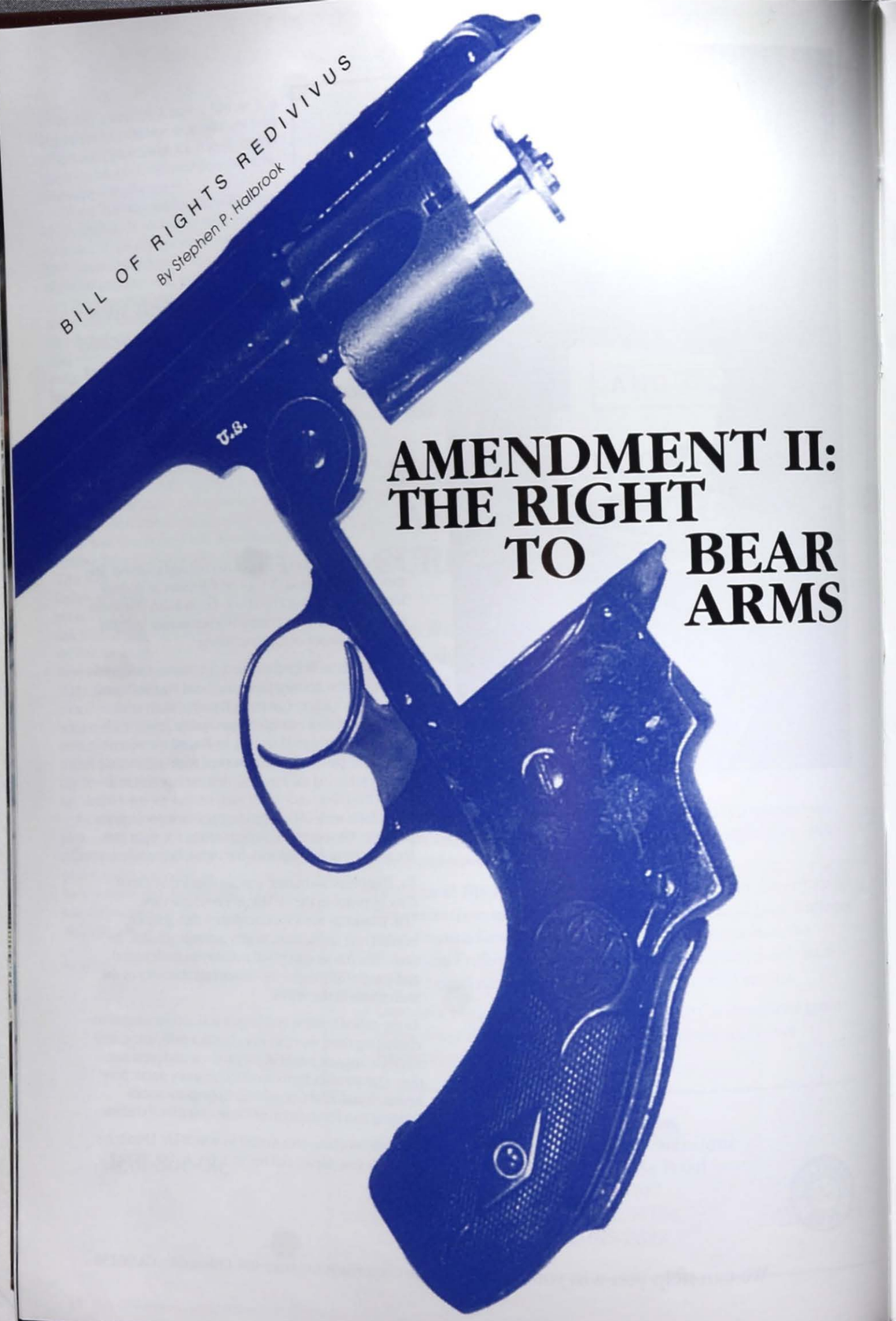
BILL OF RIGHTS REDIVIVUS

By Stephen P. Halbrook



AMENDMENT II: THE RIGHT TO BEAR ARMS

Some two hundred years after its adoption, the Second Amendment to the United States Constitution has become the black sheep of the Bill of Rights. The Second Amendment 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."

