

# WHAT THE FRAMERS INTENDED: A LINGUISTIC ANALYSIS OF THE RIGHT TO "BEAR ARMS"

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## I

### INTRODUCTION

In 1775, General Gage ordered that all private arms in Boston be deposited with the magistrates, supposedly to be stored temporarily and eventually returned to the owners. Those citizens naive enough to comply with the general's edict turned in 1778 muskets, 634 pistols, 973 bayonets, and 38 blunderbusses.<sup>1</sup> As the Declaration of Causes of Taking up Arms passed by the Continental Congress stated: "They accordingly delivered up their arms; but in open violation of honour, . . . the govenour ordered the arms deposited as aforesaid . . . to be seized by a body of soldiers . . . ."<sup>2</sup> One newspaper published a poem entitled "Tom Gage's Proclamation":

That whoseoe'er keeps gun or pistol,  
I'll spoil the motion of his systole; . . .  
But every one that will lay down  
His hanger bright, and musket brown,  
Shall not be beat, nor bruis'd, nor bang'd,  
Much less for past offenses, hang'd;  
But on surrendering his toledo,  
Go to and fro unhurt as we do;——. . . .  
Meanwhile let all, and every one  
Who loves his life, forsake his gun . . . .<sup>3</sup>

In a recent article, Professor Don Kates acknowledged that the second amendment "right of the people to keep and bear arms" protects an individual right to keep arms in the home for self-defense.<sup>4</sup> He contends, however, that the amendment serves "to guarantee the right to carry them outside the home only in the course of militia service."<sup>5</sup> In that article and in this dialogue Professor Kates argues that the following arms may be completely banned from private ownership: "Saturday Night Specials,"

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1. R. FROTHINGHAM, *HISTORY OF THE SEIGE OF BOSTON* 95 (6th ed. 1903).

2. The Declaration, passed on July 6, 1775, is reprinted, among other places, in Connecticut Courant, July 17, 1775, at 2 (quote taken from col. 3).

3. *Id.* at 4, col. 1.

4. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 267 (1983).

5. *Id.*

“gangster weapons” (brass knuckles, switchblade knives, and short-barreled shotguns), purely offensive military weapons,<sup>6</sup> and “the urban possession of rifles, shotguns and highly penetrative handgun bullets.”<sup>7</sup> Lastly, Professor Kates contends that “permissive” licensing and registration for gun ownership is constitutional.<sup>8</sup>

Did the framers of the second amendment (as well as those of the fourteenth) intend constitutional protection of the right to “bear” arms to encompass the private carrying of arms for self-defense? What “arms” are protected under that guarantee? May licenses and registration be required for exercise of a constitutional right per se? The following analysis seeks to resolve—or at least clarify—these queries.<sup>9</sup>

## II

### THE RIGHT TO “BEAR” ARMS

Did the framers intend the second amendment to encompass a right to carry guns for self-protection? Professor Lawrence Cress, who speaks for himself when he claims that “we know little about the Second Amendment’s reception in the States,” has recently argued that the Founding Fathers would have been shocked by the idea that citizens could bear firearms for self-defense.<sup>10</sup> Professor Kates bases his similar argument that there is no right to bear arms outside of militia service on an unpublished thesis of a law student.<sup>11</sup> Yet Cress and Kates are well aware<sup>12</sup> that the first state Declaration of Rights to use the term “bear arms” was that of Pennsylvania in 1776: “That the people have a right to *bear arms in defense of themselves and the State.*”<sup>13</sup>

6. *Id.* at 260-61; Kates, *The Second Amendment: A Dialogue*, LAW & CONTEMP. PROBS., Winter 1986, at 143, 147-48 & n.25.

7. Kates, *supra* note 4, at 261.

8. *Id.* at 265; Kates, *supra* note 6, nn.26-28 and accompanying text. Kates also argues that laws prohibiting felons from owning or carrying firearms are consistent with the second amendment. While generally true of common law offenses, which were violent, this principle is sometimes suspect in this age of strict criminal liability, victimless crimes, and over-criminalization of previously legal conduct. For instance, a relative who gives a gun to a family member in another state commits a felony. 18 U.S.C. §§ 922(a)(5), 924(a) (1982).

9. This author treats some of these issues in much greater detail in S. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984).

10. Cress, *An Armed Community*, 71 J. AM. HIST. 22, 38 (1984). Cress was apparently unaware of the comprehensive evidence presented in Halbbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791*, 10 N. KY. L. REV. 13 (1982).

Cress concluded: “No one argued that the individual had a right to bear arms outside the ranks of the militia. To the contrary, bearing arms outside the framework of the established militia structure immediately provoked fears for the constitutional stability of the Republic.” Cress, *supra*, at 41. Not surprisingly, he was unable to cite a single original source to substantiate this assertion. At a time when most Americans thought that pistols on the field of honor according to the *code duello* provided a test of virtue, only a Quaker might object to bearing arms for self-defense against robbers and highwaymen.

