Sources on the Second Amendment and Rights to Keep and Bear Arms in State Constitutions

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These materials can be useful for discussing how the Second Amendment ought to be interpreted. I intentionally include more materials here than any teacher will likely use, to give people flexibility in picking and choosing.

I. Text of the Second Amendment and Related Contemporaneous Provisions

Second Amendment: A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

English Bill of Rights: That the subjects which are protestants may have arms for their defence suitable to their conditions and as allowed by law (1689). 1

Connecticut: Every citizen has a right to bear arms in defense of himself and the state (1818). 2

Kentucky: [T]he right of the citizens to bear arms in defense of themselves and the State shall not be questioned (1792). 3

Massachusetts: The people have a right to keep and to bear arms for the common defence (1780). 4

North Carolina: [T]he people have a right to bear arms, for the defence of the State; and, as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power (1776). 5

Pennsylvania: That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination, to, and governed by, the civil power (1776). 6

The right of the citizens to bear arms in defence of themselves and the State shall not be questioned (1790). 7

Rhode Island: The right of the people to keep and bear arms shall not be infringed (1842). 8

Tennessee: [T]he freemen of this State have a right to keep and bear arms for their common defence (1796). 9

Vermont: [T]he people have a right to bear arms for the defence of themselves and the State -- and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power (1777). 10

Virginia: 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; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power. 11

II. Calls for the Right to Keep and Bear Arms from State Ratification Conventions

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Five of the states that ratified the Constitution also sent demands for a Bill of Rights to Congress. All these demands included a right to keep and bear arms. Here, in relevant part, is their text:

New Hampshire: Twelfth[:] Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion.

Virginia: . . . Seventeenth, That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil power.

New York: . . . 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 defence of a free State; That the Militia should not be subject to Martial Law except in time of War, Rebellion or Insurrection. That Standing Armies in time of Peace are dangerous to Liberty, and ought not to be kept up, excess in Cases of necessity; and that at all times, the Military should be under strict Subordination to the civil Power.

North Carolina: Almost identical to Virginia demand, but with "the body of the people, trained to arms" instead of "the body of the people trained to arms."

Rhode Island: Almost identical to Virginia demand, but with "the body of the people capable of bearing arms" instead of "the body of the people trained to arms," and with a "militia shall not be subject to martial law" proviso as in New York.

III. "The Right of the People" in Other Bill of Rights Provisions

First Amendment: Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

Ninth Amendment: The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Tenth Amendment: [Speaking of "the powers . . . of the people" rather than "the right . . . of the people"] The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

IV. Some Other Contemporaneous Constitutional Provisions With a Similar Grammatical Structure

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Rhode Island Free Press Clause: The liberty of the press being essential to the security of freedom in a state, any person may publish sentiments on any subject, being responsible for the abuse of that liberty 14

Massachusetts Free Press Clause: The liberty of the press is essential to the security of freedom in a state it ought not, therefore, to be restricted in this commonwealth. 15

Massachusetts Speech and Debate Clause: The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation of prosecution, action or complaint, in any other court or place whatsoever. 16

New Hampshire Venue Clause: In criminal prosecutions, the trial of the facts in the vicinity where they happen is so essential to the security of the life, liberty, and estate of the citizen, that no crime or offence ought to be tried in any other county than that in which it is committed 17

V. 18th- and 19th-Century Commentary

A. William Blackstone, Commentaries on the Laws of England (1765)

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In the three preceding articles we have taken a short view of the principal absolute rights [personal security, personal liberty, private property] which appertain to every Englishman. But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.

1. The constitution, powers, and privileges of parliament . . . .

2. The limitation of the king's prerogative . . . .

3. . . . [A]pplying to the courts of justice for redress of injuries.

4. . . . [T]he right of petitioning the king, or either house of parliament, for the redress of grievances.

5. The fifth and last auxiliary right of the subject, that I shall at present mention, 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 . . . and 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.

. . . [T]o vindicate [the three primary rights], when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of

petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence.

B. St. George Tucker, Blackstone's Commentaries (1803)

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[Annotation to Blackstone's discussion of the right to have arms as the fifth and last auxiliary right:]

The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence [fn40] suitable to their condition and degree, and such as are allowed by law. [fn41]

[fn40] The right of the people to keep and bear arms shall not be infringed, and this without any qualification as to their condition or degree, as is the case in the British government.

