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The Right to Keep and Bear Arms

The right of the people to keep and bear arms, as stated in the Second Amendment to the U.S. Constitution, was recently examined by United States District Judge Sam R. Cummings in "United States of America v. Timothy Joe Emerson." A large portion of Judge Cummings' excellent opinion, issued March 30, 1999, follows:

Second Amendment Schools of Thought

Two main schools of thought have developed on the issue of whether the Second Amendment recognizes individual or collective rights. These schools of thought are referred to as the "states' rights," or "collective rights," school and the "individual rights" school. The former group cites the opening phrase of the amendment, along with subsequent case law, as authority for the idea that the right only allows states to establish and maintain militias, and in no way creates or protects an individual right to own arms.[1] Due to changes in the political climate over the last two centuries and the rise of National Guard organizations among the states, states' rights theorists argue that the Second Amendment is an anachronism, and that there is no longer a need to protect any right to private gun ownership.

The individual rights theorists, supporting what has become known in the academic literature as the "Standard Model," argue that the amendment protects an individual right inherent in the concept of ordered liberty, and resist any attempt to circumscribe such a right.[2]

Textual Analysis

A textual analysis of the Second Amendment supports an individual right to bear arms. A distinguishing characteristic of the Second Amendment is the inclusion of an opening clause or preamble, which sets out its purpose. No similar clause is found in any other amendment.[3] While states' rights theorists seize upon this first clause to the exclusion of the second, both clauses should be read *in pari materi*a, to give effect and harmonize both clauses, rather than construe them as being mutually exclusive.

The amendment reads "[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." Within the amendment are two distinct clauses, the first subordinate and the second independent. If the amendment consisted solely of its independent clause, "the right of the people to keep and bear Arms, shall not be infringed," then there would be no question whether the right is individual in nature.[4]

Collective rights theorists argue that addition of the subordinate clause qualifies the rest of the amendment by placing a limitation on the people's right to bear arms. However, if the amendment truly meant what collective rights advocates propose, then the text would read "[a] well regulated Militia, being necessary to the security of a free State, the right of the *States* to keep and bear Arms, shall not be infringed." However, that is not what the framers of the amendment drafted. The plain language of the amendment, without attenuate inferences therefrom, shows that the function of the subordinate clause was not to qualify the right, but instead to show why it must be protected. The right exists independent of the existence of the militia. If this right were not protected, the existence of the militia, and consequently the security of the state, would be jeopardized.[5]

The Supreme Court recently interpreted the text of the Second Amendment and noted that the phrase "the people" in the Second Amendment has the same meaning in both the Preamble to the Constitution and in the First, Fourth, Fifth, and Ninth Amendments.[6] The Court held that the phrase "the people" "seems to have been a term of art employed in select parts of the Constitution."

The Second Amendment protects "the right of the people to keep

and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people."

* * *

While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments,... refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.[7]

The Court has also held that given their contemporaneous proposal and passage, the amendments of the Bill of Rights should be read *in pari materia*, and amendments which contain similar language should be construed similarly.[8] The Court's construction of "the people" as used in the Second Amendment supports a holding that the right to keep and bear arms is a personal right retained by the people, as opposed to a collective right held by the States. Thus, a textual analysis of the Second Amendment clearly declares a substantive right to bear arms recognized in the people of the United States.

Historical Analysis

"[T]here is a long tradition of widespread lawful gun ownership by private individuals in this country."[9] A historical examination of the right to bear arms, from English antecedents to the drafting of the Second Amendment, bears proof that the right to bear arms has consistently been, and should still be, construed as an individual right.

