The Right to Keep and Bear Arms under the Second and Fourteenth Amendments: The Framers' Intent and Supreme Court Jurisprudence

by Stephen P. Halbrook

The Second Amendment to the United States Constitution provides: "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 Fourteenth Amendment provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The following analyzes the jurisprudence of the United States Supreme Court on the Second and Fourteenth Amendments. In addition to case law, this paper sets forth the intent of the framers of those respective amendments. It concerns two fundamental issues: First, to what extent does the Second Amendment, which provides protection from federal infringement, guarantee the individual right to keep and bear arms? Second, does the Fourteenth Amendment protect this right from state infringement?

I. The Individual Right to Keep and Bear Arms Under the Second Amendment

United States v. Verdugo-Urquidez, 494 U.S. 259, 108 L.Ed.2d 222, 110 S.Ct. 1056 (1990) makes clear that the Second Amendment protects the rights of all law-abiding persons. The Court stated:

"The people" seems to have been a term of art employed in select parts of the Constitution.... The Second Amendment protects "the right of *the people* to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "*the people*." See also U.S. Const., Amdt. 1, ("Congress shall make no law ... abridging ... the right of *the people* peaceably to assemble"); Art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second year by *the People* of the several States")(emphasis added). While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to *a class of persons who are part of a national community* or who have otherwise developed sufficient connection with this country to be considered part of that community. 108 L.Ed.2d at 232-33 (emphasis added in part.)

Concurring, Justice Stevens added that "aliens who are lawfully present in the United States are among those 'people' who are entitled to the protection of the Bill of Rights .... " *Id*. at 241. In his dissent, Justice Brennan noted that "the term 'the people' is better understood as a rhetorical counterpoint 'to the government,' such that rights that were reserved to 'the people' were to protect all those subject to 'the government'

... 'The people' are 'the governed.'" *Id*. at 247.

The above decision reversed a split decision by the Ninth Circuit, 856 F.2d 1214 (9th Cir. 1988), thereby upholding the dissenting views of Circuit Judge Wallace. Judge Wallace stated:

The fourth amendment extends its guarantees to "the people," meaning "the people of the United States." Elsewhere in the Bill of Rights, the Framers sought to constrain the reach of the federal government in the name of "the people." Besides the fourth amendment, the name of "the people" is specifically invoked in the first, second, ninth, and tenth amendments. Presumably, "the people" identified in each amendment is coextensive with "the people" cited in the above amendments. *No contrary indication appears in either the text or history of the Constitution*. *Id*. at 1239. (Emphasis added.)

Similarly, *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950) considered the meaning of "the people" and denied Bill of Rights protection to enemy aliens because otherwise:

Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and "werewolves" could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against "unreasonable" searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.

As is clear, the rights to speech and bearing arms are assumed to be guaranteed to the citizens. After quoting the First Amendment, the Court has referred to "the equally unqualified command of the Second Amendment: 'the right of the people to keep and bear arms shall not be infringed.'" *Konigsberg v. State Bar of California*, 366 U.S. 36, 49 n.10 (1961). As stated by the Court:

This constitutional protection must not be interpreted in a hostile or niggardly spirit ....

As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion. To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.[1]

In *United States v. Miller*, 307 U.S. 174 (1939), the Court avoided determining whether a short barrel shotgun may be taxed under the National Firearms Act consistent with the Second Amendment, as no evidence in the record addressed whether such a shotgun was, or was not, an ordinary militia arm. The Supreme Court remanded the case for fact-finding based on the following:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly *it is not within judicial notice that this weapon is any part of the ordinary military equipment* or that its use could contribute to the common defense. *Aymette v. State*, 2 Hump. 154, 158. 307 U.S. at 178 (emphasis added).

The *Miller* court did not suggest that the possessor must be a member of the militia or National Guard, asking only whether the arm could have militia use. The individual character of the right protected by the Second Amendment went unquestioned.

The *Aymette* opinion stated on the page cited above by the U.S. Supreme Court: "the arms, the right to keep which is secured, are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment. If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments on their rights, etc." 2 Hump. (21 Tenn.) 154, 158 (1840).

Referring to the militia clause of the Constitution, the Supreme Court stated that "to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made." 307 U.S. at 178. The Court then noted that "the Militia comprised all males physically capable of acting in concert for the common defense" and that "these men were expected to appear *bearing arms supplied by themselves and of the kind in common use at the time*." *Id*. at 179 (emphasis added).