11. See Kates, *supra* note 4, at 267.

12. Cress, *supra* note 10, at 29; Kates, *supra* note 4, at 244 n.169.

13. PA. CONST. OF 1776, Declaration of Rights, art. XIII (emphasis added). As the law student conceded, with the words quoted in the text “the phrase of the Second Amendment—‘the right to . . . bear arms’ appeared.” J. Smith, *The Constitutional Right to Keep and Bear Arms* 58 (1959)

That to “bear” arms means simply to carry them was clear in a game bill drafted by Thomas Jefferson and proposed by James Madison, draftsman of the second amendment, in the Virginia legislature.<sup>14</sup> The bill would have fined those who hunted deer out of season, and if within a year “[the hunter] shall bear a gun out of his inclosed ground, unless whilst performing military duty,” he shall be in violation of his recognizance. The game violator would have to go back to court for “every such bearing of a gun” to be again bound to his good behavior.<sup>15</sup>

Thus, in the minds of Thomas Jefferson and James Madison, to “bear” a gun meant to carry it about in one’s hands or on one’s person, as for instance a deer hunter would do. “Bearing arms” is not associated with militia duty only, for the language above addresses the “bearing of a gun” by any person when *not* “performing military duty.” Further, while the bill would have restricted the carrying of scatterguns and other long guns for hunting, it would not have prohibited carrying pistols for self-defense. At that time, “one species of fire-arms, the pistol[,] [was] never called a gun.”<sup>16</sup>

Previous game legislation had imposed a possible maximum penalty of twenty lashes on a violator’s back;<sup>17</sup> Madison’s proposed legislation was intended to make the law more humane. Jefferson strongly relied on the penal reform theories of Cesare Beccaria, whose *Essay on Crimes and Punishments* was partly responsible for the eighth amendment’s prohibition on cruel and unusual punishment.<sup>18</sup> “In America of the revolutionary period, [Beccaria’s] little book was more influential than any other single book, its spirit incorporated in documents such as . . . the Bill of Rights.”<sup>19</sup> Beccaria’s influence on the second amendment only recently has come to light.

Just months before writing the Declaration of Independence, Jefferson kept a Commonplace Book where he copied his favorite passages from legal writers. This book “may well be considered as the source-book and repertory of Jefferson’s ideas on government.”<sup>20</sup> Among the passages Jefferson copied word-for-word was Beccaria’s denunciation of laws which forbid *di portar le armi*, which may be translated as to “bear,” “carry,” or “wear arms.” That portion of Beccaria which Jefferson copied in Italian (writing “false ideas of

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(thesis, Harvard Law School). Smith’s evidence elsewhere contradicts his argument. *E.g.*, 12 Rich. 2, ch. 6 (1388) (no servant “shall from henceforth bear any buckler, sword, nor dagger, . . . but in time of war”). J. Smith, *supra*, at 9. Since colonial militia service was required of males “capable of bearing arms,” Smith (and Kates) illogically infer that the words “bear arms” mean only militia service. See Kates, *supra* note 4, at 267.

14. *A Bill for Preservation of Deer (1785)*, in 2 THE PAPERS OF THOMAS JEFFERSON 443 (J. Boyd ed. 1950-1982) [hereinafter cited as JEFFERSON PAPERS]. On Madison’s role in drafting the second amendment, see S. HALBROOK, *supra* note 9, at 76.

15. *A Bill for Preservation of Deer (1785)*, *supra* note 14, at 444.

16. N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York 1828) (“GUN”). This edition was printed without page numbers; citations are to individual entries.

17. Act of 1772, Va. Statutes at Large, 8 Hening 593.

18. C. BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS (1764).

19. A. CASO, AMERICA’S ITALIAN FOUNDING FATHERS 9 (1975).

20. THE COMMONPLACE BOOK OF THOMAS JEFFERSON 4 (G. Chinard ed. 1926).

utility" in the margin) was worded in the standard English translation of the time as follows:

A Principal source of errors and injustice, are false ideas of utility. For example, that legislator has false ideas of utility, who considers particular more than general convenience; who had rather command the sentiments of mankind, than excite them, and dares say to reason, "Be thou a slave;" who would sacrifice a thousand real advantages, to the fear of an imaginary or trifling inconvenience; who would deprive men of the use of fire, for fear of being burnt, and of water, for fear of being drowned; and who knows of no means of preventing evil but by destroying it.