English History

A review of English history explains the founders' intent in drafting the Second Amendment. As long ago as 690 A.D., Englishmen were required to possess arms and to serve in the military.[10] This obligation continued for centuries, requiring nobility, and later commoners, to keep arms and participate in the militia.[11] The obligation to keep arms was not simply to provide military service in the king's army; English citizens were also required to provide local police services, such as pursuing criminals and guarding their villages.[12]

By the middle of the seventeenth century, however, the sovereign jeopardized the individual right to bear arms. Charles II, and later James II, began to disarm many of their Protestant subjects.[13] James II was an unpopular king whose policies stirred great resentment among both the political and religious communities of England.[14] Eventually, James II fled England during what was later termed the Glorious Revolution.[15] In the aftermath of the Glorious Revolution, Parliament passed the English Bill of Rights in 1689, codifying the individual right to bear arms. The Bill of Rights provided that "the subjects which are Protestant may have arms for their defense suitable to their conditions and as allowed by law."[16]

The Colonial Right To Bear Arms

The American colonists exercised their right to bear arms under the English Bill of Rights. Indeed, the English government's success in luring Englishmen to America was due in part to pledges that the immigrants and their children would continue to possess "all the rights of natural subjects, as if born and abiding in England."[17] As in England, the colonial militia played primarily a defensive role, with armies of volunteers organized whenever a campaign was necessary.[18] Statutes in effect bore evidence of an individual right to bear arms during colonial times. For example, a 1640 Virginia statute required "all masters of families" to furnish themselves and "all those of their families which shall be capable of arms . . . with arms both offensive and defensive."[19] A 1631 Virginia law required "all men that are fittinge to beare armes, shall bring their pieces to church . . . for drill and target practice."[20] These laws served the twofold purpose of providing individual self-defense while giving England a reserve force available in time of war.[21]

Following the French and Indian War, England increased taxes and stationed a large army in the colonies. On April 3, 1769, the *Boston Evening Post* announced that colonial authorities urged the citizenry to take up arms. In reply to the claim that this request was unlawful, the newspaper observed that:

> It is certainly beyond human art and sophistry, to prove the British subjects, to whom the *privilege* of possessing arms as expressly recognized by the Bill of Rights, and who live in a province where the law requires them to be equipped with *arms*, are guilty of an *illegal act*, in calling upon one another to be provided with them, as the *law directs*.[22]

Shortly after the "Boston Tea Party," British soldiers, led by General Gage, attempted to disarm the colonists. The British Parliament banned all exports of muskets and ammunition to the colonies and began seizing the colonists' weapons and ammunition.[23] The British efforts to disarm the colonists hardened American resistance. At that point, the colonists began to form the "minutemen," a nationwide select militia organization.[24] In February 1775, a colonial militia prevented the British from seizing weapons at an armory in Salem, Massachusetts. Two months later,

the colonists defeated British troops at Concord.[25] Distinguished colonial leaders, such as George Washington and Samuel Adams, strongly influenced the organization of these local militias.[26]

The "militia" which won the Revolutionary War consisted of all who were treated as full citizens of the community. George Mason stated, "Who are the militia? They consist now of the whole people."[27] Similarly, the Federal Farmer referred to a "militia, when properly formed, [as] in fact the people themselves."[28]

The individual right to bear arms, a right recognized in both England and the colonies, was a crucial factor in the colonists' victory over the British army in the Revolutionary War. Without that individual right, the colonists never could have won the Revolutionary War. After declaring independence from England and establishing a new government through the Constitution, the American founders sought to codify the individual right to bear arms, as did their forebears one hundred years earlier in the English Bill of Rights.

The Ratification Debates

A foundation of American political thought during the Revolutionary period was the well justified concern about political corruption and governmental tyranny. Even the federalists, fending off their opponents who accused them of creating an oppressive regime, were careful to acknowledge the risks of tyranny. Against that backdrop, the framers saw the personal right to bear arms as a potential check against tyranny. Theodore Sedgwick of Massachusetts expressed this sentiment by declaring that it is "a chimerical idea to suppose that a country like this could ever be enslaved . . . Is it possible . . . that an army could be raised for the purpose of enslaving themselves or their brethren? or, if raised whether they could subdue a nation of freemen, who know how to prize liberty and who have arms in their hands?"[29] Noah Webster similarly argued:

