unequivocally expressed on a public television program his strongly held belief that an ordinance banning the possession of firearms would not violate the Second Amendment." Motion of Plaintiffs-Appellants for Leave to File Their Addendum to Petition for Rehearing and Suggestion for Rehearing en banc Based on Newly Discovered Evidence and Their Motion for Disqualification at 1, *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

⁷⁸ Marchetti v. United States, 390 U.S. 62, 84 (1968) (Warren, C.J., dissenting) (Chief Justice commenting on the Court's holding in *Haynes v. United States*, 390 U.S. 85 (1968)).

⁷⁹ 407 U.S. 143, 151 (1972) (Douglas, J., dissenting). This hostility has surfaced in other areas. For example, an attempt to force a \$2,500 contribution to a gun prohibition group, as part of a sentence for possessing an unlicensed pistol, was voided in *People v. Warren*, 89 A.D.2d 501, 452 N.Y.S.2d 50 (1982). Striking veniremen, without voir dire, who believed in the principles of the National Rifle Association, were members or former members of the NRA, or had a family member who belonged to the NRA

at times the predilection of judges reigns rather than the Bill of Rights. Some courts simply overlook history. Justice Neely of the West Virginia Supreme Court quipped that "Lawyers, certainly, who take seriously recent U.S. Supreme Court historical scholarship as applied to the Constitution also probably believe in the Tooth Fairy and the Easter Bunny."⁸⁰

The second amendment need not be rendered moribund because some courts have ignored its command and the political and social ideas that prevailed at the time of its framing. *Stare decisis* is a rule that has less power in constitutional cases. Courts are obligated to overrule erroneous precedent.⁸¹ Even a line of cases covering nearly a century has been branded as "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."⁸²

IV. SUPREME COURT INTERPRETATION

The United States Supreme Court has had occasion to decide four cases on the right to arms, but three of these came in the nineteenth century and are of little precedential value because none decide the full scope and meaning of the right. One of these cases, *United States v. Cruikshank*⁸³ involved a conspiracy by more than a hundred klansmen to deprive blacks of first and second amendment rights.⁸⁴ The Court held that the first amendment was "not a right granted to the people by (pg.72) the Constitution,"⁸⁵ and also that the second amendment was not "a right granted by the Constitution."⁸⁶ This recognizes the principle that certain rights predate the Constitution and that such rights are guaranteed rather than granted by a Constitution.⁸⁷

The Court, however, held that the national government shall not infringe such rights, and citizens have "to look for their protection against any violation by their fellow-citizens" to the police power of the state.⁸⁸ Subsequent decisions have rendered *Cruikshank* a relic of Reconstruction by holding that the First Amendment applies to the states and that private interference with federal constitutional rights may be punished.⁸⁹

was held reversible error in *United States v. Salamone*, 800 F.2d 1216, 1226-27 (3d Cir. 1986).

⁸⁰ R. NEELY, HOW COURTS GOVERN AMERICA 18 (1981); see also Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?* 36 OKLA. L. REV. 65 (1983).

⁸¹ *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3056 (interim ed. 1989); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 627-28 (1974) (Powell, J., concurring); *Powell v. McCormack*, 395 U.S. 486, 546 (1969); see also Note, *The Power that Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U.L. REV. 345 (1986).

⁸² *Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1938). Courts must bow to force of better reasoning. *United States v. Scott*, 437 U.S. 82, 101 (1978).

⁸³ 92 U.S. 542 (1876).

⁸⁴ *Id.* at 544-45.

⁸⁵ *Id.* at 551.

⁸⁶ *Id.* at 553.

⁸⁷ The right to arms "predates any Constitution of the Commonwealth." *Commonwealth v. Ray*, 218 Pa. Super. 72, 79, 272 A.2d 275, 278-79 (1970), *vacated*, 448 Pa. 307, 292 A.2d 410 (1972).

⁸⁸ *Cruikshank*, 92 U.S. at 553.

⁸⁹ *United States v. Guest*, 383 U.S. 745, 760 (1966) (private interference with federal constitutional rights may be punished); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (first amendment applies to states).

In *Presser v. Illinois*⁹⁰ the defendant was prosecuted for leading a band of armed men in a parade without a license.⁹¹ The Court reaffirmed *Cruikshank's* holding that the second amendment applied only to infringement by the federal government.⁹² The Court defined the constitutional term "militia" and held that a state could not disarm the people because the people have a duty to the federal government to maintain public security and owe militia duties to the federal government.⁹³

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.⁹⁴ (pg.73)

*Miller v. Texas*⁹⁵ cited *Cruikshank* for the proposition that the second and fourth amendments did not apply to the states.⁹⁶ The Court did not decide whether those amendments applied to the states through the fourteenth amendment because that issue "was not set up in the trial court."⁹⁷

In *United States v. Miller*⁹⁸ the Supreme Court reversed the district court's sustention of a demurrer and quashing of the indictment on second amendment grounds:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.⁹⁹

⁹⁰ 116 U.S. 252 (1886).

⁹¹ *Id.* at 254.

⁹² *Id.* at 265.

⁹³ *Id.* at 264-65.

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

⁹⁵ 153 U.S. 535 (1894).

⁹⁶ *Id.* at 538. The fourth amendment now applies to the states through incorporation under the fourteenth amendment. *See Mapp v. Ohio*, 367 U.S. 643 (1961). The Supreme Court has not specifically held that the second, third, and seventh amendments, as well as the indictment provision of the fifth and the bail provision of the eighth, apply to the states. Recently, however, federal circuit courts have decided that the third amendment and bail provision of the eighth amendment apply to the states. *Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982) (third amendment); *Hunt v. Roth*, 648 F.2d 1148 (8th Cir. 1981) (bail), *vacated as moot sub nom.*, *Murphy v. Hunt*, 455 U.S. 478 (1982).