While treasured by America's 70 million gun owners, the guarantee is an embarrassment to many judges and academics,[1] who consign its history to the Orwellian memory hole, and its wording to 1984 Newspeak: "the people" means the state, "right" means governmental power, and "arms" do not include weapons.

The ostensibly-harmless philosophical declaration about the militia which precedes the substantive guarantee belonging to "the people" has been seized upon to invent the twentieth century argument that the amendment somehow protects only the power of a state to maintain a militia. While harboring no agenda for state militia powers, advocates of this hypothesis strongly oppose firearms ownership by the general public, and opine that no prohibition on firearms possession could ever violate the Second Amendment.

English/Revolutionary Origins

The Second Amendment originated from a libertarian vision of the Revolutionary patriots, who claimed and expanded on the rights of Englishmen. In response to the Crown's infringement on these rights, in 1768 the Town of Boston passed resolutions against standing armies and taxation without representation, and requested each inhabitant to obtain and keep a firearm. Boston justified the arming of the populace by the following:

> WHEREAS, by an Act of Parliament, of the first of King William and Queen Mary, it is declared, that the Subjects being Protestants, may have arms for their Defence; It is the Opinion of this town, that the said Declaration is founded in Nature, Reason and sound Policy, and is well adapted for the necessary Defence of the Community.[2]

The Act of Parliament mentioned above was the Declaration of Rights of 1689, which stated that James II had subverted "the Laws and Liberties of this kingdom," in part "by causing several good Subjects, being Protestants, to be disarmed, at the same Time when Papists were both armed and employed, contrary to law."[3] The "true ancient and indubitable rights" it declared included: "that the Subjects which are Protestants, may have Arms for their Defence suitable to their Condition, and as are allowed by Law."[4]

In the first major commentary on the American Bill of Rights, St. George Tucker would note that the Second Amendment expanded the English version of the right by dropping the aristocratic-based clause at the end: "The right of the people to keep and bear arms shall not be infringed…and this without any qualification as to their condition or degree, as is the case in the British government…."[5]

As Boston passed its resolutions, British troops were sailing to the town to begin their brutal occupation. Rumors abounded, and the *Boston Gazette* published the following warning probably written by Samuel Adams:

> It is reported that the Governor has said, that he has Three Things in Command from the Ministry, more grievous to the People, than any Thing hitherto made known. It is conjectured 1st, that the Inhabitants of this Province are to be disarmed. 2d, The Province to be governed by Martial Law. And 3d, that a Number of Gentlemen who have exerted themselves in the Cause of their Country, are to be seized and sent to Great Britain.[6]

The rights of the people to keep arms, to be governed by the rule of law, and to trial by a jury of their peers would later find expression in the Bill of Rights. In vindicating these rights, the patriots sought refuge in Sir William Blackstone. Samuel Adams found in Blackstone three ways in which individuals protect their rights:

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'To vindicate these rights, says Mr. Blackstone, when actually violated or attack'd, the subjects of England are entitled first to the regular administration and *free course of justice* in the courts of law — next to the right of *petitioning the King* and parliament for redress of grievances — and lastly, to the right of *having and using arms for self-preservation and defence*.' These he calls "auxiliary subordinate rights, which serve principally as barriers to protect and maintain inviolate the three great and primary rights of *personal security, personal liberty* and *private property*": And that of *having arms for their defense* he tells us is 'a public allowance, under due restrictions, of the *natural right of resistance and self-preservation*, when the sanctions of society and laws are found *insufficient* to restrain the *violence of oppression*.'[7]

In 1774, the "Divan," the Crown-packed governing body of Boston, debated America's first "gun control" law, but apparently decided the proposal to be unenforceable or feared widespread protest. A Boston paper reported: "It is said, it was proposed in the Divan last Wednesday, that the inhabitants of this Town should be disarmed, and that some of the new-fangled Counsellors consented thereto, but happily a majority was against it."[8]