The *Miller* court noted that most states "have adopted provisions touching the right to keep and bear arms" but that differences in language meant variations in "the scope of the right guaranteed." 307 U.S. at 182. State precedents cited by the court are divided mainly over whether the respective state guarantees protect all arms or only militia-type arms.[2]

Miller also cites approvingly the commentaries of Joseph Story and Thomas M. Cooley. 307 U.S. at 182 n.3. Justice Story stated: "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of the republic; since it offers a strong moral check against usurpation and arbitrary power of the rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."[3] Judge Cooley stated:

Among the other safeguards to liberty should be mentioned the right of the people to keep and bear arms .... The alternative to a standing army is 'a well-regulated militia'; but this cannot exist unless the people are trained to bearing arms.[4]

Lewis v. United States, 445 U.S. 55 (1980) dealt with the federal prohibition on possession of firearms by felons. The Court noted: "These legislative restrictions [i.e., a felon may not receive a firearm in commerce] on the use of firearms are neither based upon *constitutionally suspect criteria*, nor do they trench upon any *constitutionally protected liberties*." *Id*. at 65 n.8 (emphasis added.) Since "a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm" — including the exercise of other civil liberties, and may even deprive a felon of life itself — felons have no fundamental right to keep and bear arms. *Id*. at 66. Lewis explicitly reaffirmed the *Miller* rule, and removed any uncertainty, that the Second Amendment protects possession of "a firearm" with a militia nexus, and does not merely protect a person with a militia nexus. *Id*. at 65 n.8. *Lewis* did not say that the right to keep and bear arms is not a fundamental right of law-abiding citizens.[5] A "fundamental right" includes a right "explicitly ... guaranteed by the Constitution." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973).

Until recently, no law has ever been passed which banned possession of ordinary firearms by law-abiding citizens. There is dictum about the Second Amendment from cases concerning felons. E.g., *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974)(court appointed attorney made preposterous argument that Second Amendment protects felon's purchase of firearm; unsupported dictum about "a collective right"). Other cases presuppose an individual right.[6] Only one local ordinance banning handgun possession — with exemptions for collectors and storage at clubs — has ever been the subject of a federal appellate decision related to the Second Amendment. *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982)(2-1 opinion), cert. denied 464 U.S. 863 (1983). Yet the majority in this case decided that the Second Amendment does not apply to the states, and did not decide that the Second Amendment does not recognize an individual right. Instead, the court noted the *Miller* holding that "the right to keep and bear arms extends only to those arms which are necessary to maintain a well regulated militia."[7]

In 1989, the State of California banned rifles with military model designations, and declared an intent to allow firearms for sporting use only. California Penal Code paragraph 12275.5, 12276. Such models as are semiautomatic rifles pass the *Miller* test because they are appropriate for militia use, even though the Armed Forces only use fully automatic machineguns.[8] The use of these rifles in the federal Civilian Marksmanship Program demonstrates their suitability for militia purposes.

Tanks, rockets, and nuclear weapons are not protected by the Second Amendment. The Second Amendment protects only arms which one may "keep" and "bear." "The term 'arms' as used by the drafters of the constitutions probably was intended to include those weapons used by settlers for both personal and military defense... The term 'arms' would not have included cannons nor other heavy ordnance not kept by militiamen or private citizens." *State v. Kessler*, 289 Or. 359, 368, 614 P.2d 94, 98 (1980).[9] Semiautomatic firearms have been held as constitutionally guaranteed "arms" under state provisions which were derived from the Second Amendment.[10]

In the Firearms Owners' Protection Act of 1986, Congress interpreted the Second Amendment as guaranteeing an individual right of persons to acquire and keep rifles, pistols, and shotguns. It recognized "the rights of citizens to keep and bear arms under the second amendment to the United States Constitution"[11] as a reason to deregulate substantially the purchase, sale and ownership of firearms.[12] paragraph 1, P.L. 99-308, 100 Stat. 449 (1986). Relying on to its enforcement power under the Fourteenth Amendment, Congress preempted state laws which disallowed transportation of firearms.[13]

In sum, it is clear that Supreme Court jurisprudence is entirely consistent with an individual rights interpretation of the Second Amendment.

II. The Intent of the Framers of the Second Amendment

The Supreme Court has held that "when we do have evidence that a particular law would have offended the Framers, we have not hesitated to invalidate it on that ground alone." *Minneapolis Star v. Minnesota Comm. of Rev.*, 460 U.S. 575, 583-84 n.6 (1983).

It is precisely because the framers wanted to promote a well regulated militia composed of the populace at large that they insisted that the people have a right to keep and bear arms. Concern for the militia does not logically negate recognition of the people's right to keep and bear arms. Far from being mutually exclusive, the militia and this right sustain each other.

Of the eight state bills of rights adopted before the federal Constitution, four recognized the right of "the people" to bear arms. None of these were contained in a militia clause, nor was the term "bear arms" limited to war usage. For instance, the Pennsylvania Declaration of Rights, Art. XIII (1776) provided: "That the people have a right to bear arms for the defense of themselves, and the state... ."