[fn41] Whoever examines the forest, and game laws in the British code, will readily perceive that the right of keeping arms is effectually taken away from the people of England. The commentator himself informs us, "that the prevention of popular insurrections and resistence [*sic*] to government by disarming the bulk of the people, is a reason oftener meant than avowed by the makers of the forest and game laws."

[A separate discussion in an Appendix, specifically about the Second Amendment.]

A well regulated militia being necessary to the security of a free state, the right of the people to keep, and bear arms, shall not be infringed.

This may be considered as the true palladium of liberty . . . . The right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms, is under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.

In England, the people have been disarmed, generally, under the specious pretext of preserving the game: a never failing lure to bring over the landed aristocracy to support any measure, under that mask, though calculated for very different purposes. True it is, their bill of rights seems at first view to counteract this policy: but the right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorise the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subject to a penalty. [Editorial note: I understand that this last sentence is considered by some historians to be an exaggeration. 20]

C. Joseph Story, Familiar Exposition of the Constitution of the United States (1840)

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The next amendment is, "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." One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia. The friends of a free government cannot be too watchful, to overcome the dangerous tendency of the public mind to sacrifice, for the sake of mere private convenience, this powerful check upon the designs of ambitious men.

The importance of this article will scarcely be doubted by any persons, who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations.

How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our National Bill of Rights.

D. Thomas Cooley, Principles of Constitutional Law (1898)

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Section IV. -- The Right to Keep and Bear Arms.

The Constitution. -- By the Second Amendment to the Constitution it is declared that "a well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."

The amendment, like most other provisions in the Constitution, has a history. It was adopted with some modification and enlargement from the English Bill of Rights of 1688, where it stood as a protest against arbitrary action of the overturned dynasty in disarming the people, and as a pledge of the new rulers that this tyrannical action should cease. The right declared was meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of regaining rights when temporarily overturned by usurpation.

The Right is General. -- It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose. But this enables the government to have a well regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.

Standing Army. -- A further purpose of this amendment is, to preclude any necessity or reasonable excuse for keeping up a standing army. A standing army is condemned by the traditions and sentiments of the people, as being as dangerous to the liberties of the people as the general preparation of the people for the defence of their institutions with arms is preservative of them.

What Arms may be kept. -- The arms intended by the Constitution are such as are suitable for the general defence of the community against invasion or oppression, and the secret carrying of those suited merely to deadly individual encounters may be prohibited.

VI. Supreme Court Cases

These are pretty much all the opinions that mention the Amendment, even in passing. Few teachers will want to assign them all, but we include them to give readers maximum choice.

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

[The only extensive modern discussion of the Amendment]

An indictment in the District Court Western District Arkansas, charged that Jack Miller and Frank Layton "did unlawfully, knowingly, wilfully, and feloniously transport in interstate commerce from the town of Claremore in the State of Oklahoma to the town of Siloam Springs in the State of Arkansas a certain firearm, to-wit, a double barrel 12-gauge Stevens shotgun having a barrel less than 18 inches in length [contrary to the National Firearms Act] . . . ."

A duly interposed demurrer alleged: The National Firearms Act is not a revenue measure but an attempt to usurp police power reserved to the States, and is therefore unconstitutional. Also, it offends the inhibition of the Second Amendment to the Constitution -- "A well regulated Militia, being necessary to the security of a free State, the right of people to keep and bear Arms, shall not be infringed." The District Court held that section eleven of the Act violates the Second Amendment. It accordingly sustained the demurrer and quashed the indictment.

. . .

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

The Constitution as originally adopted granted to the Congress power -- "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 Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.

The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia -- civilians primarily, soldiers on occasion.

The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time. [Citing further sources, e.g., the Virginia Act of October 1785 providing for a Militia of "all free male persons between the ages of eighteen and fifty years," with certain exceptions.]

Most if not all of the States have adopted provisions touching the right to keep and bear arms. Differences in the language employed in these have naturally led to somewhat variant conclusions concerning the scope of the right guaranteed. But none of them seem to afford any material support for the challenged ruling of the court below.

B. Dred Scott v. Sandford, 60 U.S. 393, 416-17, 449-51 (1857)

[In the course of explaining that the Bill of Rights -- including the Due Process Clause, which the majority concluded prevented Congress from interfering with slaveowners' property rights in their slaves -- limited Congressional action in the Territories, the Court said:] [N]o one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances.

Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding. These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care.

[Earlier in the opinion, in holding that blacks generally could not be U.S. citizens, the Court said:] [I]t cannot be believed that the large slaveholding States regarded [blacks] as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety.

It would give to persons of the negro race, who were recognised as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them 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. And all

of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

C. United States v. Cruikshank, 92 U.S. 542, 551 (1876)

[Cruikshank and others were tried under the Civil Rights Act of 1870 for lynching two blacks. The Act barred people for conspiracy to "prevent or hinder [a person's] free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same." The charges included, among other things, that the defendants conspired to interfere with the victims' rights to peaceably assemble and to keep and bear arms. The Court threw out the indictment, saying:]

The first and ninth counts state the intent of the defendants to have been to hinder and prevent the citizens named in the free exercise and enjoyment of their "lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose." The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government.

It "derives its source," to use the language of Chief Justice Marshall, in *Gibbons v. Ogden*, "from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to Congress, it remains, according to the ruling in *Gibbons v. Ogden*, subject to State jurisdiction. Only such existing rights were committed by the people to the protection of Congress as came within the general scope of the authority granted to the national government.

The first amendment to the Constitution prohibits Congress from abridging "the right of the people to assemble and to petition the government for a redress of grievances." This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone. It is now too late to question the correctness of this construction. As was said by the late Chief Justice, in *Twitchell v. The Commonwealth*, "the scope and application of these amendments are no longer subjects of discussion here." They left the authority of the States just where they found it, and added nothing to the already existing powers of the United States.

The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offence, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.

The second and tenth counts are equally defective. 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. 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 powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in *The City of New York v. Miln*, the "powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police," "not surrendered or restrained" by the Constitution of the United States.

D. Presser v. Illinois, 116 U.S. 252, 264-66 (1886)

[State law barred "any body of men, other than the organized militia of the state and the troops of the United States, from associating as a military company and drilling with arms in any city or town of the state"; the Court held:] The first [claim is based on] the second amendment, which declares: "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." We think it 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.

But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of congress and the national government, and not upon that of the state. It was so held by this court in the case of *U. S. v. Cruikshank*, in which the chief justice, in delivering the judgment of the court, said that the right of the people to keep and bear arms "is not a right granted by the constitution. Neither is it in any manner dependent upon that instrument for its existence. 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 powers of the national government . . . ." . . .

It is undoubtedly 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, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government. But, as already stated, we think it clear that the sections under consideration do not have this effect.

E. Logan v. United States, 144 U.S. 263, 286-87 (1892)

[The Court was faced with a question about the scope of the conspiracy statute involved in *Cruikshank*.] In *U.S. v. Cruikshank* . . . (1) It was held that the first amendment of the constitution . . . did not grant to the people the right peaceably to assemble for lawful purposes, but recognized that right as already existing, and did not guaranty its continuance except as against acts of congress . . . .

(2) It was held that the second amendment of the constitution, declaring that "the right of the people to keep and bear arms shall not be infringed," was equally limited in its scope.

F. Miller v. Texas, 153 U.S. 535, 538-39 (1894)

[Miller challenged a law banning the carrying of dangerous weapons on the person.] In his motion for a rehearing, however, defendant claimed that the law of the state of Texas forbidding the carrying of weapons, and authorizing the arrest, without warrant, of any person violating such law, under which certain questions arose upon the trial of the case, was in conflict with the second and fourth amendments to the constitution of the United States, one of which provides that the right of the people to keep and bear arms shall not be infringed, and the other of which protects the people against unreasonable searches and seizures.

We have examined the record in vain, however, to find where the defendant was denied the benefit of any of these provisions, and, even if he were, it is well settled that the restrictions of these amendments operate only upon the federal power, and have no reference whatever to proceedings in state courts. And if the fourteenth amendment limited the power of the states as to such rights, as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court.

G. Dissent in Brown v. Walker, 161 U.S. 591, 635 (1896) (Field, J., dissenting)

[The question had to do with the scope of a witness's Fifth Amendment privilege against self-incrimination. Field wrote:] As said by counsel for the appellant: "The freedom of thought, of speech, and of the press; the right to bear arms; exemption from military dictation; security of the person and of the home; the right to speedy and public trial by jury; protection against oppressive bail and cruel punishment, -- are, together with exemption from self-crimination, the essential and inseparable features of English liberty. Each one of these features had been involved in

the struggle above referred to in England within the century and a half immediately preceding the adoption of the constitution, and the contests were fresh in the memories and traditions of the people at that time."