⁹⁷ *Miller v. Texas*, 153 U.S. at 538.

⁹⁸ 307 U.S. 174 (1939).

⁹⁹ *Id.* at 178 (citation omitted). The short-barreled shotgun is the modern equivalent of the ancient blunderbuss. It was not uncommon for a blunderbuss to have a barrel under 18 inches. F. WILKINSON, *ANTIQUÉ FIREARMS* 99 (1969). *Compare Burks v. State*, 162 Tenn. 406, 36 S.W.2d 892 (1931) (miniature shotgun with twelve inch barrel is a constitutionally protected firearm)

The quoted phrase "[i]n the absence of any evidence"¹⁰⁰ is crucial to the opinion of the Court. The defendants did not appear nor were they represented before the Supreme Court.¹⁰¹ Thus the opinion suffers from a fundamental defect: the Court considered only the government's view. Further, the reference to the "common defense" flies in the face of the historical intent of the amendment: "[t]he Senate refused to limit the right to bear arms by voting down the addition of the words 'for the common defence.'"¹⁰² (pg.74)

Miller discussed the connection between militia service and the private possession of arms:

[T]he Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.¹⁰³

The Court simply refused to take judicial notice that a particular shotgun's possession or use had some reasonable relationship to the preservation or efficiency of a well-regulated militia.¹⁰⁴ The Court made no finding that the right to arms is a collective right, or that it belonged only to the militia or the National Guard, and in remanding did not suggest that the lower court inquire as to what constitutes the militia in Arkansas, nor did it suggest an inquiry as to the defendants' able-bodiedness. The focus was on the shotgun in question to see if it was an "arm" in the constitutional sense. These factors and the Court's definition of militia also indicate that a locality rule in judging the breadth of the second amendment was not adopted.

Miller holds that the Constitution protects the right to "possession or use" of arms having a militia utility, e.g., shotguns, rifles, and pistols.¹⁰⁵ The Court, however, was willing to narrow the right by holding that some shotguns may not be "any part of the ordinary military equipment."¹⁰⁶ The arms must have "some reasonable relationship to the preservation or efficiency of a well regulated militia"¹⁰⁷ Justice Black has claimed that "only arms necessary to a well-regulated militia" are absolutely protected.¹⁰⁸ *Miller* leaves unanswered whether modern arms of mass destruction may be possessed by individuals. Some courts make no attempt to come up with a test; alarmist rhetoric has

with State v. LaChapelle, 234 Neb. 458, 451 N.W.2d 689 (1990) (sawed-off shotgun is not constitutionally protected).

¹⁰⁰ *United States v. Miller*, 307 U.S. at 178.

¹⁰¹ *Id.* at 175.

¹⁰² 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 450 (1971).

¹⁰³ *United States v. Miller*, 307 U.S. at 179.

¹⁰⁴ *Id.* at 178.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 873 (1960). Justice Black's individual rights view has Supreme Court support. In *Scott v. Sanford*, 60 U.S. 393 (1856), the Court included the right "to keep and carry arms wherever they went" as a privilege and immunity. *Id.* at 416-17. It also listed the right to bear arms in a list of individual rights which Congress could not deny. *Id.* at 450. In *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897), the Court, in discussing individual rights, opined that a law against concealed carrying of arms is not repugnant to the second amendment, but to admit this exception is to admit there is a fundamental right. *Id.* In *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977), an earlier list of individual rights, including the right to arms, was approved. *Id.*

supplanted intellectual rigor.¹⁰⁹ However, a number of modern (pg.75) state courts have come up with a principled test. Hand-carried arms suitable for personal protection and potential militia use come under the Constitution's umbrella. Modern arms of mass destruction used exclusively by the military do not enjoy constitutional protection.¹¹⁰

V. THE STATES AND THE RIGHT TO ARMS

The federal Constitution is a grant of limited power and its Bill of Rights is a further restriction on governmental power. The legislature of a state, unlike Congress, does not depend on the Constitution for an express grant of legislative power. Its powers are plenary unless otherwise restrained. A state's bill or declaration of rights is a restriction on governmental power. It must be examined to ascertain the restraints which the people have imposed upon the state legislature, not to determine the powers they have conferred.¹¹¹

State courts do not utilize a uniform test to determine if a law is an unconstitutional infringement on the right to bear arms or to keep arms. One test is to see if the law sweeps so broadly that it stifles the exercise of a right where the governmental purpose can be more narrowly achieved.¹¹² Another approach is to see if the enactment is arbitrary, discriminatory, capricious or unreasonable, and whether it bears a real and substantial relation to health, safety, morals or general welfare of the public.¹¹³ Courts have also scrutinized legislation simply to determine if all arms have been banned.¹¹⁴ Its practical effect is to (pg.76) render the arms guarantee lifeless on account of the police power becoming supreme rather than a constitutional right. This analysis makes no serious effort to harmonize the police power with a constitutional right, something that courts face

¹⁰⁹ Sandidge v. United States, 520 A.2d 1057 (D.C.), *cert. denied*, 484 U.S. 868 (1987); *see also* United States v. Warin, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976). Both decisions express alarm about highly sophisticated lethal arms of today.

¹¹⁰ State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921); State v. Delgado, 298 Or. 395, 692 P.2d 610 (1984); State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980).

¹¹¹ Kamper v. Hawkins, 3 Va. (3 Va. Cas.) 20, 79 (1793) (state constitution is supreme); State *ex rel.* Farley v. Brown, 151 W. Va. 887, 892-93, 157 S.E.2d 850, 853 (1967). State courts have been employing their bill of rights to void state statutes since the infancy of this nation. *See, e.g.*, E. POLLOCK, OHIO UNREPORTED DECISIONS PRIOR TO 1823, at 71 (1952) (reporting the case of Rutherford v. M'Faddon (Ohio Supreme Court 1807) (right to jury trial)).

