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The Right To Bear Arms in Texas:

The Intent of the Framers of the Bills of Rights

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This is part of a series of studies on the original understanding of the right to bear arms in the state bills of rights. See Halbrook, The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts, 10 **Vt. L. Rev**. 20 (1985).

(continued...)

"The right to bear arms is essential to freedom. For it is the policy of governments to disarm the people, that they may have the opportunity to oppress them."

--Robert Emmett Bledsoe Baylor, 1845

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I. **Introduction**

As Texas ends the sesquicentennial celebration of its first bill of rights and as the nation observes the bicentennial of the federal Bill of Rights, "the right of the people to keep and bear arms" still guaranteed in each is perhaps the most

controversial and least understood enumerated right. Indeed, bearing arms is probably the only "right" that is often treated as a criminal offense.

In its 1989 session, the Texas legislature rejected bills that would ban the mere possession of many conventional rifles and pistols, as well as a bill that would legalize carrying handguns by providing for a permit.[1] Bills to ban firearms recently have been introduced or enacted in other states, and the United States Congress is considering legislation to ban various rifles, pistols, and shotguns.

The public debate over the issue of firearms prohibition is incomplete without a thorough understanding of constitutional limitations. In the words of James P. Hart, "As the historic conditions that first inspired bills of rights recede further into the dim past, the danger increases that guarantees of

personal liberties will not be fully appreciated . . . . No more serious responsibility rests upon the legal profession than the preservation of the bill of rights, which embodies the essence of free government."[2]

While the original language of Article I, Section 23 of the Texas Constitution provided for no legislative power to regulate the right, today's provision contains language almost identical to that enacted in 1836: "Every citizen shall have the right to keep and bear arms in the lawful defence 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." The federal second amendment provides somewhat different wording: "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."

The U.S. Supreme Court has never determined whether the fourteenth amendment incorporates the second amendment so as to limit the state or local prohibition of rifles, pistols, or shotguns.[3] In recent times, the Supreme Court has retreated from earlier stances which favored civil liberties over police action, while many state courts have protected such liberties by the rediscovery of and increased reliance on the state bills of rights.[4] Notwithstanding this recent trend, a Texas legal scholar prophetically stated thirty years ago:

> It has become almost a fixed attitude of mind to look only to the United States Constitution and ultimately to the Supreme Court of the United States, for protection against unreasonable state statutes affecting the citizens of that state. For those who would halt, or at least slow down, the expansion of

> federal power and who would revitalize state governments, the careful drafting of a state bill of rights to include all liberties which should be guaranteed against state action (even if they may also be protected by the fourteenth amendment) offers a major challenge. If the states cannot protect their citizens' fundamental liberties, or are careless about such protection, then obviously the basic, fundamental vitality of state governments is immeasurably weakened.[5]

The arms guarantee was expressed in different versions of the Texas Constitutions of 1836, 1845, 1869, and 1876. The constitutions of these dates coincide with milestones in Texas legal and political history: the founding of the republic, statehood, Reconstruction, and the return to majority rule. The

fate of the right to bear arms in that forty year period reflects the kind of epic that has made Texas famous.

Tracing the constitutional development of the right to bear arms in the period 1836-1876 serves a useful purpose aside from constructing another colorful sesquicentennial tale to amuse Texans and other Americans alike. A fundamental method of constitutional interpretation is to rely on the intent of the framers and the common understanding of the people.[6] The arms guarantee in the current Texas Bill of Rights was adopted in 1876 and has remained unchanged to this day. Further, the intent of those who adopted the 1876 Constitution must be determined in the context of events which began when Santa Anna tried to disarm the Texans in 1835, sparking the Revolution.

Despite its stereotype of being a state where cowboys promiscuously tote six-shooters, Texas is one of the few states

that absolutely prohibits the bearing of pistols by private individuals.[7] The only off-premises exception is for travelers, who may bear arms for self-defense, as the constitution allows, either openly or concealed.[8] The only other exception is for hunters and other sportsmen, who bear arms for recreation and not for self-protection.[9]

By contrast, most states either allow arms to be carried openly in public and/or require permits to carry concealed arms. The Southern and Western states generally allow arms to be borne openly but require permits for carrying concealed arms off one's premises.[10] The Northern states generally require permits or licenses to bear arms either openly or concealed.[11] Vermont is unique in allowing weapons to be carried hidden from view without a permit.[12] Unlike Texas, even the reputedly most restrictive jurisdictions such as Massachusetts, New York City,

and Washington, D.C. provide for the issuance of permits to carry a firearm for self-protection.[13]

The Texas courts have in several opinions sought to reconcile the general statutory prohibition of bearing arms for self-defense with the constitutional right to bear arms for defense of self and state. These courts, as well as the United States Supreme Court, have commented on the status of statutory prohibitions under the second amendment to the Federal Constitution. While this article concentrates on the meaning of the right to bear arms under the pertinent state constitutions adopted between 1836 and 1876, the central involvement of Texas in second and fourteenth amendment jurisprudence warrants analysis of the state prohibition on bearing arms under the Federal Constitution.

II. **Every Citizen Shall Have the Right:**

From the Revolution to Secession

A. "It Has Demanded Us to Deliver Up Our Arms": Texians Revolt Against Santa Anna's Dictatorship

In 1827, Noah Smithwick left Kentucky for Texas "with all [his] . . . worldly possessions, consisting of a few dollars in money, a change of clothes, and a gun, of course . . . ."[14] At one point in some Texas wilderness he lost his property and found himself "weak, unarmed, not even a pocket knife."[15] Meeting a wild animal, he "felt around for a good sized club. . . . Thus armed, I started on."[16]

Firearms, knives, and blunt implements have evolved technologically, but remain the primary types of arms possessed for self-protection. Austin's colony was occasionally raided by Indians, but an early visitor noted that "traveling with arms is

thought safe."[17] "We had left our guns at San Felipe, . . . but we had our pistols with us, and our new companion went better armed with his rifle."[18] Besides protection, rifles and pistols were used for hunting and in shooting matches.[19]

The right to keep and bear arms was both a republican principle, brought by the Anglos from the United States, and a practical necessity for the early settlers. The independence of Texas became inevitable when Mexican authorities attempted to deprive the settlers of this right.

In 1835, the government of Santa Anna sought to make its rule absolute through the spread of military garrisons, declarations of martial law, and attempts to disarm the inhabitants of the Mexican states. Santa Anna's puppet congress passed a law providing for the replacement of the local militias by his standing army. Stephen F. Austin explained: "This

'reform' reduced the militia of the States to one militia-man for every five hundred inhabitants, and disarmed all the rest. The people of Zacatecas resisted this iniquitous law, but were unfortunate, and compelled, for the time being, to submit to the military power of the reformers."[20]

After smashing republicanism in Zacatecas, Santa Anna turned his attention to Texas. At a time when Texans were hoping that freedom would not be destroyed in Mexico, Samuel Houston (after becoming Commander-in-Chief of the Army of Texas) wrote:

> the Dictator required the surrender of the arms of the civic militia, that he might be enabled to establish, on the ruins of the Constitution, a system of policy which would forever enslave the people of Mexico. Zacatecas, unwilling to yield her sovereign rights to the demand, which struck at the root of all liberty,

refused to disarm her citizens of their private arms. Ill-fated State! her power, as well as her wealth, aroused the ambition of Santa Anna, and excited his cupidity. Her citizens became the first victims of his cruelty, while her wealth was sacrificed in payment for the butchery of her citizens. The success of the usurper determined him in exacting from the people of Texas submission to the Central form of Government; and, to enforce his plan of despotism, he despatched a military force to invade the Colonies, and exact the arms of the inhabitants. The citizens refused the demand, and the invading force was increased. The question then was, shall we resist oppression and live free, or violate our oaths, and wear a despot's stripes?[21]

Specifically, in September 1835 Santa Anna sent his brother-in-law, General Martin Perfecto de Cos, to Texas to confiscate the inhabitants' arms and to arrest Santa Anna's political opponents. Referring to the causes of the Texian Revolution, Rev. C. Newell observed:

> The next and last of the leading causes alluded to, was an order received from Gen. Cos in the course of the month of September, requiring the citizens of Brazoria, Columbia, Velasco, and other places, to deliver up their arms to the Mexican authorities: thus attempting to carry out in Texas the plan adopted by Santa Anna, and put in execution in many parts of Mexico, of disarming those whom he suspected of being disaffected to his Government. This . . . showed the people of Texas what sort of government they were to

expect--that of the bayonet, and the entire sway of military.[22]

The Texians responded by preparing for armed resistance. One Mexican captain proclaimed to the citizens of Anahuae: "The General Congress have passed a law ordering every state to disband their militia and I here find that in defiance of the Government you are organizing and arming yourselves and have forcibly seized upon the arms of the Mexican nation."[23] The Brazoria Texas Republican urged its readers to make contributions for the purchase of arms.[24] Stephen Austin called for "a great immigration from Kentucky, Tennessee, etc., each man with his rifle . . . ."[25]

The "Lexington" of the Texas Revolution was sparked at Gonzales, where the Mexicans tried to seize a small cannon the settlers used to scare away Indians.[26] "That one old bushed

cannon was our only artillery, and our only arms were Bowie knives and long single-barreled, muzzle-loading flintlock rifles, the same that our forefathers won their independence with," recalled Smithwick.[27] A "few of us had pistols."[28] The Texians raised a flag which stated "Come and Take It," some shots were fired, and the Mexicans retreated.[29]

Elated by this victory, Texians were urged to collect at Gonzalez "armed and equipped for war even to the knife."[30] Meanwhile the Austin Telegraph warned that near the mouth of the Brazos Mexican troops were landing, "under the command of general Cos with the declared intention of 'disarming the people,' erecting a military government, and confiscating the property of the rebellious . . . ."[31] The newspapers began comparing Santa Anna to George III, and reprinted such documents as the Declaration of Causes of Taking up Arms of July 6, 1775,

including the complaint that General Gage agreed to allow the people of besieged Boston to leave town only after they "deposited their arms with their own magistrates."

> They accordingly delivered up their arms; but in open violation of honour, in defiance of the obligation of treaties, which even savage nations esteemed sacred, the Governour ordered the arms deposited as aforesaid, that they might be preserved for their owners, to be seized by a body of soldiers; detained the greatest part of the inhabitants in the town, and compelled the few who were permitted to retire, to leave their most valuable effects behind.[32]

Like the Americans in 1775 who demanded their English common-law rights, the Texians of 1835 demanded their rights under the liberal Mexican Constitution of 1824. These rights

could be protected only by an armed populace. Sam Houston, commander of the Texan citizens army, "urged the North Americans: "Let each man come with a good rifle and one hundred rounds of ammunition--and . . . come soon. Our war cry is 'LIBERTY OR DEATH!!'"[33]

Many hoped that resistance by other Mexican states would overthrow Santa Anna. The Telegraph reported:

> The state of Puebla, with the governor at its head, has refused to publish the law of centralism [decreed on Oct. 3, 1835]; and by last accounts, it appears that the citizens were arming en masse to defend their liberties and rights.
>
> The state of Morelia . . . has protested, in the strongest terms, against a change of system, were arming their "milicia civica," and had a respectable

body of liberal troops in the southern part of the state, prepared for the field.[34]

While Santa Anna snuffed out these Mexican rebellions, the Texian volunteers captured General Cos and his army at San Antonio de Bexar on December 10, 1835. Despite lenient treatment and parole of the captives, including Cos, the Mexican military's response was that "all foreigners . . . who enter [Mexico] armed and for the purpose of attacking our territory shall be treated and punished as pirates. . . . Foreigners who introduce arms and ammunition" into Texas would also be executed.[35] Soon Santa Anna included legal settlers "in the sweeping decree of 'death to every man taken in arms.'"[36]

Like their ancestors of 1776, the Texians realized in 1836 that only independence would suffice. A convention met beginning March 1 at Washington-on-the-Brazos. Its delegates

included former members of the United States Congress and framers of southern state constitutions.[37]

George C. Childress, a lawyer and former editor of the Nashville Banner who in the United States had raised funds and volunteers for the Texas army, was appointed chairman of a committee of five to draft a Declaration of Independence.[38] On March 2 Childress drafted and reported the Declaration, which the convention adopted the same day.[39] The Declaration charged of Santa Anna's government: "It has demanded us to deliver up our arms, which are essential to our defence--the rightful property of freemen--and formidable only to tyrannical government."[40]

On March 9, delegate Palmer, chairman of the committee to draft a constitution, reported a Declaration of Rights which the convention adopted the same day.[41] Article 14 declared: "Every

citizen shall have the right to bear arms in defence of himself and the republic."[42] The same convention had already required able-bodied males to provide their own arms for militia service.[43]

Unknown to the convention, the Alamo fell just before the Declaration of Rights was adopted. Jim Bowie with his famous knife, Davy Crockett with his long rifle "Old Betsy," William Travis with sword and pistols, and 180 other armed patriots withstood two weeks of seige by Santa Anna's forces only to be overrun and killed on March 6.

Rifles and shotguns with short barrels, large and small pistols, swords and knives, tomahawks, and similar arms used by the Texans at the Alamo[44] and declared as constitutionally protected arms in 1836 are currently illegal to bear in Texas. With the exception of long barrelled rifles and shotguns, it is

today a crime to bear or, in come cases, even to keep these arms.[45] At some point in Texas' weapons-control history, "Remember Santa Anna" replaced "Remember the Alamo!"[46]

The type of knife named after James Bowie, a founding father of Texas who died at the Alamo, is today an "illegal knife."[47] Yet the Bowie knife was generally used as the main eating implement, to cut limbs from trees, and to skin and butcher game.[48] An early settler in Texas, Bowie led the Texas volunteers at the Battles of Concepcion, the Grass Fight, San Antonio, and the Alamo.[49] In their final victory at San Jacinto, the Texans "used rifles and rifle butts, pistols and finally their Bowie knives."[50]

The self-armed civilians who defeated Mexico's professional standing army used all kinds of weapons. Kentucky rifles, muskets, carbines, short barrelled shoulder firearms, large

holster pistols, pocket pistols, shotgun fowling pieces, the blunderbuss, tomahawks, swords, and butcher knives were the commonly possessed arms which won Texan independence.[51] Like the United States sixty years before, the Republic of Texas was created by an armed citizenry unwilling to permit government to trammel their fundamental rights.

B. The Constitutional Convention of 1845

Just as Santa Anna's troops were storming the Alamo, Samuel Colt was granted a patent for his revolving pistol.[52] Before long, the Colt revolver became known as "the Texas Arm" as it was widely used first in Texas.[53]

Colts became standard arms in wars with the Indians and Mexicans.[54] Captain Samuel Walker of the Texas Rangers worked with Samuel Colt in improving the revolver's design.[55] According to an account of the Rangers written in the 1840s, "each man was

armed with a rifle, a pistol, and a knife."[56]

Texas civilians probably acquired more Colt revolvers than the private citizens of any other antebellum state. The large Dragoon Colt, equipped with an attachable shoulder stock, was a popular revolver which converted into a short barrel rifle.[57] The Walker-Colt model "was used successfully for frontier defense against Indians and outlaws. . . . Standard side-arm for the Rangers, the six-shooter was also useful to mounted cattlemen . . . . The revolver is credited, along with the windmill and the barbed wire fence, as being a prime factor in the opening of the plains area to settlement."[58]

In 1845, a convention assembled at Austin to frame a new constitution in anticipation of the admission of the Republic of Texas into the United States. The convention considered several bill of rights proposals recognizing the right to keep and bear

arms, and ended by adopting the strongest version proposed for this right.

Judge William B. Ochiltree[59] began the debate by proposing "that the free citizens of this state shall have a right to keep and bear arms for their common defense, provided that the Legislature shall have the right to pass laws prohibiting the carrying of deadly weapons secretly."[60] The following discussion ensued:

> Mr. Evans objected that this would give the right to carry bowie knives.
>
> Mr. Hogg inquired whether it would secure the right of taking deadly weapons about the person?
>
> Mr. Ochiltree said: He was as much opposed to that as any body. How shall it be remedied? The legislature has the right to say, they shall not be

carried secretly. But certainly he was not to be prevented from carrying them if he thought it necessary. If this is not inserted, there is no telling how far the legislature, in their extreme philanthropy may go. They may go the extent of saying, that a man shall not wear them under any circumstances. He might be compelled to allow himself to be assassinated, or his property to be invaded, by being denied the use of necessary weapons. We might be placed in the condition of the people of Ireland, and a large portion of England, who are denied the right of having firearms about their houses. One of the first principles of freedom, is the right to bear arms. It is true, it may have been prostituted to the worst of purposes; but it is too great a right to deny

on that account. Such cases always attend the settlement of new countries; and public opinion will reform the abuse after a while. Under a similar provision, precisely, the legislature of Alabama has proscribed the carrying of weapons secretly, and the supreme tribunals have decided that it is not an infraction of the Constitution."[61]

The case referred to was State v. Reid,[62] in which the Alabama Supreme Court found a prohibition on carrying concealed weapons compatible with the right to bear arms. That court added: "A statute which, under the pretence of regulating, amounts to a destruction of the right, or requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional."[63]

Mention of the Alabama precedent by Judge Ochiltree (who had

studied law in that state) prompted the following response:

> Mr. Baylor fully agreed with the gentleman, that the right to bear arms is essential to freedom. For it is the policy of governments to disarm the people, that they may have the opportunity to oppress them. This great right ought to be guaranteed; but it is subject to great abuse. The gentleman has correctly stated the decision of the Supreme Court of Alabama. But there is a conflict upon this subject. The Supreme Court of Kentucky decided, in a similar case, that the legislature could not pass any law upon the subject. For if it had the right to proscribe one mode of wearing arms, it had the right to proscribe another, and thus it might finally defeat the great end and object.[64]

In Bliss v. Commonwealth,[65] the Kentucky Supreme Court declared a prohibition on carrying a concealed sword cane or other weapon to be violative of the right to bear arms for defense of self and state.