H. Robertson v. Baldwin, 165 U.S. 275, 280 (1897)

[Robertson challenged, under the Thirteenth Amendment, enforcement of a mariner's labor contract. The Court said:] But we are also of opinion that, even if the contract of a seaman could be considered within the letter of the thirteenth amendment, it is not, within its spirit, a case of involuntary servitude. The law is perfectly well settled that the first 10 amendments to the constitution, commonly known as the "Bill of Rights," were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed.

Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (article 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion; nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify, if a prosecution against him be barred by the lapse of time, a pardon, or by statutory enactment. . . . It is clear . . . that the [Thirteenth] amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional, such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards. . . .

I. Maxwell v. Dow, 176 U.S. 581, 597 (1900)

[The Court concluded that the Jury Trial Clause wasn't incorporated into the Fourteenth Amendment, and thus didn't bound the states.] In *Presser v. Illinois,* it was held that the Second Amendment to the Constitution, in regard to the right of the people to bear arms, is a limitation only on the power of Congress and the national government, and not of the states. It was therein said, however, that as all citizens capable of bearing arms constitute the reserved military force of the national government the states could not prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.

J. Trono v. United States, 199 U.S. 521, 528 (1905)

[The question was whether an action of the Supreme Court of the Philippines -- then a U.S. possession -- violated an act of Congress applying most of the Bill of Rights to the Philippines.] The whole language [of the Act] is substantially taken from the Bill of Rights set forth in the amendments to the Constitution of the United States, omitting the provisions in regard to the right of trial by jury and the right of the people to bear arms, and containing the prohibition of the 13th Amendment, and also prohibiting the passage of bills of attainder and ex post facto laws.

[Almost identical language can be found in Kepner v. United States, 195 U.S. 100, 123-24 (1904).]

K. Twining v. New Jersey, 211 U.S. 78, 98 (1908)

[The Court concluded that the privilege against self-incrimination wasn't incorporated into the Fourteenth Amendment, and thus didn't bound the states.] [T]he question [of incorporation] is no longer open in this court. The right of trial by jury in civil cases, guaranteed by the 7th Amendment, and the right to bear arms, guaranteed by the 2d Amendment [citing *Presser v. Illinois*], have been distinctly held not to be [incorporated].

L. United States v. Schwimmer, 279 U.S. 644, 650 (1929)

[Schwimmer was denied citizenship because she refused to swear to "if necessary, . . . take up arms in defense of this country." In the process of upholding the denial of citizenship, the Court argued as follows:]

The common defense was one of the purposes for which the people ordained and established the Constitution. It empowers Congress to provide for such defense, to declare war, to raise and support armies, to maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for organizing, arming, and disciplining the militia, and for calling it forth to execute the laws of the Union, suppress insurrections and repel invasions; it makes the President commander in chief of the army and navy and of the militia of the several states when called into the service of the United States; it declares that, a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. . . .

M. Dissent in Adamson v. California, 332 U.S. 46, 78 (1947) (Black, J., dissenting)

[The Court reaffirmed that the privilege against self-incrimination wasn't incorporated into the Fourteenth Amendment, and thus didn't bound the states.] Later, but prior to the *Twining* case, this Court decided that the following were not "privileges or immunities" of national citizenship, so as to make them immune against state invasion: the Eighth Amendment's prohibition against cruel and unusual punishment, *In re Kemmler*; the Seventh Amendment's guarantee of a jury trial in civil cases, *Walker v. Sauvinet*; the Second Amendment's "right of the people to keep and bear arms * * *," *Presser v. Illinois*; the Fifth and Sixth Amendments' requirements for indictment in capital or other infamous crimes, and for trial by jury in criminal prosecutions . . . .

N. Johnson v. Eisentrager, 339 U.S. 763, 784 (1950) (Jackson, J., for the majority)

[The Court was arguing that the Fifth Amendment doesn't apply to alien enemies on occupied alien territory.] If the Fifth Amendment confers its rights on all the world except Americans engaged in defending it, the same must be true of the companion civil-rights Amendments, for none of them is limited by its express terms, territorially or as to persons. Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and "were-wolves" could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against "unreasonable" searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.