In *The Federalist* No. 46, James Madison alluded to "the advantage of being armed, which the Americans possess over the people of almost every other nation." Madison, Hamilton, and Jay, *The Federalist Papers* 299 (Arlington House ed. n.d.) Madison continued, "Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms." *Id*.

Noah Webster, the influential federalist whose name still appears on dictionaries, stated: "Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed... ." *Pamphlets on the Constitution of the United States* 56 (P. Ford ed. 1888).

Insisting on a Bill of Rights, Richard Henry Lee wrote that "to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them ... " R. Lee, *Additional Letters from The Federal Farmer* 170 (1788). The Supreme Court has noted: "The remarks of Richard Henry Lee are typical of the rejoinders of the Antifederalists... . The concerns voiced by the Antifederalists led to the adoption of the Bill of Rights... ." *Minneapolis Star v. Minnesota Corn. of Rev.*, 460 U.S. 575, 584 (1983).

In the Virginia ratifying convention, Patrick Henry argued, "the great object is, that every man be armed... . Everyone who is able may have a gun." 3 Elliot, *Debates in the Several State Conventions* 386 (1836). Accordingly, the Virginia convention proposed a declaration of individual rights, including: "That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state... ." *Id*. at 659.

Virginia also proposed an entirely separate body of amendments concerning governmental powers, including: "That each state respectively shall have the power to provide for organizing, arming, and discipline its own militia, whensoever Congress shall omit or neglect to provide for the same." *Id*. at 660.

When James Madison proposed the Bill of Rights in 1789, he wrote that the proposed amendments concerning the press and arms "relate first to private rights." 12 *Madison Papers* 193-194 (Rutland ed. 1979). Ten days after its introduction, federalist leader Tench Coxe wrote of what became the Second Amendment: "As civil rulers, not having their duty to the

people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms." *Federal Gazette*, June 18, 1789, at 2, col. 1 (emphasis added). Madison endorsed Coxe's analysis, which was reprinted without contradiction. See 12 *Madison Papers* at 239-40, 257 (1979).

When the constitutional amendments were being debated in Congress, the state-militia guarantee proposed by the Virginia convention was rejected. *Journal of the First Session of the Senate* 75 (1820). Thus, Congress passed the Bill of Rights, which guaranteed "the right of the people to keep and bear arms," and rejected an explicit "power" of "each state" to provide for militias. No court has ever acknowledged awareness of this fact. Through an Orwellian rewriting of history, adherents of an exclusive state militia power appear to claim that the defeated amendment is really what passed in the Second Amendment.

The Framers assigned promotion of a well regulated militia as the leading purpose of what is nonetheless the "right of the people to keep and bear arms." One would not expect the Framers to state in a serious political charter a preamble such as "duck hunting being necessary to the recreation of a fun state."

St. George Tucker, the first major commentator on the Bill of Rights (*New York Times v. Sullivan*, 376 U.S. 254, 296-97 (1964)), explained the Second Amendment as follows: "The right of self defense is the first law of nature .... Wherever ... 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 Tucker, *Blackstone's Commentaries* (Appendix) 300 (1803).

In sum, the Framers clearly intended to protect the individual right to keep and bear arms.

III. Does the Fourteenth Amendment Incorporate the Second Amendment?

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, including the state slave codes. 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." *Scott v. Sandford*, 60 U.S. 393, 417 (1857). In other words, if blacks were citizens, then the Second Amendment would invalidate state laws which prohibited firearms possession by such citizens.

The Fourteenth Amendment was intended to eradicate the black codes, under which "Negroes were not allowed to bear arms or to appear in all public places... " *Bell v. Maryland*, 378 U.S. 226, 247-48 & n.3 (1964) (Douglas, J., concurring). In his concurring opinion in *Duncan v. Louisiana*, 391 U.S. 145, 166-67 (1968), Justice Black recalled the following words of Senator Jacob M. Howard in introducing the amendment to the Senate in 1866: "The personal rights guaranteed and secured by the first eight amendments of the Constitution; such as ... the right to keep and bear arms .... The great object of the first section of this amendment is, therefore, to

restrain the power of the States and compel them at all times to respect these great fundamental guarantees."

The Supreme Court has never determined whether the Fourteenth Amendment protects the right to keep and bear arms from state infringement. However, *Malloy v. Hogan*, 378 U.S. 1, 5 (1964) states: "The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme.[14]

The same two-thirds of Congress which proposed the Fourteenth Amendment also passed an enactment declaring that the fundamental rights of "personal liberty" and "personal security" include "the constitutional right to bear arms." Freedmen's Bureau Act, paragraph 14, 14 Stat. 176 (July 16, 1866). This Act, and the companion Civil Rights Act of 1866, sought to guarantee the same rights that the Fourteenth Amendment was adopted to protect.