> The right existed at the adoption of the constitution; it had then no limits short of the moral power of the citizens to exercise it, and in fact consisted in nothing else but in the liberty of the citizens to bear arms. Diminish that liberty, therefore, and you necessarily restrain the right; and such is the diminution, and restraint, which the act in question most indisputably imports, by prohibiting the citizens wearing weapons in a manner which was lawful to wear when the constitution was adopted.[66]

As delegate Robert E.B. Baylor pointed out in the Texas

convention, the Kentucky court reasoned that if concealed arms could be banned, so could openly carried weapons, a result inconsistent with the right to bear arms.[67] Baylor had been admitted to the Kentucky bar, and served in the Kentucky and Alabama legislatures and the U.S. Congress before coming to Texas, where he became a Justice of the Texas Supreme Court and founded Baylor University.[68]

After Baylor's remarks, John Hemphill stated:

> The object of inserting a declaration that the people shall have a right to bear arms is, that they may be well armed for the public defence; it is in order that the law regulating the militia should be kept up. It is not a supposition which can arise in a country where the common law prevails, that it is necessary to bear arms for protection against a citizen.[69]

Hemphill then offered a substitute for Ochiltree's amendment worded after the federal second amendment: "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."[70]

The Hempell substitute, which the convention then adopted, was understood to guarantee an individual right to bear arms in order to support militia readiness. War with Mexico was known to be imminent due to the expected annexation of Texas by the United States. Mr. Mayfield, a supporter of the Hempell substitute,[71] had stated just before debate on the arms guarantee began: "We may individually and collectively be called upon, perhaps in a short time, to burnish our arms, and march to the defence of our country from an invading foe."[72]

The Convention was cognizant that, consistent with the

ruling of the Kentucky Supreme Court explained by Mr. Baylor, the language of the federal second amendment proposed by Hempell contained no authorization for the legislature to prohibit individuals from carrying weapons concealed. Accordingly, Joseph L. Hogg moved for, and the convention adopted, the following amendment: "Provided, that the Legislature may pass laws to suppress the practice of bearing arms concealed, in the private walks of life."[73]

In what must have been further intense debate which went unrecorded, the convention took a sharp turn in favor of the right to bear arms for individual self-protection and against a legislative power to prohibit the bearing of concealed arms. Mr. Armstrong offered a substitute for the Hemphill-Hogg language which had passed:

> "Every citizen shall have a right to bear arms in

the lawful defence of himself and the state." Adopted.

Mr. Hemphill moved to amend the additional section, by inserting before the word "bear," "keep and." Adopted.

Mr. Everts offered the following amendment:

"Provided the Legislature shall have power to prevent the carrying of concealed weapons, under such restrictions as may be prescribed." Rejected.[74]

Thus, in its final form, Article I, Section 13 of the Texas Constitution of 1845 provided: "Every citizen shall have the right to keep and bear arms in the lawful defence of himself and the State." The vote was 33 in favor and 18 opposed.[75] Delegates voting favorably included the proponent Armstrong, who had voted against any restriction on carrying concealed arms; Baylor, who had informed the convention of the Kentucky precedent holding

that concealed weapons could not be prohibited; and Ochiltree, proponent of the original provision, who said that without an arms guarantee, the legislature "may go to the extent of saying, that a man shall not wear them under any circumstances."[76]

Those voting against the arms guarantee included Evans, who "objected that this would give the right to carry bowie knives"; Hemphill, who did not think it necessary to bear arms for protection against other citizens, but who still supported the individual right to keep and bear arms; and Hogg, author of an ultimately defeated concealed carrying prohibition.[77]

Thus, constitutional convention of 1845 established that in Texas, the right to keep and bear arms was considered to be absolute. Bowie knives and Colt pistols could be worn, openly or concealed, without legislative infringement.

C. Justice Oran M. Roberts and the

"Absolute" Right to Bear Arms

Antebellum Texas was remarkably unlike most other Southern states, but resembled the Northeastern states, in its lack of infringement of the right to keep and bear arms.[78] No one in Texas, regardless of race, was denied the right to possess or carry arms in any manner. At a time when slaves in most states were legally disarmed, there was no such law in Texas, and whites, Mexicans, and blacks could wear concealed arms.

The Texas code as of 1859 shows that only the misuse of weapons was punishable. Apparently the legislature recognized that it had no power to regulate even concealed weapons since the constitutional convention of 1845 defeated proposals to authorize such a power. Duelling was prohibited.[79] The slave code contains no arms regulations, but the homicide provisions provided that it was permissible to kill a slave only "[w]hen a

slave uses weapons calculated to produce death, in any case other than those in which he may lawfully resist with arms."[80]

An act passed in 1856 doubled the punishment for assault with intent to murder if a "bowie-knife or dagger" was used,[81] and also provided:

> Article 610. If any person be killed with a bowie-knife or dagger, under circumstances which would otherwise render the homicide a case of manslaughter, the killing shall nevertheless be deemed murder, and punished accordingly.
>
> Article 611. A "bowie-knife" or "dagger," as the terms are here and elsewhere used, means any knife intended to be worn on the person, which is capable of inflicting death, and not commonly known as a pocket knife.[82]

The above definitions were far broader than the terms normally signify, and would include sheath knives such as those used for hunting and fishing.[83] The clear legislative intent was to discourage unlawful stabbings with large knives.

The enactment was challenged in Cockrum v. State as violative of the arms guarantees in the federal second amendment and Section 13 of the Texas Bill of Rights.[84] In an opinion by Justice Oran M. Roberts, the Supreme Court defined the purpose of the two constitutional provisions as follows:

> The object of the clause first cited, has reference to the perpetuation of free government, and is based on the idea, that the people cannot be effectually oppressed and enslaved, who are not first disarmed. The clause cited in our bill of rights, has the same broad object in relation to the government,

> and in addition thereto, secures a personal right to the citizen. The right of a citizen to bear arms, in the lawful defense of himself or the state, is absolute. He does not derive it from the state government, but directly from the sovereign convention of the people that framed the state government. It is one of the "high powers" delegated directly to the citizen, and "is excepted out of the general powers of government." A law cannot be passed to infringe upon or impair it, because it is above the law, and independent of the law-making power.[85]

Of course, the right to bear arms implied no right to misuse them, and Cockrum had been convicted of murdering someone who accused him of horse theft.[86] The statute provided that manslaughter, if committed with a bowie knife or dagger, would

be considered murder. Cockrum's attorney argued that this law was unconstitutional under both the federal and state constitutions as overbroad and in violation of equal rights. By banning cheap, ordinary weapons such as large knives, the legislature had effectively denied the right to bear arms to persons too poor to afford firearms.[87]

The Texas Supreme Court did not dispute that the poor had as much a right to bear arms as the rich. However, it held that a homicide committed with a deadly weapon could be punished more harshly to deter abuse of the right to bear arms:

> The right to carry a bowie-knife for lawful defense is secured, and must be admitted. It is an exceeding destructive weapon. It is difficult to defend against it, by any degree of bravery, or any amount of skill. The gun or pistol may miss its aim,

and when discharged, its dangerous character is lost, or diminished at least. The sword may be parried. With these weapons men fight for the sake of the combat, to satisfy the laws of honor, not necessarily with the intention to kill, or with a certainty of killing when the intention exists. The bowie-knife differs from these in its device and design; it is the instrument of almost certain death. He who carries such a weapon, for lawful defense, as he may, makes himself more dangerous to the rights of others, considering the frailties of human nature, than if he carried a less dangerous weapon . . . . May the state not say, through its law, to the citizen, 'this right which you exercise, is very liable to be dangerous to the rights of others, you must school

your mind to forbear the abuse of your right, by yielding to sudden passion; to secure this necessary schooling of your mind, an increased penalty must be affixed to the abuse of this right, so dangerous to others.'[88]

The status of the bowie knife as a constitutionally protected arm, which Cockrum noted was in common use,[89] could hardly be denied. Its originator, James Bowie, had died at the Alamo defending Texas liberty with his famous knife. Yet murder was hardly encompassed in the "absolute right" to keep and bear arms.

Two years after he authored the Cockrum decision, Justice Roberts found himself elected president of the convention that passed Texas' Ordinance of Secession in early 1861.[90] The convention delegates included Joseph L. Hogg and Judge William

B. Ochiltree,[91] who had debated the arms guarantee at the constitutional convention of 1845. All of the above persons became high Confederate officers, although Oran M. Roberts shortly returned to the bench to become Chief Justice of Texas. As they had done against Mexico, Texans now prepared to bear arms against the Northern foe.

The Texas forces were composed of largely self-armed citizens. As Oran Roberts noted of their first battle: "The Texans fought for the most part with shotguns and rifles that they had brought from their homes, but they fought with the old Texas spirit during four or five hours, when a glorious victory was achieved by the Confederate forces."[92] General Hogg's brigade "embraced some of the flower of the youth of Texas and Arkansas who, filled with enthusiastic devotion, hastened to arm themselves for the defense of their respective States."[93] The

Texans were known for their double-barreled shotguns and Colt six shooters.[94]

Governor Edward Clark reported to the Texas legislature in November 1861 that it was necessary to calculate the number of private arms in Texas, in light of the chance of invasion and the lack of state arms.[95] The citizens reported only 40,000 largely obsolete arms, most arms not being disclosed because the people feared confiscation.[96] Texans were willing to bear their own arms in defense of the state, but not to surrender these arms to the state. The legislature purchased and eventually contracted for the manufacture of rifles and pistols after the Colt patterns.[97]

Despite laws in most Southern states against them carrying arms, armed blacks and slaves served in the Confederate forces.[98] No such laws existed in Texas, although in October 1864 a bill

to prevent slaves from carrying arms was referred to committee in the Texas Senate.[99] At that time Confederates who favored independence over slavery were advocating the arming and emancipation of slaves, at least one state (Virginia) was about to repeal its prohibition on slaves carrying arms, and troops from Texas and other states met and adopted resolutions in favor of the official use of blacks as soldiers.[100]

Through the end of the War Between the States, the right to bear arms in Texas remained, as Justice Roberts had stated, "absolute." In the chaos that followed, Texas' first gun control laws were born.

III. **Arms, Freedmen, and Reconstruction**

A. The Freedmen Disarmed, the Fourteenth Amendment Rejected

The constitutional convention which met at Austin in March-April of 1866 reenacted the arms provision of 1845 verbatim:

"Every citizen shall have the right to keep and bear arms in the lawful defence of himself or the State."[101] A key issue was whether the freed slaves would be entitled to all of the rights of citizenship, at a time when the federal fourteenth amendment was working its way through Congress.

Republicans held that blacks were already entitled to all rights of citizenship, including an individual right under the second amendment to keep and bear arms for self-defense. The fourteenth amendment was promoted by Republicans to end any dispute about the matter.[102] A report of the Republican minority in the Texas legislature in support of black suffrage states:

> These fundamental principles of American liberty constitute the basis of the Bill of Rights, which, under various modifications, pervade all our constitutional charters. . .

> . [T]he framers of the Federal Constitution were careful to confide all power to the people, and to provide for the protection of the whole people. To illustrate this, it is only necessary to refer to the constitution itself. . .
>
> "ART. 2. A well regulated militia being necessary to the success [sic] of a free state, the right of the people keep and bear arm shall not be infringed." . . .[103]
>
> Those who were lately slaves . . . are now freemen, entitled to the rights and privileges of American citizens.[104]

Congress adopted the fourteenth amendment in 1866 and issued its Report of the Joint Committee on Reconstruction. The widely

published report influenced the state ratification process and figured in the 1866 election campaign.[105] It emphasized the need to adopt the fourteenth amendment to ensure freedmen the liberties included in the federal Bill of Rights.

Testimony reprinted in the report detailed "tyrannical provisions to prevent the negroes from leaving the plantation without a written pass from the proprietor; forbidding them . . . to have firearms in their possession, even for proper purposes."[106] General Rufus Saxon informed the committee that in the South whites were "seizing all fire-arms found in the hands of the freedmen. Such conduct is in clear and direct violation of their personal rights as guaranteed by the Constitution of the United States, which declares that 'the right of the people to keep and bear arms shall not be infringed.'"[107]

Influenced by the partisan feeling of war's aftermath,

witnesses who testified in March and April 1866 described in vivid terms the arms culture of Texas and the extent to which freedmen participated in it. Brigadier General W. E. Strong surveyed the condition of freedmen by visiting portions of Texas with cavalry troops armed with Spencer repeating carbines. He noted that "nearly every man we met with in travelling was armed with a knife, seven-shooter, and double-barrelled shot-gun."[108]

Major General David S. Stanley led Northern troops to Texas at the end of the war and described conditions after the surrender:

> Question. State what you know as to returned rebels having arms.
>
> Answer. I can say . . . that every one of them has either a six-shooter or a musket. They keep the muskets hid, but every man down there travelling

through the country has a six-shooter. They never turned in their arms, they concealed them.[109]

No one suggested that ex-Confederates be disarmed, but strong sentiments were expressed over abuses committed by state agents who were disarming freedmen. Lieutenant Colonel H. S. Hall, an official with the Freedmen's Bureau, told how Governor Hamilton authorized armed patrols to suppress an alleged negro insurrection.

> Under pretense of the authority given them, they passed about through the settlements where negroes were living, disarmed them--took everything in the shape of arms from them--and frequently robbed them of money, household furniture, and anything that they could make of any use to themselves. Complaints of this kind were very often brought to my notice by the

negroes from counties too far away for me to reach.[110]

A contrasting view was presented by New York Times correspondent Benjamin C. Truman, who had just returned from the Texas constitutional convention of 1866 at Austin. Truman found Texas to be the most progressive and tolerant of freedman's rights of the several southern states he visited.[111] He noted that "[t]he convention passed an ordinance giving the negroes all the civil rights, and it passed by a very large majority."[112]

The above civil rights apparently included bearing arms, for unlike other Southern states, Texas did not pass a black code provision disarming freedmen. T. J. Mackay, an ex-Confederate who assisted in the surrender of arms to the Northern army,[113] stated that "a majority of [the freedmen] are armed, and entitled to bear arms under the existing laws of the southern States."[114]

The Texas legislature considered and rejected adoption of the fourteenth amendment in October 1866. The report of the Senate Committee on Federal Relations admitted that the Negro had no right of suffrage, but noted, "our Constitution guarantees to the negro every other right of citizenship."[115] This clearly included the right to keep and bear arms.

On the other hand, the House report suggested that section 1 of the fourteenth amendment would make negroes "entitled to all the privileges and immunities of white citizens; in these privileges would be embraced the exercise of suffrage at the polls, participation in jury duty in all cases, [and] bearing arms in the militia . . . ."[116] The militia laws in Texas at that time, according to a congressman, "authorize anybody and everybody . . . to organize a militia hostile to the Government . . . ."[117] Thus, the Senate committee did not object to blacks

keeping and bearing arms and exercising other rights of citizenship aside from voting. The House committee, however, rejected the fourteenth amendment because it was perceived as protecting from state infringement privileges such as bearing arms and associating into militia companies.

On November 6, 1866, the Texas legislature passed its first gun control measure, which was also the closest Texas came to adopting a black code provision to disarm freedmen. The act declared that "it shall not be lawful for any person or persons to carry fire-arms on the enclosed premises or plantation of any citizen, without the consent of the owner or proprietor," subject to a fine of one to ten dollars and imprisonment of one to ten days.[118] This meant that sharecroppers who still lived on plantations could keep firearms in their homes but could not carry them outside for any purpose other than civil or military

duties.