¹¹² City of Lakewood v. Pillow, 180 Colo. 20, 23, 501 P.2d 744, 745-46 (1972); State *ex rel.* City of Princeton v. Buckner, 377 S.E.2d 139, 146 (W. Va. 1988); *see also* State v. Comeau, 233 Neb. 907, 448 N.W.2d 595, 597-98 (1989); State v. Smith, 571 A.2d 279 (N.H. 1990).

¹¹³ City of Akron v. Williams, 113 Ohio App. 293, 296, 177 N.E.2d 802, 804 (1960), *appeal dismissed*, 172 Ohio St. 287, 175 N.E.2d 174 (1961); *see also* State v. Hogan, 63 Ohio St. 202, 210, 58 N.E. 572, 573 (1900).

¹¹⁴ Kalodimos v. Village of Morton Grove, 103 Ill. 2d 483, 511, 470 N.E.2d 266, 279 (1984) (pistol prohibition upheld in 4 to 3 decision). Newspapers throughout Illinois advised that the Bill of Rights Committee rejected 8 to 6 an effort to amend the arms guarantee by adding "except handguns" after the word "arms." *Rights Committee Affirms Support For Sweeping Firearms Provision*, Galesburg Register-Mail, Mar. 13, 1970, at 2; *Committee Backs Gun Supporters*, Metro-East Journal, Mar. 13, 1970, at 22; *Arms Provision Approved by Committee*, Marion Daily Republican, Mar. 13, 1970, at 1; *Con-Con Group Supports Right To Bear Arms*, Rockford Morning Star, Mar 13, 1970, at A-19; *Gun Lobby Triumphs*, Southern Illinoisan, Mar. 12, 1970, at 1; *Gun Lobby Scores Victory At Con-Con*, Decatur Daily Review, Mar. 12, 1970, at 1. The court ignored this evidence of the people's understanding. The Illinois guarantee is unique because it is specifically "subject only to the police power." ILL. CONST. art I, § 22.

frequently. After all, constitutional guarantees other than the right to arms are subject to regulation.¹¹⁵

A guarantee is placed in a constitution because it is deemed peculiarly important and peculiarly exposed to invasion. Therefore, a rational basis standard of review is too weak to protect the guarantee.

In the area of bearing arms, courts often use the following standard: are arms to be borne in such a manner as to render them wholly useless for the purposes guaranteed in the constitution?¹¹⁶ Where a license to carry a firearm is required, courts often hold that obtaining a license becomes a right rather than a matter of discretion.¹¹⁷

The right to keep arms, as opposed to the right to bear arms, is often construed by using a two step process: (1) does the person come under the protection of the constitutional guarantee and (2) does the arm enjoy constitutional protection.¹¹⁸

The right to keep and bear arms also includes "the right to load them and shoot them and use them as such things are ordinarily used."¹¹⁹ It likewise "necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair."¹²⁰

Although 43 states guarantee a right to arms, courts in two states have gone beyond even the most restrictive model on interpretation. In Kansas and Massachusetts their guarantee to arms has been judicially repealed.¹²¹

*City of Salina v. Blaksley*¹²² held that a constitutional right promising "the people have the right to bear arms for their defense and security" meant only that the people collectively, not individually, had (pg.77) a limited right to bear arms in the organized militia or any military organization provided by law.¹²³ This holding was not even put forth in any party's brief.¹²⁴ The court

¹¹⁵ Some rights are "absolute." *Carey v. Phipps*, 435 U.S. 247, 266 (1978) (procedural due process); *Faheem-El v. Lane*, 657 F. Supp. 638, 645 (C.D. Ill. 1986) (religious belief).

¹¹⁶ *Hill v. State*, 53 Ga. 473, 480-81 (1874); *Glasscock v. City of Chattanooga*, 157 Tenn. 518, 11 S.W.2d 678 (1928); *State v. McAdams*, 714 P.2d 1236, 1237 (Wyo. 1986).

¹¹⁷ *See Schubert v. DeBard*, 398 N.E.2d 1339, 1341 (Ind. Ct. App. 1980); *Rabbitt v. Leonard*, 36 Conn. Supp. 108, 413 A.2d 489, 491 (1979). State laws on the issuance of a license to carry a firearm are discussed in Comment, *Carrying Concealed Weapons in Self-Defense: Florida Adopts Uniform Regulations for the Issuance of Concealed Weapons Permits*, 15 FLA. ST. U.L. REV. 751, 753-61 (1987).

¹¹⁸ *People v. Zerillo*, 219 Mich. 635, 189 N.W. 927 (1922); *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980).

¹¹⁹ *Hill v. State*, 53 Ga. 473, 480 (1874).

¹²⁰ *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 178 (1871).

¹²¹ *See infra* notes 122-35 and accompanying text.

¹²² 72 Kan. 230, 83 P. 619 (1905).

¹²³ *Id.* at 231, 83 P. at 620.