Even so, the Redcoats began to commit arbitrary searches and seizures for firearms and ammunition, an outrage the Framers would recall in adopting both the Second and Fourth Amendments. Worchester County protested to General Gage as follows: "This County are constrained to observe, they apprehend the People justified in providing for their own Defense, while they understood there was no passing the Neck without Examination,... and many places searched, where Arms and Ammunition were suspected to be; and if found seized...."[9]

After Lexington and Concord, Gage ordered the inhabitants of Boston to surrender their arms, promising to keep them for the owners and to return them at a later date. After the people complied, Gage thereafter refused to return the arms, and would not allow anyone to leave town.[10]

The Declaration of Causes of Taking Up Arms adopted by the Continental Congress in 1775 complained: "It was stipulated that the said inhabitants having deposited their arms with their own magistrates, should have liberty to depart.... They accordingly delivered up their arms, but in open violation of honor,...the governor ordered the arms deposited as aforesaid, that they might be preserved for the owners, to be seized by a body of soldiers...."[11]

The first state bills of rights sought to protect the above rights. Pennsylvania and Vermont declared: "That the people have a right to bear arms for the defense of themselves, and the state...."[12] North Carolina declared "that the People have a right to bear arms for the defense of the State...."[13] Reflecting its experience with gun seizures from houses, Massachusetts added the right to "keep" arms: "The people have a right to keep and bear arms for the common defense."[14]

The Intent Of The Framers

A storm erupted when the Constitution was proposed in 1787 with no bill of rights. Antifederalists insisted that the Constitution not be ratified without an explicit declaration. Federalists warned that any enumeration of rights would be later misconstrued by government to limit or deny the rights of the people.

In *The Federalist* No. 46, James Madison argued that an oppressive army of the United States government "would be opposed [by] a militia amounting to near half a million citizens with arms in their hands."[15] Alluding to "the advantage of being armed, which the Americans possess over the people of almost every other nation," 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."[16]

Noah Webster, 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...."[17] 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...."[18] The Supreme Court recently 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.... The fears of the Antifederalists were well founded.[19]

The Constitution was finally ratified by the states based on the Federalist promise to seek adoption of a bill of rights. When James Madison proposed the Bill of Rights to the House of Representatives in 1789, he wrote that the proposed amendments concerning the press and arms "relate first to *private* rights...."[20] 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...in their right to keep and bear *their private arms*."[21] Madison endorsed Coxe's analysis, which was reprinted without contradiction.[22]

The Senate took two actions which clarify the intent of the Second Amendment. First, it considered, and then rejected an entirely separate proposal that would have recognized a state militia power: "That each state, respectively, shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same...."[23]

The above highlights the clear distinction between the "right" of "the people" to keep and bear arms, and the "power" of the "state" to arm and provide for militias. This demonstrates the absurdity of the argument invented in the twentieth century that by declaring the right of the people to keep and bear arms, Congress actually intended to declare the power of states to maintain militias — the very proposal Congress rejected.

The Senate also rejected a proposal to add "for the common defence" after "bear arms" in the Second Amendment.[24] Had it succeeded, recognition of "the right of the people to keep and bear arms for the common defense" would have still been an individual right to have arms, but could have been interpreted as allowing arms to be kept only for common defense against foreign aggression or domestic tyranny, or that only military arms could be kept.

The Supreme Court And The Second Amendment

The Supreme Court decided two cases in 1990 which contribute to an understanding of the Second Amendment. First, in *United States v. Verdugo-Urquidez*, a Fourth Amendment case, the Court made clear that all law-abiding Americans are protected by the Second Amendment as follows:

> '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., amend. 1, (Congress shall make no law...abridging... the right of the people peaceably to assemble')..... 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.[25]

In his dissent, Justice Brennan argued even more broadly 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.'"[26] Justice Brennan also reviewed the drafting history of the Fourth Amendment, noting that the Framers "could have limited the right to 'citizens,' 'freemen,' 'residents,' or the 'American people.'...Throughout that entire process, no speaker or commentator, pro or con, referred to the term 'the people' as a limitation."[27] Similarly, the Framers could have limited the Second Amendment right to select state militias, but instead used the terms "the people."