Southern Democrats were opposed to blacks bearing arms in militias which could be manipulated by radical Republicans to seize power.[119] In the period of fall 1866 through summer 1867, carpetbaggers descended upon the South. Following orders from Washington, D.C., General Phil Sheridan deposed Texas governor Throckmorton and installed E. M. Pease.[120] Sheridan, according to a partisan account, "under the inspiration of an incendiary press and the [Union] Leagues, was permitting the Texas negroes to run amuck with guns and knives."[121] In the wake of this military autocracy, a constitutional convention was called.[122]

B. The Reconstruction Convention of 1868

The convention which met at Austin between June and December 1868 was called pursuant to reconstruction acts of Congress

requiring Southern states to ratify the fourteenth amendment and to adopt new constitutions consistent with that amendment.[123] The convention proceedings reflected the Republican view that the fourteenth amendment would protect the right of all, including freedmen, to keep and bear arms.

The Report of the Attorney General of Texas for 1867, appended to the convention journal, contains an analysis of what it called "Pretended Laws of 1866 against the Freedmen":

> The main object kept in view by . . . those who devised the pretended laws . . . was the restoration of African slavery, in the modified form of peonage.
>
> Ch. 80, p. 76--The so-called labor law.--It provides expressly for a system of peonage, without using that term. . . . It is directly opposed to the Thirteenth Amendment of the Constitution of the United

States, and of the Civil Rights Act. . . .

Ch. 92, p. 90--Makes the carrying of fire-arms on enclosed land, without consent of the land-owner, an offence. It was meant to operate against freedmen alone, and hence is subject to the same objections. . . .

Joint Resolution No. 13, p. 166--The refusal to ratify the fourteenth proposed amendment to the constitution of the United States. As the first section of this amendment guarantees freedmen their civil rights as citizens of the United States and of the States in which they reside, the rejection of the amendment . . . is subject to the further objection of being a rejection of a condition precedent since imposed by the military reconstruction act.[124]

A related opinion of the Attorney General circulated at the convention concerned the supremacy of the federal constitution and the state's obligations under the Military Reconstruction Act. It stated that the gun control and vagrancy laws amounted to a "cunningly devised system, planned to prevent equality before the law, and for the restoration of African slavery in a modified form, in fact, though not in name."[125]

Even though the freedmen were "generally as well armed as the whites,"[126] a convention committee reported, "bands of armed whites are traversing the country, forcibly robbing the freedmen of their arms, and committing other outrages upon them."[127] Radical ally Gen. J. J. Reynolds reported to Washington, D.C., that Ku Klux Klan organizations sought "to disarm, rob, and in many cases murder Union men and negroes . . . . "[128] A resolution predicted that the law-abiding "will be compelled, in

the exercise of the sacred right of self defense, to organize for their own protection."[129]

Talk in the convention about adopting "every safeguard contemplated by the Fourteenth Amendment to the Constitution of the United States"[130] led to suggestions for amendments modeled after the federal Bill of Rights. Delegate Fayle proposed adoption of the following:

> A well regulated militia being necessary to the safety of a free State, every citizen shall have the right to keep and bear arms for the common defence. Nevertheless this article shall not be construed as giving any countenance to the evil practice of carrying private or concealed weapons about the person; but the Legislative and municipal authorities within this State are fully authorized to make such

laws and ordinances as shall tend to abolish a practice so prolific of strife and bloodshed.[131]

While not adopted, this version suggests that the convention meant to regulate the manner of bearing arms rather than to prohibit them per se. An enabling act was proposed to empower city councils to prevent the carrying of concealed weapons.[132]

Amusingly, the convention initiated such restrictions within its own walls by passing the following resolution:

> WHEREAS, The custom of carrying concealed weapons is openly indulged by spectators and others who visit this Convention, in the lobbies and elsewhere; therefore be it
>
> Resolved, That the Convention do order that no person shall hereafter be allowed in this hall, who carries belted on his person, revolvers or other

deadly weapons.[133]

The Sergeant at Arms was ordered to enforce this ban on carrying "concealed" weapons which was "openly" indulged in.[134]

Adhering to the theme that the state constitution must be in accord with the fourteenth amendment, which in turn incorporated the federal Bill of Rights, the Committee on General Provisions proposed:

> The inhibitions of power enunciated in articles from one to eight inclusive, and thirteen, of the amendments to the Constitution of the United States, deny to the States, as well as to the General Government, the exercise of the powers therein reserved to the people, and shall never be exercised by the government of this State.[135]

Radical leader Morgan C. Hamilton, the committee chairman,

explained this provision as follows:

> It will be observed that section 3 embodies the substance of ten of the sections in the Bill of Rights in the Constitution of 1845, it being the opinion of your Committee that the inhibitions enumerated in the said ten sections are fully covered by the nine articles mentioned as amendments to the Constitution of the United States, thus dispensing with a long string of sections which are deemed useless.[136]

The committee's report is highly significant in several respects. First, it reaffirms the understanding that the federal second amendment protected individual rights, for it "embodies the substance" of the guarantee in the 1845 Texas Constitution that "every citizen shall have the right to keep and bear arms in the lawful defence of himself or the State."[137]

Secondly, the report clearly recognizes that the fourteenth amendment, which the proposed state bill of rights was precisely fashioned to emulate, made "articles from one to eight inclusive . . . of the amendments to the Constitution of the United States" applicable to the states.[138] Thirdly, failure to adopt the proposed new bill of rights signified no rejection of its principles because the 1845 provisions guaranteed the same protection as the federal Bill of Rights.

Instead of adopting the committee's version, the convention adopted a modified version of the old Texas Bill of Rights. A clause was added to the arms guarantee so that it stated: "Every person shall have the right to keep and bear arms in the lawful defense of himself or the state, under such regulations as the legislature may prescribe."[139]

Under the new version, "person" replaced "citizen"--an

expansion of the protected class which would include blacks in the event any lingering doubts existed about their citizenship. The granting of legislative power to regulate the bearing of arms meant that the right was no longer "absolute,"[140] but still its exercise could not be prohibited. The intent was to authorize the legislature to ban carrying concealed weapons, but not to ban the bearing of arms in any fashion.

Texas ratified the fourteenth amendment on February 18, 1870, and Congress determined that the new Texas Constitution was consistent with the fourteenth amendment. An act of March 30, 1870, readmitted Texas to the Union.

C. "The People Have Been Disarmed Throughout the State"

The elections of 1869 were characterized by massive fraud and force. Gen. Reynolds relinquished military authority to the new governor, E.J. Davis, who assumed extraordinary powers to

make arrests, suspend the writ of habeas corpus, and declare martial law. Legislators who opposed his policies were arrested so that Radicals could obtain majorities to pass their bills.[141] state police force was organized which promoted "official murder and legalized oppression."[142]

"An Act Regulating the Right to Keep and Bear Arms," approved on August 13, 1870, made it illegal for one to "have about his person a bowie-knife, dirk or butcher-knife, or fire-arms, whether known as a six-shooter, gun or pistol of any kind" at any church or religious assembly, school, ball room "or other social gathering composed of ladies and gentlemen," or election precinct.[143] The act was fairly limited, although its effect on cooks with butcher knives at social gatherings is unclear.

The far more draconian statute was passed on April 12, 1871, entitled "An Act to regulate the keeping and bearing of deadly

weapons."[144] For the first time, Texas prohibited the bearing of all arms other than rifles and shotguns at any place off of one's premises. Today's statute derives from the 1871 act passed by the Reconstruction legislature.

Section 1 of the act provided in part:

> Any person carrying on or about his person, saddle, or in his saddle-bags, any pistol, dirk, dagger, slung-shot, swordcane, spear, brass knuckles, bowie knife, or any other kind of knife, manufactured or sold, for the purpose of offense or defense, unless he has reasonable grounds for fearing an unlawful attack on his person, and that such ground of attack shall be immediate and pressing; or unless having or carrying the same on or about his person for the lawful defense of the State, as a militiaman in actual

> service, or as a peace officer or policeman, shall be guilty of a misdemeanor . . . . Provided, That this section shall not be so construed as to prohibit any person from keeping or having arms on his or her own premises, or at his or her own place of business, nor to prohibit sheriffs or revenue officers, and other civil officers, from keeping or having arms, while engaged in the discharge of their official duties, nor to prohibit persons traveling in the State from keeping or carrying arms with their baggage. . . .[145]

Punishment for a first offense was a fine of not less than $25 nor more than $100 and forfeiture of the weapon. A subsequent offense was punishable by a maximum of sixty days in jail.

The act was one of a series of controversial measures passed

by the Reconstruction legislature in 1871, a year in which Republicans were consolidating their political power over disenfranchised ex-Confederates. A taxpayers' convention in Austin undertook to investigate general grievances of the people. The Report of the Subcommittee on Violations of [the] Constitution and Laws, chaired by W.M. Walton, was submitted on September 25, 1871 to Senator A.J. Hamilton, Chairman of the General Committee. It complained that the arms act and other acts rendered the majority helpless in the grasp of a military dictatorship:

> 17. The people have been disarmed throughout the State, notwithstanding their constitutional right "to keep and bear arms." (Constitution, section 13, article 1. Laws 1871, p. 75.)

The police and State guards are armed, and lord it

over the land, while the citizen dare not, under heavy pain and penalties, bear arms to defend himself, unless he has reasonable grounds for fearing an unlawful attack on his person, and that such grounds of attack shall be immediate and pressing. The citizen is at the mercy of the policeman and the men of the State Guard, and that too, when these bodies of men embrace in them some of the most lawless and abandoned men in the State, many of whom are adventurers--strangers to the soil--discharged or pardoned criminals . . . .

18. The election order . . . forbids the assembling of the people on the days of election; it prohibits free speech; it is the unlawful will of the executive, enforced by him through the power of an

> armed police upon an unarmed people; it is the will of a despot and the act of tyrant overriding the supreme law of the land. . . .
>
> 19. By orders executed through his armed bodies of police, the executive has taken control of peaceable assemblies of the people . . . and there suppressed free speech under threats of arrest and subjection to punishment as criminals.[146]

The grievances were reprinted in the minority report of the U.S. Congress' Joint Select Committee on the Condition of Affairs in the Late Insurrectionary States. The report noted that Governor E. J. Davis placed armed police at all voting places for the Congressional election in October 1871, and observed, "[t]he effect of putting such a military force in possession of the ballot box, with the citizens disarmed, is

easily seen . . . ."[147]

Governor E. J. Davis appointed the members of the Texas Supreme Court, which in English v. State[148] sustained the validity of the prohibition on bearing arms. True to the Radical orthodoxy of the time, the court took an expansive view of the federal second amendment and interpreted the state arms guarantee in light of the federal provision.

Consistent with the antebellum judicial view[149] and with the position of Republicans in both Texas and the United States Congress,[150] English held that the second amendment prohibited both state and federal infringement of the right to keep and bear arms. The opinion by Justice Walker relied on the following words from a well recognized criminal law treatise by Joel P. Bishop:

> The constitution of the United States provides

that "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." This provision is found among the amendments; and, though most of the amendments are restrictions on the general government alone, not on the states, this one seems to be of a nature to bind both the state and national legislatures, and doubtless it does.[151]

Applying literally Bishop's statement that the second amendment "protects only the right to 'keep' such 'arms' as are used for purposes of war,"[152] the court explained:

The word "arms" in the connection we find it in the constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense. The arms of the infantry soldier

> are the musket and bayonet; of cavalry and dragoons, the sabre, holster pistols and carbine; of the artillery, the field piece, siege gun, and mortar, with side arms.
>
> The terms dirks, daggers, slingshots, sword-canes, brass-knuckles and bowie knifes, belong to no military vocabulary. Were a soldier on duty found with any of these things about his person, he would be punished for an offense against discipline.[153]

The upholding of the statute under the above reasoning is somewhat contradictory, since "the deadly weapons spoken of in the statute are pistols,"[154] which the court recognized as militia arms. Moreover, dirks, daggers, and bowie knives were widely used by Texas soldiers in the wars of 1835-1836 and 1861-1865, and these edged weapons have been routinely used in

every American war.[155] It is interesting that by applying a literal military test, the court sanctioned the keeping by private persons of field pieces, siege guns, and mortars.

Quoting the Texas Bill of Rights provision, the court found the term "arms" to mean the same as used in the federal second amendment.[156] The court did not address whether militia arms would sometimes differ from arms used "in the lawful defense of himself" instead of the state. "Our constitution, however, confers upon the legislature the power to regulate the privilege. The legislature may regulate it without taking it away . . . ."[157] Yet the fact remains that the act did not regulate how arms may be borne, but prohibited bearing them for self-defense and other lawful purposes.

The defendants in English were not sympathetic figures--one had carried a pistol while intoxicated, and another was armed

with a butcher knife in a religious assembly.[158] Yet hunters were also prosecuted under the act.[159] Further, the court's references to "a class of our own people" and "the customs and habits of the people" as being in conflict with "intelligent and well-meaning legislators"[160] symbolizes the reconstruction's mission of civilizing purportedly backward Southerners, who were deemed unfit to vote or bear arms. A product of military occupation, the reconstruction court's decisions would not be considered binding precedents in later years.[161]

IV. **The Power to Regulate But Not Prohibit:**

The Right To Bear Arms After Reconstruction

A. Such Arms as Are Commonly Kept: The Duke Standard For Protected Arms

The 1871 disarming law and the other grievances expressed in the taxpayer convention proceedings became the basis for

Democratic election campaigns. The report which outlined these grievances became one of the party platform documents.[162] When the newly enfranchised Democrats won the legislature in 1872, they repealed most of the obnoxious acts but for some reason retained the ban on bearing arms. In the 1873 elections, the Democrats defeated Governor Davis, although armed citizens had to take over the capitol when Davis tried to keep office by armed force.[163]

A new supreme court was formed with Oran M. Roberts, who in 1859 had considered the right to bear arms to be absolute, as its Chief Justice. Surprisingly, the new court upheld the validity of the disarming act passed by the reconstruction legislature in 1871. As a practical matter, those in power could selectively enforce this act against political opponents or selected ethnic groups.

In State v. Duke,[164] the Texas Supreme Court in an opinion by Justice Gould, repudiated the English holding and concluded that the federal second amendment did not limit state action, but that the arms protected by the state guarantee were not restricted to militia arms. The decision reflects a Democratic rejection of federal interference, with increased tolerance for the kinds of arms recognized as protected under state law.

Duke's conclusion that the second amendment and other federal Bill of Rights provisions limited the United States but not the individual states was based on the United States Supreme Court's restrictive views in the Slaughterhouse cases and similar precedents.[165] Ignoring the intent of the framers of the fourteenth amendment to incorporate the Bill of Rights, the Supreme Court took a narrow view of the privileges and

immunities of citizens in its post-Reconstruction opinions.[166] Of course, Duke did not consider whether the second amendment applied to the states through the fourteenth amendment.[167]

Duke remains the leading Texas authority on the arms right, even though it construed the no-longer-valid 1869 guarantee recognizing the right to bear arms "under such regulations as the Legislature may prescribe." After quoting this provision, Justice Gould stated that the court acquiesced in the English decision, "but do not adopt the opinion expressed that the word 'arms,' in the Bill of Rights, refers only to the arms of a militiaman or soldier. Similar clauses in the Constitutions of other States have generally been construed by the courts as using the word arms in a more comprehensive sense."[168] The court proceeded to cite cases holding a sword cane, a pistol, and a bowie knife to be constitutionally protected arms.[169]

The court went on to formulate a test which appears to combine common-law concepts with a nineteenth century southern gentleman's code:

> There is no recital of the necessity of a well-regulated militia, as there is in the corresponding clause in the Constitution of the United States. The arms which every person is secured the right to keep and bear (in the defense of himself or the State, subject to legislative regulation), must be such arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense, as well as such as are proper for the defense of the State. If this does not include the double-barreled shot-gun, the huntsman's rifle, and such pistols at least as are not adapted to being

carried concealed, then the only arms which the great mass of the people of the State have, are not under constitutional protection. But, beyond question, the dragoon or holster pistol is part of the arms of a soldier in that branch of the service.[170]

The reference to "such arms as are commonly kept, according to the customs of the people" is clearly rooted in English common law.[171] The notion that the arms be "appropriate for open and manly use in self-defense" originated in the code of honor of the antebellum southern gentleman.[172] Like the code duello, this test does not anticipate womanly use of arms (such as smaller pistols) for self-defense.

Duke proceeded to uphold the constitutionality of the act because "[i]t undertakes to regulate the place where, and the circumstances under which, a pistol may be carried; and in doing

so, it appears to have respected the right to carry a pistol openly when needed for self-defense or in the public service, and the right to have one at the home or place of business."[173] Actually, having a pistol at home or place of business would be protected by the right to "keep" arms. The right to "bear" arms was effectively taken away by the act.[174]

It is somewhat surprising that the new court would uphold the unpopular reconstruction measure. The chief justice of the Duke court was Oran M. Roberts, author of the 1859 Cockrum opinion which held the right to bear arms to be "absolute." Yet under the reconstruction constitution bearing arms was recognized to be a right only "under such regulations as the Legislature may proscribe."[175] It remained for the constitutional convention of 1875 drastically to curtail this legislative power.