> 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.[30]

Richard Henry Lee's view that a well regulated militia was the entire armed populace rather than a select body of men was reiterated by proponents to a bill of rights. As "M.T. Cicero" wrote to "The Citizens of America":

> Whenever, therefore, the profession of arms becomes a distinct order in the state . . . the end of the social compact is defeated. . . .
>
> No free government was ever founded, or ever preserved its liberty, without uniting the characters of the citizen and the soldier in those destined for the defence of the state. . . . Such are a well regulated militia, composed of the freeholders, citizen and husbandman, who take up arms to preserve their property, as individuals, and their rights as freemen.[31]

George Mason argued the importance of the militia and right to bear arms by reminding his compatriots of England's efforts "to disarm the people; that it was the best and most effectual way to enslave them . . . by totally disusing and neglecting the militia."[32] He also clarified that under prevailing practice the militia included all people, rich and poor. "Who are the militia? They consist now of the whole people, except a few public officers."[33] Because all were members of the militia, all enjoyed the right to individually bear arms to serve therein.

The framers thought the personal right to bear arms to be a paramount right by which other rights could be protected. Therefore, writing after the ratification of the Constitution, but before the election of the first Congress, James Monroe included "the right to keep and bear arms" in a list of basic "human rights" which he proposed to be added to the Constitution.[34]

The framers also saw an armed populace as the safeguard of religious liberty. Zachariah Johnson told the Virginia convention their liberties would be safe because

> the people are not to be disarmed of their weapons. They are left in full possession of them. The government is administered by the representatives of the people, voluntarily and freely chosen. Under these circumstances should anyone attempt to establish their own system [of religion], in prejudice of the rest, they would be universally detested and opposed, and easily frustrated. This is the principle which secures religious liberty most firmly. The government will depend on the assistance of the people in the day of distress.[35]

Patrick Henry, also in the Virginia convention, eloquently argued for the dual rights to arms and resistance to oppression: "Guard with jealous attention the public liberty. Suspect everyone who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are ruined."[36] Thus, the federalists agreed with Blackstone that an armed populace was the ultimate check on tyranny.[37]

While both Monroe and Adams supported ratification of the Constitution, its most influential framer was James Madison. In The Federalist No. 46, he confidently contrasted the federal government of the United States to the European despotisms which he contemptuously described as "afraid to trust the people with arms." He assured his fellow citizens that they need never fear their government because of "the advantage of being armed."[38] Many years later, Madison restated the sentiments of The Federalist No. 46 by declaring: "[A] government resting on a minority is an aristocracy, not a Republic, and could not be safe with a numerical and physical force against it, without a standing army, an enslaved press, and a disarmed populace."[39]

Although on the other side of the ratification debate, Anti-Federalist Patrick Henry was unequivocal on the individual right to bear arms. During the Virginia ratification convention, he objected to the Constitution's inclusion of clauses specifically authorizing a standing army and giving the federal government control of the militia. He also objected to the omission of a clause forbidding disarmament of the individual citizen: "The great object is that every man be armed. . . . [e]veryone who is able may have a gun."[40]

By January of 1788, Delaware, Pennsylvania, New Jersey, Georgia and Connecticut ratified the Constitution without insisting upon amendments. Several specific amendments were proposed, but were not adopted at the time the Constitution was ratified. The Pennsylvania convention, for example, debated fifteen amendments, one of which concerned the right of the people to be armed, another with the militia. The amendment on the right to bear arms read:

> That the people have a right to bear arms for the defence 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 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 power.[41]

The Massachusetts convention also ratified the Constitution with an attached list of proposed amendments. In the end, the ratification convention was so evenly divided between those for and against the Constitution that the federalists agreed to amendments to assure ratification.[42] Samuel Adams proposed that the Constitution

> [B]e 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 peaceable and orderly manner, the federal legislature, for a redress of their grievances: or to subject the people to unreasonable searches and seizures.[43]