No court has ever considered Congress' declaration, contemporaneously with its adoption of the Fourteenth Amendment, that the rights to personal security and personal liberty include the "constitutional right" — i.e., the right based on the Second Amendment — "to bear arms." Until now, this declaration in the Freedmen's Bureau Act has been completely unknown both to scholars and the courts.[15]

At the beginning of the above session, Senator Sumner presented "a memorial from the colored citizens of the State of South Carolina in convention assembled .... They ask also that they should have the constitutional protection in keeping arms ..." *Cong. Globe*, 39th Cong., 1st Sess., 337 (Jan. 22, 1866). The Second Amendment was explained as protecting the right "for every man bearing his arms about him and keeping them in his house, his castle, for his own defense." *Id*. at 371 (Jan. 23, 1866) (remarks of Senator Davis).

The Freedmen's Bureau bill would have protected the right of every person "to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right to bear arms." *Id*. at 654, 1292. The first bill, including this exact language, passed Congress, but was vetoed by President Johnson.

Jones v. Mayer Co., 392 U.S. 409, 423-24, 436 (1968) notes the intimate connection between the above and the adoption of the Fourteenth Amendment. See *Bell v. Maryland*, 378 U.S. 226, 292-93 (1964) (Goldberg, J., concurring) (tracing Fourteenth Amendment to Civil Rights Act and Freedmen's Bureau bill, and quoting the latter's reference to "full and equal benefit of all laws and proceedings for the security of person and estate").

When reintroduced after the President's veto, and as passed, the Freedmen's Bureau Act protected the "full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*". *Cong. Globe*, 39th Cong., 1st Sess., 3412; 14 Stat. 176 (emphasis added).

Each and every member of Congress who voted for the Fourteenth Amendment also voted for one or both of the two Freedmen's Bureau bills which recognized the right to bear arms.

Every single senator who voted for the Fourteenth Amendment also voted for the recognition of the constitutional right to bear arms in the Freedmen's Bureau bills, S. 60 and H.R. 613. An analysis of the roll call votes reveals that all 33 senators, i.e., 100%, who voted for the Fourteenth Amendment also voted for either S. 60 or H.R. 613.[16] Of the 33 who voted for the Fourteenth Amendment, 28 (85%) voted for both S. 60 and H.R. 613. The Senate's override of the Presidential veto passed by 33 to 12 (73%), more than the necessary two-thirds.[17]

Members of the House cast recorded votes overwhelmingly in favor of the Freedmen's Bureau bills, with recognition of the right to bear arms, on three occasions, and in favor of the Fourteenth Amendment on two occasions.[18] The overwhelming majority voted in the affirmative on all five recorded votes — once on S. 60, twice on the Fourteenth Amendment, and twice on H.R. 613. A total of 140 Congressmen voted at least once in favor of the Fourteenth Amendment, and of these 140 — i.e., 100% — voted at least once in favor of one of the Freedmen's Bureau bills. Of the 140 Congressman who voted for the Fourteenth Amendment, a total of 120 — i.e., 86% — voted for both S. 60 and H.R. 613. The House overrode the President's veto of H.R. 613 by a vote of 104-33, i.e., 76%.

Accordingly, to a man, more than two-thirds of members of Congress who voted for the Fourteenth Amendment also voted for the proposition in the Freedmen's Bureau bills that the constitutional right to bear arms is included in the rights of personal liberty and personal security.

The Supreme Court has repeatedly found the Fourteenth Amendment to protect from state action the "indefeasible right of personal security, personal liberty and private property ... ." *Griswold v. Connecticut*, 381 U.S. 479, 485 n. (1965). "Constitutional provisions for the security of person and property should be liberally construed." *Coolidge v. New Hampshire*, 403 U.S. 443, 454 (1971).[19]

The Freedmen's Bureau Act recognized the right to bear arms as a right of every person, not as a state militia power. Indeed, the Act and the Fourteenth Amendment — as well as an act abolishing the Southern state militias — were passed in part to prevent state militias from disarming individuals and hence infringing on the right to keep and bear arms.[20]

Justice Marshall's opinion in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 397 (1978) states: "The Congress that passed the Fourteenth Amendment is the same Congress that passed the 1866 Freedmen's Bureau Act." Justice Marshall concluded that the rights set forth in the Freedmen's Bureau Act were dispositive of Congress' intent in the Fourteenth Amendment. *Id*. at 398.