The laws of this nature, are those which forbid to wear arms, disarming those only who are not disposed to commit the crime which the laws mean to prevent. Can it be supposed, that those who have the courage to violate the most sacred laws of humanity, and the most important of the code, will respect the less considerable and arbitrary injunctions, the violation of which is so easy, and of so little comparative importance? Does not the execution of this law deprive the subject of that personal liberty, so dear to mankind and to the wise legislator; and does it not subject the innocent to all the disagreeable circumstances that should only fall on the guilty? It certainly makes the situation of the assaulted worse, and of the assailants better, and rather encourages than prevents murder, as it requires less courage to attack armed than unarmed persons.<sup>21</sup>

The wisdom of Beccaria was a source of Jefferson's proposed Virginia Constitution of 1776 which provided: "No freeman shall ever be debarred the use of arms."<sup>22</sup> An avid hunter and gun collector, Jefferson carried pocket pistols which may be seen today at Monticello.<sup>23</sup>

John Adams began his opening statement in the Boston Massacre trial in 1770 with a quote from Beccaria, and in the course of his speech he added that "the inhabitants had a right to arm themselves at that time, for their defense . . . ."<sup>24</sup> Adams' own views against disarming the people were certainly consistent with the following favorite passage from Beccaria which he copied in his diary: "Every Act of Authority, of one Man over another for which there is not an absolute Necessity, is tyrannical."<sup>25</sup> Adams upheld the

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21. BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS . . . WITH A COMMENTARY ATTRIBUTED TO MONS. DE VOLTAIRE 160-62 (London 1775). John Adams' copy of this edition is inscribed on the title page, "Thomas B. Adams [his son], From his Father 1800." This inscription is reproduced in Halbrook, *To Bear Arms for Self-Defense: Our Second Amendment Heritage*, AM. RIFLEMAN, Nov. 1984, at 29 (source: Rare Books Division, Boston Public Library). The Jefferson manuscript, also reproduced *id.*, is from the Library of Congress' collection of the papers of Thomas Jefferson. *On Crimes and Punishments* was reproduced in American editions as follows: Philadelphia, 1776, 1778, and 1793; Charleston, 1777 and 1778.

Blackstone, who in volume one of his *Commentaries* confirmed the right to have arms for self-defense under the English Bill of Rights, 1 W. BLACKSTONE, COMMENTARIES 140-44 (Philadelphia 1803 & reprint 1965), was influenced by Beccaria. 1 RADZINOWICZ, HISTORY OF ENGLISH CRIMINAL LAW 346 (1948). Jeremy Bentham stated of Beccaria: "Oh, my master, first evangelist of Reason . . . you who have made so many useful excursions into the path of utility, what is there left for us to do? Never to turn aside from that path." E. HALÉVY, THE GROWTH OF PHILOSOPHICAL RADICALISM 21 (1928).

22. 1 JEFFERSON PAPERS, *supra* note 14, at 344.

23. See Halsey & Snyder, *Jefferson's Beloved Guns*, AM. RIFLEMAN, Nov. 1969, at 17-22.

24. 3 J. ADAMS, LEGAL PAPERS 242, 248 (1965).

25. 3 J. ADAMS, DIARY AND AUTOBIOGRAPHY 194 (1961).

right of "arms in the hands of citizens, to be used at individual discretion, . . . in private self-defense."<sup>26</sup>

Bearing arms for personal protection was an unquestioned right in the minds of the Founding Fathers. Before the Revolution, James Iredell, who would be prominent in the struggle to ratify the Constitution and later a Justice of the United States Supreme Court, wrote his mother:

Be not afraid of the Pistols you have sent me. They may be necessary Implements of self Defense tho' I dare say I shall never have Occasion to use them . . . . It is a Satisfaction to have the means of Security at hand, if we are in no danger, as I never expect to be. Confide in my prudence and self regard for a proper use of them, and you need have no Apprehension.<sup>27</sup>

In 1775, North Carolina's delegation to the Continental Congress, all of whom became prominent state or federal leaders, resolved: "It is the Right of every *English* Subject to be prepared with Weapons for his Defense."<sup>28</sup> William Henry Drayton, a prominent Revolutionary leader and Chief Justice of the South Carolina Supreme Court, "always had about his person, a dirk and a pair of pocket pistols; for the defense of his life . . . ."<sup>29</sup> Up in Vermont, Ethan Allan and his friends "never walked out without at least a case of pistols."<sup>30</sup> Lodging with a Quaker on one occasion, Ethan's brother Ira recalled, "We took our pistols out of our holsters and carried them in with us. He looked at the pistols saying 'What doth thee do with these things?' He was answered 'Nothing amongst our friends,' but we were Green Mountain Boys, and ment [sic] to protect our persons and property. . . ."<sup>31</sup>

Just ten days after James Madison proposed the Bill of Rights to Congress in 1789, Tench Coxe, a prominent federalist and life-long correspondent of Jefferson and Madison, wrote that what became the second amendment would confirm the people "in their right to keep and bear their private arms."<sup>32</sup> James Madison endorsed the widely published article in which these words appear.<sup>33</sup> Coxe's writings provide unmistakable evidence that eighteenth-century Americans defined muskets, rifles, and pistols as "arms,"<sup>34</sup> and that they endorsed an individual "right to own and keep and use arms and consequently of *self-defense* and of the *public militia power*."<sup>35</sup>

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26. 3 J. ADAMS, A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 475 (1787-1788).

27. 1 THE PAPERS OF JAMES IREDELL 79 (D. Higginbotham ed. 1976).