Finally, Justice Brennan pointed out that rights are not "given *to* the people *from* the government.... The Framers of the Bill of Rights did not purport to 'create' rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing."[28] This statement is particularly applicable to the right to keep and bear arms, which has been recognized as a personal right for centuries.[29]

A second 1990 Supreme Court opinion has relevance to the twentieth century argument that the Second Amendment protects only the "right" of a state to maintain a militia, and that the "militia" is restricted to the National Guard. In *Perpich v. Department of Defense* (1990),[30] the Court recognized that the National Guard is part of the Armed Forces of the United States and that the Reserve Militia includes all able-bodied citizens.[31]

The issue was whether the militia clause allows the president to order members of the National Guard to train outside the United States without the consent of a state governor or the declaration of a national emergency.[32] Perhaps the most noteworthy fact about the opinion is its failure to mention the Second Amendment at all, that amendment being irrelevant to the issue of the state power to maintain a militia. In fact, the Court refers to the state power over the militia as being recognized only in "the text of the Constitution," not in any amendment:

> Two conflicting themes, developed at the Constitutional Convention and repeated in debates over military policy during the next century, led to a compromise in the text of the Constitution and in later statutory enactments. On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States, while, on the other hand, there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense. Thus, Congress was authorized both to raise and support a national army and also to organize 'the Militia.'[33]

The Court referred to "the traditional understanding of the militia as a part-time, nonprofessional fighting force,"[34] and as "a body of *armed citizens* trained to military duty, who may be called out in certain cases, but may not be kept on service like standing armies, in time of peace."[35] The Court also recognized the existence of "all portions of the 'militia' — organized or not...."[36]

The Court concluded that "there is no basis for an argument that the federal statutory scheme deprives [a state] of any constitutional entitlement to a separate militia of its own."[37] The Court failed even to suggest that the Second Amendment had any bearing on the issue.

In sum, it was clear enough to the Supreme Court in 1990 that "the people" in the Second Amendment means individuals generally, as it does in the rest of the Bill of Rights; that the "militia" means the body of armed citizens at large, organized and unorganized; and that the Second Amendment is not relevant to the power of a state to maintain the militia.

Traditionally, the Supreme Court has paid little attention to the Second Amendment. It noted in the *Dred Scott* case that recognition of African-Americans as citizens would exempt them from "police regulations," *i.e.*, slave codes, and allow them "to keep and carry arms wherever they went."[38] During Reconstruction, the Court stated that the rights of the people "peaceably to assemble for lawful purposes" and "of bearing arms for a lawful purpose" were not "granted" by the Constitution because they existed long before its adoption.[39] A later opinion again recognized "the right of the people to keep and bear arms" and repeated that the Second Amendment is a limitation "upon the power of Congress and the National government...."[40]

At the turn of the century, the Court wrote of "the freedom of speech and of the press" and "the right of the people to keep and bear arms" that "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 inherited from our English ancestors...."[41]

Only in *United States v. Miller* (1939)[42] has the High Court addressed the Second Amendment, and even then only in rudimentary form. Absent evidence in the trial court that a sawed-off shotgun "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."[43] The test was not whether the person in possession of the arm was a member of a formal militia unit, but whether the arm "at this time" is "ordinary military equipment" or its use "could" potentially assist in the common defense.