¹²⁴ The Brief for Appellee at 2, *City of Salina v. Blaksley*, 72 Kan. 230, 83 P. 619 (1903) (No. 14375), noted that in September of 1904, "The evidence in the case showed that the weapon Blaksloy [sic] carried, or 'bore,' on the occasion in question was a short, 32-calibre pistol, and that he made use of it by firing indiscriminately in a crowd of people." *Id.* It was then argued on pages 4 to 16 of the brief that a pocket pistol is not constitutionally protected and that intoxicated or concealed carrying of arms may be prohibited. *Id.* at 14-16. On page 16, the brief concluded by noting that

The record in this case nowhere intimates that Mr. Blaksley was carrying that 32-calibre pistol 'for his defense and security,' but it does disclose that he pleaded guilty in the police court, and that the jury found him guilty in the district court of 'carrying on his person a deadly weapon when under the influence of intoxicating liquor.' *Id.* at 16. The Brief for Appellant at 13, *City of Salina v. Blaksley*, 72 Kan. 230, 83 P. 619 (1905) (No. 14375), argued "this right is absolute" and Blaksley had a right to bear arms "whether he be good, bad or indifferent or whether he be drunk or sober." *Id.*

ignored precedent when it chose "to treat the question as an original one."¹²⁵ In any event, several generations later the Kansas Supreme Court obliquely retreated from *Blaksley* when it unanimously voided an arms ordinance in *City of Junction City v. Mevis*¹²⁶ as being unreasonable, oppressive, and overly broad.¹²⁷

The truism that a constitutional guarantee "was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages"¹²⁸ was disregarded in *Commonwealth v. Davis*.¹²⁹ The court agreed that at one time the people kept arms for potential militia service.¹³⁰ However, it reasoned that in contemporary times the government provides arms for military use.¹³¹ In turn, military functions are now performed by the National Guard.¹³² Moreover, the guarantee that "[t]he people have a right to keep and to bear arms for the common defence" was "not directed to guaranteeing individual ownership or possession of weapons."¹³³ The opinion is at war with itself. On the one hand it agrees that at one time the right to keep arms for potential militia use was guaranteed.¹³⁴ In spite of that, individual (pg.78) rights are no longer protected.¹³⁵ This construction takes arms out of the hands of the people and places them in the hands of the state, with no restraints upon its power.

Arkansas and Tennessee, like Massachusetts, have a constitutional guarantee to keep and bear arms for the "common defense."¹³⁶ Their courts have consistently held that individual liberty is protected.¹³⁷ The scope of this right was fully explained in *Andrews v. State*¹³⁸ as follows:

The right and use are guaranteed to the citizen, to be exercised and enjoyed in time of peace, in subordination to the general ends of civil society; but, as a right, to be maintained in all its fullness.

The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair.

....

Neither party raised the second amendment nor the fourteenth amendment.

¹²⁵ *Blaksley*, 72 Kan. at 231, 83 P. at 620. *Blaksley* has been used by other courts to judicially repeal the guarantee to arms. See *Commonwealth v. Davis*, 369 Mass. 886, 888, 343 N.E.2d 847, 849 (1976).

¹²⁶ 226 Kan. 526, 601 P.2d 1145 (1979).

¹²⁷ *Id.* at 534, 601 P.2d at 1151.

¹²⁸ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816).

¹²⁹ 369 Mass. at 886, 343 N.E.2d at 847. Besides a guarantee to arms, in article 17, the right to self-defense is protected by part I, article 1 of the Massachusetts Declaration of Rights.

¹³⁰ *Davis*, 369 Mass. at 888, 343 N.E.2d at 849.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 887-88 (quoting MASS. DECL. OF RIGHTS art. xvii)

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ ARK. CONST. art. II, § 5; TENN. CONST. art. I, § 26.

¹³⁷ *Wilson v. State*, 33 Ark. 557 (1878); *Carroll v. State*, 28 Ark. 99, 101 (1872); *Glasscock v. City of Chattanooga*, 157 Tenn. 518, 11 S.W.2d 678 (1928); *State v. Foutch*, 96 Tenn. 242, 34 S.W. 1 (1896).

¹³⁸ 50 Tenn. (3 Heisk.) 165, 178, 181-82 (1871).

While the private right to keep and use such weapons as we have indicated as arms, is given as a private right, its exercise is limited by the duties and proprieties of social life, and such arms are to be used in the ordinary mode in which used in the country, and at the usual times and places. Such restrictions are implied upon their use as are thus indicated.

....

... Bearing arms for the common defense may well be held to be a political right, or for protection and maintenance of such rights, intended to be guaranteed; but the right to *keep* them, with all that is implied fairly as an incident to this right, is a private individual right, guaranteed to the citizen, not the soldier.¹³⁹

However, even in states without a specific guarantee to arms, the right to self-defense serves as an independent source to guarantee a right to arms.¹⁴⁰ The reasonable mind envisions the use of arms in self-defense rather than bare hands.

*Scott v. Sandford*¹⁴¹ opines that privileges and immunities of free men include the right "to keep and carry arms wherever they went,"¹⁴² (pg.79) and the rights Congress cannot deny include "the right to keep and bear arms."¹⁴³ The fourteenth amendment was intended to extend the rights enunciated in *Scott* to all persons and to prevent such rights from being infringed by the states.¹⁴⁴ This historical reason, plus the decision of 43 states to adopt an arms guarantee, supports the view that the second amendment should be binding on the states. It has been firmly established in our concept of "liberty" under the due process clause.¹⁴⁵

Although the second amendment has not yet been held to be binding on the states, state guarantees to arms offer the most promise in protecting individual liberty because numerous state courts have taken the right seriously and have strived to achieve a workable balance between a right and the needs of the state. State courts have on at least 20 reported occasions found arms laws to be

¹³⁹ *Id.*

¹⁴⁰ The natural or inalienable right to self-defense is guaranteed by CAL. CONST., art. I, § 1; IOWA CONST., art. I, § 1; N.J. CONST., art. I, para. 2. The right to life is an inherent right under WIS. CONST., art. I, § 1. The right to self-defense serves as an independent guarantee to possess arms. *Commonwealth v. Ray*, 218 Pa. Super. 72, 272 A.2d 275 (1970), *vacated on other grounds*, 448 Pa. 307, 292 A.2d 410 (1972).