28. Hooper, Hewes & Caswell, *To the Committees*, North Carolina Gazette (Newbern), July 7, 1775, at 2, col. 3.

29. 1 J. DRAYTON, MEMOIRS OF THE AMERICAN REVOLUTION 378 (1821).

30. Allen, *Autobiography*, in J. WILBUR, IRA ALLEN: FOUNDER OF VERMONT 44 (1928) (autobiography written in 1799).

31. *Id.* at 40.

32. "A Pennsylvanian," *Remarks on the First Part of the Amendments*, Federal Gazette, June 18, 1789, at 2, col. 1.

33. Madison, *To Tench Coxe*, in 12 THE PAPERS OF JAMES MADISON 257 (C. Hubron & R. Rutland eds. 1979).

34. Coxe, *To the Public*, Democratic Press (Philadelphia), Feb. 2, 1811, at 2.

35. Sidney, *To the Friends of the Principles of the Constitution*, Democratic Press (Philadelphia), Jan. 23, 1823, at 2, col. 2.

“His own firearms are the second and better right hand of every freeman,” held Coxe.<sup>36</sup> In the 1830’s, Madison wrote: “A Government resting on a minority, is an aristocracy not a Republic, and could not be safe with a numerical [and] physical force against it, without a standing Army, and enslaved press, and a disarmed populace.”<sup>37</sup> The Founding Fathers in general strongly endorsed the right to bear arms for self-defense; they gave written expression to their views through the second amendment and personally exercised the right by owning and possessing arms.

The same linguistic usage of the terms “bear” and “arms” prevailed during the period of the adoption of the fourteenth amendment, which was intended to incorporate the second amendment.<sup>38</sup> For instance, in 1865, Florida made it unlawful “for any negro, mulatto, or other person of color, to own, use or keep in his possession or under his control, any Bowie-knife, dirk, sword, fire-arms or ammunition of any kind, unless he first obtain a license to do so from the Judge of Probate.” Violators faced a possible penalty of thirty-nine stripes with a whip.<sup>39</sup> The commission that drafted this legislation opined that “the privilege of bearing arms should be accorded only to such of the colored population as can be recommended for their orderly and peaceable character.”<sup>40</sup>

Members of the Reconstruction Congress, state constitutional conventions of the time, and mainstream white—and even black—newspapers cited protection of the right of freedmen to “bear” arms to protect themselves and their families from infringement by sheriffs, militias, and the Ku Klux Klan as a major object of the fourteenth amendment and the civil rights acts (including what is now 42 U.S.C. § 1983).<sup>41</sup> While the Reconstruction Congress interpreted the second amendment, buttressed by the fourteenth, as protecting the rights of freedmen—and even former Confederates—to keep and bear private arms, it abolished the southern state militia organizations, denying a second amendment-protected right of states to organize militias.<sup>42</sup>

Although the real issue in the Morton Grove, Illinois handgun ban (America’s first)<sup>43</sup> involved the right to “keep” rather than to “bear” arms, the brief of Handgun Control, Inc. (HCI) claimed: “The language of the second amendment suggests that its purpose is limited to protecting organized and effective state militias. The terms ‘arms’ and ‘bear arms’ have

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36. Sherman, *To the People of the United States*, apparently published in the Democratic Press of the Philadelphia Sentinel in early 1823, PAPERS OF TENCH COXE reel 113, at 716 (1977) (microfilm; available from the Historical Society of Pennsylvania (Philadelphia)).

37. Madison, *James Madison’s Autobiography*, 2 WM. & MARY Q. 191, 208 (1945).

38. See *Freedom, Firearms, and the Fourteenth Amendment*, in S. HALBROOK, *supra* note 9, at 107-53.

39. Acts and Resolutions Adopted by the General Assembly of Florida, 14th Sess., Dec. 18, 1865, at 25 (1866).

40. Report of the drafting commission as reprinted in J. WALLACE, *CARPETBAG RULE IN FLORIDA* 33 (1888).

41. See *Freedom, Firearms, and the Fourteenth Amendment*, in S. HALBROOK, *supra* note 9, at 107-53.

42. See *id.*

43. Morton Grove, Ill., Ordinance 81-11 (June 8, 1981).

always been associated with organized military activity.”<sup>44</sup> The chief authority cited by HCI for this proposition is Noah Webster’s famous 1828 dictionary.<sup>45</sup>

Anyone who looks up Webster’s definition of “bear” will be startled to find the very opposite of what HCI claimed: “[t]o wear; to bear as a mark of authority or distinction; as to *bear* a sword, a badge, a name; to *bear* arms in a coat.”<sup>46</sup> Although HCI also referred to Webster’s definition of “arms,” this again fails to imply an exclusively military usage: “[w]eapons of offense, or armor for defense and protection of the body.”<sup>47</sup> Consistent with the meaning of “bear arms” as carrying or wearing weapons on the person or inside one’s clothing, Webster defines “pistol” as “[a] small fire-arm, or the smallest fire-arm used . . . . Small pistols are carried in the pocket.”<sup>48</sup> As to who has the right to bear arms, Webster defined “the people” as “[t]he commonalty, as distinct from men of rank.”<sup>49</sup>