B. The Constitutional Convention of 1875

In September of 1875 delegates assembled in Austin to formulate a new constitution. These delegates had participated in previous conventions, one even in the 1845 convention, but not one member had taken part in the 1868 convention.[176] Tired of corruption and military rule, "the delegates to the Constitutional Convention of 1875 determined to include in the state's basic instrument as many safeguards as possible to prevent the recurrence of such widespread and flagrant abuse of power."[177] The constitution they drafted greatly reduced the powers of the legislature and has been described as "an antigovernment instrument."[178]

According to Seth Shepard McKay's definitive study, in raising the demand for a convention, "the arguments most used were that the old constitution apparently had permitted the so-

called 'obnoxious acts' of the Davis administration."[179] Governor Richard Coke stated in an early 1874 message: "It is admitted . . . that the Constitution of Texas must be extensively and radically amended . . . ."[180] "As McKay further notes, "the experiences with the 'obnoxious acts' passed by the Twelfth Legislature caused restriction of the power of the legislative branch of government. More than one-half of the fifty-eight sections of the article finally agreed upon dealt with restrictions and limitations of the power of the legislature."[181]

The Bill of Rights Committee, chaired by W.L. Crawford,[182] reported an arms guarantee which would become Article I, Section 23 of the constitution of 1876: "Every citizen shall have the right to keep and bear arms in the lawful defence 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."[183]

The convention journal reflects the following attempt to amend this provision:

> Mr. [W.P.] Ballinger offered the following amendment:
>
> Section 23, line 105, next before the word "regulate" insert "prohibit and."
>
> On motion of Mr. Nugent, laid on the table.[184]

T.L. Nugent, maker of the motion to kill the amendment,

was a member of the Bill of Rights Committee,[185] which had crafted the language of the guarantee very carefully. The record of convention debates provides more detail concerning the above action:

> Judge Ballinger moved to insert before the word "regulate," the words "prohibit and," in Section 23.

It has reference to the bearing of arms.

Mr. [John Henry] Brown said that, after what he had seen in the last fifteen years, he would not prohibit the bearing of arms, but would leave it with the Legislature to regulate.

Mr. [Jacob] Waelder said he thought it led to more crime than any other cause did.

The amendment was tabled.[186]

The arms guarantee in its original form passed along with the rest of the Bill of Rights by a vote of 69 to 9.[187] A linguistic analysis comparing the new language with that of the 1869 Constitution demonstrates that the legislative power was drastically curtailed.

Initially, the sentence structure was changed. The 1869 provision asserted the right to keep and bear arms only "under

such regulations as the legislature may prescribe." Keeping and bearing arms was contingent on legislative regulations. "The 1875 Convention changed this to the more specific and limited qualification in the present Section 23, which gives the legislature power to regulate 'the wearing of arms.'"[188] The new language asserted the right in an absolute form without making it contingent on legislative regulation, subject only to the power of the legislature to regulate how arms are worn.

Secondly, the new guarantee deleted any legislative power to regulate the keeping of arms. The possession, ownership, transportation, or other forms of "keeping" arms, particularly on one's premises or while travelling, were intended to be beyond the parameters of legislative control.

Thirdly, the "bearing" of arms could no longer be generally regulated but only the "wearing" of arms could. To "bear" arms

means to carry or move while holding or wearing readily accessible arms on or about one's person. To "wear" means more narrowly to have attached to one's body or part of it or to one's clothing.[189] Thus, the bearing of arms would include both wearing them as well as carrying them in other manners, such as in the hand, in saddle bags, or on a vehicle seat. Thus, the convention did not give the legislature power to regulate the "bearing" of arms, but instead chose a different word so as to allow regulation only of the "wearing" of arms. By allowing regulation of how arms are worn, citizens could be required to carry them openly and not concealed.

Fourthly, the legislature could regulate, but not prohibit, the wearing of arms. The convention's rejection of a power to prohibit the wearing of arms again affirms that the legislature might prohibit carrying concealed weapons, but could not

prohibit carrying them openly. Texans were long since aware of the rule that "a statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them useless for the purpose of defence, would be clearly unconstitutional."[190]

Finally, the power to regulate the wearing of arms was made contingent on the regulation being "with a view to prevent crime." The wearing of arms could not be regulated for purposes other than to prevent crime. Wearing arms concealed for necessary self-defense, particularly in emergencies, or while hunting during inclement weather could be beyond legislative regulation because the conduct is manifestly not criminal. Moreover, a statute regulating the wearing of arms which demonstrably does not prevent crime could be beyond the legislative power to enact.[191]

Under the 1876 guarantee, the legislature (but not a locality) could regulate how arms were to be worn, i.e., openly or concealed, but could not bar the wearing of weapons per se. It was intended to repeal the broad legislative power in the 1869 Constitution and in particular the unpopular 1871 act which prohibited the bearing of arms anywhere but on one's premises.[192] The 1871 act was used to disarm and oppress the people and to set up a police state.[193]

The address of the convention to the people promised that the language of the new Bill of Rights protected the citizen's liberties "by every safeguard known to constitutional law."[194] The constitution was submitted to a popular vote and ratified in early 1876.[195] Those who thought that the new guarantee would restore the right to bear arms in Texas were in for a rude awakening.

When the Constitution of 1876 became effective, the courts began to render opinions on the 1871 Act which continued to rely on the Duke precedent and failed to mention what effect the new arms guarantee had on the act.[196] One such case, Lewis v. State (1877), contains the following seemingly contradictory sentences: "The statute prohibits all persons, except those exempted from its penalties therein, from carrying a pistol, or the other weapons named, either on or about his person, or saddle, or in his saddle-bags. . . . The statute is not intended to prevent keeping and bearing arms, but merely to regulate the manner in which they are to be carried and used."[197] It is unclear how a walker or a horseman could bear a pistol any other way than the prohibited way.

Despite such contradictory analysis, the constitutional right to "keep" a pistol, even one carried in violation of the

1871 Act, was recognized as absolute and beyond the legislative power to regulate. Jennings v. State held:

> We believe that portion of the act which provides that, in case of conviction, the defendant shall forfeit to the county the weapon or weapons so found on or about his person is not within the scope of legislative authority. The Legislature has the power by law to regulate the wearing of arms, with a view to prevent crime, but it has not the power to enact a law the violation of which will work a forfeiture of defendant's arms. While it has the power to regulate the wearing of arms, it has not the power by legislation to take a citizen's arms away from him. One of his most sacred rights is that of having arms for his own defense and that of the State. This right

is one of the surest safeguards of liberty and self-preservation.[198]

Since the ratification of the arms guarantee in the constitution of 1876, the 1871 act, which continues in effect, has never been successfully challenged in a published judicial opinion. The cases usually follow the Duke precedent and uphold the prohibition. None of these opinions mention the debates in the constitutional conventions which framed the guarantee of the right to keep and bear arms. Indeed, analysis of the intent of the framers of the successive arms guarantees appears to be printed here for the first time since the convention debates and journals were originally published in the nineteenth century.

V. **The Federal And State Courts Construe Texas Firearms Prohibitions**

A. Does the Fourteenth Amendment Incorporate the Second

Amendment? The Enigma of Miller v. Texas (1894)

The right to keep and bear arms is one of the federal Bill of Rights provisions which applied to the states, according to the English precedent. Coinciding with the U.S. Supreme Court's narrow interpretation of the fourteenth amendment, the Duke court held that the second amendment does not limit state action.

Yet neither English nor Duke raised the issue of whether the second amendment applies to the states through the fourteenth amendment. These holdings were concerned only with whether the second amendment applied directly to the states.

Ironically, the only mention by the United States Supreme Court of the right to keep and bear arms before the fourteenth amendment was passed found the right to be protected from any infringement. In the Dred Scott decision, Chief Justice Taney

wrote that citizenship "would give to persons of the negro race . . . the full liberty of speech . . . and [the right] to keep and carry arms wherever they went."[199] The stated purpose of the fourteenth amendment was to nullify this decision denying citizenship to blacks and to guarantee them all the rights of citizenship.[200]

In United States v. Cruikshank,[201] the United States Supreme Court stated that the federally recognized rights of peaceable assembly and bearing arms did not limit state action. This was dictum, since the case involved the disruption of a meeting and the disarming and murder of freedmen by private persons.[202] Again, in Presser v. Illinois,[203] the Court repeated that the first and second amendments did not apply to the states and upheld a conviction for leading a march of four hundred armed workers in Chicago. This too was dictum, since the Court

held that bans on armed parades in cities "do not infringe on the right of the people to keep and bear arms."[204]

Like the Texas high court in English and Duke, the United States Supreme Court has never considered whether the second amendment applies to the states through the fourteenth amendment. The Supreme Court confirmed that it had never addressed this issue in Miller v. Texas (1894),[205] which remains the last word on the subject from the Court.

Convicted of murder and sentenced to death, defendant Miller attacked the 1871 Reconstruction Act prohibiting the bearing of pistols as violative of the second, fourth, and fourteenth amendments. However, he asserted these arguments for the first time in a motion for rehearing after his conviction had been affirmed by the Court of Criminal Appeals of Texas.[206] The defendant made no constitutional objections in his original

assignment of error to the Court of Criminal Appeals:

> In his motion for a rehearing, however, defendant claimed that the law of the State of Texas forbidding the carrying of weapons, and authorizing the arrest without warrant of any person violating such law, under which certain questions arose upon the trial of the case, was in conflict with the Second and Fourth Amendments to the Constitution of the United States, one of which provides that the right of the people to keep and bear arms shall not be infringed, and the other of which protects the people against unreasonable searches and seizures. We have examined the record in vain, however, to find where the defendant was denied the benefit of any of these provisions, and even if he were, it is well settled

that the restrictions of these amendments operate only upon the Federal power, and have no reference whatever to proceedings in state courts.[207]

The Supreme Court then turned to the claim that the Texas statute violated the above rights as incorporated in the fourteenth amendment. The court would not hear objections not made in a timely fashion:

> And if the Fourteenth Amendment limited the power of the States as to such rights, as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court. . . . A privilege or immunity under the Constitution of the United States cannot be set up here . . . when suggested for the first time in a petition for rehearing after judgment.[208]

Rather than reject incorporation of the second and fourth amendments into the fourteenth, the Supreme Court merely refused to decide the defendant's claim because its powers of adjudication were limited to the review of errors timely objected to in the trial court. The careful distinction drawn by the Miller Court between rights based solely on provisions in the Bill of Rights and those based on the fourteenth amendment, and the Court's reliance on Cruikshank, demonstrates that neither of these cases dealt with the issue of whether the fourteenth amendment prohibits the states from infringing on the right to keep and bear arms. The court merely left open the possibility that the right to keep and bear arms and freedom from warrantless arrests or unreasonable seizures would apply to the states through the fourteenth amendment.

In 1897, just three years after Miller v. Texas was

decided, the Supreme Court determined that the fourteenth amendment incorporated the right to compensation for property taken by the state as guaranteed in the fifth amendment.[209] Simultaneously, in Robertson v. Baldwin, the Court stated:

> The law is perfectly well settled that the first ten Amendments to the constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if

> they had been formally expressed. Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons . . . .[210]

While the above case concerned the thirteenth and not the fourteenth amendment, its language suggests that the right to bear arms would be infringed by a law absolutely prohibiting the carrying of weapons either openly or concealed. If so, the second amendment, if incorporated into the fourteenth amendment, may be inconsistent with the Texas prohibition on bearing open or concealed arms.

From the 1920s through the present, the Supreme Court has held the fourteenth amendment to protect free speech, freedom from unreasonable search and seizure, the right to counsel, freedom from self-incrimination, warnings before confession, speedy trial, compulsory process, jury trial, absence of double jeopardy, and so on.[211] In a case involving a ban on handguns in the home in 1983, the court declined to hear and decide whether the right to keep arms is incorporated in the fourteenth amendment.[212] Following the logic of previous cases, the Supreme Court could apply the second amendment to the states directly through the due process or the privileges and immunities clauses of the fourteenth amendment. It could also adopt a broader "penumbra" theory to guard the right to keep and bear arms from state infringement.[213] Under this theory, unenumerated rights protected by the ninth amendment could be defined, in part, by

reference to the objectives of the other amendments--the first (privacy), the second (security and a free state), the third (protection of home), the fourth (protection of house and person), the fifth (protection of life, liberty, and property), and the tenth ("powers" reserved to the people).

The reluctance to incorporate the second amendment into the fourteenth may stem from the uncertainty of whether the right to bear arms is a private, individual right or a collective, militia power. The framers of the second amendment held that it was both of those.[214] Presumably, at some point the Supreme Court will address whether the fourteenth amendment protects a personal right to keep and bear arms.

B. Judicially Created Exceptions

The reconstruction ban on carrying pistols and certain knives and blunt instruments has remained on the books to the

present, and has been upheld by every court to consider the issue. The intent of the framers of the current constitutional guarantee as adopted in 1876 has never been alluded to in these opinions. Instead, the courts have relied mostly on precedents, particularly Duke, which was decided in 1875 and construed a much weaker arms guarantee than the current one.[215]

Felons have traditionally been subject to disabilities, including the forfeiture of the right to possess firearms or vote in many jurisdictions. Texas liberally prohibits only the carrying of concealable firearms off of the felon's premises. The right of a convicted burglar "to arm himself in self-defense, as secured to him by Art. 1, Section 23 . . . is in no way infringed . . . because appellant might have armed himself with any other weapon not prohibited in the article."[216]

The precedents uphold the constitutionality of prohibitions

on carrying certain arms because Article I, Section 23 of the Texas Constitution allows the legislature "to regulate the wearing of arms." There appears to be only one case involving a prohibition on mere possession of an arm. A ban on possession of an unregistered machine gun was upheld under the Duke rule: "A machine gun is not a weapon commonly kept, according to the customs of the people and appropriate for open and manly use in self-defense."[217] Article I, Section 23 protects "those arms which by the common opinion and usage of law-abiding people, are proper and legitimate to be kept upon private premises for the protection of persons and property."[218] The court did not consider whether a machine gun may be protected if kept for defense of the state.

The prohibition on carrying pistols is so draconian that judicially carved exceptions were inevitable. The constitution

provides no legislative power to regulate the keeping on one's premises of commonly possessed arms such as pistols. By implication, on obtaining a pistol, one may carry it home by the nearest practicable route.[219] One may carry a pistol to and from a shop to have it repaired,[220] but the carrying must be without unreasonable delay.[221]

The statute originally provided an imminent self-defense exception.[222] "If, at the time appellant armed himself, he was then apprehensive of an attack . . ., and he had not time to appeal to the law for protection, there would be some excuse for him . . . ."[223]

The explicit self-defense exception has been long since deleted from the statute, but the courts have continued to recognize the exception, and have actually expanded it to include situations where no specific attack is imminent.

"There is no recognized exception permitting one to carry a handgun on the basis of self-protection; therefore, if appellant is to be successful, it must be on the legitimate business of protecting a large sum of money or carrying the pistol to his place of business along a practical route, such carrying being not habitual."[224] Nonhabitual carrying of a pistol between a home and one's place of business is lawful if "the purpose is a legitimate one."[225]

The statutory prohibition is so broad that the judicially created exceptions discussed above were inevitable. Ironically, none of these opinions even mentions the constitutional right to bear arms for self-defense. Except for the early invalidation of a forfeiture provision, the constitutional right to bear arms is perhaps the only Texas Bill of Rights provision that has never been relied on in any published opinion to invalidate a

statute or to acquit a defendant.

C. A Dollar for a Sai: Masters v. State

The nature of the right to bear arms was addressed by a court of appeals in 1983 and the Court of Criminal Appeals in 1985. In Masters v. State, the defendant was convicted of unlawfully carrying a weapon and fined one dollar.[226] He had been arrested at a busy intersection in Austin carrying a pair of sai, described by the court as "swordlike" weapons used in Korean martial arts, after telling the police that "he might need

them" and "wanted to be prepared."[227]

Master's pro se appeals were based on the argument that the right to bear arms guaranteed in the Texas and United States Bills of Rights is absolute. The majority and concurring opinions in the appeals, which affirmed the conviction without

analyzing the intent of the framers of these Bills of Rights, warrant scrutiny.

Writing for two justices, Chief Justice Phillips of the court of appeals opined that the federal second amendment did not grant the right to carry arms upon the person. The court's brief summary of three United States Supreme Court precedents does not, on close scrutiny, reflect what those cases literally stated.[228] While denying that the second amendment recognizes an individual right, the court of appeals represents one of these precedents as stating "that the right to bear arms was contingent upon their being borne by the people for lawful purposes in lawful ways. . . ."[229]

The following quotation from the United States Supreme Court, repeated in Masters, clearly implies that the second amendment recognizes an individual right which may be regulated

but not prohibited: "The right of the people to keep and bear arms is not infringed by laws prohibiting the carrying of concealed weapons."[230] Moreover, this implies that the right would be infringed if both the open and concealed bearing of arms is prohibited, which is the case under the Texas statute.