Other states which had not yet ratified the Constitution followed the Maryland convention's practice of ratifying the Constitution while submitting proposed amendments. The New Hampshire convention, for example, adopted the nine Massachusetts amendments and added three others: one to limit standing armies, a second to ensure an individual right to bear arms, and a third to protect freedom of conscience.[44] The proposed amendment on freedom to bear arms read: "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion."[45]

Drafting the Second Amendment

When the first Congress convened on March 4, 1789, James Madison, who had previously advocated passage of the Constitution without amendments, now pressed his colleagues to act on a bill of rights.[46] When his initial efforts failed to produce any response, he drafted his own version of a bill of rights and presented them to members of Congress on June 8 of that year.[47] He explained to Jefferson that he deliberately drafted the amendments to be unexceptional and therefore likely to win approval.[48] His version of what would later be the second amendment read:

> The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.[49]

That Madison envisioned a personal right to bear arms, rather than merely a right for the states to organize militias, is evident from his desired placement of the right in the Constitution. Madison's original plan was to designate the amendments as inserts between specific sections of the existing Constitution, rather than as separate amendments added to the end of the document.[50] Madison did not designate the right to keep and bear arms as a limitation of the militia clause of Section 8 of Article I. Rather, he placed it as part of a group of provisions (with freedom of

speech and the press) to be inserted in "Article 1st, Section 9, between Clauses 3 and 4."[51] Such a designation would have placed this right immediately following the few individual rights protected in the original Constitution, dealing with the suspension of bills of attainder, habeas corpus, and ex post facto laws. Thus Madison aligned the right to bear arms along with the other individual rights of freedom of religion and the press, rather than with congressional power to regulate the militia.[52] This suggested placement of the Second Amendment reflected recognition of an individual right, rather than a right dependent upon the existence of the militia.

At that point, the Senate took up the Bill of Rights. Unfortunately, Senate debate on the issue was held in secret, and therefore no record exists of that body's deliberations.[53] The Senate form of the second amendment now described the militia not as "the best security" of a free state, but as "necessary to the security" of a free state, an even stronger endorsement than Madison's original description. The Senators also omitted the phrase describing the militia as "composed of the body of the people." Elbridge Gerry's fear that future Congresses might expand on the religious exemption clause evidently convinced the Senate to eliminate that clause as well.[54] Even more important, however, was the Senate's refusal of a motion to add "for the common defense" after the phrase "to keep and bear arms."[55] Thus the American Bill of Rights, like the English Bill of Rights, recognized the individual's right to have weapons for his own defense, rather than for collective defense. In this form, Congress approved the Second Amendment and sent the Bill of Rights to the state legislatures for ratification.[56]

In retrospect, the framers designed the Second Amendment to guarantee an individual's right to arms for self-defense. Such an individual right was the legacy of the English Bill of Rights. American colonial practice, the constitutional ratification debates, and state proposals over the amendment all bear this out. The American Second Amendment also expanded upon the English Bill of Rights' protection; while English law allowed weapons "suitable to a person's condition" "as allowed by law," the American right forbade any "infringement" upon the right of the people to keep and bear arms.[57]

In his influential *Commentaries on the Constitution*, Joseph Story emphasized the importance of the Second Amendment. He described the militia as the "natural defence of a free country" not only "against sudden foreign invasions" and "domestic insurrections," but also against "domestic usurpations of power by rulers." He went on to state that "[t]he right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."[58]

Structural Analysis

The structure of the Second Amendment within the Bill of Rights proves that the right to bear arms is an individual right, rather than a collective one. The collective rights' idea that the Second Amendment can only be viewed in terms of state or federal power "ignores the implication that might be drawn from the Second, Ninth, and Tenth Amendments: the citizenry itself can be viewed as an important third component of republican governance as far as it stands ready to defend republican liberty against the depredations of the other two structures, however futile that might appear as a practical matter."[59]

Furthermore, the very inclusion of the right to keep and bear arms in the Bill of Rights shows that the framers of the Constitution considered it an individual right. "After all, the Bill of Rights is not a bill of states' rights, but the bill of rights retained by the people."[60] Of the first ten amendments to the Constitution, only the Tenth concerns itself with the rights of the states, and refers to such rights in addition to, not instead of, individual rights.[61] Thus the structure of the Second Amendment, viewed in the context of the entire Bill of Rights, evinces an intent to recognize an individual right retained by the people.