Webster was certainly in a position to know what the second amendment phrase “bear arms” meant. A prominent federalist, he wrote the first major pamphlet in support of the Constitution when it was proposed in 1787, in which he stated: “Before a standing army can rule, the people must be disarmed; as they are in almost every Kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed . . . .”<sup>50</sup>

When the Morton Grove case was still before the United States Court of Appeals for the Seventh Circuit, unassailable evidence was presented that the respective framers of the second and fourteenth amendments intended the individual right to keep arms, including pistols, to be protected from infringement by the federal, state, and local governments. The intent of the framers was so overwhelmingly contrary to the court’s opinion upholding the gun ban that the court held that intent to be “irrelevant.”<sup>51</sup> In contrast, the Supreme Court has stated repeatedly that the Constitution’s provisions must be interpreted according to the intent of the framers.<sup>52</sup>

### III

#### WHAT “ARMS” ARE PROTECTED?

As the Oregon Supreme Court recently opined, in the state constitutions adopted between 1776 and 1802 “the term ‘arms’ as used by the drafters of the constitutions probably was intended to include those weapons used by

44. Brief of Amicus Curiae, Handgun Control, Inc., In Opposition to Certiorari at 10, *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

45. *Id.* at 10 n.21.

46. N. WEBSTER, *supra* note 16 (“BEAR”—definition 3).

47. *Id.* (“ARMS”—definition 1).

48. *Id.* (“PISTOL”).

49. *Id.* (“PEOPLE”—definition 3).

50. N. WEBSTER, AN EXAMINATION OF THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 43 (1787). James Madison repeated this argument in THE FEDERALIST NO. 46 (1788).

51. *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 n.8 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

52. *E.g.*, *Malloy v. Hogan*, 378 U.S. 1, 5 (1964); *Ex parte Baine*, 121 U.S. 1, 12 (1887).

settlers for both personal and military defense. The term 'arms' was not limited to firearms, but included several handcarried weapons commonly used for defense."<sup>53</sup> Under the second amendment, all commonly possessed arms which an individual could "keep and bear" would be constitutionally protected. Both then and now, these arms include firearms, edged weapons, and blunt instruments.<sup>54</sup>

The most clearly protected firearm is the rifle, the use of which for self-defense even in urban areas is protected by the second amendment "guarantee of the right of the individual to bear arms."<sup>55</sup> The modern descendent of the musket, the rifle is the classic militia firearm. The shotgun is also protected by the second amendment.<sup>56</sup> The short-barreled shotgun is the descendent of the blunderbuss, a classic home defense arm,<sup>57</sup> in contrast with the long-barreled hunting shotgun known traditionally as the fowling piece. While it may not be *within judicial notice* that the short-barreled shotgun is a militia arm protected by the second amendment,<sup>58</sup> such an arm has been factually determined to fall within a state constitution protecting the right of citizens to "keep and bear arms for their common defense."<sup>59</sup>

The arm most commonly possessed for self-defense is the pistol,<sup>60</sup> due to its ease of storage, carriage, and accessibility. "[P]istol' *ex vi termini* is properly included within the word 'arms,' and . . . the right to bear such arms . . . cannot be infringed."<sup>61</sup> Its short barrel makes it difficult for an assailant to grab, and its size, weight, and simple mechanism makes its use viable for women, the elderly, and the handicapped. Smaller pistols have particular utility for smaller people.<sup>62</sup> The smallest handgun designed by Smith & Wesson "was such a small revolver that it was nicknamed the Ladysmith, since

53. *State v. Kessler*, 289 Or. 359, 614 P.2d 94, 98 (1980).

54. *Nunn v. State*, 1 Ga. 243 (1846), interpreted the federal second amendment as follows: "The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as one used by the *militia*, shall not be *infringed*, curtailed or broken in upon, in the smallest degree . . ." *Id.* at 251 (emphasis in original). There is no evidence that the Founding Fathers distinguished in any way the meaning of "arms" in the federal second amendment from that in the state bill of rights which they adopted.

55. *Hutchinson v. Rosetti*, 24 Misc. 949, 951, 205 N.Y.S.2d 526, 529 (1960) (use of hunting rifle for self-defense against mob in Queens, New York); see also *People v. Givens*, 26 Ill. 2d 371, 372-74, 186 N.E.2d 225, 226 (1962) (justifiable homicide by black man with .22-caliber rifle in Chicago rooming house). There are no reported cases in which an innocent bystander was injured by another using a rifle in self-defense. On whether keeping loaded firearms may give rise to civil liability, see Halbrook, *Tort Liability for the Manufacture, Sale, and Ownership of Handguns?*, 6 *HAMLIN L. REV.* 351, 353-58 (1983).

56. *United States v. Bowdach*, 414 F. Supp. 1346, 1353 & n.11 (S.D. Fla. 1976), *aff'd*, 561 F.2d 1160 (5th Cir. 1977).