Referring to the militia clause of the

Constitution, the 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."[44] The Court then surveyed colonial and state militia laws to demonstrate 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."[45]

The philosophy behind the Second Amendment was well articulated in the commentaries of Justice Joseph Story and Judge Thomas M. Cooley, which *Miller* approvingly cites.[46] 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."[47] *Miller's* reference to Judge Cooley finds him stating:

> 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. The federal and state constitutions therefore provide that the right of the people to bear arms shall not be infringed...."[48]

While it has not decided a Second Amendment case since *Miller*, the Supreme Court has recently denied that some Bill of Rights freedoms "are in some way less 'fundamental' than" others. "Each establishes a norm of conduct which the Federal Government is bound to honor—to no greater or lesser extent than any other inscribed in the Constitution. Moreover, we know of no principled basis on which to create a hierarchy of constitutional values...."[49]

Despite the above, many lower federal courts have been reluctant to recognize any rights as protected by the Second Amendment. While no one disputes that felons may be disarmed,[50] a federal appellate court in 1942 rewrote history to argue that the Framers did not intend any law-abiding citizen to be protected by the Second Amendment either.[51] In litigation concerning America's first local handgun ban, it was demonstrated that the Framers did in fact seek to protect individual rights, and that the Framers of the Fourteenth Amendment sought to incorporate the Second Amendment to protect the right from state infringement.[52] To uphold the ban, the Court held that "the debate surrounding the adoption of the Second and Fourteenth Amendments...has no relevance...."[53] Similarly, in 1992, an appellate court upheld America's first state ban on many semiautomatic rifles, simply ignoring the intent of the Framers.[54]

The Supreme Court has held that the Bill of Rights does not directly limit state action, although most guarantees have been incorporated into the Fourteenth Amendment. The Court has not considered whether the Fourteenth Amendment protects the right to keep and bear arms. However, more than two thirds of the same Congress that adopted the Fourteenth Amendment passed the Freedmen's Bureau Act to prevent the Southern states from disarming blacks, and that act declared that the right "to have 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,* shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color or previous condition of slavery...."[55]

The State Constitutional Guarantees

In this epoch of receding federal protection for the Bill of Rights, the people remain protected from state infringement through the state bills of rights. Forty-three states guarantee the right to keep and bear arms, and many of these guarantees make clear that the right extends to defense of self, home, and state.[56] Moreover, state firearms prohibitions have been invalidated as unconstitutional in at least 20 reported opinions.[57]

In *City of Lakewood v. Pillow* (1972),[58] the Colorado Supreme Court invalidated a local ordinance which purported to ban possession or carrying a revolver, pistol, shotgun or rifle, except within one's domicile or at a target range, unless licensed by the city. Finding the ordinance to be "unconstitutionally overbroad, the Colorado Supreme Court also explained that a ban on firearms is not proper under the police power:

> A governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.... Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.[59]

Similarly, in *State v. Buckner* (1988),[60] the West Virginia Supreme Court held concerning a statute which:

> [p]rohibits the carrying of weapons for defense of self, family, home and state without a license or statutory authorization. Article III, Section 22 of the West Virginia Constitution, however, guarantees that a person has the right to bear arms for those defensive purposes. Thus, the statute operates to impermissibly infringe upon this constitutionally protected right to bear arms for defensive purposes.

It is noteworthy that *Buckner* interpreted constitutionally protected "arms" to include military-type firearms as well as other arms which could be used for defense of self, family, home and state.[61]

Most other states guarantee the right to keep and bear arms, and it is fundamental that protected arms include, but are not limited to, military-style firearms. An Arizona court held that the "[T]he term 'arms' as used means such arms as are recognized in civilized warfare...."[62]

The Oregon Supreme Court held: "The Oregon provision, however, guarantees a right to bear arms 'for defense of themselves and the State.' The term arms in our constitution therefore would include weapons commonly used for either purpose, even if a particular weapon is unlikely to be used as a militia weapon."[63]

In *State v. Rupe* (1984),[64] the Washington Supreme Court was concerned with the right to keep various firearms, including "a CAR 15 semiautomatic rifle (civilian version of the military's M-16)": "Constitutionally protected behavior cannot be the basis of criminal punishment....The State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right." The Court held that it was improper to consider the ownership of a gun collection as pertinent in imposing a death sentence.

