

**The Last Line of Defense against Government:
A study of the origins and history of the Second
Amendment and the American right to arms**

By

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A senior thesis
submitted to the Department of Politics
in partial fulfillment of the requirement for
the degree of Bachelor of Arts

PRINCETON UNIVERSITY
Princeton, New Jersey

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April 5, 2004

TO MY MOTHER,
WHO INSTILLED IN ME A LOVE OF LEARNING
AND THE CONFIDENCE TO ACHIEVE ANYTHING

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“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.”
Second Amendment to the United States Constitution

Introduction

Since its ratification in 1791, the Second Amendment to the United States Constitution has become one of the most often confused and misunderstood parts of the entire Constitution, and, in fact, of the entire legal history of the United States. Despite the fact that, compared to relatively large body of both scholarly work and case law that surrounds other provisions of the Constitution and the Bill of Rights, there has been very little study done or legal examination of the Second Amendment, the issue of the true meaning of the Second Amendment remains one of the most controversial and one of the most divisive issues in American politics, both historical and contemporary. 213 years after its adoption, there is still no consensus about the rights of Americans when it comes to the subject of the right to keep and bear arms.

Through close examination of the historical, political and ideological context of both the right to arms and the framing of the Second Amendment, this paper will show that the Second Amendment guarantees every individual American the right to keep and bear arms to defend himself and his freedoms from all threats, ranging from the threat posed by another individual citizen to the threat posed by the government of the United States. The Second Amendment is not a collective right to defense, granted by the government and able to be rescinded by the government just as easily. The

framers of the Second Amendment wanted to enshrine a right that would ensure that every American would be able to defend all his other rights and freedoms. They achieved this goal with the passage of the Second Amendment, assuming that an armed people would be a permanently free people.

We will first examine the English origin of the right to arms. The framers of the Second Amendment were born as Englishmen, and were raised and educated in English history and legal tradition. It is crucial to our understanding of the Second Amendment that we are able to understand the men whose vision founded the nation and whose beliefs on the rights of men were enshrined in the Constitution and the Bill of Rights. Though the English history is often unclear, and the rights granted to English citizens never reached the scope of those granted to American citizens, we will see that there was a progression towards the idea of an individual right that the Americans built upon in drafting the Second Amendment.

In the same vein, we will also examine the English and the early American understanding of the nature of militia. It is the presence of the militia clause in the Second Amendment that often obscures the true meaning, and so if we are to discover the true meaning of the Second Amendment, it is essential that we understand why the framers found it necessary to prominently include a reference to militia in a guarantee of individual rights. What we will discover is that the framers never intended the militia clause to dominate the understanding of the Second Amendment. For the framers, the militia consisted of all adult male citizens, and the militia clause was meant as a reinforcement of the right, not a restriction of it.

Turning to the Second Amendment itself, we will examine closely the circumstances surrounding the drafting of the amendment. With a close examination of the proposals, the wording, and the minds of the men drafting the amendment, we will reveal that these men intended all Americans to have the right to arms. The framers knew that they were expanding the old English understanding of a right to

arms. However, as we will see through an examination of the natural law and natural rights thinking of John Locke that heavily influenced the founders, the Second Amendment reflects a fusing of the tradition into which the framers were born with the dominant theory of the natural rights of men prominent during the era in which the Second Amendment was crafted.

Finally, with a clear understanding of the true meaning of the right to keep and bear arms that belongs to every American, we will examine the amazingly small body of judicial casework interpreting and applying the Second Amendment throughout American history. As we will quickly discover, the Second Amendment, because of its perceived lack of clarity, has been open to misinterpretation, and has met great resistance to its full and proper application. The Supreme Court, through misinterpretation, neglect, and sometimes even open disdain, has failed in its duty to the American people to defend their rights from infringement by lower courts, whose rulings have been contrary to the true meaning of the Second Amendment and yet have remained unchallenged by the body entrusted by the Constitution with the prevention of such judicial abuses. Examination of the judicial history of the Second Amendment will reveal why, in the year 2004, despite the evidence that the Second Amendment intended to make the right to keep and bear arms beyond the regulating arm of the government, we see a populace effectively disarmed by the very government which the founders so distrusted, that they established the Second Amendment to ensure that the people would always be armed.

Current scholarship on the subject of the true meaning of the Second Amendment focuses on two theories. One, most notable espoused by Joyce Lee Malcolm, holds that the Second Amendment does indeed protect an individual's right to bear arms, and that this individual right can be traced back to English legal history, where it was first established. The other theory that will be predominantly relied upon, in the works of Lois Schwoerer and Steven Heyman, holds that the English history does not contain

an individual right to bear arms. Rather, the English history contains a duty to arm, and the Second Amendment reflects that in its protecting only the right of States to call up their citizens into militias.

Though Malcolm is correct in asserting that the right protected by the Second Amendment is indeed an individual right to arms, this thesis will show that the right did not emerge from England as an individual right to arms. Rather, the framers of the Second Amendment, influenced not only by the legal tradition of England, but also by the era in which they lived and the natural rights and law philosophy of John Locke, created a new individual right to arms themselves. The current scholarship, for the most part, holds that either the individual right to arms is English in origin or does not exist at all. This paper will show that, in reality, though strongly influenced by English legal tradition, the individual right to keep and bear arms is an American innovation, and that, unfortunately, the American people and Courts have not protected one of the founders most important achievements.

Chapter I

The English Origin of the Second Amendment

In order to understand the Second Amendment to the US Constitution, we must look back at the origins of the Amendment and the tradition out of which the men who crafted it came. Of course, for the drafters of the US Constitution, that tradition is the English Law tradition. It is there that we must start our exploration for the true meaning of the Second Amendment. Unfortunately for the founders, the English view

on the right of Englishmen to arms was unclear and thus could not have been the sole basis for their framing of the Second Amendment. The English history of the right to arms is confusing and ever changing, and it is that very progression and change that the founders found so crucial. It allowed them to build on what had previously been accomplished, and take the next step in transforming the right to bear arms into an individual right. By the end, it will be clear why the framers could not just follow the English example on this subject. Rather, they infused their own new American sensibilities, especially their belief in the natural rights espoused by John Locke, into the English tradition and what resulted is the often debated but never truly resolved Second Amendment to the U.S. Constitution.

In our examination of the origins of the Second Amendment in English history, we will first look at the English common law traditions on the bearing and keeping of arms before the Glorious Revolution and the formulation of the English Declaration of Rights in 1689. Before anything formal was ever guaranteed, there was a “long-standing English concern for protecting the sanctity of property from the arbitrary power of the crown”¹. It was also true that “men were expected to defend themselves and their families and, if need be, their neighbors as well”². Though not fully laid out in the law, the duty of every Englishman to bear arms for self-defense from both government tyranny and local criminals was commonly understood.

We will also examine the English Declaration of Rights in 1689 where clause VII made the right to bear arms a right of all Englishmen. Its final draft reads, “That the subjects which are Protestants may have arms for their defense suitable to their condition and as allowed by law”³. Though not the explicit individual right that the Second Amendment would become, this English right is crucial to the understanding

¹ Rowland, *Origins of the Second Amendment*, p. 12

² Malcolm, “The Creation of a ‘True Ancient and Indubitable’ Right: The English Bill of Rights and the Right to be Armed“, p.229

³ Schwoerer, “To Hold and Bear Arms: The English Perspective“, p. 43

of the American right to arms because it contains within it the dual nature of the individual and collective right to arms that the framers of the Bill of Rights would later rely upon in envisioning what a new American right to arms would look like.

Ironically, once we understand the confusion on the English history of the right to bear arms, it will become much clearer what the US framers had in mind when they drafted the Second Amendment. The English origins contain the dual concepts of the right to arms as a collective, as well as an individual right. In addition, the confusion over not only who is defended by an armed populace, but also against whom the populace is defending, will plague the English legal history. We will also discover, by looking at the changes made to clause VII, that there was a real conflict in England itself over the role and importance of an armed populace in the first place, again disqualifying any hard and fast position on the nature of the right to be armed in the English tradition. In short, the English origins of the Second Amendment shed light on the true meaning of it by emphasizing the unclear messages that the founders were hearing from their legal precedent. An examination of these issues will show that the Second Amendment can be seen as a individual right to arms necessitated by collective and individual needs, and arising out of the English legal tradition.

1.1 The English Tradition of a Right to Self Defense

All the founders came out of English tradition and its influence on them is unquestionable. Looking back on the old English tradition, we can discover that the right to bear arms grew up as much as an individual right as a collective one. Before the law was even codified, “the right of each subject to protect his or her own life and limbs was already well established in Anglo-Saxon and Anglo-Norman custom and

law, requiring no special royal edict⁴. This is one of the most important and most overlooked points in the entire debate, so it is important here to emphasize it. Every Englishman would have known from birth that he had a right to self-defense which was part of the customs of his land and people. “English common law recognized many instances in which an individual might legitimately use deadly force without the need to retreat, and these circumstances were expanded over time, for example, killings that occurred when a man was acting as a peacekeeper or defending himself, his family, and property were classified as justifiable or excusable.”⁵ Even lethal force was acceptable under English common law if the purpose was to defend yourself, your family, or even your community. And there were numerous cases in the English legal tradition which support this individual right to use lethal force in self-defense; including a 1221 case where a man was found blameless for the killing a robber in the process of resisting his assault.⁶ Thus it is clear that the right of every Englishman to defend himself, and use lethal force if necessary is established in both English common law and in the case law.

It is not even necessary to accept this fact on common law and tradition alone. Sometimes this duty was put down in the laws of the nation, as a 1618 record of the guidelines for a English Justice of the Peace shows: “If thieves shall come to a man’s House, to rob or murder him, he may lawfully assemble company to defend his House by force; and if he or any of his company shall kill any of them in defence of Himself, his Family, his Goods or House, This is no Felony, neither shall they forfeit any thing therefore”⁷. There can be no argument that self-defense would most definitely be considered an individual right, especially when self-defense is

⁴ Rowland, p. 17

⁵ Malcolm, Guns and Violence: The English Experience, p. 24

⁶ Ibid., p. 25, See Howel’s Case, from Select Pleas of the Crown, ed. F.W. Maitland,

vol. I, Selden Society (London 1888), p. 94

⁷ Malcolm, To Keep and Bear Arms, p. 2

expanded to include defense of family, property or community. And though the law does not explicitly mention arms, the allowance of the use of lethal force clearly indicates an assumption that the defender would be armed in some way. This point is crucial to the understanding of the right to arms in England because the assumption that lethal force may be necessary and is permissible lends significant credibility to my position that the English did indeed intend to codify a right to arms based in a tradition of the individuals right to defend himself.

Therefore, when critics of any assertion that the English had a tradition of respect for the individuals right to arm himself for the purpose of self-defense claim that “There was no ancient political or legal precedent for the right to arms”, and cite the Ancient Constitution, the Magna Carta and the 1628 Petition of Right, it is clear that they are only selectively choosing those precedents that do not mention such a basis in law.⁸ In reality, there was a deep tradition that, though not explicitly stated in seminal documents of English law, was established in common law and case law. The fact that it was not included in some of the central documents of English law just reinforces the fact that the English tradition never fully established a right to arms. It is mentioned in the 1689 Declaration of Rights, further demonstrating that the right to bear arms was evolving and expanding as English history progressed. Despite never fully codifying an individual right to arms, they did recognize in common law and case law the right of every Englishman to keep and use arms for his own defense, and this fact would have been understood and followed by every Englishman, including the framers of the U.S. Bill of Rights and the Second Amendment.

We must address further the critics of any such right, because they would be right to claim that all that has been proven is that there was a right to self defense, not mentioning whether that lethal force could come from a gun. Jumping ahead for a second to the Declaration of Right, we can easily address this critique. When debating

⁸ Schwoerer, p. 34

the wording of clause VII, the word “armes” was chosen for a specific reason. As will be discussed in more detail later, the impetus behind clause VII was the disarming of the populace by King James II. James II confiscated mostly military weapons, pikes, pistols and other firearms, from his people, rather than confiscating all arms in the commonly understood meaning of the term at the time: “any thing that a man in his anger or furie taketh into his hand to cast at or strike another”⁹. Thus, since James II had confiscated guns when he disarmed the populace, and since the Declaration of Rights was adopted to prevent the abuse of power shown by James II, the only logical conclusion is that the word was intended to include pistols and other guns as part of its protection. Clearly, the English were not just protecting the rights of its citizens to use a club or knife in self-defense. Despite the fact that the cost of a gun would have made it prohibitive for most Englishman to own, nonetheless, the English clearly understood that, how ever many guns there were, they were a crucial component of the arms that the people must be allowed to bear if they are to defend themselves.

1.2 The Role of the Armed Citizen

Returning to the old traditions that clause VII and eventually the Second Amendment grew out of, we must also conclude that there was an understanding early on that bearing arms was less an individual right and more a collective duty. This point I believe is also often misinterpreted as proof that clause VII and then the Second Amendment were collective rights to arm for defense, rather than an individual right to arm for self-defense. However, I believe that such interpretation again ignores the important point that though bearing arms may have started as a collective duty, the seeds of the individual right it would become were planted in the very nature of the duty. By understanding how the bearing of arms was originally understood, we will be able to show that the changes made in the Declaration of Rights and the Second

⁹ Rowland, p. 81.

Amendment were intended to shift the right from collective duty to individual right.

“By the middle of the fourteenth century, the medieval institution of *posse comitatus* had become very well established as a means for local military and law enforcement duties. Every person, upon summons, was required to assist in executing writs and keeping the peace.¹⁰” The tradition of the *posse comitatus*, Latin for “the power of the country”, held that all able-bodied men were required to arm themselves so that they could assist in the prevention of crime, the apprehension of criminals, the execution of executive orders, and the defense of their town from invasion. In this tradition, it would be very easy to try to claim proof that Englishmen could only bear arms in order to serve the collective good, and only for common defense. However, what is really important about the tradition of the *posse comitatus* is that it sets the precedent for an armed populace, and showed that the English understood that only an armed people could defend themselves, not relying on the government to do so. This point will become crucial as we move towards the American founding and the tradition in America of self-reliance and self-defense, separate from dependence on, and more powerful than, the government.

400 plus years after the *posse comitatus* became the accepted duty of an Englishman, James Madison, asserting that an armed populace (in the American case connected to the State militias) was the surest defense against any threat foreign or domestic, would write in Federalist #46: “Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprise of ambition, more insurmountable than any which a simple government of any form can admit of.”¹¹ Madison expresses, in no uncertain terms, what has changed about the role of

¹⁰ Ibid., p. 21

¹¹ Madison, The Federalist Papers, Paper #46, p. 267.

the armed citizen. While the citizen may originally have been armed as a duty to government to protect the citizens from threats both foreign and domestic, by the time 1789 rolls around and Madison is drafting the Second Amendment, it is clear that he sees an armed populace as a right of the individual to defend himself and the people against government, which is now seen as just one more of the threats against which the people must be prepared to defend.

1.3 The Response of the Monarchy

Due to the fact that he was scared of the power of an armed populace that had been demonstrated during the Civil War of 1642-1649 in which an uprising had cost his family members their thrones and their heads, but unable to get Parliament to enact laws to remedy the concern, Charles II set out to start to get guns out of the hands of his people where they posed a threat to him the only way he could, through royal proclamations. The moves by Charles II to start to disarm the populace started in 1660, when the king “forbid footman from wearing swords or carrying other weapons in London”.¹² Emerging from the Civil War, Charles II encountered a large class of disgruntled former soldiers who remained armed after the war and posed a threat to his throne. Therefore, later that year in 1660, he banned former soldiers with no good reason for being there from residing within 20 miles of London.¹³ In 1661, that edict was expanded to include all former soldiers who had fought against the Stuarts during the Civil War, and it was also decreed that they could not “weare, use carry or ryde with any sword pistoll, or other armes or weapons”.¹⁴ His fear of the now armed elements of his people who were unhappy with his rule led him to disarm a significant portion of the population.

Unconcerned anymore with the collective security that the duty to bear arms

¹² Malcolm, “Creation of a Right“, p. 234-235

¹³ Ibid., p. 235

¹⁴ Ibid. p. 235

provided before in the government controlled *posse comitatus* and in the government controlled militia, it is now clear that the focus of the ability to bear arms was being shifted onto the individual, as the monarchy set out to legislate arms out of the hands of individual citizens. The monarchy started to see an armed populace as a threat to their power because they realized that an armed people could defend themselves not only from local criminals and foreign invaders, but also from the government itself were they to feel the need to. Again, a crucial point is revealed in studying the origins of the Second Amendment. It is clear that as the American founding drew closer, the English tradition which the founders relied upon evolved more and more toward the recognition of bearing arms as an individual right, crucial to the ability of the people to resist a government they saw as tyrannical or invading their rights.