57. The blunderbuss was described as a "well-known firearm . . . very fit for . . . defending the door of a house, staircase, etc." W. DUANE, *A MILITARY DICTIONARY* 55 (1810).

58. *United States v. Miller*, 307 U.S. 174, 178 (1939).

59. *Burks v. State*, 162 Tenn. 406, 410-11, 36 S.W.2d 892, 894 (1931).

60. See *Patson v. Pennsylvania*, 232 U.S. 138, 143 (1914); *Rex v. Knight*, Comb. 38-39, 90 Eng. Rep. 330 (K.B. 1686).

61. *State v. Kerner*, 181 N.C. 574, 576, 107 S.E. 222, 224 (1921).

62. See *Gurko v. United States*, 153 U.S. 183, 187, 191 (1894) (slight defendant "drew a small bright pistol from his pocket, and he shot" heavy-set assailant; the defendant's act was justifiable "provided he rightfully so armed himself for purposes simply of self-defense").

it seemed to be more suitable for a woman's small hand."<sup>63</sup> The relatively high cost of rifles as compared to pistols suggests that a ban on the ownership or possession of low-caliber handguns would effectively negate any right of the poor to bear firearms for their self-defense.

There has been little scholarship concerning whether certain edged weapons and blunt instruments are "arms" in a constitutional sense. The knife is one of mankind's oldest tools and weapons.<sup>64</sup> Pocketknives were in use when the second amendment was adopted. It is questionable whether "switchblade" knives with the modern convenience of a spring-assisted blade may be banned any more than could modern firearms which no longer rely on a flintlock mechanism.<sup>65</sup> The staff and the club, mankind's oldest defensive weapons, are clearly constitutionally protected.<sup>66</sup>

Since "arms" under the second amendment are those which an individual is capable of bearing, artillery pieces, tanks, nuclear devices, and other heavy

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63. R. JINKS, *HISTORY OF SMITH & WESSON* 191 (1977). The smallest pocket pistols of the 19th century are known as "muff pistols," said to be carried by ladies in their muffs. J. GEORGE, *ENGLISH PISTOLS AND REVOLVERS* 135 (1962). While not as deadly, such small pistols are "amongst the largest class of 'self-defense' pistols whose chief value lies in the element of surprise introduced by an unexpected discharge of firearms, however ineffectual." *Id.* Cheap, small pocket pistols, being convenient and compact, became prevalent as crime decreased. *Id.* at 129-34.

Females, who may have unique self-defense needs, may find small pistols in calibers such as .22 and .25 particularly useful for self-defense in situations in which large pistols cannot be carried. *See* Kates & Engberg, *Deadly Force Self-Defense Against Rape*, 15 U.C.D. L. REV. 873 (1982). Such small pistols are also used by sportsmen as trail guns and by police as back-up pieces.

Kates proposes excluding inexpensive pistols of .25 caliber or less from the definition of constitutionally protected arms, because they are not used by military establishments. Kates, *supra* note 4, at 258-60; Kates, *supra* note 6, at 148 n.25 and accompanying text. Since military requirements have always been oriented toward equipment for utilization by able-bodied males, the military test would discriminate against women, the elderly, and the handicapped. Furthermore, rimfire .22-caliber ammunition is by far the least expensive and most popular ammunition in America, and denying second amendment protection to pistols that shoot it would discriminate against the poor and could prevent the majority from becoming proficient through target practice.

64. Bowie knives, stilettos, and other knives are prohibited in various jurisdictions. Yet humans began to use stone knives a half million years ago. H. PETERSON, *DAGGERS AND FIGHTING KNIVES OF THE WESTERN WORLD: FROM THE STONE AGE TILL 1900*, at 1 (1970). In the Middle Ages, "[a]lmost everyone carried a knife or a dagger in his belt. . . . Civilians wore them for self-protection, for general utility and also for eating." *Id.* at 12.

65. States holding that knives are constitutionally protected have also held that knives with spring-assisted blades ("switchblades") may not be banned. *State v. Delgado*, 69 Or. App. 245, 684 P.2d 630, *aff'd*, 298 Or. 395, 692 P.2d 610 (1984). The Oregon Supreme Court stated the test as "whether a kind of weapon, as modified by its modern design and function, is the sort commonly used by individuals for personal defense." 692 P.2d at 612. The U.S. Department of Justice advised *against* a federal ban on switchblades because such knives "serve useful and even essential, purposes in the hands of persons such as sportsmen, shipping clerks, and others engaged in lawful pursuits. . . ." S. REP. NO. 1980, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. CODE CONG. & AD. NEWS 3435, 3439. The federal prohibition does exempt "any individual who has only one arm." 15 U.S.C. § 1244 (1982); *see* *Fall v. Esso Standard Oil Co.*, 297 F.2d 411, 414 n.1 (5th Cir. 1961), *cert. denied*, 371 U.S. 814 (1962) (the judge and lawyers on both sides had each "carried a switchblade knife on fishing trips"). Having less utility as a weapon than hunting knives and other edged instruments that are not prohibited, switchblades may have been banned due to a cultural hysteria against immigrant minorities.