Semiautomatic firearms, have been held to be constitutionally protected by other courts as well. The Florida Supreme Court noted that the right to keep and bear arms includes "the ownership, custody and possession of 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 semi-automatic shotguns, semiautomatic pistols and rifles."[65]

Constitutionally protected arms are not limited to firearms. In an Oregon case, the state argued that switchblade knives are not used for personal defense but are used by criminals.[66] "We are unpersuaded by this distinction which the state urges of 'offensive' and 'defensive' weapons. All hand-held weapons necessarily share both characteristics."[67] The following comments by the court apply to various arms:

> At one time the single-action, single-shot handgun was carried by many men for defense. Did the development of the double-action feature of the handgun or the addition of the revolving cylinder which enabled one to fire the gun several times without pausing to reload, as a matter of law, transform the handgun from a defensive weapon to an offensive weapon? Obviously, the gun, both before and after such changes, could be used for either defense or offense.[68]

The Court then formulated the following test: "The appropriate inquiry in the case at bar is whether a kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during either the revolutionary and post-revolutionary era, or in 1859 when Oregon's constitution was adopted."[69] In other words, "arms" include the technological descendants of the personal weapons kept during the American Revolution and when the federal and state bills of rights were adopted.

All of the above cases involved criminal prosecutions for mere possession of arms. An arms guarantee may also justify or excuse deadly force to protect life. A Louisiana court explained:

> Article 1, § 32 of the Indiana Constitution is entitled "Bearing arms" and provides as follows: The people shall have a right to bear arms, for the defense of themselves and the State....The right of Indiana citizens to bear arms for their own self-defense and for the defense of the state is an interest in both liberty and property which is protected by the Fourteenth Amendment to the Federal Constitution....This interest is one of liberty to the extent that it enables law-abiding citizens to be free from the threat and danger of violent crime. There is also a property interest at stake, for example, in protecting one's valuables when transporting them, as in the case of a businessman who brings a sum of cash to deposit in his bank across town.

It is apparent that in most state constitutions, the right to keep and bear arms is considered a fundamental right like other bills of rights guarantees. By contrast, the Second Amendment is treated by some lower federal courts in a manner akin to "Dred Scott" jurisprudence, turning upside down the rule of broad interpretation of Bill of Rights provisions, to a rule of obliteration. As the Bill of Rights enters its third century, it remains to be seen whether those members of "the people" who keep and bear arms have any rights which the government is bound to respect. ■

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Notes

1. S. Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989). "As with our First Amendment, the text of the Second is broad enough to protect rights of discrete individuals or minorities...." A. Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1162 (1991), an article cited as authority in California v. Acevedo, 111 S.Ct. 1982, 1992, 114 L.Ed.2d 619 (1991) (Scalia, J., concurring).
2. Boston Chronicle, Sept. 19, 1768, at 363, col. 2.
3. An Act Declaring the Rights and Liberties of the Subject, 1 W. & M., Sess. 2, c.2 (1689).
4. *Id.*
5. 1 BLACKSTONE, COMMENTARIES 143 n.40 (St. Geo. Tucker ed. 1803).
6. Boston Gazette, September 26, 1768, at 3, cols. 1-2.
7. Boston Gazette, Feb. 27, 1769, at 3, col. 1. Adams is quoting verbatim from 1 Blackstone, Commentaries *140-41, 143-44.
8. Massachusetts Spy, Sept. 8, 1774, at 3, col. 3.
9. Boston Gazette, Oct. 17, 1774, at 2, col. 2-3.
10. For a detailed account, see S. Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 UNIV. OF DAYTON L.REV. 91, 112-18 (1989).
11. Connecticut Courant, July 17, 1775, at 2, col. 1.
12. PA. DEC. OF RIGHTS, Art. XIII (1776); VT. CONST., art. I, § 15 (1777).
13. N.C. DEC. OF RIGHTS, Art. XVII (1776).
14. MA. DEC. OF RIGHTS, Art. XVII (1780).
15. MADISON, HAMILTON, AND JAY, THE FEDERALIST PAPERS 299 (Arlington House ed. n.d.)
16. *Id.*
17. N. Webster, *An Examination into the Leading Principles of the Federal Constitution* (1787), in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 56 (P. Ford ed. 1888).
18. R. Lee, ADDITIONAL LETTERS FROM THE FEDERAL FARMER 170 (1788).
19. Minneapolis Star v. Minnesota Com. of Rev., 460 U.S. 575, 584 (1983).
20. 12 MADISON PAPERS 193-194 (Rutland ed. 1979) (emphasis added).
21. "Remarks on the First Part of the Amendments to the Federal Constitution," Federal Gazette, June 18, 1789, at 2, col. 1 (emphasis added).
22. *See* 12 MADISON PAPERS at 239-40, 257 (1979).
23. *Id.*
24. *Id.*
25. United States v. Verdugo-Urquidez, 494 U.S., ___, 108 L.Ed.2d 222, 232-33, 110 S.Ct. 1056, 1060-61 (1990) (holding the Fourth Amendment warrant requirement inapplicable to the search of a home in a foreign country).