Turning to state law, the court of appeals conceded that "the Texas Constitution gives the right to keep and bear arms directly to the individual . . . ."[231] However, the court was unable to distinguish regulation of how arms are worn (e.g., openly or concealed) from a total prohibition on bearing arms. Article I, Section 23 of the Texas Constitution provides that "the Legislature shall have the power, by law, to regulate the wearing of arms . . . ." The Court was apparently unaware that the constitutional convention which framed this provision rejected a proposal to allow the legislature also "to prohibit"

the wearing of arms.[232]

Characterizing the statute's total prohibition as "reasonable regulations," the court stepped into the policy arena by repeatedly referring to the statute as "needed" and as one which the legislature had a "duty" to enact. The constitutional right to bear is reduced to "licentiousness cloaked under the name of natural and personal liberty . . . ."[233]

Justice Power's concurring opinion in Masters suggests that the issues were more complicated than the majority opinion would indicate. Noting that the legislative "power" to regulate the wearing of arms is not a "duty," Justice Powers found bearing arms to be both explicitly guaranteed and an enumerated right reserved to the people:

> I disagree with the numerous statements in the majority opinion to the effect that a given

constitutional provision "gives" or "grants" to individuals a "right," or that a "specific right" could have been "given" or "granted" by the constitution but was not. Such language suggests that without constitutional authorization, the right would not exist in an individual person. In other words, if the second amendment does not "give" or "grant" the right to keep and bear arms, individuals would not possess that right. The theory of the majority contravenes the basic constitutional principals that individuals possess immunities and prerogatives by the very fact that they are human beings, and they retain these rights save to the extent they have voluntarily ceded them to a sovereign power, as in the Federal and State constitutions, where they expressly reserved all

rights not granted expressly or by implication, including those immunities and prerogatives listed in the Bill of Rights, upon which the government of the sovereign is forbidden to infringe. U.S. Const. amend. IX; Tex. Const. Ann. art. 1, Section 29 (1955).[234]

The reference to the federal ninth amendment as added protection for bearing arms is historically correct. In his constitutional law treatise published in 1832, Benjamin L. Oliver expressed the established view of the time that the second amendment guaranteed an individual right to bear arms against state or federal deprivation.[235] Of the ninth amendment Oliver stated:

> There are some other rights, which are reserved to the people, though not mentioned in the general

constitution. Among these is the right of self-defence, in cases where the danger is so imminent, that the person in jeopardy, may suffer irreparable injury, if he waits for the protection of the laws. . .. [A]s the compact between him and society is mutual, if society is unable to protect him, natural right revives to protect himself.[236]

Oliver also wrote: "Of those rights which are usually retained in organized society . . . the first and most important of these rights, is that of self-defense."[237] .,

Justice Powers pointed out that constitutional scholars have traditionally regarded the second amendment as recognizing individual rights. In the words of Judge Cooley, the second amendment originated in

the English Bill of Rights of 1688, where it stood as

> a protest against arbitrary action of the late dynasty in disarming the people, and as a pledge of the new rulers, that this tyrannical action should cease. The right declared was meant to be a strong moral check against the usurpation of arbitrary power by rulers, and as a necessary and efficient means of regaining rights temporarily overturned by usurpation.[238]

Moreover, the "collective theory" which holds that the second amendment only protects state militia powers, according to Justice Powers, is filled with "difficult internal inconsistencies."[239]

Nonetheless, Justice Powers concurred in the result because the defendant failed to attack the reasonableness of the statute "as applied to the weapon in question."[240] "Even if individuals do possess under the second amendment a fundamental right to

keep and bear weapons, which the Constitution guarantees against State as well as federal infringement, it plainly is not an absolute right . . . ."[241] Missiles, grenades, flamethrowers, or howitzers would not be constitutionally protected arms.[242] Whether the sai, a primitive club which looks like a short sword, is such an arm was left unresolved.

In a per curiam opinion, the Court of Criminal Appeals affirmed the conviction.[243] The opinion contains no analysis of the right to bear arms under the Texas Bill of Rights, or the intent of its framers. The constitutional guarantee is written off by citation to precedents which similarly failed to take notice of the intent of the framers or the basic linguistic distinction between the terms "regulate" and "prohibit."[244]

Likewise, the second amendment argument was brushed aside by reciting precedents without analysis. "The second amendment

simply does not apply to the states or their subdivisions,"[245] in the opinion of the court. Of course, neither do the first or fourth amendments, yet freedom from unreasonable searches and seizures and freedom of speech are protected from state and federal intrusion. The issue is whether the fourteenth amendment incorporates a right to bear arms as it does free speech or freedom from unreasonable search. None of the cases cited by the court, with one exception, contains any analysis of whether the second amendment might apply to the states through the fourteenth amendment. That exception was the controversial opinion of the U.S. Court of Appeals for the Seventh Circuit in 1983 upholding the first ban in American history on keeping handguns in the home.[246] Faced with evidence that the framers intended to protect the personal right to have arms from state infringement,[247] the federal court disregarded established

constitutional interpretative rules and found the framers' intent to be "irrelevant."[248]

Justice Clinton of the Texas Court of Criminal Appeals wrote a thoughtful concurring opinion in Masters. Texas judges have a duty to follow the U.S. Supreme Court's construction of the federal Constitution, including its holding that the second amendment restricts only the powers of the federal government.[249] "Still," he noted, "the Supreme Court did acknowledge that the second amendment 'recognizes' the 'rights' it mentioned."[250] While concluding that attacking state law on second amendment grounds is "utterly futile,"[251] neither Justice Clinton nor the U.S. Supreme Court considered whether the fourteenth amendment makes the second amendment binding on the states.

Even apart from the fourteenth amendment, Justice Clinton suggested that the right to keep and bear arms could be held to

be an unenumerated right under the ninth amendment. "Not yet finally decided" by the U.S. Supreme Court is whether a federal right to keep and bear arms "is a preexisting 'right' under the Ninth Amendment [which] government may not 'deny or disparage.'"[252]

Moreover, the right to bear arms is clearly guaranteed by the Texas Bill of Rights. Justice Clinton continued:

> On the other hand, on firm ground of experience recounted in the Texas Declaration of Independence, the citizen in Texas does have the right to keep and bear arms "in the lawful defense of himself or the State" subject, however, to the Legislature's regulating by law "the wearing of arms, with a view to prevent crime." Apparently because the Legislature has exercised its authority to enact laws regulating the

carrying of weapons, appellant and others find our own constitutional guarantee unacceptable.[253]

Justice Clinton did not delve into "the firm ground of experience" which led to the adoption in 1876 of a limited power of the legislature to regulate, but not prohibit, the wearing of arms.[254] In his concurring opinion in Brown v. State, joined by Justices Onion and Miller, Justice Clinton noted the origins of the right against unreasonable searches guaranteed by the Texas Bill of Rights: "While its origin may indeed be traced back to incidents in English and American colonial history, surely local experiences at the hands of 'military commandants,' alluded to in the Declaration of Independence of the Republic, made constitutional protections even more imperative and that the safeguards they provided be enforced."[255]

Reaction to reconstruction's "military commandants," who

disarmed the Texas populace on a wider scale than had those of Santa Anna, led to the rejection of a fairly unlimited legislative power to regulate the bearing of arms in favor of a narrow power to regulate how arms are worn.[256] No dispute exists in the Court of Criminal Appeals that the Texas guarantee protects individual rights from state infringement.[257] It remains to be seen whether the right to bear arms, with regulations on how arms can be worn (as opposed to an outright prohibition), will be recognized in Texas.

D. Banning Constitutionally Protected Arms Via Taxes and Tort Law

A prohibitive $500 tax for selling "the illustrated Police News, Police Gazette, and other illustrations of like character" was upheld by the Texas Court of Appeals in 1884.[258] Affirming the conviction of a newsdealer who had not paid the tax, the

court found that "these publications were of an indecent, immoral and pernicious character."[259]

In 1912, the right to keep and bear arms fared little better than free press in the above case. If a prohibitive tax could be imposed on the Police News and the Police Gazette, the court of civil appeals analogized in Caswell & Smith v. State, then all dealers in pistols and other firearms could be required to pay a tax of fifty percent of gross receipts of sales.[260] Rejecting challenges under the federal[261] and Texas bills of rights, the court found that the act:

> does not infringe or attempt to infringe the right on the part of the citizen to keep or bear arms; nor does it prohibit a dealer in this state from selling them; and even if it did, we think the act in question would not be violative of this provision.[262]

Making a constitutional right too expensive to exercise infringes the right just as much as criminal prohibition.[263] The above opinions were long forgotten until 1984, when the Illinois Supreme Court relied on the Texas pistol tax case to support its holding that pistols could be absolutely prohibited, even in the home.[264]

The strategy of banning pistols by making them too expensive to make or sell has recently been revived by product liability suits against firearm manufacturers and dealers. Whenever a pistol is used in a crime, suicide, or accident, "[t]he focus is on the small concealable handgun as an unreasonably dangerous product when marketed to the general public."[265]

Suits alleging that a pistol is defective even though it performs as designed and seeking to hold the maker strictly liable have all been dismissed for failure to state a claim upon

which relief may be granted with only two exceptions.[266] One of these suits was in Texas. In Clancy v. Zale Corp., the plaintiff alleged that a pistol maker and seller were liable for a negligent shooting.[267] The trial court never ruled on defendants' motion to dismiss, but the jury found both defendants not liable after being instructed to find whether the pistol was defectively designed "because of its overall design as a handgun, without regard to the absence of a hammer block or safety bar?"[268] The Court of Appeals found the following testimony as not being against the great weight and preponderance of the evidence:

> One of Zale's experts testified that most people buy handguns for self-defense; that those who use guns or knives in self-defense are less likely to have crimes completed against them; and that an estimated

380,000 handgun owners are burglarized each year while at home and awake. He also stated that handguns inspire feelings of security and safety, adding that inexpensive handguns provide affordable protection to lower income individuals who are the most frequent victims of crime.

Another expert for Zale testified that handguns are purchased primarily for protection and that less than one percent of the handguns manufactured are involved in homicides, suicides, and accidents. He also testified that, because of the high incidence of violent crime among the poor, they have the greatest need for handguns as protection and that owning a handgun can create a sense of security.[269]

While Clancy is the only case in the country where the

defectless firearms theory has been tested in a jury trial, motions to dismiss were granted in other Texas cases. In Robertson v. Gogan Investment Co, a suicide case, the court of appeals held that the allegation that "the sale of handguns . . . to the general public is an abnormally dangerous and ultrahazardous activity" does not state a cause of action for strict liability,[270] noting, "[t]he proposition that the manufacture or sale of a handgun is an ultrahazardous activity giving rise to strict liability has been rejected in every case in which it has been considered."[271]

Finally, in Patterson v. Gesellschaft, in which the mother of a murder victim alleged that the risk of death from pistols "greatly outweigh[s] any utility they have," the U.S. District Court held:

> This claim is totally without merit and totally

> unsupported by legal precedent. It is a misuse of tort law, a baseless and tortured extension of products liability principles. And, it is an obvious attempt--unwise and unwarranted, even if understandable--to ban or restrict handguns through courts and juries, despite the repeated refusals of state legislatures and Congress to pass strong, comprehensive gun-control measures.[272]

None of the above decisions mention whether the existence of a constitutionally guaranteed right to keep and bear arms for defense of self and state would preclude strict liability for the implements necessary to exercise that right.[273] Indeed, in Clancy the trial court granted a motion in limine against defense counsel mentioning anything about "the right to own a handgun."[274] Courts of other states have relied in part on the existence of right-to-have-arms guarantees in dismissing

suits involving defectless firearms.[275]

VI. **Conclusion**

The history of the right to keep and bear arms in Texas is a constitutional epic. More nineteenth century records concerning the infringement and recognition of this right exist concerning Texas than any other single state.[276] From Santa Anna's attempts to disarm the "Texians" in 1835 to the restoration of majority rule and the limitation of the legislative power to regulate how arms are worn in 1876, the fate of the right to arms has been bound up with the dramatic political developments of the republic and state.

While never referring to the intent of the framers, the Texas courts have construed the constitutional guarantee as allowing a general prohibition on bearing all arms other than long-barreled rifles and shotguns. By contrast, without

mentioning the guarantee, the judiciary has carved out exceptions for self-protection and carrying large sums of money which are inconsistent with the sweeping terms of the prohibition. The courts have also held that a pistol which works is not a defective product, even though it is designed to be worn, thus inviting violation of the statute which prohibits the off premises carrying of a pistol on one's person.[277]

The need for legislative reform of the current version of the 1871 Reconstruction Act seems clear. The convention which framed the bill of rights of 1876 and the people who adopted it intended to limit the legislature to enacting regulations on how arms are worn and not to prohibit the wearing of arms. That intent remains binding today since the guarantee has not been amended and because the clear terms of the guarantee are inconsistent with a general prohibition of the bearing of

firearms. Moreover, an explicitly guaranteed constitutional right is deemed fundamental and must be interpreted broadly in favor of the individual.[278]

Unlike states which allow the open carrying of arms and provide for permits for concealed carriage, the Texas prohibition recognizes a right to bear arms for self-defense only on the part of travellers.[279] This exception encourages general disregard for the law. Persons against whom the law is enforced typically claim to be travellers.[280] Selective enforcement against persons based on race or age is encouraged by the unrealistic prohibition.[281]

Had the defendant in the recent Masters case been practicing with his sai at a karate demonstration instead of carrying them on the street,[282] he would still have been in violation of the statute. Members of the Army of Texas and

other reenactment groups are in technical violation of the statute when they wear bowie knives, swords, tomahawks, and replica antique pistols. Every person who participates in one of Texas' famous gun collector's shows necessarily "carries on or about his person a handgun, illegal knife, or club."[283]

Current bills to ban possession of certain conventional rifles, pistols, and shotguns fail to take account of the right to "keep" arms and penumbral rights. Proponents must explain why some constitutionally protected arms are more equal (or rather unequal) than others.

As Texas law evolves in the post-sesquicentennial era, it remains to be seen whether its citizens will retain those fundamental rights envisioned by its founders. The right to bear arms has been characterized by different Texas courts as an "absolute" right[284] and as "licentiousness cloaked under

the name of natural or personal liberty. . . ."[285] Rights vary in popularity from time to time. If the controversial right to keep and bear arms is to be preserved, it will probably be in part through a rediscovery of the intent of the framers of the Texas Bill of Rights.

1. Compare H.B. 1744, 71st Leg. (1989) (ban on semiautomatic rifles), H.B. 199, 71st Leg. (1989) (7 day waiting period for handgun purchase), and H.B. 161, 71st Leg. (1989) (ban on sale of handguns not approved by a board), with S.B. 871, 71st Leg. (1989) (permit to carry handgun) and H.B. 246, 71st Leg. (1989) (right to use deadly force).

2. J. Hart, The Bill of Rights: Safeguard of Individual Liberty, 35 **Tex. L. Rev**. 919 (1957). "The test of whether a right is 'fundamental' lies in assessing whether it is '. . . explicitly or implicitly guaranteed by the Constitution.'" Sullivan v. University Interscholastic League, 599 S.W.2d 860, 864 (Tex. Civ. App.--Austin 1980), aff'd in part, rev'd in part, 616 S.W.2d 170 (Tex. 1981)(citing San Antonio School Dist. v. Rodriquez, 411 U.S. 1 (1973)).

3. "Some of the guarantees in the Federal Bill of Rights and also in the Texas Bill of Rights which may or may not be included in the rights protected by the Fourteenth amendment are the prohibition against quartering of soldiers in the house of any citizen, **U.S. Const**. amend. III; **Tex. Const**. art. I, +s 25, and the right to bear arms, **U.S.Const**. amend. II; **Tex. Const**. art. I, +s 23." J. Hart, supra note 2, at 923 n.25. See infra notes 102-36, 199-213 and accompanying text.

4. See, e.g., Linde, First Things First: Rediscovering the States' Bills of Rights, 9 **U. Balt. L. Rev.** 379 (1980); Symposium: The Emergence of State Constitutional Law, 63 **Tex. L. Rev**. 959-1375 (1985).

5. J. Hart, supra note 2, at 924.

6. In construing Article III, Section 18 of the Texas Constitution, which "was first included in the constitution of 1876 in response to the graft that occurred during the Reconstruction period," Brown v. Strake, 706 S.W.2d 148, 151 (Tex. App.--Houston [1st Dist.] 1986, no writ), noted:

> The Texas Supreme Court has held that the fundamental rule of interpreting the state constitution is to give effect to the intent of the people who adopted it in light of 1) conditions existing at that time; 2) the general spirit of the times, and 3) the prevailing sentiments of the people. . . . The common sense meaning of the terms is the

> one in which they should be understood; when the meaning is doubtful, the interpretation that seems best calculated to promote the public interest should be adopted upon the theory that its framers so intended. . . . It is also pertinent to consider the history of the times out of which the constitution grew, the evils intended to be remedied, and the good to be accomplished.