Leading up to the formulation of the Declaration of Rights, the English government became more and more clear about its intention to take firearms out of the hands of its people, leaving only the government armed. The Game Act of 1671 passed by Parliament during the rule of Charles II, whose key provision read, “all and every person and persons not having land and tenements of the clear yearly value of one hundred pounds ... are ... not allowed to have or keep for themselves or any other person or persons, any Guns, Bowes ... or other Engines aforesaid; But shall be and are Hereby prohibited to have, keep, or use the same”, effectively disarmed almost the entire English populace.¹⁵ This act leaves no doubt about the individual nature of the right to bear and keep arms. The government was striking out at all individual gun owners it felt it could not trust, and in doing so, crippled the traditional collective security provided by an armed populace.

1.4 The Convention of 1689 and the Declaration of Rights

James II continued to tighten his hold on his throne by denying any of his people who

¹⁵ Ibid., p. 239

disliked his rule the ability to resist. But James II went too far and finally the people and Parliament would take no more. The Convention of 1689 was formed to document and prevent the abuses of power and denial of rights that the monarchy was imposing upon the English people. In debates, the members expressed their outrage at the disarming of law-abiding citizens, specifically through the Militia Act of 1662, which allowed citizen militias to disarm any citizen the monarch wanted disarmed. Important to note, this form of disarmament was particularly troubling to the members because it showed how the monarch could wield near total power over the people by disarming them, leaving only his army armed.¹⁶

This fear of a standing army, to which the people had no opposing force, is seen throughout both English history and the American founding. The English people grew concerned about the ability of the government to disarm them, even preventing them from forming a militia, because it would mean that the people had no force behind them if they were to complain to the government about its abuse of power. As we will see, this same concern was felt 100 years later by the American founders, fearful that their own history could repeat itself. However, as the Second Amendment shows, the framers of the US Constitution were not about to make the same mistake their great-grandfathers had.

The convention produced a list of the violations of the rights of Englishmen by the monarchy. In listing the violations of their rights that James II himself had committed, there was included the claim that he had violated their rights, “by causing several good subjects, being Protestants, to be disarmed.”¹⁷ It was agreed upon by the delegates that they needed legislation to specifically enshrine the rights they had been denied as rights to prevent any future abuse by the monarchy.

Out of that agreement came the English Declaration of Rights, which was

¹⁶ Malcolm, To Keep and Bear Arms, p. 115-16

¹⁷ Malcolm, “Creation of a Right“, p. 244

accepted by the new jointly ruling monarchs, King William and Queen Mary, on December 16, 1689. Included in that Declaration was clause VII protecting the rights of English Protestants to “have armes for their defence”. It is important to note here that Catholics were excluded from the right to arms. This is a clear indication that the Civil War and the conflict caused by dueling religions were on the minds of the drafters of the English Bill of Rights. In order to be crowned, William and Mary had to accept the Bill of Rights, and that included accepting that Protestants could be armed to have the power to resist the new monarchs. Parliament was setting up the Bill of Rights to be in a position to oppose the new monarchs should they try to abuse the rights of the people as previous monarchs had, and for Parliament, the disarmament of the people was on the top of the list of previous abuses.

This is proof that, as has been shown, the English history of the right to arms is not an individual right as the Second Amendment would become. If it were, then there would be no need to exclude Catholics. In reality, the right to arms of the English Declaration of Rights was a first effort to restrict the power of government by arming the people in opposition to the government. In this case, the opposition to the monarchy came from the Protestant majority, and so they were given exclusive rights to arms. The American founders clearly knew of this tradition and, as we will see, inspired by the idea of the natural rights of all men, they built upon it, creating out of this first effort at using an armed populace to counter government power a right of all men to bear arms for their defense from the tyrannical nature of government.

1.5 Clause VII of the Declaration of Rights

The story of the development of and debate over that clause will again show the evolution of the English understanding of the right to bear arms. Though never reaching the level of an inviolable right of Englishman, as some scholars have

incorrectly asserted, we will see that the enactment of the Declaration of Rights, specifically clause VII, was one more step toward the recognition of the right to bear arms as an individual right. More importantly, it helps to prove the validity of the claim that the American founders enacted the Second Amendment fully aware of, and in fact relying upon, the ability of an armed people to resist government tyranny and oppression, and remain free.

Looking at the changes made in the wording of clause VII, it will become clear the intent and meaning of the clause itself. The original wording read in part, “the subjects which are Protestants, should provide and keep armes for their common defence”¹⁸. This wording makes bearing arms sound like a collective duty right out of the tradition of the *posse comitatus*. The Englishman “ought” to have arms for “common defence”. Were the clause to have remained like this, there would have been little doubt as to the meaning.

However, in the second draft, the word “should” was changed to “may”, such that the clause now read “may provide and keep armes“. Also, another clause, reading “it is necessary for the publick safety” was dropped entirely from the wording. These changes has a devastating impact on the claim that clause VII is about the old duty to arm, rather than a new right to arm. Malcolm asserts that these two changes are enough to prove a that a right for the individual to bear arms had just been enshrined in English law.¹⁹ However, it is also valid to point out that the word “subjects” remains plural.²⁰ There is no doubt that were the right to arms an individual right, the word would be made singular, and it would most likely read “any subject who is Protestant”.

These two conflicting points about the revised clause help to show that the current polarized debate on the meaning of clause VII needs revision. It is clear that there was

¹⁸ Schwoerer, p. 39

¹⁹ Malcolm, To Keep and Bear Arms, p. 245

²⁰ Schwoerer, p. 40

as much tension and disagreement about the nature of the right to bear arms then as there is today. However, it remains a crucial fact that the framers of the Second Amendment would have seen not only a move toward (though not a full recognition of) an individual right to bear arms, but they also would have been aware of the collective duty which preceded this new hybrid right. In explaining why the Second Amendment contains both the collective and individual nature of bearing arms, pointing to the disagreement during the Convention of 1689 over clause VII of the Declaration of Rights can help shed light on the confusion of the tradition from which the Second Amendment emerged and was interpreted.

In another later revision, this tension is underscored by three new changes that give us the clause we have today. First, supporting the individual right view, the word “common” was removed from in front of “defence”. There is only one logical explanation for such a move, and that is that the convention wanted to underscore the oldest of English traditions. Namely, they wanted to ensure that the people could not only defend their communities, but also could defend themselves, their families, and their property. And now, unlike the earlier understandings, it is clear that amongst those, and perhaps first among those things against which arms were necessary for defense was the government. The people needed guns to defend themselves, and the government could not deny them arms, lest it become too powerful and try to violate the other rights of Englishmen again. Clause VII now ensured that all other rights could be protected by the right of Englishmen to “have armes for their defense”.

The clauses “suitable to their condition” and “as allowed by law” provide restrictions on this new right, thus ensuring that the right to arms is not absolute in the English tradition. However, the absence of such clauses later in the Second Amendment just underscores how the Americans were not content to settle for the right to arms that the English citizen had been afforded. These clauses are just one more example of the conflict over the definition of arms as a “right”, but they do not

detract from the clear development of clause VII toward the right of the individual to have arms.

Still, questions remain about the sometime uncertain language of Clause VII. If we are to accept that the drafters of the Declaration of Rights were indeed shifting the duty to arm to a right to arm, we must be able to answer the critiques of such a claim. First and most obvious is the provision that the right to arms only applies to Protestants. This would appear to make the right a common right of Protestants to protect the religion from the Catholic forces that had just attempted to convert England back to Catholicism. Clearly this concern was on the minds of the drafters, as the charter commissioning the drafting of the Declaration read in part that they were to discuss “things absolutely necessary to be considered for the better securing of out Religion, Laws, and Liberties”²¹. Note that the securing of their Religion is first amongst their concerns, before even laws or liberties. Also, the list of complaints against James II included the claim that he had disarmed Protestants “at the same time when Papists were both armed and employed”²². There can be no argument that the defense of the Anglican Religion from Catholicism was high on the list of concerns and reasons for the inclusion of Clause VII.

However, that does not prove that the right was not intended to be an individual right. In fact, the critics who point to the fear of Catholics neglect to point out one very important fact. In England, in 1689 at the drafting of the Declaration of Rights, a full 98% of the population was Protestant.²³ Therefore the clause restricting the right to arms to Protestants covered 98% of the population. As we have seen, Clause VII was never intended to be an all encompassing right to arms. This is just one more example of how the drafters were making progress towards a true individual right, but were not yet there. If one was to claim that this clause prevented Clause VII from

²¹ Malcolm, “Creation of a Right“, p. 244

²² Ibid., p. 244

²³ Levy, Origins of the Bill of Rights, p. 137

being seen as very close to an individual right, then one would similarly have to claim that none of the 10 Amendments of the U.S. Bill of Rights are rights because at the time of their enactment, they did not apply to any enslaved blacks living in the United States. The reality is that the Protestant clause is just more proof that Clause VII of the English Declaration of Rights is indeed a step towards making the right to arm an individual right, lacking only the American concept of a “right” to make it so.

The clearest example of how the concept of an individual right to arms was not yet the American one is in the fact that the right is restricted. In the final version of the clause, “the words now qualified the right of the subject to have arms in three respects: *religion* - must be Protestant; *socioeconomic status* - ‘suitable to their condition’; and *law* - ‘as allowed by law’. One may ask: What kind of ‘right’ is this that is so severely qualified as to negate the very meaning of a ‘right’.”²⁴ Fairly, the critics point out that in the American conception of a “right”, there could be no such qualifiers as the definition includes the idea that the government could not take away a right if it wanted to.

Again though, this is more proof that neither side on the debate has it quite right. It is clear that Clause VII is not an individual right in the American conception of a right of 1789. However, this does not, as Schwoerer would like you to believe, therefore prove that the Second Amendment does not cover the individual’s right to arms. All that this shows is that, for the English in 1689, a right included qualifications and restrictions; nothing was absolute. After all, there are many cases in the Declaration of Rights where restrictions were placed on so called “rights”, and where the uncertainty of how to go about securing liberties in a political system in crisis could be accomplished. Clause VIII says that elections “ought to be free” and Clause IX asserts that free speech and debate in Parliament “ought not to be

²⁴ Schwoerer, p. 43

impeached or questioned”.²⁵ This timid language reflects the uncertain nature of the “rights” that were being secured, as well as the fact that the document required the approval of William and Mary, against whom the rights would be enforced. If Schwoerer and her fellow critics of the idea that this is a step towards an individual right were correct, then there would be no need for such timid and careful language. After all, the collective duty of an Englishman to bear arms was long established and would be unnecessary to repeat. The reason for such caution was that the drafters themselves were aware of the fact that they were revising the relationship between citizens and their arms. They realized that the duty was a thing of the past, and that in the political climate they found themselves in, stronger language and a stronger resolve to ensure an armed populace was necessary. Men get scared when changing the status quo, not when reinforcing it.

1.6 The True Meaning of Clause VII

In 1765, English jurist William Blackstone wrote his Commentaries on the Laws of England, a book which fast became recognized as one of the preeminent works on English Law. In it, he commented on the right of an Englishman to arms as a means for self-defense. “The fifth and last auxiliary right of the subject ... is that of having arms for their defence suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2 c. 2 [the Bill of Rights], and it is indeed, 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.”²⁶ This passage has been misinterpreted by those on both sides of the argument to mean either that he was

²⁵ Malcolm, “Creation of a Right“, p.246

²⁶ Heyman, “Natural Rights and the Second Amendment“, p. 253

claiming no right existed because of the restrictions, or that an unquestioned right to arms. Both of these fall short because they ignore the context of his discussion.

Important to note is the fact that he calls this the *fifth* auxiliary right. Looking at the first four, they are: 1) The constitution of Parliament; 2) The limitation of executive power in the hands of the Monarch; 3) Access to courts of Justice; 4) The right to petition king or Parliament for redress of grievances.²⁷ Taken in this context, Blackstone was calling the right to arms a *fifth* and final way in which the people could resist an tyrannical government when the other four failed. His commentary is not about whether or not the right to arms is an individual right. Rather, he wants to make clear that what the Declaration of Rights meant to ensure was that the English people were armed in case a tyrannical government tried to deny them their liberties.

This interpretation of Clause VII is, as I believe I have shown, the answer to the question of what the clause means. Though not an explicit individual right to arms, the evidence points to the conclusion that Clause VII was intended to ensure an armed populace, capable of resisting government. The attempted disarming of the population by James II necessitated this reinterpretation of the centuries old duty of an Englishmen to arm for defense of self and community from domestic and foreign threats. When it became clear that the most immediate danger was from the government itself, this collective duty was changed by a nervous convention to an individual right. This English conception of a “right” to arms grants to the people the ability to arm, while leaving to the government the ability to restrict who can keep arms and which arms they may keep.

In 1780, a English judge who also happened to be the legal advisor to the Mayor of London, summed up the dual nature of the English understanding of their right to bear arms between the old collective and the new individual right. He wrote:

The right of His Majesty’s Protestant subjects, to have arms for

²⁷ Ibid., p. 257

their own defence, and to use them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of this kingdom, not only as a right, but as a duty; for all the subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of the public peace. And that right, which every Protestant most unquestionably possesses, individually, may, and in many cases, must, be exercised collectively, is likewise a point which I conceive to be most clearly established by the authority of judicial decisions and ancient acts of Parliament, as well as by reason and common sense.²⁸

His words clearly show the dual nature of Clause VII that the framers of the Second Amendment would have been dealing with at the time they wrote it. The English tradition left the American founders with the ideas of arms for collective defense, for self-protection, and for prevention of government oppression, but it was never able to truly reconcile these three strands into one coherent vision of the right of citizens to arms. It will take the American founders, born into the English legal tradition and schooled in the enlightenment ideals of natural rights and liberties, to translate the incomplete English right to arms of Clause VII to the solid American right of the Second Amendment.

²⁸ Levy, p. 138

Chapter II

The English and Early American Militia

The Second Amendment to the Constitution of the United States of America starts with the clause, “A well regulated militia, being necessary to the security of a free State”. This clause is the cause of the debate over the true meaning of the Second Amendment. Without it, the framers would have been quite clear in their intention to secure the right to bear arms to every American. However, because they chose to include the clause, we must ask why they did and what they meant by it. The clearest way to understand what the framers were thinking is to understand what their concept of the nature and role of a militia was. What we will find is that the American founders had a clear conception of the militia which they intended to protect in the Second Amendment. However, it will also become clear by the end that the meaning of the Second Amendment militia clause was lost at its inception, thus leaving us with a Second Amendment that “continued to express the point of view of fear of federal oppression and despotism” where no such fear was necessary.²⁹ The Second Amendment was left protecting the rights of every American to arms, with the need for participation in an organized militia an unnecessary condition of the right, since it

²⁹ Rowland, p. 8

is the “security of a free State”, not the preservation of militia, that the Second Amendment cites as the justification for giving the American people the right to keep and bear arms.

The militia underwent a series of redefinitions in English and early American minds. We will trace the development of the militia and in doing so, we will come to a better understanding of what the framers of the U.S. Bill of Rights believed they were including in the Second Amendment. Starting in England with the *posse comitatus*, militia in spirit though not in name, and ending up at the close of the 18th century, we will see that the Americans changed and refined “militia” to the point where the framers never would have dreamed that their inclusion of the militia clause in the Second Amendment could have been used in later years to distort their intent and deny Americans the right to bear arms in defense of self and nation against all threats to their liberties.

The first area where we must look is the English understanding of the role and nature of the militia. Interestingly, the English Declaration of rights clause VII contains no reference to militia, while the Second Amendment does. However, there is no separating the US conception of the nature of militia from the English, and we must therefore understand the English tradition of the militia if we are to understand why the framers of the Second Amendment chose to include that clause concerning militia in their Bill of Rights.

Then we will examine the early American beliefs on the nature of militia, as expressed when they still considered themselves Englishmen. This is a short but amazingly important area to examine because it shows us the newly forming Americans trying to reconcile their English past with their American future, and gives us a glimpse into the minds of men wrestling with their understanding of their rights as English citizens and their new understanding of their rights as men.

As they come to terms with this conflict, they start to form a new American ideal

and with it comes a new American idea of the nature and role of militia. In their new understanding, they take the old English ideas and add the individualistic and self-reliant American spirit born of their belief in the power, liberty and duty of one man to himself, his nation, and mankind. As we will see, we must first understand the evolving nature of militia for the founders before we can move on and examine the understanding of the Second Amendment as a whole that the founders believed in and that should still govern us today.

2.1 Posse Comitatus

The English history of the militia, relevant to our discussion, starts with the *posse comitatus*, which though not officially militia, served a purpose more important to our discussion than the actual militia. It is important to note that the militia existed right alongside the *posse comitatus* for the whole of the existence of the *posse*. The militia was called up by the king whenever there was a threat to the nation. It was a defensive force, consisting of men compelled by law to serve, either in person, or by donations of arms and armor. Its officers were, important to note as this will change with the American militia, appointed by the king. The militia, though called up by the king, ordered to act by the king, not voluntary, and led by officers appointed by the king, still gave the people a sense of security due to the fact that the king's power and kingdom were defended by the people, not by an army beholden to the king only. It is for this reason that the people were especially distrustful of an army of mercenaries,

whose only allegiance was to the money paid them by the monarchy. We will return later to this point, as the importance of the English people's fear of a standing army will come to influence the development of the militia.