Thus, over two-thirds of the Congress that passed the Fourteenth Amendment went on record recognizing that "the constitutional right to bear arms" was among the guarantees of personal liberty and personal security to be protected from state infringement. No other provision of the Bill of Rights was singled out for this preferred treatment.

A lengthy analysis of the Civil Rights Act of 1871, 42 U.S.C. paragraph 1983, in *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 665 (1978) relies on a speech by Representative John Bingham as follows: "Representative Bingham, for example, in discussing paragraph 1 of the bill, explained that he had drafted paragraph 1 of the Fourteenth Amendment with the case of *Barron v. Mayor of Baltimore*, 7 Pet. 243 (1833), especially in mind." 436 U.S. at 686-87. On the same page of the speech where he mentioned *Barron*, Bingham characterized "the right of the people to keep and bear arms" as one of the "limitations upon the power of the States ... made so by the Fourteenth Amendment." *Cong. Globe*, 42nd Cong., 1st Sess., pt. 2, Appendix 84 (Mar. 31, 1871). As the Court pointed out, "Representative Bingham, the author of paragraph 1 of the Fourteenth Amendment, ... declared the bill's purpose to be 'the enforcement ... of the Constitution on behalf of every individual citizen of the Republic ... to the extent of the rights guaranteed to him by the Constitution.'" 436 U.S. at 685 n. 45.

Another authority cited in *Monell* (*id*.) was Representative Henry L. Dawes, who stated on the pages referenced by the Court that the Fourteenth Amendment "has secured to [the citizen] the right to keep and bear arms in his defense." *Cong. Globe*, 42nd Cong., 1st Sess., pt. 1, 475-76 (Apr. 5, 1871).

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) points out that, in passing the Civil Rights Act, Congress assigned to the federal courts a paramount role in protecting constitutional rights. Representative Dawes expressed this view as follows:

"The first remedy proposed by this bill is a resort to the courts of the United States .... If there be power to call into courts of the United States an offender against these *rights, privileges, and immunities*, and hold him to an account there, *either civilly or criminally*, for their infringement, ... there is no tribunal so fitted ... as that great tribunal of the Constitution." *Id*. at 503. (citing *Cong. Globe*, 42d Cong., 1st Sess. 476 (1871)) (emphasis added.)

"These rights, privileges, and immunities," which the Supreme Court noted are "constitutional rights" that the federal courts are bound to protect, were identified in detail by Representative Dawes just before he uttered the words quoted above by the Court. Dawes stated in part:

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

... Then again he has secured to him the right to keep and bear arms in his defense ....

It is all these, Mr. Speaker, which are comprehended in the words, "American citizen," and it is to protect and to secure him in these rights, privileges and immunities this bill is before the House. *Cong. Globe* at 475-76.

After quoting Dawes, the Supreme Court references the remarks of Representatives Butler and Coburn. 457 U.S. at 504. On the pages referred to by the Court, Butler argued for protection of "rights, immunities, and privileges" guaranteed in the Constitution. *Cong. Globe* at 448-49. In a report introducing the civil rights bill just weeks before, Butler advocated protection for "the well-known constitutional provision guaranteeing the right in the citizen to 'keep and bear arms'

.... " H.R. Rep. No. 37, 41st Cong., 3d Sess. 3 (Feb. 20, 1871). The page reference to Coburn finds him supporting the bill to prevent the following state infringement: "How much more oppressive is the passage of a law that they shall not bear arms than the practical seizure of all arms from the hands of the colored men?" *Cong. Globe*, 42d Cong., 1st Sess. 459 (1871). (The Court relies on this page of Coburn's speech as authority four times. 457 U.S. at 504-06.)

The Supreme Court continued: "Opponents of the bill also recognized this purpose and complained that the bill would usurp the State's power. See, e.g., ... remarks of Representative Whitthorne ... , *Id*. at 504 n.6. On the page cited by the Court, Whitthorne noted that the proposed Civil Rights Act, today's paragraph 1983, would allow suits by any person "who conceives that he has been deprived" by state action "of any right, privilege, or immunity secured to him by "the Constitution of the United States." Whitthorne added that if a police officer seized a pistol from a "drunken negro," "the officer may be sued, because the right to bear arms is secured by the Constitution ...." *Cong. Globe*, 42d Cong., 1st Sess. 337 (1871).

The Supreme Court cites Senator Thurman four times as a representative opponent of the civil rights bill. 457 U.S. at 504 n.6, 505 n.7, 506 & n.9. The Court depicts such opponents as correctly recognizing the bill's broad scope. *Id*. at 504 n.6. Senator Thurman included the Second Amendment among the "rights privileges, and immunities of a citizen of the United States." "Here is another right of a citizen of the United States, expressly declared to be his right — the right to bear arms; and this right, says the Constitution, shall not be infringed." *Cong. Globe*, 42d Cong., 2d Sess., App. 25-26 (1872). Senator Sherman — whom Patsy relied upon as a proponent of the bill (457 U.S. at 505 n.8) — agreed with Thurman's assessment as far as it went. *Cong. Globe*, 42d Cong., 2d Sess., App. 25-26 (1872).