26. 108 L.Ed.2d at 247.
27. *Id.* at 248.
28. *Id.* at 247.
29. S. Halbrook, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 7-54 (1984).
30. 110 S.Ct. 2418.
31. *Id.* at 2424-25.
32. *Id.* at 2420.
33. *Id.* at 2422-23.
34. *Id.* at 2426.
35. *Id.*, quoting Dunne v. People, 94 Ill. 120 (1879) (emphasis added).
36. *Id.* at 2429 n.25.
37. *Id.* at 2429. "[The Constitution left] under the sway of the states undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power raise armies." *Id.* at 2430 n.29, quoting *Selective Draft Law Cases*, 245 U.S. 366, 383 (1918).
38. Scott v. Sanford, 60 U.S. (19 How.) 393, 417 (1857)
39. United States v. Cruikshank, 92 U.S. 542, 551, 553 (1876).
40. Presser v. Illinois, 116 U.S. 252, 265 (1886). Miller v. Texas, 153 U.S. 535, 538 (1894) repeats that "the restriction of" the Second and Fourth Amendments operate "upon the Federal power." In *Cruikshank*, *Presser*, and *Miller*, the Court refused to find First, Second, or Fourth Amendment protection against private conspiracies or state action, but did not consider whether the guarantees are incorporated into the Fourteenth Amendment so as to limit state action.
41. Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897).
42. 307 U.S. 174 (1939).
43. 307 U.S. at 178.
44. *Id.*
45. *Id.* at 179.
46. *Id.* at 183 n.3.
47. 2 J. Story, COMMENTARIES ON THE CONSTITUTION 646 (5th ed. 1891).
48. 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.... But the law may make provision for the enrollment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is that 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.

49. Valley Forge College v. Americans United, 454 U.S. 464, 484 (1982).
50. Lewis v. United States, 445 U.S. 55, 65-66 (1980).
51. United States v. Tot, 131 F.2d 261, 266 (3rd Cir. 1942), *rev'd on other grounds* 319 U.S. 463 p(1943).
52. *See* S. Halbrook, THAT EVERY MAN BE ARMED 107-53, 176-78 (1984).
53. Quilici v. Village of Morton Grove, 695 F.2d 261, 270 n.8 (7th Cir. 1982), *cert. denied* 464 U.S. 863 (1983).
54. Fresno Rifle and Pistol Club, Inc. v. Van de Kamp, 965 F.2d 723 (9th Cir. 1992).
55. Act of July 16, 1866, ch. 200, §14, 14 Stat. 173, 176-77 (emphasis added.)
56. R. Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 UNIVERSITY OF DAYTON L. REV. 59, 84-89 (1989).
57. *Id.* at 79 n. 146.
58. 180 Colo. 20, 501 P.2d 744, 745
59. *Id.*
60. 377 S.E.2d 139, 143, 144, 146, 149.
61. *Id.* at 143.
62. State v. Swanton, 129 Ariz. 131, 629 P.2d 98, 99 (Ct.App. 1981).
63. State v. Kessler, 289 Or. 359, 369, 614 P.2d 94, 99 (1980).
64. 101 Wash.2d 664, 683 P.2d 571, 594.
65. Rinzler v. Carson, 262 So.2d 661, 666 (Fla. 1972).
66. State v. Delgado, 298 Or. 395, 399, 692 P.2d 610 (1984).
67. *Id.* at 399-400.
68. *Id.* at 400 n.4.
69. *Id.* at 400-01.
70. Mckellar v. Mason, 159 So.2d 700, 702 (La. App.) *aff'd* 245 La. 1075, 162 So.2d 571 (1964).
71. 562 N.E.2d 685, 694.