66. *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980) (possession of billy club constitutionally protected); 2 S. ADAMS, *WRITINGS* 119 (1906) (man slain at Boston Massacre "had as good right, by the law of the land, to carry a stick for his own and his neighbor's defence") (emphasis in original). Finding "no significant distinction . . . between a club held in the hand and a device put on the

ordnances are not constitutionally protected.<sup>67</sup> Nor are other dangerous and unusual weapons, such as grenades, bombs, bazookas, and other devices which, while capable of being carried by hand, have never been commonly possessed for self-defense.<sup>68</sup> Blunt and edged instruments and firearms are capable of being used against a violent assailant in such a manner as not to endanger the innocent. In contrast, explosive devices may be incapable of pinpointing an aggressor, thus harming the innocent as well as the guilty.<sup>69</sup>

#### IV

#### ARE REGISTRATION AND LICENSING "INFRINGEMENT"?

No one would seriously argue that citizens must register with the police or obtain a license in order to exercise freely their political or religious beliefs. Requiring citizens to register or obtain a permit if they object to unreasonable searches and seizures of their persons and homes would clearly infringe their rights. Except where there is limited space in public forums which requires fair allocation, authorities cannot require persons giving speeches and assembling to obtain permission to do so.<sup>70</sup>

Nor may the anonymous keeping and bearing of arms by law-abiding citizens, without more, constitutionally be the subject of registration and licensing. To be sure, armed marches in a city, like other assemblies in public places, may be the subject of a license requirement.<sup>71</sup> When the possibility of tyranny exists, however, the people cannot be denied their rights of "associating, arming and fighting, in defense of . . . [their] liberties."<sup>72</sup> In a true

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hand," one court has found possession of metal knuckles to be constitutionally protected. *State v. Johnson*, No. DA 256676-8305 (Or. Dist. Ct. Aug. 31, 1983).

If a club is protected, so too must be two clubs held together with rope. Ironically, the nunchaku and similar Oriental martial arts weapons, which are increasingly being banned in this country, originally came into use because ruling classes deprived populaces of swords and other traditional arms. Halbrook, *Oriental Philosophy, Martial Arts and Class Struggle*, 2 SOCIAL PRAXIS 135 (1974).

67. "The term 'arms' would not have included cannon or other heavy ordnance not kept by militiamen or private citizens." *State v. Kessler*, 289 Or. 359, 368, 614 P.2d 94, 98 (1980).

68. "Modern weapons used exclusively by the military are not 'arms' which are commonly possessed by individuals for defense, therefore, the term 'arms' in the constitution does not include such weapons." *Id.* at 369, 614 P.2d at 99 (interpreting art. I, § 27 of the Oregon Constitution, which protects the right of the people to bear arms in defense of themselves and the state).

According to the writings of William Hawkins, an affray could arise in 1716 in England "where a Man arms himself with dangerous and unusual Weapons, in such a Manner as will naturally cause a Terror to the People." 1 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 135 (1716 & photo. reprint 1973). Hawkins added, however, that "Persons of Quality are in no Danger of Offending against this Statute by wearing common Weapons . . ." *Id.* at 136.

69. Indeed, whether governments—much less individuals—may justifiably possess atomic or nuclear weapons has been a matter of public debate. Unlike firearms, bombs of virtually every description may be inherently unethical in that they kill all alike, including (and often mostly) mere bystanders or noncombatant civilians.

70. *Kunz v. New York*, 340 U.S. 290 (1951); e.g., *Lovell v. Griffin*, 303 U.S. 444, 452 (1938). In contrast, a permit may be required for marches in public places that may disrupt others' use of sidewalks and streets. *Cox v. New Hampshire*, 312 U.S. 569 (1941).

71. *Presser v. Illinois*, 116 U.S. 252, 264-65 (1886); cf. *Rex v. Dewhurst*, 1 State Trials (Gr. Brit.), New Series 529, 601-02 (1820) (right to go armed individually or in small groups). *Presser* would not apply to independent militia exercises on private property.

72. *Pennsylvania Gazette*, Apr. 23, 1788, at 2, col. 3.

republic, the people may arm and associate without anyone's permission. Although violent criminals, children, and those of unsound mind may be deprived of firearms, enforcement of such a prohibition would not be materially aided by requiring ordinary citizens to register or obtain licenses for their firearms.

Throughout history, firearms registration classically has been required as a prelude to confiscation.<sup>73</sup> The English Bill of Rights provision "that subjects may have arms for their defense" was passed in direct response to a registration/confiscation scheme.<sup>74</sup> The anonymous keeping of firearms acts as a deterrent to governmental oppression, whether by a racist local sheriff or a coup-minded military junta. Creation of yet another victimless crime—that of exercising a constitutional right without first registering with the government—can only promote a burgeoning police state to enforce it while convicting the innocent.<sup>75</sup>

A requirement that one may not exercise the right to bear or carry arms, either openly or concealed, without a license is also constitutionally defective. Until the fourteenth amendment was adopted, licenses to carry arms were required only for slaves and blacks, while free men could carry arms openly

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73. Many antique Irish and Scottish firearms have registration marks made pursuant to English measures designed to conquer those nationalities. I. GLENNING, *BRITISH PISTOLS AND GUNS* 54-55 (1951). It is well known that the Nazis used registration lists to confiscate guns and to find and execute gun owners.