¹⁴¹ 60 U.S. 393 (1856).

¹⁴² *Id.* at 417.

¹⁴³ *Id.* at 450.

¹⁴⁴ S. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 107 (1984); Sprecher, *The Lost Amendment*, 51 A.B.A. J. 554, 665 (1965).

¹⁴⁵ *Benton v. Maryland*, 395 U.S. 784, 794-96 (1969).

unconstitutional.¹⁴⁶ This once again demonstrates that the federal Bill of Rights serves as a floor and not as a ceiling.¹⁴⁷

VI. CONSTITUTIONALLY PROTECTED ARMS

It is well-known that colonial militia statutes required the keeping of firearms, shot, powder, and edged arms.¹⁴⁸ They help determine (pg.80) what the Framers meant by the term *arms*. Cases of old, when interpreting the second amendment or a state constitutional guarantee with a militia or common defense purpose, took either an expansive view of the term "arms" or a narrow view. The broad view held that basically all arms are constitutionally protected.¹⁴⁹ The narrow view held that only arms suitable for civilized warfare are protected.¹⁵⁰ Under the narrow view, large pistols are constitutionally protected but pocket pistols do not enjoy constitutional protection.¹⁵¹ Accordingly, "[w]hen we see a man with musket to shoulder, or carbine slung on back, or pistol belted to his side, or such like, he is bearing arms in the constitutional sense."¹⁵²

Constitutionally protected arms under the modern view are not limited to those of a militia. They include hand-carried defensive arms and the modern equivalents of arms possessed by colonial

¹⁴⁶ *Wilson v. State*, 33 Ark. 557 (1878); *City of Lakewood v. Pillow*, 180 Colo. 20, 501 P.2d 744 (1972) (en banc); *People v. Nakamura*, 99 Colo. 262, 62 P.2d 246 (1936) (en banc); *Nunn v. State*, 1 Ga. 243 (1846); *In re Brickey*, 8 Idaho 597, 70 P. 609 (1902); *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822); *People v. Zerillo*, 219 Mich. 635, 189 N.W. 927 (1922); *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921); *City of Las Vegas v. Moberg*, 82 N.M. 626, 485 P.2d 737 (Ct. App. 1971); *In re Reilly*, 31 Ohio Dec. 364 (C.P. 1919); *State v. Delgado*, 298 Or. 395, 692 P.2d 610 (1984); *State v. Blocker*, 291 Or. 255, 630 P.2d 824 (1981); *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980); *Barnett v. State*, 72 Or. App. 585, 695 P.2d 991 (1985); *Glasscock v. City of Chattanooga*, 157 Tenn. 518, 11 S.W.2d 678 (1928); *Andrews*, 50 Tenn. (3 Heisk.) at 165; *Smith v. Ishenhour*, 43 Tenn. (3 Cold.) 214 (1866); *Jennings v. State*, 5 Tex. Civ. Cas. 298 (1878); *State v. Rosenthal*, 75 Vt. 295, 55 A. 610 (1903); *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139 (W. Va. 1988).

¹⁴⁷ State courts have also guaranteed greater protection in many areas. *E.g.*, *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (the right to privacy); *Commonwealth v. Upton*, 394 Mass. 363, 476 N.E.2d 548 (1985) (searches and seizures); *People v. Torres*, 74 N.Y.2d 224, 543 N.E.2d 61, 544 N.Y.S.2d 796 (1989) (searches and seizures); *State v. Jacumin*, 778 S.W.2d 430 (Tenn. 1989) (searches and seizures); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (financing public education).

¹⁴⁸ Statutes typically referred to "muskett or fuzee ... pike ... Sword ... Lance ... pistoll [sic] ... case of good pistols ... rapier ... carabine ... powder ... bullets " I THE COLONIAL LAWS OF N.Y. FROM THE YEAR 1664 TO THE REVOLUTION 232 (1894); *see also* C. COLBY, REVOLUTIONARY WAR WEAPONS (1963); 6 DOCUMENTS RELATING TO COLONIAL HISTORY OF NEW JERSEY 193 (1882); 3 LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, 338 (1823); 3 RECORDS OF THE COLONY OF RHODE ISLAND 433 (1856); 3 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 12, 295 (1968).

¹⁴⁹ *Nunn v. State*, 1 Ga. 243, 251 (1846).

¹⁵⁰ *See Andrews v. State*, 50 Tenn. 165 (1871). In *Andrews*, the court stated that, "the rifle of all descriptions, the shot gun, the musket, and repeater, are such arms; and that under the Constitution the right to *keep* such arms, cannot be *infringed* or *forbidden* by the Legislature." *Id.* at 179. The court continued, "the pistol known as the repeater is a soldier's weapon" *Id.* at 187. The court in *Hill v. State*, 53 Ga. 473 (1874) stated that, "The word 'arms,' evidently means the arms of a militiamen, the weapons ordinarily used in battle, to-wit: guns of every kind, swords, bayonets, horseman's pistols, etc." *Id.* at 474. In *State v. Workman*, 35 W.Va. 367, 373, 14 S.E. 9, 11 (1891), the court stated that

in regard to the kind of arms referred to in the [second] amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets, —arms to be used in defending the state and civil liberty—and not to pistols, bowie-knives, brass knuckles, billies, and such other weapons as are usually employed in brawls, street fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desperadoes

Id. The opinion demonstrates an obvious inaccuracy. The federal arsenal at Harper's Ferry manufactured pistols. The court also wore blinders with respect to Colt's revolver in the Dragoon, Navy and Army models.