Returning to the *posse comitatus*, it was made up of all able-bodied citizens who provided their own arms, served in part voluntarily (though when a "hue and cry" was raised they were expected to join in), and was used both for local defense as well as the hunting for criminals. Though conceived of as a duty more than a right, this early militia had the job of defending the town from threats both domestic (criminals) and foreign (invasion). And it was clearly understood and even recorded, as we saw earlier in the common law and case law, that a man who bore arms as a duty could also use those arms to defend himself, his family, his home, and his possessions. Clearly this concept of the militia had a great impact on Americans, as they will structure their militia in much the same way, only adding the individualistic ideal that would change the militia from an English *posse comitatus* bound by duty to government, to the American militia with a right to defend against government.

2.2 Fear of a Standing Army and Militia Reform

The English would start the trend toward the idea that militia was formed to defend the people against the power of government, as English history contains a long standing fear of a standing army. Englishman always trusted the militia, even under the control of the monarchy, because the militia consisted of the people and that made sure that the king was, "beholden to the people and needed their aid to secure his regime".³⁰ In the mid and late 17th century, Parliament enacted numerous laws restricting the ability of the monarch to raise a standing army and hire mercenaries for

³⁰ Malcolm, To Keep and Bear Arms, p. 57

fear that such a force would be loyal to the king, and not to the people and the country. For this reason, the Parliament did everything they could to strengthen the militia, fully aware of the fact that, “real control of the militia belonged to those who legislated for it, financed it, and staffed its officer corps”.³¹ The anti-standing army sentiments of the English clearly influenced them to depend on militia and believe that it was the best way to keep a powerful government in line.

This distrust of any standing army would later be reflected in the debates over the U.S. Constitution, so there is no doubt that this fear was transferred from English to Americans, who would have been aware that, “the notion of militia as a constitutional means to counteract the debilitating influences of a professional army on English society had first been enunciated as early as 1648 when the Long Parliament first drew a distinction between the “militia” of England -- the country forces -- and the New Model Army.”³² This distinction pushed the militia out of the role of defending government and into the role of defending the people from government. Seen now as a counter to a government’s power in having a standing army, militia became the people as a whole, responsible to themselves for the defense of their liberty. The American founders would have appreciated the relevance of both the *posse comitatus* and the militia to their situation, as well as the anti-army efforts of the English Parliament and people, and would have, 130 years later, seen their belief that militia was an individual’s best defense against tyranny as just following the example of the English militia.

This would just have been underscored by the step back that the English took in 1757 with the passage of the English Militia Act. This act had two purposes. The first was as a response to the deployment of 30,000 regular troops to the United States for the French and Indian War. The act ensured that the government could raise troops at

³¹ Ibid., p. 58

³² Ibid., p. 218

home, loyal to the government, for the execution of basic homeland defense from French invasion and other domestic needs. The second reason is that it was a response to the fear that the idea of the militia as the peoples defense against government, had brought with it too many individual claims to a right to liberties which could be defended by an armed people.³³ For this purpose, the Act reduced the number of men who could serve in the militia and also decreed that militia could only form in times of emergency. In addition, militia was restricted back to only local duties, the officers were chosen by the local government, and, most importantly, whenever the militia was to be formed, it was to be armed by the government as regular soldiers.³⁴ This act effectively crippled the people's ability to resist because this militia, though still consisting of the people, was severely restricted in who could join, who could lead, and when it could be formed. The king had a standing army that would be back from the Americas after the war, and the people were losing their grip on the monarchy because he no longer depended solely on them for defense of the nation. In short, the Act damaged the people's control over the power of the government, as their only defense from the tyranny of government was the standing army of the government itself.

2.3 Anglo-American Militia

This militia reform is crucial in understanding the nature of militia for the American

³³ Ibid., p. 217

³⁴ Ibid., p. 237

founders because it showed them the form of militia that they were determined to avoid. “Americans became increasingly aware of the two competing institutional forms of militia existing in the Anglo-American world. The model of universal military obligation, expressed in colonial law and English constitutional tradition, conflicted with the model of selective reserve forces, expressed most recently and compellingly in the movement for English militia reform which climaxed with the English Militia Act of 1757.”³⁵ The American militia was not based on the selective reserve militia produced in England by militia reform. That militia consisted of only a select portion of the population, and only formed occasionally.³⁶ Rather, it was based on the old English militia, consisting of all able-bodied men, who formed for defense of the nation, and were seen by the people as their defense and control over a powerful government. However, the first American militia was not the truly American militia we will later see develop, as it was structured very similarly to the old English way.

This hybrid Anglo-American conception of militia was proven to be the Americans first clumsy step toward their own new American militia. In 1768, the English landed an army in Massachusetts and, in the minds of the colonists, occupied Boston. As Blackstone had suggested, the people of Boston started by filing grievances with English courts, the king and Parliament, but none of these were answered. This was one of the many actions on the part of the English government that convinced the founders that government could not be trusted to protect the people, especially from itself. Thus, the people of Boston assembled a town meeting and agreed to resort to their “fifth auxiliary right” and declare themselves able to take up arms, form a militia and arm every able-bodied man in the town to defend themselves. “By ‘a very great majority’ the town meeting reiterated the provision of

³⁵ Ibid., p. 217

³⁶ Western, The English Militia in the Eighteenth Century, p. 8

the English Bill of Rights that ‘the subjects being Protestants, may have arms for their defence,’ and indicated their understanding of it. ‘It is the opinion of this town,’ the vote read, ‘that the said declaration is found in nature, reason, and sound policy, and it is well adapted for the necessary defense of the community.’ Furthermore, they noted, the existing militia law provided ample legal means to provide every man with ‘musket, accoutrement, and ammunition’ so that the ‘inhabitants of this town’ would be prepared ‘in case of sudden danger.’³⁷

It is impossible not to notice the English tradition in this American statement of resistance of government. Still considering themselves English, they invoke their rights as English citizens to form a militia, arm themselves and defend their community. It is especially important to note that they have a clear conception of what Clause VII means for them as citizens. They believe that part of the meaning is that they, as Protestant citizens, are allowed to have arms for their defense even if they are defending themselves from the government. This new Anglo-American conception of militia starts to abandon the old English militia. After all, they are claiming a right to arm and assemble a militia themselves, without the king’s stamp of approval. They are going to form as a militia to restrict the power of the king, not to defend his power. They are taking the English idea that militia restricts the power of the king by making him reliant on the people one step further and they are forming militia in order to oppose the king directly. This Anglo-American militia is caught in between the two world views of the old and new world. Still remaining from English tradition is the concept of the militia only forming to face common dangers. The militia remains a collective right at best. However, now the king is seen as a common danger and the militia can restrict his power not only by refusing to carry out his orders, but in this case, by openly bearing arms against his will in order to defend themselves. And as the American Revolution began, Americans began to understand the nature

³⁷ Rowland, p. 263

and role of militia in a way very different from the old British understanding.

2.4 The New American Militia

Important to the English government's control of its people was its ability to control the people's militia from within. Colonial American militia had been organized much the same way, with the officers who armed and led the militia being chosen by the government. However, as the revolution began, that old Colonial militia was replaced with a new Revolutionary militia. "Whereas the latter had been a legally compulsory system, commanded by governor and council, with an appointive, hierarchical officer system, and a body of men little interested in training and service, the former especially in its early stage was a voluntary association of men who governed themselves, elected their own officers, and displayed an active, enthusiastic interest in military affairs."³⁸ The new American militia reflected the values of the new American people. It was non-hierarchical, democratic, voluntary, and self governed by men who felt free. Gone were the aristocratic and monarchical rules and controls of the old English militia. Militia became an association of free men banded together by love of country to defend themselves.

Crucially, the early Americans understood militia to mean all able-bodied men. The *Federal Farmer* said that "militia, when properly formed, [is] in fact the people themselves".³⁹ George Mason, a Virginia delegate to the Constitutional convention who refused to sign without a Bill of Rights, believed that, "the militia consist now of the whole people".⁴⁰ The Supreme Court defined militia as "all males physically capable of acting in concert for the common defense," the State of New York as

³⁸ Ibid., p. 279

³⁹ Levinson, "The Embarrassing Second Amendment", p. 647

⁴⁰ Ibid., p. 647

“every able-bodied male ... of the age of sixteen, and under the age of forty-five years,” the State of Virginia as, “all free male persons between the ages of eighteen and fifty,” and the State of Massachusetts as, “all able-bodied men, from sixteen to forty years”.⁴¹ Since militia was understood to mean all men, there can be no doubt that the inclusion of the militia clause in the Second Amendment was not intended to keep arms only in the hands of militia. After all, since all men were in the militia, then all men were allowed to “keep and bear arms” for the defense of their community, and as would have been assumed from the English tradition, a people armed for collective defense may also use those arms for their personal defense should the need arise.

In 1792, only three years after the Second Amendment was written, Congress passed the Uniform Militia Act of 1792 which defined militia for the entire nation as, “every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years”.⁴² In addition, that same Act declared “that every citizen ... shall ... provide himself with a good musket or firelock, each cartridge to contain a proper quantity of powder and ball; or with a good rifle , knap-sack, shot-pouch, and powder horn, twenty balls suited to the bore of his rifle, and a quarter pound of powder”.⁴³ This uniformity of the American conception of militia is still more clear evidence that the framers intended all men to be able to have arms. This act not only allowed it, but it in fact required it. In doing so, it cements into law the new American militia.

This act still clings to a few of the old English traditions, such as the idea of mandatory defense of town and country. However, this is the new American militia, formed to ensure the freedom and security of the citizens of the United States, especially from the tyranny of the government. They were required to provide their own weapons (which incidentally tells us that every able-bodied white male citizen,

⁴¹ Williams, The Mythic Meanings of the Second Amendment, p. 47

⁴² 1 U.S. Stat. 271

⁴³ Ibid.

and thus every family in the early United States, had and used firearms for defense of self, property and community), and most importantly, elected their own officers, ensuring that the control of the militia was in the hands of the people who made up its ranks. The old English conception had just assumed that the people who formed the militia would be able to disobey the king if they felt they had to. But now, the election of their own officers made it clear that the American militia consisted of, was led by, and was loyal to the American people. They were the counter to the president and his standing army that threatened the liberty of the American people. John Hancock summarized the trust and responsibility that Americans were putting in the militia: “‘From a well regulated militia,’ unlike the army, he argued, ‘we have nothing to fear; their interest is the same with that of the state; ... they fight for their houses, their lands, for their wives, their children; they fight *pro aris & focis*, for their liberty, and for themselves, and for their God’.”⁴⁴ The militia was the people’s defense against the government because it was the people armed and ready to resist the government.

One important point to note before moving into the end of our discussion of militia is the use by Hancock above and the framers in the wording of the Second Amendment itself of the term “well regulated”. Contrary to its modern meaning, in a military context in the 17th and 18th centuries, “well regulated”, rather than meaning “regulated by laws”, meant “properly disciplined”. “Discipline” in military context, according to the Oxford English Dictionary, meant, “training or skill in military affairs generally; military skill and experience”.⁴⁵ The framers explicitly chose not to include in the Second Amendment a clause similar to the “as allowed by law” clause from the English Declaration of Rights. They included “well regulated” to ensure that then men who were entrusted with defending the people from the government were well trained and skilled with a gun. Though sometimes used to justify restrictions on

⁴⁴ Rowland, p. 268

⁴⁵ Ibid., 320

gun owners, the inclusion of the term “well regulated” is in fact one of the clearest examples of the founders determination that all men not only own a gun but be skillful with it as well in case they needed to use it.

2.5 An Outdated Concept of Militia

After hundreds of years leading up to the end of the 18th century, militia had developed from the *posse comitatus*, men armed and controlled by the government, and arresting criminals in small English countryside towns, and the old English militia summoned by the king to defend against invasions and controlling the power of the monarch only through the threat of disobedience, into an entire nation of men who had borne arms against the most powerful nation on earth and won the right to live free of government oppression. It was fear of the tyranny of government and the government’s control of a standing army, that had spurred this development both in Britain and in America; but just when militia had reached the peak of its power, as the first and only line of defense of the people against their government, in 1787, the people became the government for the first time in human history.

Just as John Hancock had trusted the militia because it was comprised of the people themselves and the people would never turn their arms against themselves, the new American government put its trust in the notion that a government of the people would never tyrannize the people because people will not tyrannize themselves. Militia was no longer needed to defend the people from government because there was no opposing force of government to fear, as any standing army would be controlled not just by one man, but by a government of the people, and could be countered by a people guaranteed the right to arms. The American conception of militia had worked so well, that it ended the need for its own existence. “Thus, as

soon as the Second Amendment was ratified, it lost its original meaning.”⁴⁶ The Second Amendment had been ratified to protect the American people’s right to arm themselves against the power of government and the fear of a standing army. Now that purpose had been negated, Americans were left with an amendment protecting “militia” and the “right to keep and bear arms”. Militia had changed so much and become so effective, that it was no longer necessary and left us with a Second Amendment that protects the right of every American, the true meaning of the word “militia” in the Second Amendment, to keep bear arms.

Chapter III

The Framing of the Second Amendment

As the American Revolution neared, it became increasingly clear to the colonial

⁴⁶ Ibid., p. 8

Americans that they were not going to be able to settle their differences with the English without having to resort to taking up arms against their mother country to defend their liberties and rights which had been repeatedly violated. One of the foremost complaints by the early Americans was on the subject of the English attempt to disarm the American people. It is in fact a complaint about the confiscation of their weapons that led to the first official shots of the Revolution.

Since it was a cause of the war, after they had won their freedom and had set about ensuring that no government would ever have the power to tyrannize them again, the American founders saw it as crucial to protect the right of an American to bear arms in his own defense. Drawing on the English tradition of the right of an armed populace as having the ability to protect all other rights, by force if necessary, they crafted the Second Amendment and gave it a prominent place in the Bill of Rights. In addition, almost every State enshrined the right to arms in their own State constitutions.

By close examination of the text of the Second Amendment, we will see that, though as was discussed earlier the militia clause lost its original meaning at its ratification, the spirit of the Second Amendment remains one of individual rights, self-defense, communal security, and fear that government could step beyond its bounds and oppress its people. Even in the presence of the now defunct militia clause, there is no question that an examination of the drafting of the Second Amendment will clearly show that the American people do have a right to arms for the purpose of defense of self and nation. As the Pennsylvania delegation proposal for the Second Amendment most bluntly put it, “The people have a right to bear arms for the defense of themselves, and their own State, or the United States, or for the purpose of killing game; and *no law shall be passed for disarming the people* [emphasis added]”⁴⁷.

⁴⁷ Shalhope, “The Ideological Origins of the Second Amendment”, p. 610.

3.1 The Right to Arms in State Constitutions

After the 1768 occupation of Boston failed to accomplish the goal of quashing civil unrest in the colonies, the English government tried a new tactic; they confiscated guns, ammunition and powder from the colonists in the hope of disarming them in case of any attempted rebellion. This strategy backfired. The colonists, clinging to their rights as English citizens, resisted their disarmament and at Lexington and Concord in April of 1775. American militiamen opened fire on a column of English troupes on its way to confiscate an arsenal that could arm 15,000 men, and included 10 cannon. This attempt to deny them their rightful arms was used as one of the main arguments for war by the American colonists. The Second Continental Congress, in its June 6, 1775 explanation for the reasons that war was upon them, stated that they, “had taken up arms in defense of the Freedom that is our birthright” and “for the protection of our property ... against violence actually offered”.⁴⁸ They followed closely Blackstone’s argument for the right to arms; that after peaceful protest fails, it is the right of an Englishman to take up his arms and resist his oppression by the government, violently if necessary.⁴⁹

Now embroiled in a war against the most powerful nation on earth, Americans set about securing the liberties that they were fighting and dying for. Each State drafted a Constitution which would become the basis for the new government that was to be established when the war was won. These State Constitutions would become the basis for the Federal Constitution that would be adopted a decade later, and thus their views on the right to arms are crucial because they give us a glimpse into both the laws view of gun rights at the time, and also a glimpse into what the founders believed. For instance, Samuel Adams proposed an amendment to the Massachusetts Constitution

⁴⁸ Rowland, p. 287

⁴⁹ Ibid., p. 287

that read, “that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press or the rights of conscience; or to prevent the people of the United States who are peaceable citizens from keeping their own arms”⁵⁰. That language gives a very clear vision of what Samuel Adams, a very important figure in the founding of the United States, believed about the right to arms. Thomas Jefferson, as well, was quite unambiguous when he proposed this clause for the Virginia State Constitution, “No freeman shall ever be debarred the use of arms”⁵¹. Both these men saw no reason the government should ever be enabled to take the gun out of the hands of a law abiding citizen. And neither did the vast majority of the States.