The *Patsy* Court did not ignore Representative Bingham, the draftsman of the Fourteenth Amendment, and approvingly cites the same page of his well-known speech: "that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States." Bingham proceeded to read each of those amendments, including the Second Amendment. *Id*., 1st Sess., App., 85 (1871). (This page is cited as authority in 457 U.S. at 507.)

The Court has never held that the Second Amendment does not apply to the states through the Fourteenth Amendment.[21] The Court confirmed that it had never addressed this issue in *Miller v. Texas*, 153 U.S. 535 (1894), which remains the last word on the subject from the Court.

Miller attacked a state statute on 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 a state appellate court.

The Court stated (*id*. at 538) that the Second and Fourth Amendments did not directly apply to the states, citing the pre-Fourteenth case of *Barron v. Baltimore*, 32 U.S. 243, 250-51 (1833) (Fifth Amendment just-compensation clause does not restrict state action) and *United States v. Cruikshank*, 92 U.S. 542, 552-53 (1876)("the first amendment . was not intended to limit the powers of the State governments ... but to operate upon the National government alone"; same

with Second Amendment). *Cruikshank* was also cited in *Presser v. Illinois*, 116 U.S. 252 (1886). *Presser* held that a prohibition on unlicensed armed marches "do[es] not infringe the right of the people to keep and bear arms," adding that the First Amendment right to assemble and the Second Amendment right to bear arms do not, in and of themselves, limit state action. 116 U.S. at 265, 267. *Presser* did not address whether the Fourteenth Amendment incorporates the First and Second Amendments so as to limit state action concerning the rights there declared.[22]

The Court in *Miller v. Texas* then turned to the claim that the Texas statute violated the rights to bear arms and against warrantless searches 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. *Id*. at 538-39.

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 assigned in the trial court. The Court merely left open the possibility that the right to keep and bear arms and freedom from warrantless searches would apply to the states through the Fourteenth Amendment.

While the above was the last word by the Supreme Court on the issue, *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897) 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... . In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions ... . Thus, ... the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons ....

Thus, the states may regulate certain aspects of the exercise of the right to keep and bear arms, but may not prohibit its exercise altogether.

Conclusion

Supreme Court jurisprudence coupled with the intent of the Framers makes clear that the Second Amendment guarantees the right of law-abiding individuals to keep and bear arms. The Fourteenth Amendment incorporates the Second Amendment so as to protect this right from state infringement. As Americans celebrate the Bicentennial of the Bill of Rights, it is evident that the Second Amendment is not an embarrassing relic to hide in the closet, but is as essential to human freedom as is any other fundamental right.

1. Ullmann v. United States, 350 U.S. 422, 426-29 (1956).

2. Among the cases cited by the Supreme Court are the following:

"The arms which it guarantees American citizens the right to keep and to bear, are such as are needful to, and ordinarily used by a well regulated militia, and such as are necessary and suitable to a free people, to enable them to resist oppression, prevent usurpation, repel invasion, etc., etc." Fife v. State, 31 Ark. 455, 458, 25 Am. Rep. 556 (1876).

"Some courts have ... held that the constitutional protection covers the bearing of such arms only as are a customary part of the equipment of a militiaman .... On the other hand, some courts ... have extended the protection to weapons of all descriptions." People v. Brown, 253 Mich. 537, 235 N.W. 245, 246 (1931).

"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." State v. Duke, 42 Tex. 455, 458-59 (1875).

"In regard to the kind of arms referred to in the [second] amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets,-arms to be used in defending the state and civil liberty ... ." State v. Workman, 35 W.Va. 367, 373, 14 S.E. 9, 11 (1891).

Thus, it has been generally assumed that militia-type firearms are constitutionally protected; past controversies centered on other types of weapons. While not cited by the Supreme Court, the following cases make this point:

"[T]he term 'arms' as used means such arms as are recognized in civilized warfare .... " State v. Swanton, 129 Ariz. 131, 629 P.2d 98, 99 (Ct. App. 1981).

"The intention was to embrace the 'arms', an acquaintance with whose use was necessary for their protection against the usurpation of illegal power — such as rifles, muskets, shotguns, swords, and pistols." State v. Kerner, 181 N.C. 574, 107 S.E. 222, 224-25 (1921).

"Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained, we would hold that the rifle of all descriptions, the shot-gun, the musket and repeater are such arms; and that under the constitution the right to keep such arms cannot be infringed or forbidden by the legislature." Andrews v. State, 50 Tenn. 165, 179, 8 Am. Rep. 8, 14 (1871). *Id*. at 183 n.3.

3. J. Story, *Commentaries on the Constitution* 646 (5th ed. 1891). "One of the ordinary modes, by which tyrants accomplish their purpose without resistance is, by disarming the people, and making it an offense to keep arms ... ." J. Story, *A Familiar Exposition of the Constitution of the United States* 264 (1893).

4. T. Cooley, *Constitutional Limitations* 729. T. Cooley, *General Principles of Constitutional Law* 281-282 (2d ed. 1891) states further:

The right is General — It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent .... The meaning of the provision undoubtedly is that the people from whom the militia must be taken shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.

5. See United States v. Three Winchester 30-30 Caliber Lever Action Carbines, 504 F.2d 1288, 1290 n.5 (7th Cir. 1974), an opinion by Judge Sprecher, author of The Lost Amendment, 51 A.B.A.J. 554, 665 (1965), which argues

the individual rights position. In his above opinion, Sprecher cited United States v. Synnes, 438 F.2d 764, 772 (8th Cir. 1971), which found "no conflict between [the prohibition] and the Second Amendment since there is no showing that prohibiting possession of firearms by felons obstructs the maintenance of a well regulated militia."

6. Felons are "a separate class whose individual right to bear arms may be prohibited." United States v. Wiley, 309 F.Supp. 141, 145 (D. Minn. 1970), aff'd 438 F.2d 773 (8th Cir. 1971). See United States v. Bowdach, 414 F.Supp. 1346, 1353 & n.11 (S.D. Fla. 1976), aff'd 561 F.2d 1160 (5th Cir. 1977) ("possession of the shotgun by a non-felon has no legal consequences. U.S. Const. Amend. II.").

7. 695 F.2d at 270. While factually incorrect, the court noted that "we do not consider individually owned handguns to be military weapons." *Id*. at 270 n.8.

8. The rifle is the militia arm par excellence. The language of the Second Amendment resulted in "the deference and immunity extended to rifles in the earliest enactments .... " People v. Raso, 9 Misc.2d 739, 170 N.Y.S.2d 245, 248-49 (1958). People v. Warden, 154 App. Div. 413, 139 N.Y.S. 277, 284 (1913) states: "If the Legislature had prohibited the keeping of arms, it would have been clearly beyond its power."

9. Construing the Second Amendment and a state guarantee, State v. Kerner, 181 N.C. 574, 577-78, 107 S.E. 222, 224-25 (1921) noted that the term "should be construed to include all 'arms' as were in common use, and borne by the people ... such as rifles, muskets, shotguns, swords, and pistols." "It does not guarantee ... that the people have the futile right to use submarines and cannons .... " *Id*.

10. In State v. Rupe, 101 Wash.2d 664, 683 P.2d 571, 594 (1984), the court was concerned with the right to keep various firearms, including "a CAR 15 semiautomatic rifle (civilian version of the military's M-16)," and stated: "Constitutionally protected behavior cannot be the basis of criminal punishment." Rinzler v. Carson, 262 So.2d 661, 666 (Fla. 1972) refers to "the historic constitutional right of the people to keep and bear arms," as including "weapons not concealed upon the person, which, although designed to shoot more than one shot semi-automatically, are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property, such as semiautomatic shotguns, semiautomatic pistols and rifles."

11. The Congressional finding that the Second Amendment guarantees "the rights of citizens" to keep and bear arms was supported by *The Right to Keep and Bear Arms: Report of the Subcommittee on the Constitution*, Senate Judiciary Committee, 97th Cong., 2d Sess. 12 (1982), which states: "The conclusion is thus inescapable that the history, concept, and wording of the second amendment to the Constitution of the United States, as well as its interpretation by every major commentator and court in the first half-century after its ratification, indicates that what is protected is an individual right of a private citizen to own and carry firearms in a peaceful manner." In "The Fourteenth Amendment and the Right to Keep and Bear Arms: The Intent of the Framers," the Report (*id*. at 68-82) demonstrates that the Second Amendment was intended to be incorporated into the Fourteenth Amendment so as to limit state action.

12. The above Congressional findings concerning the Second Amendment in the Firearms Owners' Protection Act are referred to in United States v. Breier, 827 F.2d 1366 (9th Cir. 1987) (Noonan, J., dissenting from denial of rehearing) as follows: Guns are the subject of constitutional protection: "the right of the people to keep and bear arms shall not be infringed." United States Constitution, Amendment II. Congress has regulated guns, sensitive to the Second Amendment and to the difference between hobbyists and those making a living out of the gun business.