NATIONAL CHILD ABUSE DEFENSE & RESOURCE CENTER

The National Child Abuse Defense and Resource Center is a non-profit resource center, assisting persons falsely accused of child abuse. The Center has extensive listings of articles, research materials, books, etc. on the subject. The Center has materials in the fields of psychology/psychiatry medicine and law.

The Center has provided assistance and materials to hundreds of attorneys throughout the U.S. and Canada. There is a nominal charge for this service. Our up-to-the-date information is vital for use in criminal civil or family court settings.

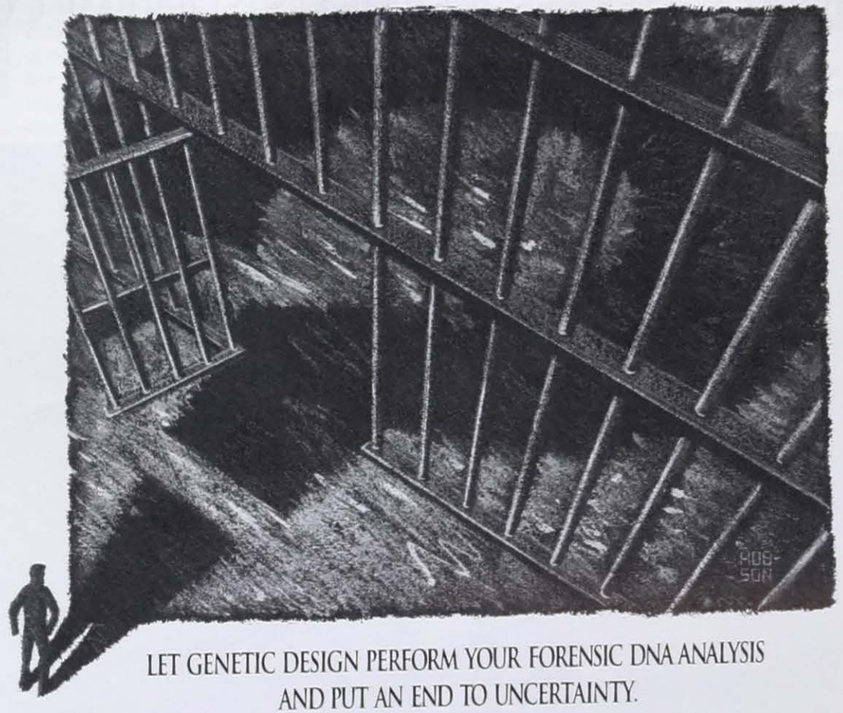
For a free information packet write to: NCADRC, P.O. Box 638, Holland, OH 43528; call (419) 865-0513 or fax (419) 865-0526

Kimberly A. Hart—
Case Management Services

Kimberly Hart, Executive Director of NCADRC, consults privately on cases involving false allegations of child abuse. Her extensive experience and knowledge makes Kim an invaluable asset in evaluating cases and devising strategies for defending false allegations of child abuse. For more information on this subject, contact Kimberly at the Center.

Ms. Hart is the author of *"Guilty Until Proven Innocent: A Manual for Surviving False Allegations of Child Abuse."* Order forms are available from the Center.

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