In fact, by 1784, every State except for Connecticut had in its Constitution a guarantee of either arms or militia. And as we have seen, a guarantee of militia is the same as a guarantee of arms. For instance, Virginias Constitution, though it does not guarantee arms, does state that, “A well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state”.⁵² This language, without specifically mentioning a right to bear arms, still is some of the clearest language of the intent of the founders when they wrote the Second Amendment. It is clear from the Virginia Constitution that, to the founders militia meant the entire citizenry (“the body of the people”), that all men could therefore arm, and that the purpose behind this was the defense of the State and the people from the abuse of government. The word “safe” helps us conclude the last point because it harkens back to John Hancock and his conclusion that only a militia of the people could truly secure the liberty of the people because only an armed people could defend itself against a government trying to oppress them. Thus, even those State Constitutions that do not specifically guarantee a right to arms still uphold the same

⁵⁰ Shalhope, p. 609

⁵¹ Ibid., p. 609

⁵² Rowland, p. 316

principal as a direct guarantee.

Some States were completely unambiguous when it comes to the guarantee of arms. Five states guaranteed the right to bear arms, two others guaranteed arms for defense of the state, and Vermont and Pennsylvania included clauses guaranteeing both arms and militia for defense of self and state. Section XIII of the Pennsylvania Constitution, adopted in 1776, stated in part, “That the people have a right to bear arms for the defense of themselves, and the State”.⁵³ This language is so clear, that it is almost indisputable that the State of Pennsylvania intended its people to be allowed to bear arms for their own defense, not merely in the context of an organized militia. In fact, in 1776 at the adoption of that language and the Constitution, the State of Pennsylvania did not even have a militia. So in the next sentence in Section XIII when the resistance to military strength of the government was mentioned, it is clear that such resistance would have to come from the individual people bearing arms, not from an organized or compulsory government militia. “In Pennsylvania, therefore, the right to bear arms was devoid of military significance.”⁵⁴

In response to this clear and unambiguous declaration of an individual right to bear arms, the critics of such a right have no real response. They respond to Section XIII of the Pennsylvania Constitution by saying that, “Unlike the other provisions we have considered, this one is ambiguous”.⁵⁵ Compare that critique to the critique used against the Second Amendment in claiming that it does not cover the right of the individual to bear arms: “The Americans, like the English, favored the militia, and wrote and awkwardly worded amendment that would assure that the militia would be appropriately armed by the individuals who served in it”.⁵⁶ These arguments fall apart in the face of the evidence, which shows us that if one of these clauses was

⁵³ Ibid., p.337

⁵⁴ Levy, p. 135

⁵⁵ Heyman, p. 266-267

⁵⁶ Schwoerer, p. 58

awkwardly worded, then they all must have been. The idea that the English militia and the American militia were the same thing has been proven wrong. It is clear that the two nations had differing conceptions of the nature of militia.

In reality, the arguments that try to prove that the Second Amendment does not cover an individual's right to own a gun, either rely on vague and disprovable claims ("ambiguous" or "awkward" wording) or straight out mistruths (American and English conceptions of militia were the same). But rather than take my word for it, let us now look at the care that went into the wording of the Second Amendment, and we will see that the Amendment was very carefully constructed to ensure a right of an individual to own a gun for the purpose of defending self and community from the oppressive nature and power of government.

3.2 Proposals for the Second Amendment

There were many proposals coming from the States for how the Second Amendment should be worded, and every state had its opinion, though no state ever proposed that there need not be a Second Amendment. Clearly there was something very important contained within it that they were determined to protect. Earlier, the Pennsylvania proposal was quoted. Other proposals, though not as clearly worded, contained the same message. Virginia and North Carolina submitted a joint proposal that read, "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 defense of a

free state”.⁵⁷ This may sound familiar, and it should be as it is almost the identical wording to the guarantee in the Virginia Constitution. This is a key point, because Virginia obviously did not thus consider militia to be a State institution used for the defense of the state against the central government. If they were using the same wording in the Federal Constitution as in their State Constitution, then it should be clear that when they claim that militia is the best defense for a “free state”, they are not referring to Virginia. Rather, they intend for us to understand that claim as meaning that a militia (properly read as meaning all able bodied men) is the only way to ensure a free state. This use of the same language for State and Federal Constitutions is one of the clearest examples yet that the Second Amendment was, as has been asserted, an amendment that covered an individual’s right to arms for the purpose of defending his rights and liberties, and those of his community from all threats, chiefly the threat of oppressive government.

Another proposal came from the State of New York, and its proposal is very telling as well. Even though the State Constitution of New York contained no Bill of Rights and no reference to a right to arms (just to militia), their proposal for the wording of the Second Amendment read, “That the people have a right to keep and bear arms; that a well regulated militia, including the body of the people capable of bearing arms, is the proper, natural and safe defense of a free State”.⁵⁸ This proposal is important, first and foremost, because even a state which only guaranteed militia still found it necessary to include a clear right to bear arms in its proposal for the Federal Bill of Rights. Also, it includes yet another reference to militia as consisting of all the people, and also another reference to the natural role of militia (armed populace) in defending the freedom of the people. Clearly the State of New York believed that the right to bear arms was an individual right, not tied only to the militia. They could

⁵⁷ Rowland, p. 402

⁵⁸ Ibid., p. 402

have just as easily have made a proposal guaranteeing the right to be in a militia. Instead, they chose to make a clear proposal where the right of all men capable of self defense to bear arms for that very purpose was protected.

An interesting note to make before we move on is to look back to the English origins of the Second Amendment again and recall that Clause VII of the English Declaration of Rights included the clause “as allowed by law”. Notice that no State Constitutions, no proposals for the Second Amendment or the Second Amendment itself contain any such reference or even a reference like it. There is no indication that the founders believed in any way that the right to arms and defense from government could be restricted in any way by the laws of that very government from which the people were arming to defend themselves. Clearly the American founders had moved beyond believing that government could restrict the right to arms. This is so noteworthy because if one of the key tenets of the theory is to be true, namely that the right to arms remains an individual right primarily because it embodies the spirit of defense from government which is still alive today, then this change is crucial to proving that the American founders did indeed see the right to arms as an defense against government. Logically, if you are going to arm the people to prevent government abuse of power, than you must also be clear that government may not disarm the people for any reason. That is the significance of the omission of a reference to the restriction of the right to arms by use of the law.

3.3 Madison’s Proposal and its Modification

Returning to the Amendment itself, James Madison must be considered the most crucial figure in the drafting and passage of the Bill of Rights, and thus his opinion is vital to the understanding of the Second Amendment. When Madison made his first proposal for the Second Amendment, he drew heavily on the Constitution of his home

state of Virginia, and he wrote, “The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person”.⁵⁹ Madison did not make the right to bear arms dependant on service in a militia, but rather he made the militia subordinate to the right of the individual to bear arms.⁶⁰ And the exception for religious scruples reinforces the idea that this is a right to bear arms if you so choose, but in no way is a collective duty to government. His wording clearly reflects the conviction that the right to bear arms is the right of every man. The militia clause was placed in to make clear the purpose of the right to arms. The right to arms was guaranteed for the purpose of ensuring that the people could arm and organize to defend themselves against any government attempt to rob them of their other rights. Just as Blackstone had proposed, the right to arms is a right that ensures government cannot violate any other guarantee of the liberty of the people.

Also, the fact that in the final version the clause about religious scruples was dropped makes it clear that the founders considered arms a right, not a duty. Going along with Madison’s theory of the Constitution which holds that the Federal Government is a government of limited and delegated powers, and his opposition to the Bill of Rights in the first place, to have included a clause guaranteeing some people the right not to arm would have made it appear that all those without religious scruples had a duty to arm. For Madison, anything not granted to the Federal Government was not in its power. However, when exceptions are made to the right to arm, it could be inferred that the right is actually a duty to arm that the government could enforce. That was the old English conception, and the Americans were determined to avoid it. Therefore, Madison must have reasoned that when removed

⁵⁹ Levy, p. 144-145

⁶⁰ Ibid., p. 145

and reworded as the Second Amendment was finally worded, the duty to arm became a right to arms, and the lack of any reference to an exception to the Amendment should have made that clear. Thus the removal of the religious scruples clause is a clear indication of the determination of Madison and the framers to ensure that the Second Amendment enshrined a right to arms that the government had no right to regulate or control.

However, another change was made from Madison's first proposal that on its face is contradictory to the idea that the Second Amendment protects an individual's right to arm. The militia clause was moved in front of the right to bear arms, thus giving it a "dominant" position. The argument that the Second Amendment only guarantees the right to a militia relies on the claim that the militia clause is first because it is the right, not the individual's right to arms. There are many reasons that the move was made and that the clarity of the individual right was actually enhanced by this move.

First, it would be wrong to immediately assume that because the militia clause comes first, it is dominant over the right to keep and bear arms. In reality, the wording has changed so that rather than the original proposal where the two ideas were separate but equal, now the militia clause has been made subordinate to the right to keep and bear arms. Before, each idea had its own sentence, thus stressing the equality of the idea of the individual right to arms, and the collective need for the security that militia brings. In the final wording, the militia has become the reason for the right to bear arms, but the right is not made dependant on it. In fact, "Militias were possible only because the people were armed and possessed the right to be armed".⁶¹ The militia clause is subordinated to the right to arms, because the very purpose of the organized militia was resistance to the government. Were the government to be able to arm or disarm the people at will, then the militia would lose its ability to carry out its intended purpose. The existence of militia is dependant on the people's ability to

⁶¹ Ibid., p.135

arm themselves, and thus the militia clause is the subordinate clause. Militia can only exist if the people can arm themselves, but the people can still arm themselves even in the absence of a formal militia.

In addition, the founders believed that the purpose of militia and the purpose of an individual right to arms was the same: self and community defense of freedom. It does not therefore follow that, in the absence of militia, the right to arms disappears. In fact, as we discussed earlier, the Second Amendment itself achieved the purpose of militia, but not the purpose of individual arms. The individual, even if he no longer need worry about defending his community from a large scale attack on his liberties by government, still needs the ability to defend himself and his family from more local threats, just as the men of the *posse comitatus* had. The two clauses of the Second Amendment are complimentary, and only the militia clause is dependant. Thus the absence of state organized militia in no way disqualifies the individual from keeping and bearing arms because the dependant clause is the militia clause, not the right to bear arms.

To drive this point home, let us borrow the idea of awkwardly worded amendments from the critics themselves and ask the question, if the framers intended the Second Amendment to protect the right of states to have and organize militias, why did they not just word the amendment, “Congress shall have no power to prohibit state-organized and directed militias”?⁶² They could have cleared up the confusion very easily if that was their intention. We must conclude that the founders believed that their language was clear, and the clarity of it comes from their belief that the common understanding of the day was reaffirmed in the Second Amendment. As we have seen, that common understanding held that all people were part of the “militia” and that their right to arms was not dependant on the participation in organized state militia.

⁶² Levinson, p. 645

3.4 The Language of the Second Amendment

Looking more closely at the language, we notice a few other interesting points that would lead us to conclude that the intent of the framers was to enshrine an individual right alongside the right of collective defense that the militia represents. For one thing, critics of an individual rights position say that the phrase “the right of the people” connotes a collective right, as it does not mention the right of an individual person. However, the Fourth Amendment also guarantees the right of “the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”. The right of the Fourth Amendment could never be confused for a collective right. It is clearly an individual guarantee and the use of the phrase “the people” does not change that.

Also, note the inclusion of the word “keep” alongside “bear” in the Second Amendment. This distinction is key, as the phrase to “bear arms”, according to the Oxford English Dictionary, “referred to being engaged in hostilities with someone, hostilities having the definition of acts of warfare or war itself”.⁶³ Thus, the phrase to “bear arms” is clearly a militia reference, as an individual would not make war by himself. However, the framers found it necessary to also include the word “keep” in the amendment. This clearly indicates an individual right to “keep” arms that goes right alongside a collective right to “bear” arms in a militia. Were the intention to have made the right to arm subordinate and dependant on participation in the militia, then the word “keep” would have had to have been made subordinate to “bear” (i.e. “the right to keep arms only for the purpose of bearing arms”). However, neither is subordinated to the other, thus indicating to us that the framers intended the

⁶³ Rowland, p. 324

individual and collective rights to stand side by side, but, crucially, independent of each other.

One final piece of evidence that the Second Amendment contains an individual right to “keep” arms right alongside the collective right to “bear” arms. In the notes to a speech of his where he was to defend the Bill of Rights as a whole, Madison wrote to himself, “[The Bill of Rights] relate first to private rights” and “amendments may be employed to quiet the fears of many by supplying those further guards for private rights”.⁶⁴ His own words do not distinguish the Second Amendment as containing a collective right. Rather, he reaffirms to himself that the entire Bill of Rights protects “private rights”. James Madison, the man most intimately connected with the Constitution and the Bill of Rights, believed all the amendments of the Bill of Rights to be securing “private rights” for the citizens of the United States of America.

3.5 The Structure of the Bill of Rights and the Constitution

The structure of the Constitution and of the Bill of Rights itself shows that Blackstone could very well have been on the minds of the framers, lending more credence to the theory that the framers intended to enshrine Blackstone’s idea of a gun right which protected all other rights when all other forms of recourse had failed. The First Amendment ends with the guarantee of the “right of the people peaceably to assemble, and to petition the government for a redress of grievances”. Just as Blackstone had suggested, the people should always first try to petition the government when it has grievances, only resorting to their “fifth auxiliary right” when that fails. This idea is embedded in the very structure of the Bill of Rights. After a petition, the people move down to the Second Amendment and may resort to using

⁶⁴ Shalhope, “The Armed Citizen in the Early Republic”, p. 39

arms to defend themselves from government. Though not necessarily the intent of the framers (this very well could be coincidence), it is possible that this theory was precisely what the framers had in mind when they structured and ordered the amendments in the Bill of Rights.

While we are looking at and questioning the structure of the Constitution itself we may also ask why, if the Second Amendment was only a guarantee of the right to have a militia, it was not included in Article I, Section 8 of the Constitution where it was made very clear that the Federal Government had the responsibility, “To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; to provide for organizing, arming, and disciplining the militia, and for governing such parts of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of officers, and the authority of training the militia according to the discipline prescribed by Congress”.⁶⁵ Clearly this would have been the perfect point to enact a guarantee of governmental non-interference with state militia. However, they chose not to include such a clause inside the Constitution.

They did however make clear two points that would immediately call into question the validity of a claim that the militia clause was included in the Second Amendment as a guarantee that the states could keep militia to defend themselves from the Federal Government. First, the quote above includes the right of the Federal Government to call up the militia to “suppress insurrections”. Second, the Constitution defines treason as “levying war against [the United States]”.⁶⁶ If it were true that the purpose of the Second Amendment was to ensure that states could arm their people as a militia for the purpose of fighting off the tyranny of the Federal Government, then the Second Amendment would be authorizing the States to commit

⁶⁵ US Constitution, Article I, Section 8

⁶⁶ Ibid., Article III, Section 3

treason against the United States.⁶⁷ Also, the Federal Government would have to put down such a treasonous insurrection by calling upon the very state militias which were in rebellion. This just does not make sense, and thus it follows that there is no way that the men who crafted both the Constitution and the Bill of Rights intended these contradictions and these incongruities. There is just no way that the intention of the framers was to make the Second Amendment a guarantee of state militia. There are just too many reasons in the Constitution itself that would make such an action illogical and almost impossible for such a theory to be true.

3.6 The Need for a Second Amendment

So having broken down the Second Amendment itself and revealed it to be a guarantee of both the individual right to “keep” arms for the purpose of self defense and the collective right to “bear” arms as a militia for the purpose of defense of a free state, the only question that remains to be answered is why the founders found it so necessary to include these dual guarantees at all? Clearly knowledgeable about the English precedent and the confusion over its meaning, and also fearing government tyranny above all else, the Second Amendment became the last line of defense for a people who had been stripped of their liberty and denied a voice in their governance by an oppressive government whose most effective method of control was the disarmament of the citizenry. “The right to keep and bear arms and the militia therefore sought to perpetuate the sovereignty of the states as the collective will of the people” and “to prevent disarming even if Congress redefined military obligations”.⁶⁸ The Second Amendment protected, and still protects, the liberties of the people. Government’s power over the people had always relied, as its last mechanism of

⁶⁷ Levy, p. 134

⁶⁸ Rowland, p. 386

control, on the power of force. Now, in the United States, the people were the government, and the people held in their hands the arms necessary for their own defense.

In the end, the Second Amendment can be summed up as guaranteeing the people the right to arm themselves, and defend themselves, in state organized militia, or individually if necessary. Patrick Henry famously decried the idea that state militia could be effective or even exist without the right of the individual to arm himself: “Of what service would militia be to you, when, most probably, you will not have a single musket in the State? For, as arms are to be provided by Congress, they may or may not furnish them”.⁶⁹ Where government has the power to disarm the people, they are left with no recourse for tyranny. Thus the Second Amendment was adopted and ratified in order to ensure that should the government of the United States ever attempt to deny its people their liberties, each individual citizen would be armed and ready to stand up and defend his freedom and the freedom of his fellow citizens.