¹⁵¹ *Wilson v. State*, 33 Ark. 557, 560 (1878); *Fife v. State*, 31 Ark. 455, 460-61 (1876).

¹⁵² *State v. Bias*, 37 La. Ann. 259, 260 (1885).

militiamen.¹⁵³ While semi-automatic firearms are protected, arms of mass destruction used exclusively by the military are not.¹⁵⁴

Legislation banning or severely restricting the possession and sale of semi-automatic firearms¹⁵⁵ is unconstitutional, even under the restricted (pg.81) "civilized warfare" test.¹⁵⁶ Such firearms have been possessed by civilians since the late nineteenth century.¹⁵⁷ They are suitable for personal protection, potential militia use, and as a deterrent against oppression.

Semi-automatic firearm legislation is appealing to the uninformed because it uses the misnomers *assault weapon* or *assault rifle*. Hence, the official military definition is enlightening: "Assault rifles are short, compact, selective-fire weapons that fire a cartridge intermediate in power between submachinegun and rifle cartridges. Assault rifles have mild recoil characteristics and, because of this, are capable of delivering effective full automatic fire at ranges up to 300 meters."¹⁵⁸ The political advantage of mislabeling a semiautomatic firearm as a fully automatic firearm is obvious. However, a debate in which misinformation prevails can only lead to bad policy.

VII. PRACTICAL CONSIDERATIONS

The solid majority of gun owners are noncriminal, and their guns create no social problems. "It is commonly hypothesized that much criminal violence, especially homicide, occurs simply because the means of lethal violence (firearms) are readily at hand, and thus, that much homicide would not occur were firearms generally less available. There is no persuasive evidence that supports this view."¹⁵⁹ Hence, fairness demands that gun owners not be used as scapegoats for society's shortcomings.¹⁶⁰ Reliance on the state for protection is an illusory remedy. Neither the police nor the state has a duty to protect the individual citizen.¹⁶¹ The burden falls on the citizen to defend himself

¹⁵³ See *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980); see also Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms,"* 49 LAW & CONTEMP. PROBS. 151 (1986).

¹⁵⁴ *Rinzler v. Carson*, 262 So. 2d 661, 666 (Fla. 1972); *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921) (Chief Justice Clark was a Civil War veteran and witnessed in his life dramatic changes in arms); *Kessler*, 289 Or. at 359, 614 P.2d at 94; *State v. Rupe*, 101 Wash. 2d 664, 703, 683 P.2d 571, 594 (1984).

¹⁵⁵ See, e.g., CLEVELAND ORDINANCE No. 415-89 (adding chapter 628 to Codified Ordinances of Cleveland); DAYTON REV. CODE OF GEN. ORDINANCES §§ 138.24-138.28; see also CAL. PENAL CODE § 12275 (WEST SUPP. 1990).

¹⁵⁶ See *State v. Swanton*, 129 Ariz. 131, 629 P.2d 98 (Ct. App. 1981); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165 (1871).

¹⁵⁷ The 1896 Model Mauser semiautomatic pistol was the first to be widely produced. It is still found in places ranging from the United States to China. The 1902 Winchester .22 semiautomatic rifle is another example of a widely produced civilian arm.

¹⁵⁸ DEFENSE INTELLIGENCE AGENCY, UNITED STATES DEPARTMENT OF DEFENSE SMALL ARMS IDENTIFICATION AND OPERATION GUIDE—EURASIAN COMMUNIST COUNTRIES 105 (1976).

¹⁵⁹ J. WRIGHT & P. ROSSI, UNITED STATES DEPARTMENT OF JUSTICE, WEAPONS, CRIME, AND VIOLENCE IN AMERICA EXECUTIVE SUMMARY 2 (Nov. 1981); see also Kleck, *Policy Lessons from Recent Gun Control Research*, 49 LAW & CONTEMP. PROBS. 35 (1986). Most police officers believe a civilian should be entitled to own a rifle, shotgun, and pistol. NATIONAL ASSOCIATION OF CHIEFS OF POLICE, AMERICAN LAW ENFORCEMENT OFFICERS SURVEY FOR 1989, 1 (1989).

¹⁶⁰ The creation of *malum prohibitum* felony offenses in the firearm area not only helps fill prisons but creates such unjust results that courts hope the defendant will be pardoned. See *United States v. Ruisi*, 460 F.2d 153, 157 (2d Cir.), cert. denied, 409 U.S. 914 (1972). The common law punished going armed to terrorize the king's subjects as a misdemeanor. *State v. Dawson*, 272 N.C. 535, 541-42, 159 S.E.2d 1, 6 (1968).

¹⁶¹ *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998 (interim ed. 1989); *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982); *Everton v. Willard*, 468 So. 2d 936 (Fla. 1985); see also *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981) (en banc); *Weiner v. Metropolitan Transp. Auth.*, 55 N.Y.2d 175, 433 N.E.2d 124, 448 N.Y.S.2d 141 (1982).

and his (pg.82) family. The Framers intended that the citizen be armed and not be left defenseless.¹⁶² An armed people also serve as a deterrent against crime.¹⁶³

Gun control laws have at least five political functions: (1) increase citizen reliance on government and tolerance of increased police powers and abuse; (2) facilitate repressive action by government; (3) help prevent opposition to government; (4) lessen pressure for major or radical reform; (5) allow selective enforcement against dissidents.¹⁶⁴ In our imperfect world the servants of the state have committed outrages.¹⁶⁵ Nevertheless, they are always exempted from gun laws designed to disarm the people. Crime, regardless of who commits it, "must be prevented by the penitentiary and gallows, and not by a general deprivation of a constitutional privilege."¹⁶⁶