Judicial Interpretations

The Court notes that several other federal courts have held that the Second Amendment does not establish an individual right to keep and bear arms, but rather a "collective" right, or a right held by the states.[62]

However, the only modern Second Amendment case from the Supreme Court is *United States v. Miller*.[63] Jack Miller was charged with moving a sawed-off shotgun in interstate commerce in violation of the National Firearms Act of 1934. Among other things, Miller had not registered the firearm, as required by the Act. The court below dismissed the charge, accepting Miller's argument that

the Act violated the Second Amendment.

The Supreme Court reversed unanimously, with Justice McReynolds writing the opinion. Interestingly enough, he emphasized that there was no evidence showing that a sawed-off shotgun "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia." And "[c]ertainly 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." Thus, Miller might have had a tenable argument had he been able to show that he was keeping or bearing a weapon that clearly had a potential military use. Justice McReynolds went on to describe the purpose of the Second Amendment as "assur[ing] the continuation and render[ing] possible the effectiveness of [the Militia]." He contrasted the Militia with troops of a standing army, which the Constitution indeed forbade the states to keep without the explicit consent of Congress. "The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion." McReynolds noted further that "the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators [all] [s]how plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense."[64]

It is difficult to interpret *Miller* as rendering the Second Amendment meaningless as a control on Congress. Ironically, one can read *Miller* as supporting some of the most extreme anti-gun control arguments; for example, that the individual citizen has a right to keep and bear bazookas, rocket launchers, and other armaments that are clearly used for modern warfare, including, of course, assault weapons. Under *Miller*, arguments about the constitutional legitimacy of a prohibition by Congress of private ownership of handguns or, what is much more likely, assault rifles, thus might turn on the usefulness of such guns in military settings.[65]

Miller did not answer the crucial question of whether the Second Amendment embodies an individual or collective right to bear arms. Although its holding has been used to justify many previous lower federal court rulings circumscribing Second Amendment rights, the Court in *Miller* simply chose a very narrow way to rule on the issue of gun possession under the Second Amendment, and left for another day further questions of Second Amendment construction. See Printz v. United States (1997).[66]

> This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment.[67] If, however, the Second Amendment is read to confer a personal right to "keep and bear arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections.[68]

Prudential Concerns

Some scholars have argued that even if the original intent of the Second Amendment was to provide an individual right to bear arms, modern-day prudential concerns about social costs outweigh such original intent and should govern current review of the amendment. However, there is a problem with such reasoning. If one accepts the plausibility of any of the arguments on behalf of a strong reading of the Second Amendment, but, nevertheless, rejects them in the name of social prudence and the present-day consequences of an individual right to bear arms, why do we not apply such consequentialist criteria to each and every part of the Bill of Rights?[69]

As Professor Ronald Dworkin has argued, what it means to take rights seriously is that one will honor them even when there is significant social cost in doing so. Protecting freedom of speech, the rights of criminal defendants, or any other part of the Bill of Rights has significant costs—criminals going free, oppressed groups having to hear viciously racist speech and so on—consequences which we take for granted in defending the Bill of Rights. This mind-set changes, however, when the Second Amendment is concerned. "Cost-benefit" analysis, rightly or wrongly, has become viewed as a "conservative" weapon to attack liberal rights. Yet the tables are strikingly turned when the Second Amendment comes into play. Here "conservatives" argue in effect that social costs are irrelevant and "liberals" argue for a notion of the "living Constitution" and "changed circumstances" that would have the practical consequence of erasing the Second Amendment from the Constitution.[70]

Other commentators, including Justice Scalia, have argued that even if there would be "few tears shed if and when the Second Amendment is held to guarantee nothing more than the state National Guard, this would simply show that the Founders were right when they feared that some future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights.