74. The Militia Act, 13 & 14 Car. 2, ch. 3 (1662), was repeatedly cited in debate leading to adoption of the English Bill of Rights, 1 W. & M., sess. 2, ch. 2 (1689) (arms guarantee at § 7). The debate is reprinted in 2 *MISCELLANEOUS STATE PAPERS FROM 1501-1726*, at 407-18 (1778). Characteristically, the Militia Act, which allowed general warrants to search for illegal arms, was passed at the same time as 13 & 14 Car. 2, ch. 33 §§ 15, 19 (1662), which provided for warrants to search for unlicensed printed matter. For an analysis of arms seizures under the Militia Act as the basis for Parliament's adoption of the Bill of Rights provision guaranteeing that Protestants "may have arms for their defence," see S. HALBROOK, *supra* note 9, at 43-45.

75. Even the registration records of the national Bureau of Alcohol, Tobacco and Firearms for automatic firearms are inaccurate and incomplete. *United States v. Seven Miscellaneous Firearms*, 503 F. Supp. 565, 576, 578 (D.D.C. 1980).

Professor Kates argues that since some arms were registered with militia authorities around the time when the second amendment was adopted, all arms may now be registered. Kates, *supra* note 4, at 265-66. Yet no general registration of arms existed historically. For instance, Virginia's Act for Regulating and Disciplining the Militia, drafted by Thomas Jefferson, see 2 *JEFFERSON PAPERS*, *supra* note 14, at 350, provided that "all free male persons, hired servants, and apprentices, between the ages of sixteen and fifty years . . . shall . . . be enrolled or formed into companies." Act of Regulating and Disciplining the Militia, Va. Statutes at Large, 9 Hening 267, 267-68 (1777). Higher officers were required to attend periodic musters armed with swords, and "every non-commissioned officer and private with a rifle and a tomahawk, or good firelock and bayonet." *Id.* at 268. Persons too poor to purchase such arms were provided with them at public expense. *Id.* at 269. The Act of 1785 clarified that each militiaman "shall constantly keep the aforesaid arms, accoutrements, and ammunition, ready to be produced whenever called for by his commanding officer." Act of 1785 § III, Va. Statutes at Large, 12 Hening 9, 12.

Under these statutes, militiamen were required to keep and bear certain *types* of arms, but no provision existed for registering any specific sword, tomahawk, rifle, or firelock. Moreover, besides providing numerous exceptions for even those free males within the age group, younger and older men—along with women, Indians, and blacks—were not required or eligible to enroll in the militia. While failure to attend muster properly armed could lead to disciplinary action, no law existed requiring registration of arms or providing criminal penalties for nonregistration.

but not concealed.<sup>76</sup> Today, some states require a permit only for carrying concealed weapons, while others require a permit for bearing arms either openly or concealed.<sup>77</sup> The arbitrary denial of licenses and permits in many states and localities would be alleviated to some extent by granting the aggrieved party automatic review and a right to receive attorney fees.<sup>78</sup>

## V

### CONCLUSION

The framers of the second and fourteenth amendments intended to guarantee an individual right to carry firearms and other common hand-carried arms. It is inconceivable that they would have tolerated the suggestion that a free person has no right to bear arms without the permission of a state authority, much less the federal government, or that a person could be imprisoned for doing so. As the Founding Fathers realized, every right has its costs, but the alternatives are often more costly.

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76. *See supra* text accompanying note 39. Even so, carrying concealed weapons was no offense at common law, and the first American state prohibition on that practice was held unconstitutional. *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822).

77. The only state with no restrictions on open or concealed carrying of firearms is Vermont, which has one of the lowest crime rates in the nation. *See, e.g.*, FBI UNIFORM CRIME REPORTS 44-51 (1983). Other states, some of which arbitrarily issue permits, prohibit only carrying a concealed weapon. Perhaps the least capricious permit requirement is that of Georgia. GA. CODE ANN. § 16-11-129(d) (1984) (mandatory issuance of carry license for citizens of good character, except invalid at public gatherings). There are no reported instances of permit holders committing a crime with a firearm in Georgia.

78. Some states provide for no judicial review of the administrative denial of licenses or permits, and probably none has a provision for attorney fees. Damages and attorney fees for violation of the right to bear arms per se were not awarded until *Motley v. Kellogg*, 409 N.E.2d 1207 (Ind. App. 1980), *appeal filed from remand sub nom. City of Gary v. Kellogg*, No. 3-983A291 (Ind. App. filed Sept. 1, 1983).