VIII. CONCLUSION

Mankind's oldest right is personal and communal defense. A written constitution was deemed necessary because experience demonstrated that the state cannot always be trusted to exercise power in a reasonable manner. Gandhi's nonviolent methods would fail against the likes of a Nicolae Ceausescu, Hitler, Stalin, or Pol Pot. The second amendment and its state analogues guarantee that the state would not have a monopoly on arms. The constitutions consistently promise to the *people* a right to bear arms. Judges know this, but some have a deep personal dislike of this right. If a guarantee's text and original intent are no longer controlling, what is controlling? The Constitution is a reminder that judges must be restrained by something more than their (pg.83) own predilections. Legislative bodies also have an obligation to defend constitutional rights. However, ultimately the Constitution restrains them, too. The majority of commentators support the individual rights view on arms.¹⁶⁷ The courts are required to follow it.¹⁶⁸ Laws seeking to disarm the people must be

¹⁶² "The right to bear arms is reserved to the people in our federal and state constitutions as a means of self-protection against tyranny or oppression and as a defense against certain forms of private aggression." *Walter v. State*, 35 Ohio C.C. Dec. 567, 568 (1905).

¹⁶³ Kleck, *Crime Control Through the Private Use of Armed Force*, 35 SOC. PROBS., Feb., 1988, at 1. One court has even admitted that although the defendant violated a harsh gun licensing law, he may have saved his life by having the gun. *Commonwealth v. Lindsey*, 396 Mass. 840, 845, 489 N.E.2d 666, 669 (1986).

¹⁶⁴ Kessler, *Gun Control and Political Power*, 5 L. & POL'Y Q. 381 (1983).

¹⁶⁵ On May 13, 1985 police in a residential area fired 10,000 rounds of heavy caliber ammunition, dropped a bomb from a helicopter, killed 11 people (including 5 children ages 7 to 14), made 250 persons homeless, and destroyed a neighborhood. *See Brown, Foreword to the Report of the Philadelphia Special Investigation Commission*, 59 TEMPLE L.Q. 267, 268 (1986). The My Lai incident is another example. *See Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 911 (1976). Chicago's Operation Greylord resulted in 15 judges being convicted on corruption charges. 'Greylord Parole', Nat'l L.J., Nov. 20, 1989, at 6.

¹⁶⁶ *Wilson v. State*, 33 Ark. 557, 560 (1878). The Framers apparently also felt "if proper attention be paid to the education of children in knowledge, and religion, few men will be disposed to use arms, unless for their amusement, and for the defence of themselves and their country." D. BOORSTIN, *THE AMERICANS—THE COLONIAL EXPERIENCE* 353 (1958).

¹⁶⁷ *See supra* notes 14, 38, 80, 144, 153. *See generally* THE RIGHT TO KEEP AND BEAR ARMS, REPORT OF SUBCOM. ON CONSTITUTION OF SENATE JUDICIARY COMM., 97TH CONG. 2D SESS. (1982); S. HALBROOK, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES (1989); B. Bordenet, *The Right to Possess Arms: The Intent of the Framers of the Second Amendment*, 21 U. WEST. L.A. L. REV. 1 (1990); Cantrell, *The Right to Bear Arms*, WIS. B. BULL., Oct., 1980, at 21; Caplan, *Handgun Control: Constitutional or Unconstitutional?*, 10 N.C. CENT. L.J. 53 (1978); Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URBAN L.J. 31 (1976); Dowlut, *The Current Relevancy of Keeping and Bearing Arms*, 15 U. BALT. L. F. 32 (1984); Gardiner, *To Preserve Liberty—A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63 (1982); Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON U.L. REV. 1 (1981); Halbrook, *Tort Liability for the Manufacture, Sale, and Ownership of Handguns?*, 6 HAMLIN L. REV. 351, 372 (1983) (gun ownership protected by second and fourteenth amendments); Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North*

declared unconstitutional. At one time the fourteenth and fifteenth amendments were mainly ignored.¹⁶⁹ Finally, courts started protecting those rights. Responsible judges will make certain that all constitutional rights are protected, regardless of personal feelings. Casting pejorative labels at those who view the arms right as genuine and fundamental will not change history; it only demonstrates the dismal intellectual discourse of some opponents.¹⁷⁰ The (pg.84) Constitution contains a mechanism for change should any provision be deemed worthy of change. The process is involved so that change is accomplished only after suitable deliberation. If the integrity of the process for change is not followed, no right is safe.¹⁷¹

APPENDIX

State Constitutional Guarantees on the Right To Keep And Bear Arms

Forty-three (43) states have constitutional guarantees on the right to keep and bear arms.

ALABAMA: "That every citizen has a right to bear arms in defense of himself and the state."
ALA. CONST. art. I, § 26.

ALASKA: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." ALASKA CONST. art. I, § 19.

Carolina, Vermont, and Massachusetts, 10 VT. L. REV. 255 (1985); Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J. OF L. & POL. 1 (1987); Hardy & Stompoly, *Of Arms and the Law*, 51 CHI.-KENT L. REV. 62 (1974); Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381 (1960); Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); Levine & Saxe, *The Second Amendment: The Right to Bear Arms*, 7 HOUS. L. REV. 1 (1969); Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987); McClure, *Firearms and Federalism*, 7 IDAHO L. REV. 197 (1970); Olds, *The Second Amendment and the Right to Keep and Bear Arms*, MICH. ST. B.J., Oct., 1967, at 15; Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125 (1986); Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982); Weiss, *A Reply to Advocates of Gun Control Law*, 52 J. URB. L. 577 (1974); Comment, *The Right to Keep and Bear Arms; A Necessary Constitutional Guarantee or an Outmoded Provision of The Bill of Rights?*, 31 ALB. L. REV. 74 (1967).