We may tolerate the abridgement of property rights and the elimination of a right to bear arms; but we should not pretend that these are not reductions of rights."[71]

In response to arguments propounded by Professor Laurence Tribe and others describing the Second Amendment as being simply "seemingly state-militia-based" rather than "supporting broad principles" of private ownership of guns, Justice Scalia pointed out that it is incorrect to assume that the word "militia" refers only to "'a select group of citizen-soldiers . . . rather than, as the Virginia Bill of Rights of June 1776 defined it, 'the body of the people, trained to arms."'[72]

Justice Scalia also notes that "[t]his was also the conception of 'militia' entertained by James Madison," citing The Federalist No. 46 for support.[73] "It would also be strange," he goes on to say, "to find in the midst of a catalog of the rights of individuals a provision securing to the states the right to maintain a designated 'Militia.' Dispassionate scholarship suggests quite strongly that the right of the people to keep and bear arms meant just that."[74]

Justice Scalia concludes by stating that "[i]t is very likely that modern Americans no longer look contemptuously, as Madison did, upon the governments of Europe that 'are afraid to trust the people with arms,' The Federalist No. 46; and the . . . Constitution that Professor Tribe espouses will probably give effect to that new sentiment by effectively eliminating the Second Amendment. But there is no need to deceive ourselves as to what the original Second Amendment said and meant. Of course, properly understood, it is no limitation upon arms control by the states."[75]

Thus, concerns about the social costs of enforcing the Second Amendment must be outweighed by considering the lengths to which the federal courts have gone to uphold other rights in the Constitution. The rights of the Second Amendment should be as zealously guarded as the other individual liberties enshrined in the Bill of Rights.

End Notes

1. David E. Johnson, Note, *Taking a Second Look at the Second Amendment and Modern Gun Control Law*s, 86 KY. L.J. 197, 198 (1997-98) (citing Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and* 5 *Dereliction of Dialogic Responsibilit*y, 75 B.U. L. Rev. 57 (1995)).

2. *Id.*(citing Glenn Harlan Reynolds, *A Critical Guide to the Second Amendmen*t, 62 Tenn. L. Rev. 461, 464-88 (1995); Robert Dowlut, *The Right to Keep and Bear Arms: A Right to Self-Defense Against Criminals and Despots*, 8 Stan. L. & Pol'y Rev. 25 (1997)).

3. Stanford Levinson, *The Embarrassing Second Amendmen*t, 99 Yale L.J. 637, 644 (1989).

4. David E. Johnson, Note, *Taking a Second Look at the Second Amendment and Modern Gun Control Law*s, 86 KY. L.J. 197, 200 (1997-98).

5. *Id.* at 200 & 201.

6. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

7. *See United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904).

8. *Patton v. United State*s, 281 U.S. 276, 298 (1930), *cited by* David Harmer, *Securing a Free State: Why the Second Amendment Matter*s, 1998 BYU L. Rev. 55, 61 (1998).

9. *Staples v. United State*s, 511 U.S. 600, 610 (1994).

10. David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment,* 9 Harv. J.L. & Pub. Pol'y 559, 562 (1986) (Citing 1 John J. Bagley & Peter B. Rowley, *A Documentary History Of England 1066-1540*, at 152 (1965)).

11. *Id.* at 563-65.

12. Clayton E. Cramer, *For the Defense of Themselves and the State: The Original Intent and Judicial Interpretation of the Right to Keep and Bear Arms* 24-25 (1994); Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 2 (1994).

13. Hardy, *supr*a, at 574-79.

14. David E. Murley, *Private Enforcement of the Social Contract: Deshaney and the Second Amendment Right to Own Firearm*s, 36 Duq. L. Rev. 15, 19 (1997).

15. Hardy, *supr*a, at 579.

16. *Id.* at 580 & 581.