13. 18 U.S.C paragraph 926A. Senator Symms introduced this provision with the explanation: "The intent of this amendment ... is to protect the second amendment rights of law-abiding citizens wishing to transport firearms through States which otherwise prohibit the possession of such weapons." 131 *Cong. Rec.* §9114 (July 9, 1985).

14. The only appellate case ever to uphold a general prohibition on possession of handguns squarely conflicts with Malloy's instruction. Quilici v. Village of Morton Grove, 695 F.2d 261, 270 n.8 (7th Cir. 1982) (2-1 opinion), cert. denied 464 U.S. 863 (1983) ("the debate surrounding the adoption of the second and fourteenth amendments ... . has no relevance on the resolution of the controversy before us.").

15. This author was unaware of this declaration in the Freedmen's Bureau Act when he published *That Every Man Be Armed: The Evolution of a Constitutional Right* (University of New Mexico Press 1984), which analyzes the Congressional intent to incorporate the Second Amendment into the Fourteenth Amendment. *Id*. at 107153. The most definitive work on the incorporation of the Bill of Rights into the Fourteenth Amendment does not reflect passage of the Freedmen's Bureau Act, although it is cognizant of the bill itself:

The most telling evidence that the "full and equal benefit of all laws and proceedings for the security of person and property" could be read to include constitutional rights in the Bill of Rights comes from Republicans in the Thirty-ninth Congress themselves. When they passed the Freedman's Bureau bill, they provided that Blacks should have, among other things, "full and equal benefit of all laws and proceedings for the security or person and estate, including the constitutional right of bearing arms."

M. Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 72 (Duke University Press 1986). Similarly, several Supreme Court cases analyze other parts of the Freedmen's Bureau bill and appear unaware that it was enacted into law. E.g., Loving v. Virginia, 388 U.S. 1, 9 (1967); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 423 n.30 (1968).

16. All voting tabulations are made from *Cong. Globe*, 39th

17. *Id*. at 3842.

18. *Id*. at 654 (Feb. 5, 1866), 688 (Feb. 6, 1866), 2545 (May 10, 1866), 3149 (June 13, 1866), 2878 (May 29, 1866), and 3850 (July 16, 1866).

19. Coolidge, *id*. at 454 n.4, quotes Gouled v. United States, 255 U.S. 298, 303-304 (1921) concerning rights "declared to be indispensable to the 'full enjoymentof personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen ... ." See also *id*. at 588, 591 n.8, and 596; United States v. Verdugo-Urquidez, 856 F.2d 1214, 1220 (9th Cir. 1988), rev'd on other grounds 494 U.S. 259 (1990) ("The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property.") (quoting 2 J. Kent, *Commentaries* 1 (1827)).

It is well established that the right to personal liberty and personal security — which the Congress that passed the Fourteenth Amendment said includes "the constitutional right to bear arms" — are protected by the Fourteenth Amendment. Wood v. Ostrander, 879 F.2d 583, 591 (9th Cir. 1989) squarely holds that no state may commit "a violation of her constitutional right to personal security, a liberty interest protected by the fourteenth amendment."

20. For instance, Senator Henry Wilson introduced a bill to disband the Southern state militias because they abused freedmen and "were engaged in disarming the negroes." *Cong. Globe*, 39th Cong., 1st Sess., 914 (Feb. 19, 1866). Because of such complaints, Congress disbanded the Southern state militias. 15 Stat. 487 (Mar. 2, 1867).

21. United States v. Cruikshank, 92 U.S. 542 (1876) stated that the federally recognized rights of peaceable assembly and bearing arms did not of themselves limit state action. This was dictum, since the case involved the disarming and murder of freedmen by KKK members. *Id*. at 551, 553; 25 F.Cas. 707 (C.C.D. La. 1874). The Court recognized that the rights to assemble and to bear arms were not "granted" by the Constitution because they existed long before its adoption. 92 U.S. at 551, 553. Presser v. Illinois, 116 U.S. 252 (1886) repeated that the First and Second Amendments did not of themselves apply to the states. This too was dictum, since the Court held that bans on unlicensed armed parades on city streets "do not infringe on the right of the people to keep and bear arms." *Id*. at 265. Presser does not discuss whether the Fourteenth Amendment incorporates the Second Amendment.

22. Presser rejected the argument that a person has, under the privileges and immunities clause of the Fourteenth Amendment, a right "to associate with others as a military company, and to drill and parade with arms in the towns and cities of the State". *Id*. at 266. The Court also rejected without discussion a due process argument under the

Fourteenth Amendment. *Id*. at 268. Presser discussed the Second Amendment issue separately from any Fourteenth Amendment issues, and did not discuss incorporation.