Chapter IV

The Influence of John Locke

When considering the drafting of the Second Amendment, the founders clearly drew on the experience and tradition of English law into which they were born and in

⁶⁹ Ibid., p. 394

which they were trained. However, as we have seen, they took the old English conception of the right to arms one step further than it had been. It is possible that, looking at the development of the right in the English tradition, that they had just decided to keep the progression from collective duty to individual right going. It is more likely that there was another influence on them which drove them to enshrine a right in the Bill of Rights that had never been fully recognized before. The founders, besides their English Law training and experience, were also well versed in the ideas of natural rights and natural law; particularly the work of John Locke, whose influence on the American founders is as indisputable as it is important due to the fact that “the Lockean perspective was firmly embedded in the leadership culture shared by the framers”.⁷⁰

Written during the period in English history that we have already discussed at length, the 1680’s, Locke’s intention in writing his Treatise of Government was to explain the “true original extent and end of civil government”.⁷¹ The revolutions and civil wars and civil strife of the period gave Locke a fertile environment to write on the nature, role, and overthrowing of governments. His writings became the theoretical basis for the American system of government, as he advocated a government ruling by the consent of the governed, protecting the rights of the people, and defending, in order of importance, life, liberty and property (later to be borrowed and modified into Thomas Jefferson’s famous “life, liberty, and the pursuit of happiness” in the Declaration of Independence). The framers of the Second Amendment would have been unable to escape the shadow of John Locke when they were trying to decide how the right to arms should be viewed in the United States, and his influence in the development from the old English right to the new American one is clear.

⁷⁰ Weaver, “Leadership, Locke, and the Federalist”, p. 423

⁷¹ Locke, Second Treatise of Government, p. 3

Indeed, almost every one of the important figures of the American founding was influenced by the works of John Locke. In fact, Locke was “by far the most frequently cited non-biblical source within the revolutionary literature”.⁷² Thomas Jefferson and John Adams, two of the central figures of the American founding, and also two men with different visions for the nation, still, as we will see, both shared John Locke as the theoretical basis for their beliefs on government.⁷³ In addition, James Madison and Alexander Hamilton, who wrote the Federalist Papers were also influenced by Locke, and it has been said that, “the *Federalist* is heir to Locke’s work of the previous century”.⁷⁴ Locke’s influence on the founders is very important to accept and understand because it is this addition of the natural rights and law theory of John Locke which inspired the founders to frame the Second Amendment and its guarantee of the right to arms for the purpose of defending those natural rights that no government has the right to take away.

There are three important features of Locke that would have had an immediate and crucial impact on the Second Amendment. One, Locke believed that the purpose of government is the defense of the individual’s life, liberty and property. Thus, because men enter into government for the purpose of protecting these three things, a right to arms would logically be an individual right to arms in order to assist a man in defending those things when government fails to do so. This individual right follows from a second feature of Locke’s theory that the framer would have found important.

Locke advocated a right to self-defense, not only outside of the constraints of government, but even for those living inside a civil government. Self-defense was an absolute right that even agreeing to enter into a social contract and live under a government does not take away. This absolute right of all men would have made the

⁷² Dienstag, “Serving God and Mammon: The Lockean Sympathy in Early American Thought”, p. 505

⁷³ Ibid., p. 504

⁷⁴ Weaver, p. 422

ability of men to bear arms crucial, since a government that denied it citizens the right to defend themselves is a government failing to fulfill its most basic objective, the protection of its citizen's life, liberty and property.

And when a government fails, the people have a right to overthrow it and replace it with a government better able to protect them and their rights. Thomas Jefferson invoked this right in the Declaration of Independence: "That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed, that whenever any form of government becomes destructive to these ends, it is the right of the people to alter or abolish it, and to institute new government, laying its foundations on such principles, and organizing its power in such form, as to them shall seem most likely to effect their safety and happiness."⁷⁵ This right to revolution is straight out of the work of John Locke.

In fact the entire Declaration of Independence, "contains a series of Lockean claims too familiar to warrant much discussion: they claim rights from nature on an individual basis ... government by social contract; and, implicitly, a right to revolt to protect all the other rights".⁷⁶ Locke's influence on Jefferson is proven by the Declaration's reliance on Lockean theory for its arguments. It helps to explain not only why the founders felt that they had a right to revolt against Britain, but also why an armed populace is so necessary. The people must always be ready to take up arms and fight to defend their rights, even if it means overthrowing their government. Coming out of this tradition of inviolable natural rights and a natural law that allowed for self-defense and the overthrow of failing governments, the framers felt the need to draft a Second Amendment which would protect the right of Americans to keep and bear arms for those two purposes.

⁷⁵ Rogers, From Revolution to Republic, p. 118

⁷⁶ Dienstag, "Between History and Nature: Social Contract Theory in Locke and the Founders", p. 998

4.1 The “State of Nature” and the Purpose of Government

Locke wrote that all men started in the “state of nature” where they are in a “state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit”.⁷⁷ In this “state of nature” men are totally free to do what they must to survive and may “do whatever he thinks fit for the preservation of himself”.⁷⁸ Also, they may acquire property: “Every man has a property in his own person ... The labour of his body, and the work of his hands, we may say, are properly his ... Whatsoever then he removes out of the state that Nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby make it his property”.⁷⁹ Once they have property that is rightly theirs, they may defend it just as they may defend themselves. However, Locke believed that men did not wish to remain in this chaotic and dangerous “state of nature”, and thus they founded governments and chose to live as a society under the governments. The governments role is the “preservation of [the people’s] lives, liberties, and estates, which I call by the general name, property”.⁸⁰ This “property“, in the “state of nature“, is under constant threat from others and had to be defended; the joining of societies and instituting of governments was intended to change that.

This argument provides problems for critics of a collective rights theory of the Second Amendment. Ceding the importance of Locke to the founders, they must go about proving that he was not advocating that man’s aim in forming governments was to protect personal life, liberty and property. Their interpretation of the Second Amendment relies on the belief that the founders were trying to protect collective

⁷⁷ Locke, p. 8

⁷⁸ Ibid., p. 67

⁷⁹ Ibid., p. 19

⁸⁰ Ibid., p. 66

rights and freedoms, not individual ones. If the role of government is the protection of personal life, liberty and property, then surely the founders must have meant that the individual can arm to defend his personal “property“ should the government fail. After all, the only reason for government is that very protection. Without it, people must rely on themselves for their defense just as they had in the state of nature.

One critic tries to claim that “it is precisely the unrestrained use of force that makes the state of nature intolerable“.⁸¹ Under his theory, it is the violence inherent in the right to self-defense that causes men to unite under governments. This theory would go along well with a claim that the framers did not want men to have individual arms. However, it is easy to disprove with the words of John Locke himself “The great and chief end, therefore, of men uniting into common-wealth’s, and putting themselves under government, is the preservation of their property”.⁸² It is the individuals desire for security in his “property” that compels men to form governments, and thus the purpose of governments can be logically construed to be the defense of the individual’s “property” from any threat.

4.2 The Right of Self Defense in Society

Back in the “state of nature”, the laws of self defense were clear and brutal:

One may destroy a man who makes war upon him, or has discovered an enmity to his being, for the same reason that he may kill a wolf or a lion; because such men are not under the ties of common law of reason, have no other rule, but that of force and violence. ... using force, where he has no right, to get me into his power, let his pretense be what it will, I have no reason to suppose, that he, who would take away my liberty, would not, when he had me in his power, take away everything else. And therefore it is lawful for me to treat him as one who has put himself into a state of war with me, i.e. kill him if I can.

(Locke, p. 14-15)

There is no doubt left in the wording of that passage that, in the “state of nature” at least, lethal force could be used on a man who attempted to deny you your rightful property. This right, though not as a first resort, still exists after men enter society.

⁸¹ Heyman, p. 242

⁸² Locke, p. 66

Once under a government, men may not always resort to the use of violence in defense of self when the law could be use instead. However, “wherever there are any number of men, however associated, that have no such decisive power (the law) to appeal to, there they are still in the state of nature”.⁸³ As Locke says, even in a society, when the law is incapable of helping the individual defend himself, the rules of the state of nature kick back in, and man is allowed to defend himself by any means necessary. There can be little doubt that Locke recognizes that men, even those in society under a government, must be allowed a way to defend themselves should the government fail to do so. And if lethal force is permissible, then surely Locke meant to protect the best instrument of lethal force from government denial. The framers of the Second Amendment would have known this too, and would have had it in mind when drawing up the Amendment itself. After all, John Adams wrote, “Resistance to sudden violence, for the preservation not only of my person, my limbs and life, but of my property, is an indisputable right of nature”.⁸⁴ The influence of Locke on Adams is indisputable, as Adams clearly was well read in the *Second Treatise* and believed in Locke’s notion of the right to self-defense.

Again, though, there are critics to this idea that men preserve their right to self-defense after entering into a society. For if they admit that such a right is preserved, the logical conclusion is that the framers intended the Second Amendment to protect the individuals right to arms for the purpose of self-defense where government does not provide it. In the reading of Locke that would support a collective rights view, it is noted that Locke says that, “it is only by surrendering [the right to self defense] that human beings are able to form a society at all”.⁸⁵ Though apparently contradictory, Locke himself will provide the evidence that the quote above is being misinterpreted by those who believe that he meant that you lose your right to self-defense when you

⁸³ Ibid., p. 48

⁸⁴ Dienstag, “Between History and Nature”, p. 994

⁸⁵ Heyman, p. 243

enter society. He reveals that neither he nor the founders would have accepted that men in society had surrendered their right to self-defense when he writes: “Because the law, which was made for my preservation, where it cannot interpose to secure my life from present force, which, if lost, is capable of no reparation, permits me my own defence, and the right of war, liberty to kill the aggressor, because the aggressor allows not time to appeal to our common judge, not the decision of law, for remedy in a case where the mischief may be irreparable”.⁸⁶ The founders knew that even after entering into society men preserve their right to self-defense, and thus the right to arms would have been understood, in part, as an assurance that every man could arm to defend himself should the need arise, as John Adams himself said in the completion of the quote above, “[The right of self preservation] is an indisputable right of nature which I never surrendered to the public by compact of society, and which, perhaps, I could not surrender if I would”.⁸⁷ Both John Locke and the American founders believed that all men had a right to self-defense, and that such a right was not surrendered to government or society even after agreeing to enter into society.

4.3 The “State of War”

The reason that the right to self-defense is preserved in society is that society has not eliminated the “state of war”. Locke defined the “state of war” as, “force, upon the person of another, where there is no common superior on earth to appeal to for relief”.⁸⁸ It is in this state of war that self-defense by any means possible becomes permissible, and, as Locke says, “Whosoever uses force without right, as every one

⁸⁶ Locke, p. 15

⁸⁷ Dienstag, “Between History and Nature”, p. 994

⁸⁸ Locke, p. 15

does in society, who does it without law, puts himself into a state of war with those against whom he so uses it”.⁸⁹ Every individual in society uses force without right, and thus, even in society, there is always a state of war allowing for the use of force in self-defense. There is no reason to believe that men will stop acting out of aggression even after they are in a society, a fact proved to Locke by the unrest in Britain at the time he was writing, and there is no question that the founders accepted this as fact. After their own recent experience with the failure of government to protect them, they felt the need to include the Second Amendment in the Bill of Rights for the purpose of ensuring that when government failed, the people were armed and capable of defending themselves, even if it meant defending themselves from the government.

Men entered government in the first place “with an intention in every one the better to preserve himself, his liberty and property (for no rational creature can be supposed to change his condition with an intention to be worse).”⁹⁰ Thus he expects government to take from him, for the most part, responsibility for his protection. However, “when by the miscarriages of those in authority, [power] is forfeited ... upon the forfeiture ... it reverts to society, and the people have the right to act as supreme”.⁹¹ This automatic forfeiture happens when governments consistently fail in their duty to protect the people and force the people into a “state of war” with each other, to the point where no man feels secure in his life, liberty or property, and has to resort to self-defense to protect himself. There is another “state of war” that governments can cause which can result in the downfall of the old government and its replacement by a new, more effective one. That is the case when government is in a “state of war” with its own people, and the people must resort to revolution to protect themselves from the aggression of the government by any means available to them.

⁸⁹ Ibid., p. 116-117

⁹⁰ Ibid., p. 68

⁹¹ Ibid., p. 124

4.4 The Right to Revolution

Both John Locke and the American founders had experience with revolution and the overthrow of governments, and from their experiences came the conviction that the people have the right to overthrow the government when it becomes destructive to the purpose for which men entered society in the first place: the protection and preservation of the life, liberty and property of each individual member of the community. Governments collapse when they allow men to feel insecure by neglect, but when the government itself is the aggressor creating the “state of war”, then the people have the right to revolt, overthrow the government, and set up a new one.

Sounding a lot like Blackstone who would come after him, Locke wrote on the subject of a government that the people would be right to over throw that, “whenever his property is invaded by the will and order of his monarch, he has not only no appeal, as those in society ought to have, but as if he were degraded from the common state of rational creatures, is denied a liberty to judge of, or to defend his right”.⁹² If government is the apparatus to which men whose rights or property have been “invaded” appeal, then when government is the invader, men are being denied their basic right to self-defense. Thus, as Blackstone and after him the American founders would later conclude, the people must be prepared to defend themselves, not only from the failure of government, but also from the aggression of government.

Displaying his Lockean sensibilities towards the subject of the people’s right of revolution, John Adams would write: “Rulers are no more than attorneys, agents, and trustees, for the people; and if the cause, the interest and trust, is insidiously betrayed, or wantonly trifled away, the people have the right to revoke the authority that they themselves have deputed”.⁹³

His right to overthrow a government that tyrannizes him stems from the fact that

⁹² Ibid., p. 49

⁹³ Dienstag, “Between History and Nature”, p. 998

all men are ruled by government only by their own consent. Though it is true that all men are born into and under a government, that does not mean that they lose their right to withdraw consent: “a man is naturally free from subjugation to any government, though he be born in a place under its jurisdiction”.⁹⁴ Thus any individual man may at any time withdraw his consent to be governed by the government in place at the time and it is his natural right to do so, having been born free. Locke believes that this is a natural right because of the empirical evidence that accumulated on the subject, both in history recent for him, as well as more ancient.

He directly addresses the critics of his belief, whose argument he summarizes: “All men are born under government, and therefore they cannot be at liberty to begin a new one. Every one is born a subject to his father, or his prince, and is therefore under the perpetual tie of subjugation and allegiance.”⁹⁵ In taking on the argument that consent is born into and hereditary (that the consent of the father is passed on to the son), he cites the fact that there is more than one government on the earth, and that they are always changing. He writes: “It is plain mankind never owed nor considered any such natural subjugation that they were born in, to one or to the other that tied them, without their own consents, to a subjugation to them and their heirs. ... All must have been but only one universal monarchy, if men had not been at liberty to separate themselves from their families, and the government, be it what it will, that was set up in it, and go and make distinct common-wealths and other governments, as they thought fit.”⁹⁶ His evidence is the empirical observation that were men truly bound by their birth, then the first government would be the only government. Rather, there are many governments, and they are always changing (a fact well known to both Locke and the American founders). Clearly, it is the natural law that men are born free and each man must, as an individual, consent to be governed by the society into which

⁹⁴ Locke, p. 98

⁹⁵ Ibid., p. 61

⁹⁶ Ibid., p. 61-62

he is born.

He concludes his proof of the natural right to revolution with the argument that even governments recognize that men may cut ties with the society into which they were born. “[Governments] claim no power over the son, because of that they had over the father”.⁹⁷ This is true because “a child is born a subject of no country or government”.⁹⁸ He is born into his fathers country, but when he comes of age, “he is a freeman, at liberty what government he will put himself under, what body politic he will unite himself to”.⁹⁹ Every individual had a right to consent to the government under which he lives. And because of this, every individual must therefore have the right to revolt against his government whenever he wants to.

This point too comes under attack from those who advocate a collective right in the Second Amendment. Unable to disprove the right of revolution, they instead try to make it an aspect of Locke’s work that supports their position. “[Locke] vested the right of revolution in an entity, the community, the body of the people, that was identical to neither individuals nor the government. ... The people as a collective entity, but not as individuals, have the right to resist a corrupt government.”¹⁰⁰ This argument supposes that Locke intended this right of revolution to be a merely collective right. Such a supposition would lend credence to the idea that the framers of the Second Amendment were doing no more than ensuring the collective right to arms for the purpose of a collective right of revolution.

However, Locke did not intend this right to be reserved only to the people as a whole. As we have seen, he made it very clear that it was the right of every individual to refuse consent to be governed by the society into which he was born. If he had intended the right to revolution to be merely a collective right, then surely he would

⁹⁷ Ibid., p. 63

⁹⁸ Ibid., p. 63

⁹⁹ Ibid., p. 63

¹⁰⁰ Williams, p. 38

have made it clear when he was discussing the right to withdraw consent, the first act of revolution, that the right to withdraw consent only held when the people as a whole were doing so. Locke did not view revolution as only the act of an entire people, and thus he reserved the right to start a revolution to each and every individual citizen on his own.