17. Malcolm, *supr*a, at 138.

18. *Id.* at 139.

19. *Id.* (citing *The Old Dominion in the Seventeenth Century: A Documentary History of Virginia, 1606-168*9, at 172 (Warren M. Billings Ed., 1975).

20. Hardy, *supr*a, at 588 (quoting 1 *William W. Hening, The Statutes At Large: Being A Collection Of All The Laws Of Virginia From The First Session Of The Legislature In The Year 1619*, At 173-74 (Reprint. 1969) (1823).

21. Murley, *supr*a, at 20.

22. Hardy, *supr*a, at 589-90 (quoting Oliver M. Dickerson, *Boston under Military Rule* 61 (1936)).

23. Malcolm, *supr*a, at 144.

24. Hardy, *supra* aAt 890.

25. *Id.* at 591.

26. Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* 60-61 (1984).

27. Sanford Levinson, *The Embarrassing Second Amendmen*t, 99 Yale L.J. 637, 647(1989) (citing statement of George Mason (June 14, 1788), *in* 3 Jonathan Elliott, *Debates in the General State Conventions* 425 (3d Ed. 1937)).

28. *Id.* (quoting Richard Henry Lee, *Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention: Letters from the Federal Farmer to the Republican* 123 (Walter H. Bennett Ed., 1978)).

29. Malcolm, *supra* at 157 (citing 2 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 97 (2d ed. 1863)).

30. *Id.* (citing Noah Webster, *An Examination into the Leading Principles of the Federal Constitution (1787),* Reprinted in *Pamphlets on the Constitution of the United States, Published During Its Discussion by the People, 1787-1788*, at 56 (Paul L. Ford, ed. 1971) (1888)).

31. Halbrook, *supra* aAt 72 (citing *State Gazette* (Charleston), Sept. 8, 1788).

32. *Id.* At 74 (citing 3 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 380 (2d Ed. 1863)).

33. *Id.* (citing 3 Elliot At 425-26).

34. Halbrook, *supra* at 223 N. 145 (citing *James Monroe Papers*, New York Public Library (*Miscellaneous Pa*pers of James Monroe)).

35. Malcolm, *supra* at 157 (citing 3 Elliot 646)).

36. Halbrook, *supra* at 73 (citing 3 Elliot At 45).

37. Malcolm, *supra* at 157.

38. Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendmen*t, 82 Mich. L. Rev. 204, 228 (1983) (Quoting *The Federalist* No. 46, at 371 (James Madison) (John. C. Hamilton Ed., 1864)).

39. *Id.* (quoting Ralph L. Ketcham, *James Madison: A Biography* 64, 640 (1971)).

40. *Id.* At 229 (citing 3 J. Elliott, *supra*, at 45).

41. Malcolm, *supra* at 158 (citing *Pennsylvania and the Federal Constitution*, 1787-1788, At 422).

42. *Id.*

43. *Id.* (citing *Debates and Proceedings in the Convention of the Commonwealth of Massachusetts, Held in the Year 1788*, at 198-99 (Bradford Pierce and Charles Hale, Ed., 1856)).

44. *Id.*

45. *Id.* at 158-59 (citing 2 *Documentary History of the Constitution of the United States,* 1787-1870, at 143 (1894)).

46. Malcolm, *supra* at 159.

47. *Id.*

48. *Id.* (citing Ronald Rutland, *The Birth of the Bill of Rights* 209 (1991)).

49. Malcolm, *supra* at 159.

50. Hardy, *supra* at 609 (citing 1 *Annals Of Congress* 707-08 (Joseph Gales ed., 1789)).

51. *Id.* (quoting 5 *Documentary History of the Constitution of the United States of America* 186-87 (1905)).

52. *Id.*

53. Cramer, *supra* at 58 (Citing Helen Veit et al., *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* xix (1991)).

54. Malcolm, *supra* at 161.

55. *Id.* (citing Halbrook, *supra* at 81, n. 167).