7. **Tex. Penal Code**, **Ann**. +s 46.02(a)(Vernon 1989) provides: "A person commits an offense, if he intentionally, knowingly or recklessly carries on or about his person a handgun, illegal knife, or club." A "club" includes such items as a nightstick and a tomahawk, while an "illegal knife" includes any knife with a blade over five and one-half inches, a throwing knife, dagger, bowie knife, sword, and spear. Id.

It is an offense to go on the premises of a school, polling place, or court with a firearm or illegal knife. It is an offense to possess a machine gun, short barreled rifle or shotgun, or silencer unless registered under the National Firearms Act, or a switchblade knife, metal knuckles, or armor-piercing ammunition, except that a switchblade knife or short barreled firearm may be possessed "solely as an antique or curio." Id. +s 46.06(a),(c),(d)(i).

8. See **Tex. Penal Code Ann**. +s 46.03(a)(2),(a)(3).

9. See id. +s 46.03(4).

10. See Bureau of Alcohol, Tobacco, and Firearms, **State Laws And Published Ordinances** (1987).

11. See id.

12. See State v. Rosenthal, 75 Vt. 295, 55 A. 610, 611 (1903) (holding that required permit to carry a concealed pistol violates the state constitutional right to bear arms).

13. See **Mass. Ann. Laws** ch. 140, +s 131 (Law. Co-op. 1983); **N.Y. Penal Law** +s 400.00(6) (Consol. 1984); **D.C. Code** +s 22-3206 (1989).

14. **N. Smithwick, The Evolution Of A State, Or Recollections Of Old Texas Days** 1 (2nd ed. 1984).

15. Id. at 15.

16. Id. at 16.

17. **Anonymous**, **Visit to Texas: Being The Journal Of A Traveller** 264 (New York 1834).

18. Id. at 240. After being attacked by some Mexican convict-soldiers, "the colonists slept with their arms at their sides or under their pillows . . . ." Id. at 132. Jackknives doubled as useful tools. Id. at 175.

19. See **N. Smithwick**, supra note 14, at 53-54.

20. Austin, Circular from the Committee of Safety of the Jurisdiction of Austin, in 2 **H. Foote, Texas And The Texans** 89 (Philadelphia 1841).

21. Houston, Proclamation to Citizens of Texas, in **C. Newell**, **History Of The Revolution In Texas** 209 (New York 1838).

22. **C. Newell**, supra note 21, at 49.

23. Capt. Thomas M. Thompson's Proclamation to Citizens of Anahuae, The Texas Republican (Brazoria), Sept. 19, 1835, at 1, col.4.

24. "We recommend to our fellow citizens to subscribe each and all, if it is only to the price of one gun ($10). The arms will be considered as private property, but when we get organized, they will be purchased by the Government . . . ." The Texas Republican, Oct. 3, 1835, at 2, col. 3.

25. **T. Fehrenbach**, **Lone Star: A History Of Texas And The Texans** 188 (1985) (emphasis in original).

26. **N. Smithwick**, supra note 14, at 71.

27. Id. at 72.

28. Id. at 73.

29. The cannon was eventually abandoned on the march. "After all the trouble we had brought upon ourselves in its defense, the old cannon was abandoned in disgrace at Sandy Creek

. . . . It had played its part, that of inaugurating the revolution." Id. at 75-76.

30. Freemen of Texas. To Arms! To Arms!, The Texas Republican, Oct. 10, 1835, at 4, col. 1. Similarly, the address of the Committee of Safety of Matagorda stated: "We devoutly believe that the time has arrived when every true citizen should step forth with his rifle, and boldly show his determination to stand by his country." The Telegraph, and Texas Register (San Felipe de Austin), Oct. 17, 1835, at 5, col. 3.

31. Resolutions (Natchitoches), The Telegraph, and Texas Register, Oct. 26, 1835, at 4, col. 2.

32. The Telegraph, and Texas Register, Nov. 21, 1835, at 1, col. 3.

33. **P. Haythornthwaite**, **The Alamo And The War Of Texan Independence 1835-36**, at 7 (1986).

34. Letter from J. Grant, The Telegraph and Texas Register, Dec. 2, 1835, at 3, col. 1. The General Council of the Provisional Government to the People of Mexico, The Telegraph and Texas Register, Jan. 2, 1836, at 1, col. 2, states: "It is equally so that they should obey the first law of which God has stamped on the heart of man, civilized or savage, which is self-preservation. The Texans have, therefore, taken up arms in defence of their constitutional rights. . . ."

35. Circular dated Dec. 30, 1835, Jose Maria Tornel to Santa Anna, in **Jose Enrique de la Pena**, **With Santa Anna In Texas** 56 (1975).

36. **N. Smithwick**, supra note 14, at 44. See generally **C. Castaneda**, **The Mexican Side Of The Texan Revolution** (1928); **R. Santos, Santa Anna's Campaign Against Texas 1835-1836 (**1968).

After allowing the surrender and then massacring the troops of Colonel Fannin on March 20, 1836, Gen. Jose Urrea sent the following dispatch to Santa Anna: "As these filibusters entered Texas with arms to assist the colonists in their revolt, they were judged outlaws and all prisoners have been shot." Santa Anna noted: "This action was based on a law passed November 27, 1835, in compliance with which the war in Texas was waged

'without 36.quarter.'" **The Eagle: The Autobiography Of Santa Anna** 51-52 (A. Crawford ed. 1967).

37. See **T. Fehrenbach**, supra note 25, at 221.

38. **L. Kemp, The Signers Of The Texas Declaration Of Independence** 63 (1944). The other committee members were Edward Conrad, Collin McKinney, Bailey Harderman, and James Gaines. See id. For an example of Childress' strong argument against despotism and for revolution, see G. Childress and W. Hill, Address from the Citizens of Nashville, The Telegraph and Texas Register, Feb. 20, 1836, at 5-6.

39. See **The General Convention At Washington, March 1-17, 1836** at 16 (Houston 1838) [Hereinafter **The General Convention**].

40. The Declaration of Independence para. 13 (Tex. 1836).

41. See **The General Convention**, supra note 39, at 49.

42. Article 14 continued: "The military shall at all times and in all cases be subordinate to the civil power." **Tex. Const.** of 1836, art. XIV. Moreover, Article 15 stated: "The sure and certain defence of a free people, is a well regulated militia: and it shall be the duty of the legislature to enact such laws, as may be necessary to the organization of the militia of this republic." Id. art. XV.

The militia clause was almost identical to that of Article I, section 20 of the stillborn Constitution of 1832, except that the term "state" was used instead of "republic." See **Journals Of Texas Comprising The Proceedings Of The Convention Of Texas** (Brazoria 1832). In 1832 some Anglos revolted against the growing replacement of militias by the standing army throughout Mexico.

43. An Ordinance to Organize the Militia required "all able bodied males (Indians and slaves excepted)" ages 17-49 to register for militia duty, and each person required to muster "to prepare himself with a rifle or musket." **The General Convention**, supra note 39, at 29-31.

44. The weapons on display at the Alamo Museum in April 1986 indicate what the term "arms" meant to the framers of the Texas Bills of Rights in the nineteenth century. The most

numerous arms are pistols, which then as now came in all sizes. Pistols on display include a pocket pistol owned by Rebecca Clark Barnhart, daughter of a signer of the Texas Declaration of Independence. Revolvers in the navy, army and dragoon models, several small derringers, a pepperbox, and single shot pistols are shown. Double barrel shotguns and several long rifles, including one used at the Alamo and Davy Crockett's "Old Betsy," are on display. The collection is rounded out by several edged weapons: a knife found embedded in an Alamo wall, an ivory grip knife found at San Jacinto, a knife used by Crockett on his last bear hunt, Bowie knives, and swords of several lengths.

On the use of rifles (both as firearms and as clubs), large pistols, pocket pistols, knives, tomahawks, and other arms of the Alamo, see **The Alamo Long Barrack Museum** 32-33, 47 (1986) (painting and photo); **T. Fehrenbach**, supra note 25, at 213.

45. See **Tex. Penal Code Ann.** +s 46.01 (Vernon 1989).

46. On the first general prohibition on bearing arms in Texas after Santa Anna's decree, see infra notes 137-161 and accompanying text.

47. **Tex. Penal Code Ann.** +s 46.01(6) (Vernon 1989). The same section prohibits carrying any knife with a blade over five and one half inches. A San Antonio Ordinance passed in April 1980 banned the carrying of any lockback folding knife with a blade under five and one half inches. The constitutional provision, however, authorizes only the legislature to regulate the wearing of arms.

48. See **J. Dobie, Tales Of Old-Time Texas** 53 (1928). The guard prevented cuts from slippage when butchering game. Id. at 57.

49. See **The Alamo Long Barrack Museum** 15 (1986). Noah Smithwick, who met Bowie at San Felipe de Austin in 1828, described the knife as having an ivory handle mounted with silver. Bowie "brought the knife to me in San Felipe to have a duplicate made. The blade was about ten inches long and two broad at the widest part." Smithwick went on to start a factory and produce Bowie knives for sale to the public. **N. Smithwick**, supra note 14, at 96-97. Such knives were generally worn. See id. at 77 ("a large Bowie knife which he carried stuck under the waistband").

For pictures of Jim Bowie, shown with his knife hilt with guard protruding from his hand, and several Bowie knives, see **The Alamo Long Barrack Museum** 15, 28 (1986). On the legacy of the Bowie Knife in Texas, see **J. Dobie**, supra note 48, at 51-77.

50. **The Alamo Long Barrack Museum** 49 (1986).

51. See P. **Haythornthwaite**, supra note 33, at 21, 39-40, and plate A.

52. See **C. Haven & F. Belden**, **A History Of The Colt Revolver** 18 (1940).

53. Id. at 24-25.

54. See id. at 27. On the story of the Colt in Texas, see id. at 18-35, 44-62.

55. Id. at 24-25.

56. **W. Webb**, **The Texas Rangers: A Century Of Frontier Defense** 81 (1935). The Act of February 4, 1840 to Raise a Company of Mounted Gunmen stated that the men "shall equip themselves . . . with a rifle gun . . . and a good belt knife . . . ." 2 **H. Gammel**, **Laws Of Texas** 420 (1898).

57. "Dragoon Colts were issued to the army and sold to civilians equipped with shoulder-stocks that locked onto the butt to make short rifles out of them." **C. Haven & F. Belden**, supra note 54, at 57.

58. **W. Webb**, **The Handbook Of Texas** 382 (1952). Capt. G.T. Howard of the Texas Infantry told the U.S. Senate: "We deem Colts' repeating pistols to be the greatest improvement in small arms of the age. We have been familiar with the use of this invention, on the frontiers of Texas, since 1839 . . . ." **M. Koury, Arms For Texas: A Study Of The Weapons Of The Texas Republic** 40 (1973.)

59. Judge Ochiltree of the district court in Shelbyville knew well the hazards of this right, for in 1842 he confronted a feud in the course of which a cannon was pointed at his courthouse. **W. Gard, Frontier Justice** 33 (1949). Ochiltree and

Sam Houston talked the feudists into a peace agreement. Id. at 38-39. At the end of the year in which the convention met, Ochiltree became judge in the log-cabin town of Dallas. Id. at 277.

60. **Debates Of The Texas Convention** 311 (Houston 1846).

61. Id.

62. 1 Ala. 612 (1840).

63. Id. at 616-17. "We are inclined to the opinion that the legislature cannot inhibit the citizen from bearing arms openly, because it authorizes him to bear them for the purpose of defending himself and the state, and it is only when carried openly that they can be effectively used for defense." Id. at 619.

64. **Debates Of The Texas Convention**, supra note 60, at 311.

65. 12 Ky. (2 Litt.) 90 (1822).

66. Id. at 92.

67. See id. at 93.

68. **Young Lawyers At Texas Independence** 38 (Texas Young Lawyers Ass'n 1986?).

69. **Debates Of The Texas Convention**, supra note 60, at 311-312.

70. Id. at 312.

71. See id.

72. Id. at 309.

73. Id. at 312. The only recorded remark about this amendment was that of Mr. Jones, who would vote for it "and then against the whole section, believing it unnecessary." Id.

74. Id. at 312-13.

75. Id. at 313.

76. Id. at 311-13.

77. Id.

78. On early Southern legislation on concealed weapons and the disarming of slaves and blacks, see **S. Halbrook, That Every Man Be Armed: The Evolution Of A Constitutional Right** 93-104 (1984). By contrast, for example, New Jersey enacted no prohibition on concealed weapons until 1905. See State v. Howard, 125 N.J. Super. 39, 308 A.2d 366, 368 (1973).

79. See 2 **W. Oldham and G. White, A Digest Of The General Statute Laws Of The State Of Texas** 533 (Austin 1859.)

80. Id. at 528.

81. Id. at 520.

82. Id. at 534.

83. "The foregoing definition of the two named knives is not the one of ordinary use, but is an enlargement thereof." Bivens v. State, 133 Tex. Crim. 604, 606, 113 S.W.2d 921 (1938).

84. 24 Tex. 394, 401 (1859).

85. Id. at 402.

86. Id. at 404.

87. Defense counsel's argument as set forth by the court was that the law

> is in violation of the state and federal constitution, which contain substantially the same provision, securing the citizen from any infringement on the right to keep and bear arms. 1st. It is asserted that any law prohibiting a citizen from keeping or bearing any knife, which is intended to be worn upon the person, which is capable of inflicting death, and not commonly known as a pocket-knife, would be unconstitutional. To prohibit absolutely the keeping and having of an ordinary weapon, is certainly to infringe on the right of keeping and bearing arms. A bowie-knife or dagger, as defined in the code, is an ordinary weapon, one of the cheapest character,

> accessible even to the poorest citizen. A common butcher-knife, which costs not more than half a dollar, comes within the description given of a bowie-knife or dagger, being very frequently worn on the person. To prohibit such a weapon, is substantially to take away the right of bearing arms, from him who has not money enough to buy a gun or pistol. Id. at 396.

88. Id. at 403.

89. Id. at 404.

90. See **Col. O.M. Roberts, Confederate Military History: Texas** 14 (Atlanta 1899).

91. See id. at 36.

92. Id. at 51 (describing the Battle of Oak Hills, Mo., Aug. 10, 1861).

93. Id. at 267-68.

94. See id. at 151; Austerman, The Clank, Clash and Glitter of Steel, 13 **Blade Mag**. 23 (May/June 1986).

95. See **H.J. Of Tex.,** 9th Leg., Reg. Sess. 25 (1861-62).

96. See id.; **T. Fehrenbach**, supra note 25, at 353 (noting also that private merchants ignored orders to surrender arms and ammunition to the state). A bill introduced in December 1861 was entitled, "an act to require the firearms in the state to be reported to the Adjutant General and providing for their use in defense of the state." **H.J. Of Tex**., 9th Leg., Reg. Sess. 91 (1861-62).

97. See **H.J. Of Tex.,** 9th Leg., Reg. Sess. 34 (1861-62); **H.J. Of Tex.,** 10th Leg., Reg. Sess. 240, 243 (1863).

98. See **H. Blackerby, Blacks In Blue And Gray** 1-40 (1979). W. Austerman, supra note 94, at 27, includes a photo of a white soldier and a black soldier each wearing Confederate uniforms and carrying large Bowie knives and pistols.

99. See **S.J. Of Tex.,** 10th Leg., 2nd Called Sess. 18 (1864).

100. See **R. Durden, The Gray And The Black: The Confederate Debate On Emancipation** 244, 250 (1972).

101. **Tex. Const.** art. I, +s 13 (1866).

102. See **S. Halbrook**, supra note 78, at 99-123.

103. **Journal Of Texas State Convention** 82 (1866) (emphasis in original).

104. Id. at 88.

105. See **Kendrick, Journal Of The Joint Committee On Reconstruction** 265 (1914).

106. Report of the Joint Committee on Reconstruction, **H. R. Rep. No.** 30, 39th Cong., 1st. Sess., pt. 2, at 240-41 (1866).

107. Id. at 229. Similar quotations from the report are referenced in **S. Halbrook**, supra note 78, at 118-19.

108. Report of the Joint Committee on Reconstruction, **H.R. Rep. No.** 30, 39th Cong., 1st Sess., Pt.4, at 37 (1866).

109. Id. at 43.

110. Id. at 49-50.

111. Id. at 136-37.

112. Id. at 138.

113. See id. at 160.

114. Id. at 150. Mackay also visited the Indian Territory, and found the Indians of the Five Nations to be armed with rifles and shotguns, although tribes which had not been part of the Confederate war effort still used tomahawks, bows and arrows. Id. at 163.