When judging whether or not the government merits revolution because it had created a “state of war“ between it and the people, Locke makes it clear that, “every man is judge for himself, as in all other cases, so in this, whether another hath put him into a state of war with him”.¹⁰¹ He also makes it clear that just as the individual can withdraw consent and defend himself against government, so too can the people as a whole act: “If [the people judging the government] be reasonable in particular cases of private men, why should it be otherwise in that of the greatest moment, where the welfare of millions is concerned?”¹⁰² Locke makes the assumption in this rhetorical question that it is “reasonable” for “private men” to judge the government. Clearly, he assumed that it was clear that any individual always has the right to judge the government a failure and revolt, even if such an individual did not have the power to overthrow the government on his own.

The basis for such a judgment is also laid out, as Locke is not advocating anarchy. Rather, he is assessing a very specific case and advising a rational judgment based on the actions of the government. For Locke, when the government “endeavors to take away, and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any further obedience, and are left to the common refuge, which God hath provided for all men, against force and violence.”¹⁰³ That common refuge is the withdrawal of consent and a revolution to install a new government.

¹⁰¹ Locke, p. 123

¹⁰² Ibid., p. 123

¹⁰³ Ibid., p. 111

Locke does not mean, as many critics accuse him, that the people or individuals may take random or spurious reasons to try to overthrow the government. John Adams defends Locke on this critique: “But it will be said, that the ill affected and facetious man may spread among the people, and make them believe that the prince or legislative act contrary to their trust, when they only make use of their due prerogative. To this Mr. Locke answers, that the people, however, is judge of all that; because nobody can better judge whether his trustee or deputy acts well, and according to the trust reposed in him, than he who deputed him.”¹⁰⁴ Rather, he is just laying out the natural law case for the right of the people to revolt against any government that refuses to do the job which it promised it would accomplish when the people first consented to live under it. Thus, “the people generally ill treated, and contrary to right, will be ready upon any occasion to ease themselves of a burden that sits heavy upon them”.¹⁰⁵ To be ready to do so, the people must be armed so that when the time comes, they are ready to fight, exercising their right to self-defense which they reserved even when they entered under the oppressive government in the first place.

4.5 Locke and the American Founders

But why is this point of a right to revolution so important? The framers of the Second Amendment had just won their revolution against a government that had grown tyrannical, and were concerned that their new government could become the same way. So they wrote and ratified the Second Amendment to ensure that the people would always be armed and prepared to resist the government should it be judged unfit for their consent, or the consent of their children, in the future. Neither Locke

¹⁰⁴ Dienstag, “Between History and Nature”, p. 1001

¹⁰⁵ Locke, p. 113

nor the founders envisioned daily revolutions by individuals which would result in anarchy, though some believe that my reading of Locke lends itself to such a conclusion.¹⁰⁶

Locke turns this argument on its head, by posing the question, “Which is better for mankind, that the people should be always exposed to the boundless will of tyranny, or that the rulers should be sometimes liable to be opposed, when they grow exorbitant in the use of their power, and employ it for the destruction, and not the preservation of the properties of the people?”¹⁰⁷ If we deny people the right to revolt against truly tyrannical governments for fear of a few unfounded revolutions, then we would be condemning people to live in fear and under tyranny because we fear what the people might do were they set free. This kind of thinking was dangerous to Locke, and was the very kind of thinking that the American founders had revolted against. That is the dated thinking of England, where the right to arms was not protected fully as an individual right because the monarch feared what might happen to his own power if the people we trusted to arm themselves in connection with their natural rights to self-defense and to revolution against a tyrannical government.

Out of that dated thinking emerged the American founders, well aware of and trained well in English law and history. To that they added the natural rights philosophy of John Locke, who confirmed for them that they had been right to revolt against a tyrannical government because they had a natural right to defend themselves and to live under a government to which they consented. In evaluating which rights were important enough to be enshrined in the Bill of Rights, they chose the right to keep and bear arms. Adding John Locke to their English tradition, they concluded that the right to arms was not a collective duty, but an individual right, capable of standing on its own, and essential to the preservation of the life, liberty and property of each

¹⁰⁶ Heyman, p. 248

¹⁰⁷ Locke, p. 115

and every American citizen against the aggression of fellow citizens, and of the government itself.

The Second Amendment was drafted with a the dual purpose in mind of protecting the rights of individual Americans to keep and bear arms for their own defense, and the right of the people to join together in militia, or in any other form, to protect themselves against the encroachment of government on the rights of the people. Cognizant that no government could ever provide people with the complete security that they desired, the founders wanted to ensure that future Americans would always remain free, and the gave them the tool of the Second Amendment to help accomplish that purpose. The people could always be armed and thus would always be free, even if they had to ensure it individual citizen by individual citizen.

This is the original understanding of the Second Amendment, which has been laid out, detailing every step in its transformation into the most important of all the rights Americans enjoy. The founders intended the Second Amendment to be the last line of defense, when all else had failed, to ensure that the people could always defend their rights and themselves from any aggression. Unfortunately, the intent of the founders has been often either mistaken or ignored by Americans who don't appreciate the importance of the Second Amendment. By obscuring or denying the intent of the founders, many have tried to deny Americans a right that the founders believed would be the right that ensured all others would be respected. Unfortunately for Americans and the Second Amendment, the only thing it could never defend against was its own misuse and misinterpretation by the hand of the very government whose power it was enacted to counter.

Chapter V

Judicial Abuse of the Second Amendment

In its history, the Supreme Court of the United States has made numerous mistakes and has, sometime intentionally and sometimes unintentionally, misused the Constitution under the pretense of interpretation. They have unlawfully read into the Constitution rights never intended to be found in it, and have at the same time

allowed the expansion of Federal power beyond the scope allowed by the Constitution. Ever since *Marbury v. Madison*, in which the Court gave itself ultimate authority in determining the meaning of the Constitution, the Supreme Court has used its power to pervert the original meaning of the Constitution and ignore the intentions of the framers who had so carefully crafted it.

Amazingly however, when dealing with the Second Amendment, the Supreme Court has suffered more from neglect and disinterest, than misinterpretation. For sure, in the limited opportunity that Supreme Court has had to interpret the Second Amendment, they have indeed misunderstood the framers intentions. By now, we understand the true meaning of the Second Amendment, and will see that the Supreme Court has never truly gotten it right. Despite its failure to recognize the individual right to arms guaranteed in the Second Amendment, its greater failure has been in failing to defend what have often been reasonable rulings against the abuse and misinterpretation of lower courts. The Supreme Court, whose rulings have been the closest to reflecting the true meaning of the Second Amendment, has repeatedly refused to defend itself or the American people from the attack of lower court judges who have eroded the most important right Americans have, the right which allows them to defend all other rights, using false interpretations of the founder's intent and of the Supreme Court's rulings to carry out their own agendas.

Whether because of fear or apathy, the Supreme Court, who took it upon themselves to defend the Constitution and protect the rights of the people, has refused throughout American history to defend the Second Amendment. We will look at three ways in which the Supreme Court has decided that the right of every American to arms is not important enough for them to defend and protect. The first is in the limited case law where the Supreme Court itself has dealt with the Second Amendment. In fact, there are only four cases where the meaning of the Second Amendment has even been an issue, and in only one of those, *U.S. v. Miller* (1939), has the issue been at the

center of the case. In these cases, the Court has repeatedly missed the opportunity to make a clear statement on the meaning of the Second Amendment, opting instead to find ways around it, either through procedural technicalities (*Miller v. Texas* (1894)), vaguely defined rules (*U.S. v. Cruikshank* (1876) and *U.S. v. Miller* (1939)), or bypassing the issue by focusing on other aspects of the case (*Presser v. Illinois* (1886)). Unfortunately, in each of these cases, while the Court hints at what may be an inclination to hold that the Second Amendment does indeed cover an individuals right to bear arms as the framers intended, they decline to do so and their rulings leave the door open for other courts to step in and misstate and misinterpret what the Supreme Court intended.

Even if they will not protect the Second Amendment themselves, we would hope that they would be willing to defend it by overturning clear mistakes in its interpretation by lower courts. However, in a second way in which the Supreme Court refuses to defend the Second Amendment, they refuse to overturn clearly incorrect rulings from lower courts. We will look at numerous cases where *cert* was denied in cases where the lower courts both misinterpreted the Second Amendment and misused previous Supreme Court rulings, going as far as changing the rulings and telling the people what the Supreme Court intended to say. In most cases, where lower courts are abusing the Constitution and misusing higher court rulings, the Supreme Court steps in to correct the mistake. However, in the case of the Second Amendment, the silence is deafening. The Supreme Court simply refuses to defend itself, the people or the Second Amendment.

The third way, which we will look at, that the Supreme Court has neglected its duty to defend the Second Amendment is in its refusal to recognize the intended incorporation of the Second Amendment by the Fourteenth Amendment against the States. We will not discuss the issue of the validity of incorporation here, as it is not relevant to our discussion. Rather, we will merely look at the Supreme Court's refusal

to incorporate the Second Amendment when, if incorporation of the others is held to be valid, there is no reason that the Second Amendment should not deserve the same treatment. The question here is not should the Second Amendment be incorporated against the States, the question is how can the Supreme Court incorporate other Amendments in the Bill of Rights and leave out the Second? The answer is that there is no justification because, as we will see, if incorporation was the intention of the Fourteenth Amendment, then the Second was intended to be among those incorporated.

5.1 The Supreme Court's Second Amendment Rulings

Amazingly, the first time that the Supreme Court dealt with the Second Amendment was in the landmark case of *Dred Scott v. Sandford* (1857). This case, which has gone down in history for other reasons, nonetheless, holds a gem of Second Amendment scholarship. 20 years before first directly dealing with the Second Amendment in *Cruikshank*, Chief Justice Roger Taney held that Blacks could not be citizens because they could not have been intended to be granted the right to bear arms like all citizens of the United States were. The decision read in part, “It would give to persons of the Negro race ... the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went”.¹⁰⁸ Not only there, but again later in the decision when stating the things Congress may not do in territories that were to become States, among most of the other rights of the Bill of Rights, the decision included the fact that, “Nor can Congress deny the people the right to keep and bear arms”.¹⁰⁹ In passing, the Court had passed its first ruling on the Second Amendment

¹⁰⁸ *Dred Scott v. Sandford*, 60 U.S. 393, (1857)

¹⁰⁹ *Ibid.*

and it was as clear as anything we have seen yet.

Here, the Supreme Court, only 60 years after the passage of the Second Amendment and in its first ruling mentioning it, makes the common sense assumption that the Second Amendment, like the rest of the rights listed, is an individual right intended to protect the people of the United States from being disarmed by the government. There is no ambiguity as to the intent of the founders, the meaning of the Amendment, or the conviction of the Court that every American has the right to arms. Ten years later, after the Civil War, “the Freedman’s Bureau Act of 1866, which foreshadowed the Fourteenth Amendment, took seriously Taney’s claim when it insisted that black Americans should also be able to bear arms for personal security”.¹¹⁰ In the early stages of its interpretation, the Supreme Court was clear in its finding that the Second Amendment was indeed an individual right to bear arms that the federal government was not allowed to deny.

5.1.1 *United States v. Cruikshank* (1876)

Cruikshank marked the first time that the Second Amendment itself came up for consideration. The case dealt with a conviction under the Enforcement Act of 1870 against two men charged with depriving black citizens of their rights, and among those rights was the right to arms. On the surface, the ruling of the court that the indictment was defective because the right to arms is not in the Constitution appears to be a defeat for the individual’s right to arms. This case was later cited on numerous occasions by lower courts as if it held that there is not individual right to arms. Most often cited is the part of the decision which reads, “The right there specified is that of ‘bearing arms for a lawful purpose’. This is not a right granted by the Constitution.”¹¹¹ This appears to be a clear statement, in which the Supreme Court holds that there is

¹¹⁰ McDonald, “The Militia and the Right to Arms Book Review”, p. 249

¹¹¹ *United States v. Cruikshank*, 92 U.S. 542 (1876)

no right to arms to be found in the Second Amendment.

However, this is a selective reading of the decision. Courts that later cite only that statement are being intentionally deceptive as to what the Supreme Court was ruling in *Cruikshank*. If we read the full paragraph from which that statement was selected, the Court actually ruled that: “The right there specified is that of ‘bearing arms for a lawful purpose’. This is not a right granted by the Constitution. *Neither is it in any manner dependent upon that instrument for its existence* [emphasis added]. The Second Amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the Amendments that has no other effect than to restrict the power of the national government.”¹¹² *Cruikshank* holds that the right to arms existed prior to the Constitution and does not demand Constitutional protection. Rather, the Second Amendment is a restriction on the power of the federal government, specifically to disarm the people or even from preventing the people from disarming each other. The Court held that it is the right of every American citizen to have arms, but that the federal government, restricted by the Second Amendment, does not have the power to prevent violations of that right by other citizens. After all, “the duty of a government to afford protection is limited always by the power it possesses for that purpose”.¹¹³

This case therefore not only finds that there is a right to arms; it in fact recognizes a right to arms that doesn’t even depend on the Constitution. It does overturn the conviction, but only because it found that the federal government did not have the power to prevent the violations of rights of one citizen by another. We will later see in the discussion of incorporation that the *Cruikshank* court did hold that the federal government would have in its power the ability to prevent States from denying their citizens the right to arms. For now, we will focus on the fact that this case marks a

¹¹² Ibid.

¹¹³ Ibid.

clear, though not explicit, recognition on the part of the Supreme Court of the right of every American citizen to have arms. Finding in the Second Amendment a protection for a right to arms that exists with or without the Constitution, any future interpretations of *Cruikshank* that held otherwise would be an incorrect reading of the case. The Court threw out the convictions not because there is no right on the part of the black citizens of the United States to keep and bear arms, but because it is not within the power of the federal government to be policing the violations of one citizen's right by another. That power is reserved to the State, and this case holds that and only that.

5.1.2 *Presser v. Illinois* (1886)

As in *Cruikshank*, *Presser v. Illinois* (1886) is a case where the ruling of the case obscures the true meaning of the ruling, and allows for future misinterpretation. In the case, the Court upheld an Illinois statute barring any military association, parading of armed citizens, or training with arms without a permit. Again this ruling, on its face, appears to be a vindication for the theory that the Second Amendment does not protect the right of individual citizens to have arms. After all, the Court does in fact hold that, “we think that it is clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms”.¹¹⁴ It looks as if the Court has upheld state regulations on the right to arms, thus holding that there is no right protected by the Second Amendment.

Again, the reasoning for the ruling is hidden by later courts wanting to use this ruling to support a claim that citizens do not have the right to bear arms. What they

¹¹⁴ *Presser v. Illinois*, 116 U.S. 252 (1886)

don't discuss is the clear understanding of the history of the Second Amendment that the *Presser* Court had and displayed in their ruling. As we have seen, the militia clause of the Second Amendment includes all citizens capable of bearing arms in its guarantee of the "right to keep and bear arms". Thus all citizens are part of the "militia" and all citizens have the right to arms. The *Presser* Court displayed this understanding in their decision: "It is *undoubtedly* [emphasis added] true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms".¹¹⁵ This speaks for itself, demonstrating that the Supreme Court had indeed held that all citizens are part of the militia covered in the Second Amendment.

This case is later used for its upholding of a States right to restrict the right to arms. However, this case upheld the statute because it ruled that the statute did not affect the Second Amendment right to arms, not that there was no such right. In reality, the Court was very careful to point out that all citizens do in fact have a right to arms that neither federal nor state government may infringe upon. This ruling again holds keys points that would incline us to believe that the Court is just waiting for the opportunity to uphold a right to arms in the Second Amendment. However, the Court continued to pass rulings that dodged the issue, just as *Cruikshank* and *Presser* had. And more disturbingly, the Court continued to pass rulings on the Second Amendment that left themselves open to misinterpretations which the Court, as we will later see, refuses to correct.

¹¹⁵ Ibid.

5.1.3 *Miller v. Texas* (1894)

In *Miller v. Texas* (1894), the Court again dodged the issue and refused to pass a ruling to defend the Second Amendment when given the chance. The Court upheld a Texas statute prohibiting the carrying of dangerous weapons on ones person, refusing to even hear a Second Amendment claim. Referring erroneously to *Cruikshank*, the Court claimed that in that case that the Court had held that the federal government may not apply the Second Amendment against the States. As we will see later in our incorporation discussion, that is not what the Court held, and in fact, it held the exact opposite fact to be true.