56. *Id.*

57. *Id.* at 162.

58. 3 J. Story, *Commentaries* § 1890, p. 746 (1833).

59. Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 651 (1989).

60. David Harmer, *Securing a Free State: Why The Second Amendment Matter*s, 1998 BYU L. Rev. 55, 60 (1998).

61. *Id.*

62. *See, e.g., Hickman v. Bloc*k, 81 F.3d 98, 100-01 (9th Cir. 1996) (holding that plaintiff lacked standing to sue for denial of concealed weapons permit, because Second Amendment does not protect possession of weapon by private citizen; right to bear arms is held by the states); *Love v. Pepersac*k, 47 F.3d 120, 124 (4th Cir. 1995) (holding that Second Amendment does not confer absolute individual right); *United States v. Wari*n, 530 F.2d 103, 106-07 (6th Cir. 1976) (holding that Second Amendment guarantees a collective rather than an individual right; fact that an individual citizen, like all others, may enroll in state militia does not confer right to possess submachine gun); *Cases v. United State*s, 131 F.2d 916, 920-23 (1st Cir. 1942) (holding that federal government may limit the keeping and bearing of arms by a single individual); *Hamilton v. Accu-Te*k, 935 F. Supp. 1307, 1318 (E.D.N.Y. 1996) (holding that Second Amendment right to bear arms establishes a collective rather than an individual or private right).

63. *United States v. Mille*r, 307 U.S. 174 (1939).

64. *Id.* at 178 and 179.

65. Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 654-55 (1989).

66. See *Printz v. United States,* 521 U.S. 898, 937-38 & n.1, 2 (1997) (Thomas, J., concurring).

67. "Our most recent treatment of the Second Amendment occurred in United States v. Miller, 307 U.S. 174 (1939), in which we reversed the District Court's invalidation of the National Firearms Act, enacted in 1934. In Miller, we determined that the Second Amendment did not guarantee a citizen's right to possess a sawed-off shotgun because that weapon had not been shown to be 'ordinary military equipment' that could 'contribute to the common defense.' Id., at 178. The Court did not, however, attempt to define, or otherwise construe, the substantive right protected by the Second Amendment."

68. "Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right. See, e.g., J. Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 162 (1994); S. Halbrook, *That Every Man Be Armed, The Evolution of a Constitutional Right* (1984); Van Alstyne, *The Second Amendment and the Personal Right to Arms,* 43 Duke L.J. 1236 (1994); Amar, *The Bill of Rights and the Fourteenth Amendment,* 101 Yale L.J. 1193 (1992); Control & Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309 (1991); Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989); Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204 (1983). Other scholars, however, argue that the Second Amendment does not secure a personal right to keep or bear arms. See, *e.g.*, Bogus, *Race, Riots, and Guns,* 66 S. Cal. L. Rev. 1365 (1993); Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 Yale L.J. 551 (1991); Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 Yale L.J. 661 (1989); Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. of Am. Hist. 22 (1984). Although somewhat overlooked in our jurisprudence, the Amendment has certainly engendered considerable academic, as well as public, debate."

69. Levinson, *supra* at 658.

70. Levinson, *supra* at 657-58.

71. Sanford Levinson, *Is the Second Amendment Finally Becoming Recognized As Part of the Constitution? Voices from the Court*s, 1998 BYU L. Rev. 127, 132 (1998) (quoting Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A Matter of Interpretation: Federal Courts and the Law* 3, 43 (Amy Gutmann, ed. 1997).

72. Antonin Scalia, Response, in *A Matter of Interpretatio*n, *supra* at 129, 136 n.13 (quoting Joyce Lee Malcolm, *To Keep And Bear Arms* 136, 148 (1994)).

73. *Id.*

74. *Id.* at 137 n.13 (citing Joyce Lee Malcolm, *To Keep and Bear Arms* (1994); William Van Alstyne, *The Second Amendment and the Personal Right to Arms,* 43 Duke L.J. 1236 (1994)).

75. *Id*

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