115. **S.J. of Tex.,** 11th Leg., Reg. Sess. 420 (1866) (emphasis added).

116. **H.J. of Tex.**, 11th Leg., Reg. Sess. 578 (1866).

117. **Cong. Globe**, 39th Cong., 1st Sess., pt. 1, at 81 (1866) (speech of Sen. George F. Edmunds [R., Vt.] against Southern militias).

118. Law of Nov. 6, 1866, Ch. 92, +s 1, 1866 Tex. Gen. Laws 90, 5 **H. Gammel**, **Laws Of Texas** 1008 (1898).

119. See **O. Singletary**, **Negro Militia And Reconstruction** 35-41, 74-75 (1957).

120. See **C. Bowers, The Tragic Era** 206 (1929).

121. Id. at 215.

122. See id.

123. Most Texans did not vote for delegates to this convention, which was dominated by two Republican factions. The Radicals were led by three members of the Supreme Court, A.J. Hamilton, Colbert Coldwell, and Livingston Lindsay. Morgan C. Hamilton, James Winwright Flanagan, and E.J. Davis led the Ultra-Radicals. See 1 **W. Webb**, **The Handbook Of Texas** 402 (1952). Popularly known as scalawags and carpetbaggers, the Radicals' "ideology, beyond Unionism, was primarily a dislike for the old Southern order and a general desire to remake Texas more in the order of a Northern state." **T. Fehrenbach**, supra note 25, at 413.

124. 1 **Journal Of The Reconstruction Convention** 953-55 (1870) [hereinafter 1 **Convention**].

125. Id. at 975.

126. Id. at 195.

127. Id. at 195-97.

128. 2 **Journal Of The Reconstruction Convention** 111 (1870) [hereinafter 2 **Convention**].

129. 1 **Convention**, supra note 124, at 111.

130. 2 **Convention,** supra note 128, at 387.

131. 1 **Convention**, supra note 124, at 152. At the same time, Fayle moved that all persons shall have equal rights, including suffrage, but that disabilities growing out of "the late rebellion" should not be removed until 1880. Id.

132. 2 **Convention**, supra note 128, at 190.

133. 1 **Convention**, supra note 124, at 248.

134. See id.

135. Id. at 235.

136. Id. at 233.

137. **Tex. Const**. art. I, +s 13 (1845).

138. 1 **Convention**, supra note 124, at 235.

139. **Tex. Const**. art. I, +s 13 (1869).

140. Cockrum v. State, 24 Tex. 394, 402 (1859).

141. **T. Fehrenbach,** supra note 25, at 416-417.

142. **W. Webb**, **The Texas Rangers: A Century of Frontier Defense**, 221 (1935). The police would arrest those who tried to protect Democratic speakers from violence. Whole counties would be fined on frivolous charges, and the police would collect them at pistol point. See **T. Fehrenbach**, supra note 25, at 425-26. Prisoners were often allegedly shot while trying to escape. See **W. Gard**, **Frontier Justice** 224 (1949).

143. Law of Aug. 13, 1870, ch. 46, +s 1, 1870 Tex. Gen. Laws 63, 6 **H. Gammel**, **Laws Of Texas** 237 (1898).

144. Law of April 12, 1871, ch. 34, +s 1, 1871 Tex. Gen. Laws 25, 6 **H. Gammel**, **Laws Of Texas** 927 (1898).

145. Id. Section 2 of the "Act to regulate the keeping and bearing of deadly weapons" provided that a person asserting that he carried arms because he was in danger of attack "shall be required to show that such danger was immediate and pressing, and was of such a nature as to alarm a person of ordinary courage; and that the arms so carried were borne openly, and not

concealed beneath the clothing; and if it shall appear that this danger had its origin in a difficulty first commenced by the accused, it shall not be considered a legal defense." Symbolic of the times, Section 4 provided that the Act would not apply to any county proclaimed by the governor to be "a frontier county, and liable to incursions of hostile Indians." Id.

146. Reprinted in 1 **Report Of Joint Select Committee On Condition Of Affairs In Late Insurrectionary States**, 42d Cong., 2d Sess. 426 (1872) [hereinafter **Report Of Select Committee**]. The taxpayers' convention report was printed initially in the Austin Statesman, Oct. 3, 1871. **S. McKay**, **Making The Texas Constitution Of l876** 36-38 (1924).

147. 1 **Report of Select Committee**, supra note 146, at 429.

148. 35 Tex. 473 (1872).

149. Nunn v. State, 1 Ga. 243 (1846); State v. Chandler, 5 La. Ann. 489, 490 (1850). Contra State v. Newsom, 27 N.C. 203, 207 (1844) (upholding prohibition on free blacks carrying firearms).

150. See supra notes 102-110, 124-136 and accompanying text.

151. 35 Tex. at 475 (citing 2 **J. Bishop**, **Criminal Law**, +s 124 (4th ed. 1868)).

152. Id.

153. Id. at 476-77.

154. Id. at 474.

155. James Bowie, of course, died at the Alamo fighting for Texas independence with the knife that bears his name. On bowie knives in Confederate service, see Harris, The Bowie Knife and the Confederacy, 9 **Nat. Knife Mag.** 20 (Mar. 1986). A captured Union soldier noted that Texans "all carried pistols and dirks, but while the greater number had Enfields [muskets], the rest were armed with carbines and buck shot guns." W. Austerman, Enfields of the Lone Star, 28 **Man At Arms** 31, 34 (Mar./Apr. 1986). On use of Bowie knives and dirks in American

wars, see **H. Peterson, American Knives** (1958).

Indeed, Confederates also carried metal knuckles and blackjacks. See **C. Clark**, **Gettysburg** 148 (1985). At Second Manassas, they even threw rocks.

156. 35 Tex. at 478.

157. Id.

158. Id. at 473-74.

159. E.g., Baird v. State, 38 Tex. 600 (1873); Titus v. State, 42 Tex. 578 (1875).

160. 35 Tex. at 479-80.

161. Supreme Court Justices Oran Roberts in 1898 and James Norvell in 1959 pointed out that the Reconstruction Court's opinions were never cited by members of the Texas bar. Norvell, Oran M. Roberts and the Semicolon Court, 37 **Tex. L. Rev**. 279, 288-89 (1959). When in 1983 the Texas Court of Appeals approvingly cited the English decision, Justice Powers objected because English was decided by "the semicolon court, a court established by a State constitution (that of 1869) which was the product of military occupation and the disfranchisement of most of the State's inhabitants . . . ." Masters v. State, 653 S.W.2d 944, 947 (Tex.App.-- Austin 1983, no writ) (Powers, J., concurring). The Court of Criminal Appeals deleted the reference to English in its opinion affirming the court below. 685 S.W.2d 654 (Tex.Crim.App. 1985), cert. denied, 474 U.S. 853 (1985).

162. See **S. McKay**, supra note 146, at 36-38.

163. See **T. Fehrenbach**, supra note 25, at 431.

164. 42 Tex. 455 (1875).

165. Id. at 457-58 (citing the Slaughter-House Cases, 83 U.S. (16 Wallace) 36 (1872)) and similar precedents. Cf. Palmer, The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment, **U. Of Ill. L. Rev**. 739, 768-69 (1984), which argues that the Slaughter-House Cases actually recognized bearing arms and other enumerated rights to be incorporated in the fourteenth

amendment, but that opinion was misread and nullified by United States v. Cruikshank, 92 U.S. 542 (1876).

166. "The Court began by interpreting the Civil War Amendments in a manner that sharply curtailed their substantive protections." University of California Regents v. Bakke, 438 U.S. 265, 391 (1978) (Marshall, J., concurring and dissenting) (citing the Slaughter-House Cases and Cruikshank).

167. This is no surprise in that the fourteenth amendment was not recognized in the South as having been consensually ratified.

168. 42 Tex. at 458.

169. Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822); Nunn v. State, 1 Ga. 243 (1846); Cockrum v. State, 24 Tex. 394 (1859).

170. 42 Tex. at 458-59.

171. "No wearing of arms is within the meaning of the statute [against affrays] unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against this statute by wearing common weapons . . . ." **W. Hawkins, Treatise Of The Pleas Of The Crown**, Ch. 28, +s 9 (8th ed. 1824). Quoting the above, Simpson v. State, 13 Tenn. (5 Yerg.) 356, 360 (1833), held that the constitutional guarantee "secured to all the free citizens of the state to keep and bear arms for their defense, without any qualification whatever as to their kind or nature . . . ."

172. See State v. Chandler, 5 La. Ann. 489, 490 (1850) (the right guaranteed by the federal second amendment "is calculated to incite men to an manly and noble defense of themselves"). The Southern states, beginning with Kentucky in 1813, prohibited concealed weapons in the antebellum epoch, but some Northeastern states had no such prohibition until the twentieth century. See Act of Feb. 3, 1813, 3 **Laws of Ky**. 202 (1817); State v. Howard, 125 N.J. Super. 39, 308 A.2d 366, 368 (1973) ("the first statute, barring the carrying of concealed weapons . . . was enacted in 1905.").

The origins in the code duello of prejudice against

concealed weapons is exhibited in the Kentucky constitutional convention of 1849. There was strong opposition to a proposal that officeholders and lawyers would have to swear that they had never sent or accepted a challenge or fought a duel. "Duelling is the fairest mode of fighting known," argued William C. Bullitt. "Where the duel is resorted to, men do not find it necessary to carry arms; and consequently, in case of a sudden quarrel, resort cannot be had to them on the instant." **Report Of The Debates And Proceedings Of The Convention For The Revision Of The Constitution Of The State Of Kentucky** 816 (1849). By permitting the duel, "you will avert the evil consequences of carrying concealed weapons." Id. at 817.

Another opponent moved to require politicians and attorneys to swear that they had never "worn any concealed deadly weapon except for self-defense." Id. at 821. "I ask gentlemen which has produced most misery and mourning in Kentucky, the duel or the bowie knife?" Id. at 822. The duel was a necessary evil, urged still another, because "if a man, influenced by a keen sense of honor, meets his adversary face to face, and scorns the use of the bowie knife and concealed weapons, where do you place him?" Id. at 823.

173. 42 Tex. at 459.

174. The standard for what constitutes bearing arms for self-defense in the act is narrowly restricted to danger of imminent attack. See supra note 145. Even so, under the 1869 constitution keeping and bearing arms was subject to "such regulations as the Legislature may prescribe." While the power to regulate is not the power to prohibit, this language, which was to be significantly narrowed in the constitution of 1876, is very broad.

175. TEX. CONST. Art. I, +s 13 (1869).

176. 1 W. **Webb, The Handbook Of Texas** 402 (1952).

177. Thomas & Thomas, The Texas Constitution of 1876, 35 **Tex. L. Rev**. 911, 913 (1959).

178. **T. Fehrenbach**, supra note 25, at 435.

179. **S. McKAY**, supra note 146, at 46.

180. Id. at 51.

181. Id. at 79.

182. **Journal Of The Constitutional Convention Of The State Of Texas** 15 (1875) (hereafter **Journal Of The Constitutional Convention).** Members of the committee included delegates Davis of Brazos, German, Nugent, Nunn, Gaither, Holmes, Haynes, and Abner. Id.

183. Id. at 274.

184. Id. at 435 (Oct. 21, 1875).

185. See id. at 15.

186. **Debates In The Texas Constitutional Convention of 1875**, at 294 (1930).

187. **See Journal Of The Constitutional Convention**, supra note 182, at 436.

188. **G. Braden, D. Anderson, R. Bickerstaff, D. Blakeway, R. Patterson, S. Searey, I. Sinclair & R. Yahr, The Constitution Of The State Of Texas; An Annotated And Comparative Analysis** 76 (n.d.).

189. **N. Webster, An American Dictionary Of The English Language** (New York 1828), defined "bear" both as "2. To carry, to convey" and "3. To wear; . . . as to bear a sword . . .; to bear arms in a coat." In defining "pistol," he noted: "Small pistols are carried in the pocket."

190. State v. Reid, 1 Ala. 612, 616-17 (1840). This case was relied on in debate over an arms guarantee in the 1845 convention. See supra notes 61-63 and accompanying text.

191. See Comment, A Farewell to Arms? An Analysis of Texas Handgun Control Law, 13 **St. Mary's L.J.** 601, 615 (1982), which noted that because handgun control laws do not prevent crime, "the legislature would then exceed its constitutional authority by enacting a licensing statute which exceeds the constitution's limitations on such regulations. If the statute had been written today, with the available data on the ineffectiveness of

handgun control laws, it is possible the statute would not survive constitutional challenge." Id.

192. In addition, the convention also intended that the guarantee would overrule the decisions in English v. State, 35 Tex. 473 (1872) and State v. Duke, 42 Tex. 455 (1875). Indeed, the convention restructured the entire judiciary. "The Constitution of 1869 gave the governor the power to appoint the judges, and, as there were not many upright, competent lawyers or jurists within the ranks of the Radical Republicans, untrained, dishonest, and unscrupulous men had been appointed to the bench. Therefore the 1876 Constitution provided that all judges were to be elected by popular vote . . . ." Thomas & Thomas, supra note 177, at 916.

193. See supra notes 146-47 and accompanying text.

194. **S. McKay**, supra note 146, at 141.

195. **See W. Webb**, supra note 176.

196. See, e.g., Lewis v. State, 7 Tex. App. 567 (1880); Jennings v. State, 5 Tex. App. 298, 301 (1878) ("a long line of decisions"); Lewis v. State, 2 Tex. App. 26, 29 (1877).

197. 2 Tex. App. at 29.

198. 5 Tex. App. at 300-01.

199. Scott v. Sanford, 60 U.S. 393, 417 (1857).

200. "What was the fourteenth article designed to secure? . . . [T]hat privileges and immunities of citizens of the United States shall not be abridged or denied by the United States or by any State; defining also, what it was possible was open to some question after the Dred Scott decision, who were citizens of the United States," **Cong. Globe**, 40th Cong., 3d Sess., 1000 (1869) (statement of Sen. George F. Edmunds [R., Vt.]).

201. 92 U.S. 542 (1876).

202. Id. at 551, 553. More facts of the case are described in 25 F. Cas. 707 (C.C.D. La. 1874) (No. 14,897).

203. 116 U.S. 252 (1886).

204. Id. at 265. Details of the labor group involved in the case are provided in Spies v. People, 122 Ill. 1, 12 N.E. 865, 886, 921-24 (1887).

205. 153 U.S. 535 (1894).

206. Justice Brown summarized the defendant's arguments as follows:

> That the statute of the state of Texas prohibiting the carrying of dangerous weapons on the person, by authority of which statute the court charged the jury that, if defendant was on a public street carrying a pistol, he was violating the law, infringed the right of the defendant as a citizen of the United States, and was in conflict with the 2d Amendment to the Constitution of the United States, providing that the right of the people to keep and bear arms shall not be infringed; second, that the same statute, which provided that any person carrying arms in violation of the previous section, might be arrested without warrant, under which the court charged the jury that defendant, if he were carrying arms in violation of the statute, was subject to arrest without warrant, was in contravention of the 4th Amendment of the Constitution, which provides that the right of the people to be secure in their persons against unreasonable searches and seizures shall not be violated and of the 5th and 14th amendments, which provide that no person shall be deprived of life, liberty, or property without due process of law, and that no state shall pass or enforce any law which shall abridge the privileges of or immunities of citizens of the United States. Id. at 535-36.

207. Id. at 538 (citing, inter alia, United States v. Cruikshank, 92 U.S. 542, 552 (1876)).

208. 153 U.S. at 538-39. The court added that there "was no denial of [procedural] due process of law, nor did the law of the State, to which reference was made, abridge the privileges or immunities of citizens of the United States . . . ." Id. (emphasis in original). While the court did not elaborate, the

same year it upheld the right to carry and use a pistol for self-defense, "provided he rightfully so armed himself for purposes simply of self-defense . . . ." Gourko v. United States, 153 U.S. 183, 191 (1894).

209. Chicago B.& Q. R. R. v. Chicago, 166 U.S. 226 (1897).

210. 165 U.S. 275, 281-82 (1897).

211. See citations in **S. Halbrook**, supra note 78, at 170 and accompanying text. On the logic of incorporating the second amendment based on recent precedents, see id. at 170-78.

212. See Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983).

213. See Griswold v. Connecticut, 381 U.S. 479 (1965).

214. See **S. Halbrook**, supra note 78, at 58-87. The only Supreme Court opinion to address this issue held that "the Second Amendment guarantees the right to keep and bear" a weapon which "has some reasonable relationship to the preservation or efficiency of a well regulated militia." United States v. Miller, 307 U.S. 174, 178 (1939).