More importantly for our current discussion of the Court’s refusal to rule directly on the Second Amendment, was the reasoning behind the dismissal of the appeal. The opinion read, “Without, however, expressing a decided opinion on the invalidity of the writ as it now stands, we think there is no federal question properly presented by the record in this case, and that the writ of error must be dismissed upon that ground. The record exhibits nothing of what took place in the court of original jurisdiction, and begins with the assignment of errors in the court of criminal appeals.”¹¹⁶ This case was dismissed on the grounds that the claim of a Second Amendment violation had not been brought up in the court of original jurisdiction. Though technically true, this is a clear and open admission that the Court does not want to express an opinion on the validity of a Second Amendment violation claim. If the Court believed that there was no such valid claim, they easily could have ruled that and been done with it. Rather, they evaded the issue, setting themselves up to be misinterpreted and leaving it up to future courts to protect the Second Amendment should it be assaulted by lower courts. As we will see, passing the buck has had a devastating effect as future Courts have been equally evasive, equally unclear, and equally unwilling to overrule

¹¹⁶ *Miller v. Texas*, 153 U.S. 535 (1894)

lower courts even when the rights of Americans are on the line, and even when lower court intentionally misuse and misinterpret earlier Supreme Court rulings.

5.1.4 *United States v. Miller* (1939)

The most important ruling in the history of the Second Amendment came May 15, 1939 in the case of *United States v. Miller*. In 1934, Congress passed into law the National Firearms Act, the most direct federal regulation of arms in the nation up to then. Frank Layton and Jack Miller were charged with the possession of a shotgun with a barrel of less than 18 inches. The Court's ruling has become one of the most reinterpreted and thus mistakenly applied rulings in its history. The controversial part of the ruling read: "In the absence of any evidence tending to show that the possession or use of 'a shotgun having a barrel of less than 18 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."¹¹⁷

This ruling seems to hold that the federal government is right in regulating arms and has only the militia restrictions of the Second Amendment standing in its way. However, this case became very dangerous to those trying to regulate arms and denying that individual Americans had a right to arms, and when you take the ruling to its logical conclusion, you can see why. First, if the standard is the military applicability of the weapon, then once a military application for a weapon is found, such a weapon becomes protected by the Second Amendment against regulation. This case, only a few years before World War II, would have opened the floodgates after the war, in which almost all weapons, including short barreled shotguns, were found

¹¹⁷ *United States v. Miller*, 307 U.S. 174 (1939)

military purposes by a nation at war for its own survival (Short barreled shotguns were used by commando units in Europe to great effect).

It is also true that *Miller* reaffirms the definition of militia held to be the official definition in *Presser*. *Miller* states that, “Militia comprised all males physically capable of acting in concert for the common defense”.¹¹⁸ And clearly the Court believed that the militia was not just active militiamen since they rejected the government’s request in their brief to throw out the case due to a lack of standing since the two defendant were not members of active state militia.¹¹⁹ This understanding, upheld very clearly both in *Presser* and again in *Miller* makes it very clear what the position of the Supreme Court is on who is covered by the reference to militia made in the Second Amendment.

Thus not only could any weapon become protected, but the *Miller* Court refused to even consider who had the weapon because they felt that all citizens were covered in having the right to arms. The decision in *Miller* shifted the focus to the military applicability of the weapon, and of the right of the individual to bear it, thus implicitly making the assumption that if a weapon was shown to have a viable military use, then it was out of the power of the government to prevent any citizen from bearing such a weapon.

Those trying to support the government’s ability to disarm the people had to diffuse *Miller* before it blew up and established that all weapons of military applicability could be kept by any citizen. It would have been very difficult to say that the Court was on unprecedented ground in ruling that the Second Amendment covered weapons of military applicability. After all, “earlier decisions required that weapons be of the type used in civilian warfare to be included under the right. [Tennessee] upheld a law preventing the carrying of any handgun except of a military

¹¹⁸ Ibid.

¹¹⁹ Denning, “Can the Simple Cite be Trusted?”, p. 7

type in the hand (*State v. Wilburn*, 7 Baxt. (Tenn.) 57 (1856)). Others have restricted the ownership of handguns to those of the current military type used by the armed forces¹²⁰.¹²¹ Thus such an argument would be difficult to sustain. And considering that *Miller* was reaffirming *Presser* and its view on the composition of the militia, it would be very hard to argue that the right belonged only to the militiaman. Especially because *Miller* had taken the debate out of the realm of who could bear arms and into the realm of what arms could be borne by any citizen.

So right away after *Miller*, lower courts set about turning *Miller* into a decision that little resembled what the justices had actually said or meant. Just three years later when the case of *United States v. Tot* (1942) came before the Third Circuit Court of Appeals, the judges started the process of misusing *Miller*. First the Court misstated the history and meaning of the Second Amendment itself, citing no support for their conclusions: “It is abundantly clear both from the discussions of this amendment contemporaneous with its proposal and adoption and those of learned writers since that this amendment, unlike those providing for the protection of free speech and freedom of religion, was not adopted with individual rights in mind.”¹²² Though this, as we now know, is not true; it is not the key to this case.

The importance of this case comes when the court adopts *Miller* to suit its purposes, and ignores it when it does not. In arguing that there is no individual right, the court refers to *Miller* in the claim that the courts have refused, “to extend [the application of the Second Amendment] to weapons thought incapable of military

¹²⁰ *State v. Reid*, 1 Alabama 612 (1840); *Glen v. State*, 10 Georgia 128 (1911); *State v. Jummel*, 13 Louisiana 399 (1858); *Commonwealth v. Murphy*, 166 Massachusetts 171 (1896); *Bliss v. Commonwealth*, 2 Kentucky 90 (1822)

¹²¹ Hays, “The Right to Bear Arms, A Study in Judicial Misinterpretation”, p. 397-

¹²² *United States v. Tot*, 131 F.2d 261 (3rd Cir. 1942)

use”.¹²³ However, later in the decision, the Court makes the claim that pistols would not be covered therefore under the *Miller* standard. This claim also has no support in the decision, and ignores exactly what *Miller* and the precedent it came out of upheld. Reasonably, the *Miller* standard could find that pistols, clearly being used in military application in October of 1942, would therefore be covered and would be allowed for all citizens. But the court in *Tot* ignores this fact, simultaneously stating the *Miller* standard and then ignoring it because it does not support their judgment in the case. It should be noted also that the *Tot* court used only lower court decisions in its justification for its ruling in every other part of the Second Amendment discussion. Its only reference to the Supreme Court, whose rulings should have been held as binding on a lower court, is to *Miller*, and as we have seen, this ruling is incompatible with the finding of the Supreme Court in *Miller*.¹²⁴

Another example of a lower courts disregard for *Miller* is the New Jersey Supreme Court case of *Burton v. Sills* (1968). In this case the Supreme Court of the State of New Jersey held a position in direct contravention of the definition of militia found in both *Miller* and *Presser*. The court held, “the term well regulated militia must be taken to mean the active, organized militia of each state, which is today characterized as the state National Guard. ... It is sufficient here to suggest that under *Miller*, Congress, though admittedly governed by the Second Amendment, may regulate interstate firearms so long as the regulation does not impair the maintenance of the active, organized militia of the states.”¹²⁵ If you go back and look at the definition of militia in the Second Amendment held to be the standard by the Supreme Court in *Presser*, and then reaffirmed in *Miller*, you will see that the Supreme Court of New Jersey has so little concern for being overturned by the Supreme Court that it is willing to base its decision on a fact of legal precedent in direct contravention of the

¹²³ *Ibid.*

¹²⁴ The Supreme Court overturned *U.S. v. Tot* one year later (319 U.S. 463 (1943))

¹²⁵ *Burton v. Sills*, 53 N.J. 86 (1968)

Supreme Court's holding on the subject. As we see, *Miller* set a standard and a precedent that should have been clear enough, if either the lower courts had accepted it or if the Supreme Court had been willing to defend its rulings and the rights of the people. However, the Supreme Court will be repeatedly defied and misinterpreted, as in these two examples, but will time and time again refuse to defend its rulings. If the Court had changed its minds and felt that the *Miller* standard was no longer applicable, they could have accepted the appeals of these cases and overturned the *Miller* ruling. Instead, they did nothing, leaving the *Miller* ruling in place but allowing it to be ignored and misused. The Supreme Court's greatest injustice to the people on the subject of the Second Amendment is not its own rulings, it is its unwillingness to defend its own rulings against an American judicial system that does not like them and is going to overturn the rulings of the highest court in the land from underneath.

5.2 The Misinterpretation of Lower Courts

Examining many cases after *Miller* where the Court denied *cert* on cases where *Miller* had been changed, reinterpreted, or flat out ignored, we see why it is so clear that unlike most of their injustices towards the American people, the Supreme Court has let down the people through neglecting to defend their own rulings (whose basis in law and history is much closer to the facts than the decisions they allow to pervert the Second Amendment).

The critics of *Miller* give us a glimpse into the minds of those lower courts who manipulated *Miller* for their own ends. The arguments of those standing against the *Miller* standard reflects the fear that was felt toward the *Miller* decision: "That decision contains the pernicious implication that the presence of such proof would result in the statute being declared invalid. By logical extension, any firearm or weapon proved to be effective as an instrument of common defense or having a

reasonable relationship to preserving the effectiveness of the militia would be beyond the regulatory power of Congress. ... It is fair to assume that the Court did not intend to establish such a remarkable rule.”¹²⁶ This is the kind of thinking that leads to lower courts ignoring the Supreme Court; though scary that lower courts would put their own biases into the clearly stated rulings of the Supreme Court, it is easy to understand why they would do such a thing. The puzzling question is why, in each and every one of the cases I am about to discuss, when a lower court disregarded the precedent of *Miller* standing unchanged since 1939, why the Supreme Court did not even grant *cert*, much less overturn the rulings of the lower courts.

5.2.1 *Cases v. United States* (1942)

The First Circuit Court of Appeals heard the case of *Cases v. United States* in 1942, and it immediately turned *Miller* on its head. Unwilling so close to the time when *Miller* had been passed down to try to change the ruling, the court instead determined that it could best subvert the Supreme Court by reading into the intent of the Court. The judges in *Cases* wanted to hold that, “The right to keep and bear arms is not conferred upon the people by the federal constitution”.¹²⁷ Thus they set about to reverse *Miller*, a Supreme Court ruling from only three years before, from a Circuit Court of Appeals bench.

First, they claimed that, “the rule of the *Miller* case, if intended to be comprehensive and complete, would seem to be already outdated”.¹²⁸ Then, apparently in a better position than the justices of the Supreme Court to let us know what the justices of the Supreme Court were thinking, the decision reads: “Apparently then, under the Second Amendment, the federal government can limit the keeping and bearing of arms by a single individual as well as by a group of individuals, but it

¹²⁶ Feller and Gotting, “The Second Amendment: A Second Look”, p. 65-66

¹²⁷ *Cases v. U.S.*, 131 F.2d 916, (1st Cir. 1942)

¹²⁸ *Ibid.*

cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia. However, we do not feel that the Supreme Court in this case was attempting to formulate a general rule applicable to all cases.”¹²⁹ They go on to dismiss the idea that the federal government could only regulate “weapons which can be classified as antiques or curiosities” such as “a flintlock musket or a matchlock harquebus”, and conclude that to uphold the *Miller* standard would be to “in effect hold that the limitation of the Second Amendment is absolute”.¹³⁰ This argument, summed up, is that there is no way the *Miller* Court meant to pass the standard that they did because the result would be to enshrine a right to bear arms for all citizens.

Of course, this argument is simultaneously mistaken and deeply disturbing. It is mistaken because the Second Amendment does indeed protect such a right, and the *Miller* Court did indeed intend to do exactly what the *Cases* court thinks they never could have meant to do. However, it is also the case that this is a very scary position, because it reflects a U.S. Court of Appeals openly disregarding the Supreme Court and, at the same time, substituting a judgment that is based on fear of the result, rather than the law. The results of laws are the domain of the legislature, not the courts. But here, disregarding the law, the Constitution, the Bill of Rights, and the clear legal precedent of the Supreme Court, a decision is passed which effectively overturns the established ruling on the Second Amendment, and replaces it with a ruling that effectively denies citizens of the United States their right to arms. Amazingly, as in many more cases we are about to look at, the Supreme Court denied *cert*. In this case, the Court failed to defend the *Miller* ruling only three years after its passage. This failure surely opened the floodgates for lower courts looking to disregard *Miller*, and growing less and less fearful that their open defiance of legal precedent would go

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

down to challenge in the Supreme Court.

5.2.2 *United States v. Warin* (1975)

In 1975, the case of *United States v. Warin* showed how the *Cases* ruling could be used to ignore the directive of the Supreme Court, how a lower court truly had overturned a higher court. The Sixth Circuit made two major mistakes in *Warin*, neither of which was overturned as the Supreme Court denied *cert.* on this case as well. First, the court in *Warin* relied on the *Cases* interpretation of the *Miller* decision. The *Warin* decision read in part, “In *Cases v. U.S.*, the court held that the Supreme Court did not intend to formulate a general rule in *Miller*, but merely dealt with the facts of that case”.¹³¹ This statement shows how far the neglect of the Supreme Court on the issue of the Second Amendment had come by 1975. The Supreme Court was allowing lower courts to use interpretations of its own decisions from other lower courts. Perhaps, the argument might go, the Supreme Court did not grant *cert.* because it agreed with the interpretation of its own ruling. However, for this to be true, it would have to be clear that the lower courts were using the *Miller* decision as it was intended, and in the case of *Warin*, this is just not the case.

The court in *Warin* denied the petitioners claim that he was part of the “sedentary militia” of Ohio, despite the fact that the State of Ohio defined its militia as “all adult residents and citizens”.¹³² Under the laws of the State of Ohio, or the ruling on the definition of militia in the Second Amendments by the Supreme Court in both *Miller* and *Presser*, Warin was indeed a member of the “militia” of Ohio, deserving of protection for his right to keep and bear arms. The *Miller* court’s ruling held that if the weapon had military applicability, and if the person in question was an adult citizen, then the Second Amendment covered his right to own such a weapon, at least

¹³¹ *United States v. Warin*, 530 F.2d 103 (6th Cir. 1975)

¹³² *Ibid.*

from federal regulation. In this case, Francis Warin, an adult citizen, and thus part of the Ohio militia by its and the Second Amendments standard, was prosecuted by the federal government for owning a submachine gun, clearly a weapon with military applicability. This correct ruling in this case should have been clearly evident, if the court in *Warin* had applied the standing law of the land as passed down by the Supreme Court in *Miller*.

Instead, they relied on the erroneous interpretation of the *Cases* court. Clearly, in 1976 when the Supreme Court denied *cert.*, it did not believe that the lower courts were correctly interpreting *Miller*. After all, the ruling in *Warin* is that it is, “an erroneous supposition that the Second Amendment is concerned with the rights of individuals rather than those of the States or that’s defendant’s automatic membership in the ‘sedentary militia’ of Ohio brings him within reach of its guarantees”.¹³³ This is not in line with the Supreme Court, but the Court nonetheless declined to overturn this illegal ruling. By 1976, the Supreme Court, as is made clear by its unprecedented unwillingness to defend its own rulings, shared the agenda of a disarmed people with the lower courts and was willing to allow rulings of previous Supreme Courts to be openly defied if it meant furthering their dream of a “world in which government is the sole legitimate instrument of violence”.¹³⁴

5.2.3 *Quilici v. Village of Morton Grove* (1982)

In *Quilici v. Village of Morton Grove* (1982), the Seventh Circuit Court of Appeals skipped over using previous lower court decisions to overturn the Supreme Court and moved right into openly misstating what the Supreme Court had ruled. Rejecting a challenge to a village handgun ban, the Court in *Quilici* ignored both *Miller* and *Presser*, in its ruling. Quoting the part of *Presser* in which the Court held that the

¹³³ Ibid.

¹³⁴ Denning, p. 14

Second Amendment means only that the federal government cannot infringe upon the right to arms, the *Quilici* court concluded that the right to bear arms is not a fundamental right. Obviously having never read *Presser*, the court simply neglected the part of that decision which read, “The States cannot, even laying the Constitutional provision in question out of view, prohibit the people from keeping and bearing arms”.¹³⁵ The language is unambiguous, yet fully ignored by the court in *Quilici*.

The court later went on to rule that, “under the controlling authority of *Miller* we conclude that the right to keep and bear handguns is not guaranteed by the Second Amendment”.¹³⁶ Where they found in *Miller* the idea that a handgun is not covered by the Second Amendment remains a mystery. Certainly handguns have military application, and thus they must be protected, yet the *Quilici* court finds that they are not, and in the ultimate in arrogance, they find that they are not in defiance of *Miller* while citing it. The conclusion of the *Quilici* court sums up their disregard for the legal precedent they should have been working under: “Because the Second Amendment is not applicable to Morton Grove [it is according to *Presser*] and because possession of handguns by individuals is not part of the right to keep and bear arms [it is according to *Miller*], Ordinance No. 81-11 does not violate the Second Amendment”.¹³⁷

5.2.4 *United States v. Oakes* (1977)

The onslaught did not stop there. In *United States v. Oakes* (1977), the Tenth Circuit got in its say, in ruling that just because a person is a member of the State militia, his right to arms is not necessarily protected. “Under Kansas Constitution Article VIII, Section I, the State militia includes ‘all able bodied male citizens between the ages of

¹³⁵ *Presser v. Illinois*

¹³⁶ *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982)

¹³⁷ *Ibid.*

twenty-one and forty-five'. ... To apply the amendment so as to guarantee appellant's rights to keep an unregistered firearm which has not been shown to have any connection to the militia, merely because he is technically a member of the Kansas militia, would be unjustifiable either in terms of logic or policy."¹³⁸ Of course, it is perfectly justifiable in terms of legality, since the Supreme Court ruled precisely that membership in a State militia is what guarantees protection. But, as we are seeing, it is not the legality of their rulings that worries lower courts trying to overturn the Constitution. The court in *Oakes* was just forward enough to admit that its concerns are logical and policy driven (with their preferred policy being that of strict gun control or even the banning of individual ownership of guns all together), rather than driven by the law as a court's rulings always should be. However, as in all the other cases mentioned so far, the Supreme Court denied *cert*.