¹⁶⁸ See *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980). The law must be followed although the court experiences no satisfaction with the result, for "this is a court of law and not a theological institution." *Oleff v. Hodapp*, 129 Ohio St. 432, 438, 195 N.E. 838, 841 (1935). Congress declared the second amendment protects individual rights. *Firearms Owners' Protection Act*, Pub. L. No. 99-308, 100 Stat. 449 (1986).

¹⁶⁹ When the Prohibition Amendment was still in force, a commission, headed by Harvard Law Dean Roscoe Pound, rejected suggestions to repeal it. William S. Kenyon opined that an alternative to repeal was nullification. WICKERSHAM COMMISSION 133 (1931). He added: "Nullification is an odious word in this republic and yet the Fifteenth and parts of the Fourteenth Amendment to the Constitution have been nullified and such nullification accepted by the people." *Id.*

¹⁷⁰ Other rights suffer whenever a state's interests are perceived as more important than individual rights. See, e.g., *Skinner v. Railway Labor Excs. Ass'n*, 109 S. Ct. 1402 (interim ed. 1989) (fourth amendment); *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (interim ed. 1989) (fourth amendment); Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984); see also *Korematsu v. United States*, 323 U.S. 214 (1944) (equal protection based on race). Times have changed but the erosion of rights based on emotion continues. The war on drugs has replaced the war with Japan. In both eras liberty has suffered needlessly.

¹⁷¹ The right to remain silent and have counsel present during a custodial interrogation has been assailed: "In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him." *Miranda v. Arizona*, 384 U.S. 436, 542 (1966) (White, J., dissenting).

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

ARKANSAS: "The citizens of this State shall have the right to keep and bear arms for their common defense." ARK. CONST. art. II, § 5.

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

CONNECTICUT: "Every citizen has a right to bear arms in defense of himself and the state." CONN. CONST. art. I, § 15.

DELAWARE: "A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use." DEL. CONST. art. I, § 20.

FLORIDA: "The right of the people to keep and bear arms in defense ^(pg.85) of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law." FLA. CONST. art. I, § 8.

GEORGIA: "The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have the power to prescribe the manner in which arms may be borne." GA. CONST. art. I, § I, para. VIII.

HAWAII: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." HAW. CONST. art. I, § 15.

IDAHO:

The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person, nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony.

IDAHO CONST. art. I, § 11.

ILLINOIS: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." ILL. CONST. art. I, § 22.

INDIANA: "The people shall have a right to bear arms, for the defense of themselves and the State." IND. CONST. art. I, § 32.

KANSAS: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power." KANSAS BILL OF RIGHTS § 4.

KENTUCKY:

All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

....

Seventh: The right to bear arms in defense of themselves and of the state, subject to the power of the general assembly to enact laws to prevent persons from carrying concealed weapons.

KY. BILL OF RIGHTS, § I, para. 7.

LOUISIANA: "The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person." LA. (PG.86) CONST. art. I, § 11.

MAINE: "Every citizen has a right to keep and bear arms and this right shall never be questioned." ME. CONST. art. I, § 16.

MASSACHUSETTS:

The people have a right to keep and bear arms for the common defence [sic]. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.

MASS. DECL. OF RIGHTS, pt. I, art. XVII.

MICHIGAN: "Every person has a right to keep and bear arms for the defense of himself and the state." MICH. CONST. art. I, § 6.

MISSISSIPPI: "The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons." MISS. CONST. art. 3, § 12.

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

MONTANA:

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

MONT. CONST. art. II, § 12.

NEBRASKA:

All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are ... the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof.

NEB. CONST. art. I, § 1.

NEVADA: "Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes." NEV. CONST. art. 1, § II, para. 1.

NEW HAMPSHIRE: "All persons have the right to keep and bear arms in defense of themselves, their families, their property, and the state." N.H. CONST. part 1, art. 2-a.(pg.87)

NEW MEXICO:

No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.

N.M. CONST. art. II, § 6.

NORTH CAROLINA:

A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.

N.C. CONST. art. I, § 30.

NORTH DAKOTA:

All individuals are by nature equally free and independent and have certain inalienable rights, among which are ... to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

N.D. CONST. art. I, § 1.

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

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

OREGON: "The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power." OR. CONST. art. I, § 27.

PENNSYLVANIA: "The right of the citizens to bear arms in defence of themselves and the State shall not be questioned." PA. CONST. art. I, § 21.

RHODE ISLAND: "The right of the people to keep and bear arms shall not be infringed." R.I. CONST. art. I, § 22.

SOUTH CAROLINA:

A well regulated militia being necessary to the security of a free State, (pg.88) the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General

Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in the manner prescribed by law.

S.C. CONST. art. I, § 20.

SOUTH DAKOTA: "The right of the citizens to bear arms in defense of themselves and the state shall not be denied." S.D. CONST. art. VI, § 24.

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

TEXAS: "Every citizen shall have the right to keep and bear arms in lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime." TEX. CONST. art. I, § 23.

UTAH: "The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the State, as well as for the other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms." UTAH CONST. art. I, § 6.

VERMONT:

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

VT. CONST. ch. I, art. 16.

VIRGINIA:

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

VA. CONST. art. I, § 13.

WASHINGTON: "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men." WASH. CONST. art. I, § 24.^(pg.89)

WEST VIRGINIA: "A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use." W. VA. CONST. art. III, § 22.

WYOMING: "The right of citizens to bear arms in defense of themselves and of the state shall not be denied." WYO. CONST. art. I, § 24.

States Without Constitutional Provisions:

Seven (7) states do not have a constitutional provision on arms: California, Iowa, Maryland, Minnesota, New Jersey, New York, and Wisconsin.