215. See e.g. Roy v. State, 552 S.W.2d 827 (Tex. Crim. App. 1977); Collins v. State, 501 S.W.2d 876, 877-78 (Tex. Crim. App. 1973). The latter case rejected the defendant's argument that the power to regulate the wearing of arms is not equivalent to a power to regulate carrying arms about the person because, the court stated, this would "nullify the purpose for which the Legislature was given the regulatory power; namely, 'to prevent crime.'" Collins, 501 S.W.2d at 877-78. This ignores that only a power to "regulate" (not prohibit) the "wearing" (not bearing) of arms is provided, and that the intent was to authorize the regulation of concealed weapons "to prevent crime."

216. Webb v. State, 439 S.W.2d 342, 343 (Tex. Crim. App.), cert. denied, 396 U.S. 968 (1969).

217. Morrison v. State, 170 Tex. Crim. 218, 339 S.W.2d 529, 531 (1960). The opinion does not address the lack of explicit legislative power to prohibit the keeping of arms, or the types of arms the citizen may keep for defense of the state.

218. 339 S.W.2d at 532.

219. See Kellum v. State, 66 Tex. Crim. 505, 147 S.W. 870 (1912).

220. See Fitzgerald v. State, 52 Tex. Crim 265, 106 S.W. 365 (1907); Magum v. State, 90 S.W. 31 (Tex. Crim. App. 1905).

221. See Henson v. State, 158 Tex. Crim. 5, 6, 252 S.W.2d 711 (1952).

222. See Coleman v. State, 28 Tex. App. 173, 174, 12 S.W. 590 (1889) (not guilty where defendant got a pistol while being pursued by man with club).

223. Brownlee v. State, 35 Tex. Crim. 213, 214, 32 S.W. 1044 (1895)(guilty where defendant drew pistol in sudden quarrel at political gathering). Accord Ellias v. State, 65 Tex. Crim. 479, 144 S.W. 1139 (1912) (not guilty where pistol grabbed from sack in wagon and fired at apparent assailant).

224. Evers v. State, 576 S.W.2d 46, 51 (Tex. Crim. App. 1978).

225. Davis v. State, 135 Tex. Crim. 659, 122 S.W. 635, 636 (1938) (defendant retrieved pistol from unsuccessful seller). Accord Smith v. State, 149 Tex. Crim. 7, 190 S.W.2d 830, 831 (1945) (grocer with $100 and pistol in pocket going home not guilty). "Ordinarily one is authorized to carry a pistol from his place of business to his home when he has on his person a considerable sum of money . . . ." Boyett v. State, 167 Tex. Crim. 195, 196, 319 S.W.2d 106, 107 (1958).

226. 653 S.W.2d 944, 945 (Tex. App.--Austin 1983), aff'd 685 S.W.2d 654 (Tex. Crim. App.), cert. denied, 474 U.S. 853 (1985).

227. 653 S.W.2d at 945. Actually, the sai has a handle and guard similar to some swords but is normally a club rather than a blade. It originated in Okinawan, not Korean, martial arts. See **F. Demura**, **Sai: Karate Weapon Of Self-Defense** 9-13 (1974).

228. 653 S.W.2d at 945-46. For a lengthy analysis of the three precedents, see **S. Halbrook**, supra note 78, at 156-169. According to the court in Masters, United States v. Cruikshank

stands for the proposition that "the Second Amendment granted the individual no right to keep and bear arms . . . ." 653 S.W.2d at 945-46. Cruikshank actually determined that the right was not "granted" by the amendment because, like assembly, it existed long before the adoption of the Federal Constitution. The right to bear arms is and always has been "one of the attributes of citizenship under a free government. . . . It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the states to afford it protection." 92 U.S. at 551, 553.

Again, implying that the precedent supported state restrictions on bearing arms, the Court represents Cruikshank as stating "that the States, through the exercise of their 'police powers,' were obligated to protect all the people's various rights through reasonable regulation." 653 S.W.2d at 945. In fact, Cruikshank held that the states had a duty to protect the freedmen in that case from being deprived of the rights to bear arms and to assemble by private parties:

> Bearing arms for a lawful purpose . . . is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. . . . The people [must] look for their protection against any violation by their fellow citizens of the rights it [the second amendment] recognizes to . . . the "powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police. . . ."
> 92 U.S. at 553.

Masters represents United States v. Miller, 307 U.S. 174 (1939), as holding that "the Second Amendment grants no right to the individual to keep and bear arms, but that it instead denies the national government the power to disarm the State militias." 653 S.W.2d at 945. Actually, Miller held that "the Second Amendment guarantees the right to keep and bear" an instrument the possession and use of which "has some reasonable relationship to the preservation or efficiency of a well regulated militia" or which "is any part of the ordinary military equipment." 307 U.S. at 178. Finally, contrary to Masters, Miller never mentioned, much less approved, state regulation of keeping and bearing arms.

229. 653 S.W.2d at 945.

230. Id. (citing (Robertson v. Baldwin, 165 U.S. 275, 281-82 (1896)). (emphasis added). Robertson noted that "the first ten Amendments . . . were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors . . . ." Id. These ancestors had a right to possess arms, but they certainly had no collective state right to maintain militias--indeed, they had no states.

231. 653 S.W.2d at 946.

232. See supra notes 184-90 and accompanying text.

233. 653 S.W.2d at 946 (quoting English v. State, 35 Tex. 473, 477-79 (1871)). On the precedential weakness of English, see supra note 161 and accompanying text.

234. 653 S.W.2d at 947.

235. **B. Oliver**, **The Rights Of An American Citizen** 174-78 (1832). See, e.g., Nunn v. State, 1 Ga. 243 (1846); **W. Rawle**, **A View Of The Constitution** 125-26 (Philadelphia 2d ed. 1829).

236. **B. Oliver**, supra note 235, at 186.

237. Id. at 40.

238. 653 S.W.2d at 947. Justice Powers also quoted **C. Stevens**, **Sources Of The Constitution Of The United States** 222-23 (1894), which states that "the second amendment deals with . . . the right of the people to bear arms,--a right involving the latent power of resistance to tyrannical government." 653 S.W.2d at 947-48.

239. 653 S.W.2d at 948.

240. Id.

241. Id.

242. Id.

243. Masters v. State, 685 S.W.2d 654 (Tex. Crim. App. 1985).

244. Id. at 655.

245. Id.

246. Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983). The court also cited Vietnamese Fisherman's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 216 (S.D. Tex. 1982), which states that "[t]he Second Amendment has not been incorporated into the Fourteenth Amendment" but cites no precedent on that precise issue. Id.

247. The court allowed this author to file two Briefs of Amicus Curiae on behalf of the Illinois State Rifle Association in Quilici v. Village of Morton Grove, concerning the intent of the framers of the second and fourteenth amendments. For an expanded version of that research, see **S. Halbrook**, supra note 78, at 67-84, 107-23, 142-53.

248. 695 F.2d at 270 n.8. By contrast, the United States Supreme Court has repeatedly stated that the Constitution must be interpreted according to the intent of the framers. See e.g., Malloy v. Hogan, 378 U.S. 1, 5 (1964); Ex parte Bain, 121 U.S. 1, 12 (1887).

249. 685 S.W.2d at 656.

250. Id. (citing United States v. Cruikshank, 92 U.S. 545, 553 (1875)).

251. Id.

252. Id.

253. Id. Justice Clinton also noted:

> Thus they must assert, as appellant does, that a state is precluded by the Second Amendment from imposing any regulation on keeping, bearing and wearing arms. But all the cases make abundantly clear that the Second Amendment does not have that preemptive effect. Miller v. Texas . . . is just one, but it upheld a Texas regulatory statute against that very contention. Actually, the Supreme Court in Miller held that the second and fourth amendments did not directly apply to the states, and refused to

consider whether the fourteenth amendment made these rights applicable to the states, because the defendant did not assert these grounds in the trial court. Miller is analyzed in detail in supra notes 205-09 and accompanying text.

254. Supra note 183-90 and accompanying text.

255. 657 S.W.2d 797, 801 (Tex. Crim. App. 1983)(citation omitted).

256. Supra notes 144-47 and 184-90 and accompanying text.

257. Unlike Brown, where the court en banc decided to base Texas search-and-seizure law on United States Supreme Court precedents, no one suggests that the Texas arms guarantee is bound by the sparse federal high court decisions on the second amendment. In the past the Supreme Court has rarely mentioned the second amendment, much less invoked it to protect individual rights in an actual case. While denial of certiorari means nothing about the merits of a case, it is unlikely that the court would have denied certiorari had Morton Grove banned mere possession in the home of pornography rather than possession of handguns.

Dissenting in Brown, Judge Teague noted: "By its decisions, [the Supreme Court] appears to be abdicating its position as the role maker and champion of individual rights. . . . Henceforth, persons of this country must look to their State legislatures and their independent appellate judiciaries for whatever rights, liberties, and freedoms they want to have." 657 S.W.2d at 808.

258. Thompson v. State, 17 Tex. App. 257 (1884).

259. Id. at 257.

260. 148 S.W. 1159, 1161 (Tex. Civ App.--Austin 1912, writ ref'd).

261. Id. at 1162-63. For its proposition that the second amendment restricted Congress but not the states, one of the cases the court purports to rely on is Andrews v. State, 50 Tenn. (3 Heisk.) 165 (1871), which on the contrary held that "[t]he 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."

262. 148 S.W. at 1163.

263. New York Times v. Sullivan, 376 U.S. 254, 277 (1964). Justice Black relied on St. George Tucker to show that when the first amendment was adopted, it was understood to protect newspapers from an overzealous libel law. Id. at 296-97. In the same work, Tucker added that "whenever . . . the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction." 1 **W. Blackstone**, **Commentaries** 300 (Philadelphia, Tucker ed. 1803).

264. Kalodimos v. Village of Morton Grove, 103 Ill.2d 483, 470 N.E.2d 266, 270, 285 (1984). Even so, the Texas opinion recognized "the right to carry a pistol openly when needed for self-defense . . . as well as the right to have one at home, or at one's place of business . . . ." Caswell & Smith v. State, 148 S.W. at 1163.

More recently, a majority on the Texas Court of Criminal Appeals favorably relied on the federal opinions upholding Morton Grove's handgun ban for a restrictive interpretation of the federal second amendment. Masters v. State, 685 S.W.2d 654, 655 (Tex. Crim. App. 1985), cert. denied, 474 U.S. 853 (1985).

265. Turley, Manufacturers' and Suppliers' Liability to Handgun Victims, 10 **N. Ky. L. Rev.** 41 (1982).

266. Kelly v. R.G. Industries, 497 A.2d 1143 (Md. 1985).

267. 705 S.W.2d 820, 823 (Tex. App.--Dallas 1986, writ ref'd n.r.e).

268. Id. at 824. The jury was alternately instructed to determine whether it was defective "because it did not have a hammer block or transfer bar?" Id. These are safety devices which give rise to a factual issue of whether the product was defective in the traditional sense of being unsafe or not performing as a reasonable consumer would expect. Strict liability for a firearm with a defective safety is well established. See, e.g., International Armament Corp. v. King, 686 S.W.2d 595 (Tex. 1985).

269. 705 S.W. 2d at 827-28.

270. 710 S.W.2d 678, 679 (Tex.App.--Dallas 1986, no writ) (citing cases from other states).

271. Id. at 680 (citing cases from other states).

272. 608 F. Supp. 1206, 1208 (N.D. Tex. 1985). The court added:

> Moreover, the judicial system is, at best, ill-equipped to deal with the emotional issues of handgun control. . . . An overwhelming number of cases and tremendous expenditure of judicial resources would be required before the proponents of these unconventional theories could even begin to accomplish their ultimate goal: driving all handgun manufacturers out of business. . . .
>
> As an individual, I believe, very strongly, that handguns should be banned and that there should be stringent, effective control of other firearms. However, as a judge, I know full well that the question of whether handguns can be sold is a political one, not an issue of products liability law--and that this is a matter for the legislatures, not the courts.

Id. at 1216.

273. See Halbrook, Tort Liability for the Manufacture, Sale, and Ownership of Handguns? 6 **Hamline L. Rev.** 351, 353-55, 358, 364-79 (1983) (preclusion of strict liability under state bills of rights and federal second amendment).

274. 705 S.W.2d at 823. Zale's Brief in Support of Motion for Summary Judgment on right-to-have-arms grounds is reprinted in **Defectless Firearms Litigation** 189-200 (S. Halbrook & M. McCabe eds. 1984).

275. Martin v. Harrington and Richardson, 743 F.2d 1200, 1204 (7th Cir. 1984), notes:

> We are also concerned that plaintiffs' argument would thwart Illinois' policy regarding possession of handguns. The right of private citizens in Illinois to bear arms is protected, at least against all restrictions except those imposed by the police power, by the Illinois Constitution.
>
> Similarly, Rhodes v. R.G. Industries, 173 Ga. App. 51,

325 S.E.2d 465, 466-67 (1985), states:

> Appellant first contends that "the trial court erred in holding as a matter of law that handguns are exempt from Georgia's product liability law because the lack of safety connected with such weapons raises a political, nonjustifiable question." Her last contention is that the trial court erroneously held as a matter of law that the R.G. revolver is not unreasonably dangerous when marketed to the general public. We disagree on both points. The Second Amendment to the U.S. Constitution guarantees the right of the people to keep and bear arms, as does Art. I, sec. I, Par. VIII of the Georgia Constitution 1983, which states that that right "shall not be infringed, but the General Assembly shall have the power to prescribe the manner in which arms may be borne."

276. There are more known surviving records on this right in Texas than all the other states, with the exception of some of the eighteenth century states which revolted against George III in part for infringing on this right. See Halbrook, The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts, 10 **Vt. L. Rev.** 255-320 (1985). Numerous records originating in Texas have been located concerning the understanding in the states that the fourteenth amendment incorporated the second amendment and other portions of the federal Bill of Rights. See **S. Halbrook**, supra note 78, at 120-133.

277. Supra, notes 265-75 and accompanying text.

278. See supra notes 2-6 and accompanying text. The Oregon Supreme Court has led the contemporary courts in applying in scholarly fashion the historical test of which arms are constitutionally protected by asking whether the modern arm in question is the historical descendant of arms used by the founders. See State v. Kessler, 289 Or. 359, 372, 614 P.2d 94, 100 (1980) ("the drafters included 'arms' to include the hand-carried weapons commonly used by individuals for personal defense. The club is an effective, hand-carried weapon which

cannot logically be excluded from this term."); State v Blocker, 291 Or. 255, 630 P.2d 824 (1981) (legislature may regulate how arms are borne but may not prohibit bearing arms); State v. Delgado, 298 Or. 395, 692 P.2d 610 (1984) (knife with spring-assisted mechanism is descendant of jackknife and cannot be banned). The following words in Delgado call to mind antebellum Texas:

> In the 19th century, daggers remained popular, but in the west the renowned Bowie knife became the weapon favored by the lawless and law-abiding alike. These were violent times, particularly from the 1820s through the Civil War, when a weapon might be needed at a moment's notice. In response, "the well-equipped gentleman carried a pistol in his pocket and a knife beneath his coattails."

Id. at 402, 692 P.2d at 613.

Texas' counterparts of the above include Cockrum v. State, 24 Tex. 394, 403 (1859) ("The right to carry a bowie-knife for lawful defense is secured, and must be admitted"); State v. Duke, 42 Tex. 455, 458 (1875) ("such arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense").

279. See **Tex. Penal Code Ann.** +s 46.03(3)(Vernon 1989). The exception in subsection (2) for being "on his premises under his control" fully recognizes the right to "keep" arms, but not to bear them. Id. +s 46.03(2).

280. See id. +s 46.03(3) (annotations).

281. A disproportionate number of prosecutions for illegal knives seem to have been directed against Mexican Americans. See e.g., Tijerina v. State, 410 S.W.2d 637 (Tex.App. 1967); Armendariz v. State, 396 S.W.2d 132 (Tex. Crim. App. 1965); Brito v. State 279 S.W.2d 104 (Tex. Crim. App. 1955); Mireles v. State, 80 Tex. Crim. 648, 192 S.W. 241 (1917).

282. See supra notes 226-53 and accompanying text.

283. **Tex. Penal Code Ann.** +s 46.02(a)(Vernon 1989).

284. Cockrum v. State, 24 Tex. 394, 401 (1859).

285. Masters v. State, 653 S.W.2d 944, 946 (Tex. App.--Austin 1983), aff'd, 685 S.W.2d 654 (Tex. Crim. App.), cert. denied, 474 U.S. 853 (1985) (approvingly citing English v. State, 35 Tex. 473, 478 (1871)). By contrast, Reconstruction Justice Walker, who authored these words, wrote in another opinion:

> In the opinion of this court, the act prohibiting the carrying of deadly weapons was not intended to prevent persons travelling in buggies or carriages upon the public highway from placing arms in their vehicles for self-defense, or even from carrying them from place to place for an innocent purpose. We can hardly conceive that a traveler would be compelled to lock up his arms, in his truck or valise, where they would be useless to him if attacked.

Maxwell v. State, 38 Tex. 170, 171 (1873).