5.2.5 *Love v. Peppersack* (1994)

Love v. Peppersack (1994) dismissed with the formality of even referring to the Supreme Court, and the Fourth Circuit Court of Appeals went right into ruling that because, "lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual right", the State of Maryland was right to deny a woman the right to own a handgun because of a previous conviction for public indecency, a misdemeanor, 20 years earlier. In fact, the precedent the court chose to use as a basis for this ruling was not even another lower court decision, but was in fact another ruling by the Fourth Circuit (*U.S. v. Johnson*, 497 F.2d 548 (4th Cir. 1974)). The *Love* court did indeed refer to *Cruikshank*, *Presser*, and *Miller* earlier in the ruling, but when it came time to the finding of the central question of the case, they chose to refer to themselves rather than the controlling legal precedent. And while this was happening, the Supreme Court sat idly by and denied *cert*.

¹³⁸ *U.S. v. Oakes*, 564 F.2d 384 (10th Cir, 1977)

5.2.6 *United States v. Kozerski* (1981)

In the last case we will look at in our examination of the Supreme Court's dereliction of duty in cases where its previous rulings were defied and yet it denied *cert.*, we will look at the U.S. District Court of New Hampshire case of *U.S. v. Kozerski* (1981). In that ruling, the court held that, "the right guaranteed by the Second Amendment is a collective right to bear arms rather than an individual right, and had application only to the right of the state to maintain a militia and not to the individual's right to bear arms. *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976)."¹³⁹ The reason the quote includes the reference to *Warin* in the ruling is the reason that this case is so disturbing and shows just how far the lower courts will go to undermine the Second Amendment.

Warin does indeed hold precisely what the *Kozerski* court said it does: "It is clear that the Second Amendment guarantees a collective rather than an individual right".¹⁴⁰ However, this case was decided by a District Court of New Hampshire, and thus it is bound by the rulings of the First Circuit Court of Appeals, while *Warin* was decided by the Sixth Circuit. The controlling legal precedent is the First Circuit's ruling in *Cases v. U.S.* In that case, the court implicitly recognized a right of individuals to arms when it ruled that the law in question, "undoubtedly curtails to some extent the right to individuals to keep and bear arms".¹⁴¹ *Kozerski* represents a case where the court knowingly ignored the controlling legal precedent to find a case from outside of its legal jurisdiction and precedent which would better suit its agenda. This is an abuse of judicial authority that merited swift and decisive action by a Supreme Court whose only constitutional duty is to correct legal mistakes made by lower courts. However, the Supreme Court, consistent with its *modus operandi* since the *Miller*

¹³⁹ *United States v. Kozerski*, 518 F.Supp. 1082 (D.N.H. 1981)

¹⁴⁰ *U.S. v. Warin*

¹⁴¹ *Cases v. U.S.*

decision in 1939, preferred to allow lower courts run amok and curtail the rights of American citizens to keep and bear arms, and denied *cert.* to the appeal of this case in 1984.

5.3 Incorporation of the Second Amendment

The unwillingness of the Supreme Court to clarify and codify the meaning of the Second Amendment, and its unwillingness to overturn cases where the rights of the American people and the legal legitimacy of their own rulings were challenged by lower courts, are only two of the three ways we are looking at in which the Supreme Court has neglected its duty to the people and to the Second Amendment. The final way is with its illogical willingness to incorporate most of the amendments of the Bill of Rights against the states through the Fourteenth Amendment, while refusing to offer the same protection to the right to keep and bear arms of the Second Amendment. As we have already seen, in most cases, courts trying to undermine the Second Amendment rely on the claim that the protection only applies to the federal government (though we have seen courts allow the federal government as well to regulate firearms). Were the Supreme Court to offer Fourteenth Amendment incorporation protection to the Second Amendment, then it would be very difficult to deny Americans their right to arms. And in the cases discussed above, the Supreme Court was offered the opportunity to incorporate the Second Amendment, but had consistently refused to do so.

However, since the piecemeal incorporation of the Bill of Rights began in 1897 with *Chicago, Burlington, and Quincy Railroad v. Chicago*, the Court has never fully incorporated the entire Bill of Rights.¹⁴² It has chosen instead to incorporate individual protections on a case by case basis.¹⁴³ However, because the Second Amendment has never been incorporated, the case law holding that the Second Amendment does not protect citizens from State regulation stands as the legal precedent. Though in reality, with the way the courts have treated the Second Amendment's recognized protection against federal regulation, even if incorporation were to happen, there is no guarantee that the courts wouldn't just find a way around that in order to subvert the Second Amendment.

The Second Amendment was well on its way to incorporation along with the rest of the Bill of Rights, until, as usual, the Supreme Court stepped in to ensure that it did not receive protection. The "privileges and immunities" clause of the Fourteenth Amendment could most reasonably be argued to have incorporated the entire Bill of Rights at its ratification. Starting with Blackstone, a man whom we have already seen was relied upon by the framers for legal advice, the terms "privileges and immunities" were used to refer to the rights guaranteed English citizens by the Magna Carta, the Petition of Right, and most importantly, the English Declaration of Rights of 1689.¹⁴⁴ In the Dred Scott decision, Chief Justice Taney in his opinion "labeled the

¹⁴² Spitzer, "Lost and Found: Researching the Second Amendment", p. 28

¹⁴³ (From Spitzer, *The Right to Bear Arms*, p. 294) *Gitlow v. New York*, 166 U.S. 226 (1897), Free Speech; *Near v. Minnesota*, 283 U.S. 697 (1931), Freedom of the Press; *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934), Religious Freedom; *De Jonge v. Oregon*, 299 U.S. 353 (1937), Freedom of Assembly; *Mapp v. Ohio*, 367 U.S. 643 (1961), 4th Amendment Search and Seizure; *Gideon v. Wainwright*, 372 U.S. 335 (1963), 6th Amendment Right to Counsel; *Benton v. Maryland*, 395 U.S. 784 (1969), 5th Amendment Double Jeopardy protection.

¹⁴⁴ Amar, "The Bill of Rights and the Fourteenth Amendment", p. 1221

entitlements in the federal bill ‘rights and privileges of the citizen’.”¹⁴⁵ Clearly, a precedent was set before the drafting of the Fourteenth Amendment for the words “privileges and immunities” to refer to the entire Bill of Rights, including the Second Amendment’s protection of the right to keep and bear arms.

When looking at the drafting of the Fourteenth Amendment, it is clear that the intent of the “privileges and immunities” clause of Section I was to incorporate the rights of the federal Bill of Rights against the States. Congressman John Bingham was the principal draftsman of Section I of the Fourteenth Amendment. In 1859, he argued in a speech before the House of Representatives that, “whenever the Constitution guarantees to its citizens a right, either natural or conventional, such guarantee is in itself a limitation upon the states”.¹⁴⁶ Bingham went on to draft Section I and include in it the “privileges and immunities” clause about which he would later explain, “the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a state, are chiefly defined in those first eight amendments to the Constitution of the United States. [Bingham read the first eight amendments word for word]. These eight articles I have shown never were limitations upon the power of the States, until made so by the Fourteenth Amendment.”¹⁴⁷ It is clear that the intent of the “privileges and immunities” clause of Section I of the Fourteenth Amendment was intended to incorporate all eight of the amendments, including the second.

This continued to be reinforced, as Senator John Howard of Michigan, in an 1866 speech before the Senate, listed the “privileges and immunities” guaranteed to a citizen of the United States and included, “the right to keep and to bear arms”. He then concluded his speech by saying, “the great object of the first section of [the Fourteenth Amendment] is, therefore, to restrain the power of the states and compel

¹⁴⁵ Ibid., p. 1222

¹⁴⁶ Ibid., p. 1233

¹⁴⁷ Ibid., p. 1235

them at all times to respect these great fundamental guarantees”.¹⁴⁸ Senator Howard made it clear that it was his belief as well that the “privileges and immunities” clause incorporated the first eight amendments, and that included the right to keep and bear arms.

Not only did the drafters of the Fourteenth Amendment believe that it incorporated the right to arms, but so did the lower courts. Judge (later Justice) William Wood wrote in his 1871 opinion in *United States v. Hale* that, “the rights enumerated in the first eight articles of amendments to the Constitution of the United States are the privileges and immunities of citizens of the United States”.¹⁴⁹ Even the lower courts were in agreement with the rest of the country that the “privileges and immunities” clause of the Fourteenth Amendment incorporated the Second Amendment. All that was left was for the Supreme Court to rule and forever enshrine the right to arms in its rightful place alongside the rest of the rights guaranteed in the Bill of Rights. However, the Supreme Court refused to do so and has worked since the passage of the Fourteenth Amendment to ensure that while other rights are incorporated, the right to arms remains on the outside looking in.

In the *Slaughterhouse Cases* of 1873, the Supreme Court stepped in and put an end to the imminent incorporation of the Second Amendment. It declared that the “privileges and immunities” clause of the Fourteenth Amendment, “did not profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens ... the same, neither more nor less, shall be the measure of the rights of the citizens of other states within your jurisdiction.”¹⁵⁰ This reading of the Fourteenth Amendment is not the intention of the framers, who had made their intentions quite clear only years earlier. Though not a direct attack on the

¹⁴⁸ Van Alstyne, “The Second Amendment and the Personal Right to Arms”, p. 1252

¹⁴⁹ *U.S. v. Hale* 26 F. Cas. 79 (C.C.S.D. Alabama 1871)

¹⁵⁰ *Slaughterhouse Cases*, 83 U.S. 36 (1873)

Second Amendment, this is just one more in a long line of examples of the Supreme Court abusing its power, and intentionally misinterpreting the Constitution. This ruling crippled the chance for incorporation of the Second Amendment because from here on, incorporation only could occur through the due process clause of the Fourteenth, and though other amendments received this protection, the Second Amendment was refused.

Three years later, in *Cruikshank*, the Supreme Court had a chance to incorporate the Second Amendment and find that it was within the power of the federal government, as granted to it by the Fourteenth Amendment, to ensure that states do not deny their citizens the right to arms. Instead, the Court failed to protect the rights of the people, and ruled that, “The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the State. ... The only obligation resting upon the United States is to see that the States do not deny that right. ... The power of the national government is limited to the enforcement of this guarantee.”¹⁵¹ After *Slaughterhouse*, the Supreme Court finally put to rest any hope for incorporation of the Second Amendment in *Cruikshank* in its only decisive act on the Second Amendment that it ever made.

Though it had refused to incorporate the Second Amendment in *Cruikshank*, the Supreme Court was still on stable, though dubious, legal ground in doing so because it had relied on its interpretation of the Fourteenth Amendment from *Slaughterhouse* where it had found that the “privileges and immunities” clause did not, as its framers had intended, incorporate any of the first eight amendments. Though clearly overstepping its bounds and changing the intent of the amendment, it at least was consistently applying its own rulings. That changed in 1912 with *Gitlow v. New York*, which incorporated the First Amendment with the assumption implicit in the question posed by the case of, “whether the statute, as construed and applied in this case by the

¹⁵¹ U.S. v. Cruikshank

state courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment”.¹⁵² The court, without justification, assumes that the due process clause of the Fourteenth Amendment incorporates freedom of speech, despite the fact that this is not the intent of the clause, but was the intent of the “privileges and immunities” clause. Such an assumption would seem to have overturned the ruling in *Cruikshank sub silencio*, or at least challenged the Supreme Court to re-examine its logic in its ruling in *Cruikshank*.¹⁵³

Perhaps it is no wonder that the Supreme Court has refused *cert.* on so many cases which would have forced it to rule on the question of why the Second Amendment continues to be refused incorporation, when most of the rest of the amendments originally slated for incorporation through the “privileges and immunities” clause of the Fourteenth have received it.¹⁵⁴ For example, in the *Quilici* case which we have already examined, that court held that, “the theory of implicit incorporation is wholly unsupported”.¹⁵⁵ Not surprisingly, the Supreme Court denied *cert.*, preferring that its rulings be ignored and the people’s rights be denied to having to question their own illogical stance on the incorporation of the Second Amendment.

Whether or not the implicit incorporation of the Bill of Rights through the due process clause of the Fourteenth Amendment is good law is not important in this case. *Slaughterhouse* removed any opportunity for complete incorporation of the first eight amendments, as was intended by the framers of the Fourteenth Amendment. Then *Cruikshank* denied incorporation to the Second Amendment on the reasoning that there was to be no incorporation because all the Fourteenth Amendment holds is that the federal government has the power to ensure that any rights a State grants to its citizens, it must grant to all, including citizens of other States. After that, many of the

¹⁵² *Gitlow v. New York*, 268 U.S. 652 (1923)

¹⁵³ Denning, p. 15

¹⁵⁴ Amar, p. 1262

¹⁵⁵ *Quilici v. Village of Morton Grove*

first eight amendments received incorporation protection, but the Second Amendment never has, and at every opportunity handed to it to re-examine this illogical condition, the Supreme Court has refused to even re-examine itself and maybe admit that it has been making a mistake.

5.4 *United States v. Emerson* (1999)

The Supreme Courts neglect and dislike for the Second Amendment shines through in its neglect and its abuse of the right of every American to keep and bear arms. By distorting history and ignoring the true historical meaning of the Second Amendment, the Court is able to continue to allow the most fundamental of rights to be infringed upon from both lower courts and legislatures around the country. Occasionally, lower courts get it right, as the Fifth Circuit Court of Appeals did in 1999 in the case of *United States v. Emerson*. That decision reads in part, “All of the evidence indicates that the Second Amendment, like other parts of the Bill of Rights, applies to and protects individual Americans. We find that the history of the Second Amendment reinforces the plain meaning of its text, namely that it protects individual Americans in their right to keep and bear arms.”¹⁵⁶ If history is any indication, the Supreme Court will not allow this proper interpretation of the rights guaranteed to every American by the Second Amendment to stand for too long.

¹⁵⁶ *United States v. Emerson*, Criminal Action No. 6:98-CR-103-C (1999)

Conclusion

The Second Amendment protects the right of every American to keep and bear arms, and yet Americans run into so many government rules and regulations today that it is difficult to say that the “right of the people to keep and bear arms” is not being infringed upon. As we have seen, the framers of the Second Amendment came out of the English tradition, which had slowly evolved from the duty to own a gun into the collective right to do so. The founders, distrustful of government power, and convinced by the natural law theory of John Locke that all men were granted a right to self-defense and to revolution should the government fail to protect the life, liberty and property of the people or even worse, participate in the denial, combined their belief in natural rights with their English legal background and completed the evolution of the right to bear arms into an individual right, unable to be challenged or regulated by government. They believed that if all able-bodied American citizens, the “militia” of which the Second Amendment speaks, were armed, then the American people would remain permanently free, able to defend their own rights and liberties without reliance on an untrustworthy government. This new American view reflects the belief of the American founders that the people need never again submit themselves to subjugation or tyranny from the government to which they consented to be ruled.

Out of this mindset came the Second Amendment to the United States Constitution, drafted and ratified with the rights of individual Americans in mind. However, since its inception, the Second Amendment has been attacked by those who believe that the people of the United States would be safer if only the government had the power of arms. Included in the long list of abuses of the Constitution and the American people perpetrated by the judicial system, and the Supreme Court in particular, perhaps the inability, unwillingness, and, often, complicity, of the courts in the denial of the fundamental right to keep and bear arms is one of the most shameful displays of the very governmental abuse of power that the founders escaped, and that the framers of the Second Amendment intended to prevent with its adoption and ratification into the Bill of Rights.

So we stand, a people disarmed by the very government who those arms were to help us defend against; a people convinced by a few in positions of authority that because the United States is a government of the people, there is nothing to fear when only the government is armed. The Second Amendment to our Constitution, one of the fundamental rights deemed so important that it deserved a place of prominence amongst all the other rights in the Bill of Rights, lies dormant and ignored, as governments, federal, state and local, infringe the “right of the people to keep and bear arms”. That is why it is so necessary that the American people re-examine the Second Amendment, and re-evaluate whether or not any of their rights are safe while they allow the government to select which rights to grant and which to deny. For upon closer examination of the Second Amendment, it is clear that, indeed, every individual American citizen has the right to keep and bear arms, but unfortunately, until more people recognize this fact, the right guaranteed by the Second Amendment will remain dormant and under the control of the very government against which it was to defend the people.

This paper represents my own work in accordance with University regulations.

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