O. Knapp v. Schweitzer, 357 U.S. 371, 378 n.5 (1958) (Frankfurter, J., for the majority)

[The Court reaffirmed that the privilege against self-incrimination wasn't incorporated into the Fourteenth Amendment, and thus didn't bound the states.] By 1900 the applicability of the Bill of Rights to the States had been rejected in cases involving claims based on virtually every provision in the first eight Articles of Amendment. See, e.g., Article I: *Permoli v. First Municipality No. 1* (free exercise of religion); *United States v. Cruikshank* (right to assemble and petition the Government); Article II: *United States v. Cruikshank* (right to keep and bear arms); Article IV: . . . .

P. Konigsberg v. State Bar, 366 U.S. 36, 49 & n.10 (1961) (Harlan, J., for the majority)

[This was a Free Speech Clause case; the majority was arguing for a narrower interpretation of the Clause than was the dissent.] At the outset we reject the view that freedom of speech and association, as protected by the First and Fourteenth Amendment, are "absolutes," not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment. [fn10]

[fn10] That view, which of course cannot be reconciled with the law relating to libel, slander, . . . and the like, is said to be compelled by the fact that the commands of the First Amendment are stated in unqualified terms: [quoting the First Amendment]. But as Mr. Justice Holmes once said: "[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." Gompers v. United States, 233 U.S. 604. In this connection also compare the equally unqualified command of the Second Amendment: "the right of the people to keep and bear Arms shall not be infringed." And see United States v. Miller, 307 U.S. 174.

[See also Justice Harlan's roughly contemporaneous opinion in *Poe v. Ullman*, quoted below in item 19, which seems to treat the right as an individual one.]

Q. Dissent in Adams v. Williams, 407 U.S. 143, 149-51 (1972) (Douglas, J., dissenting, joined by Marshall, J.)

[This was a Fourth Amendment case, not a Second Amendment one. Douglas wrote:] My views have been stated in substance by Judge Friendly dissenting in the Court of Appeals. Connecticut allows its citizens to carry weapons, concealed or otherwise, at will, provided they have a permit. Connecticut law gives its police no authority to frisk a person for a permit. Yet the arrest was for illegal possession of a gun. The only basis for that arrest was the informer's tip on the narcotics. Can it be said that a man in possession of narcotics will not have a permit for his gun? Is that why the arrest for possession of a gun in the free-and-easy State of Connecticut becomes constitutional?

The police problem is an acute one not because of the Fourth Amendment, but because of the ease with which anyone can acquire a pistol. A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment, which reads, "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."

There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted. There is no reason why pistols may not be barred from anyone with a police record. There is no reason why a State may not require a purchaser of a pistol to pass a psychiatric test. There is no reason why all pistols should not be barred to everyone except the police.

The leading case is *United States v. Miller*, upholding a federal law making criminal the shipment in interstate commerce of a sawed-off shotgun. The law was upheld, there being no evidence that a sawed-off shotgun had "some reasonable relationship to the preservation or efficiency of a well regulated militia." The Second Amendment, it was held, "must be interpreted and applied" with the view of maintaining a "militia." "The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia -- civilians primarily, soldiers on occasion."

Critics say that proposals like this water down the Second Amendment. Our decisions belie that argument, for the Second Amendment, as noted, was designed to keep alive the militia. But if watering-down is the mood of the day, I would prefer to water down the Second rather than the Fourth Amendment. . . .

R. Lewis v. United States, 445 U.S. 55, 65 (1980)

[Lewis was convicted of being a felon in possession of a firearm, and challenged the conviction on various statutory grounds, on the ground that his prior felony conviction was uncounseled and therefore shouldn't be considered, and on constitutional grounds. The Court held:]

The firearm regulatory scheme at issue here is consonant with the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment if there is "some `rational basis' for the statutory distinctions made . . . or . . . they `have some relevance to the purpose for which the classification is made." [fn1]

Section 1202(a)(1) clearly meets that test. . . .

[fn1] These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See United States v. Miller, 307 U.S. 174, 178, 59 S.Ct. 816, 818, 83 L.Ed. 1206 (1939) (the Second Amendment guarantees no right to keep and bear a firearm that does not have "some reasonable relationship to the preservation or efficiency of a well regulated militia"); United States v. Three Winchester 30-30 Caliber Lever Action Carbines, 504 F.2d 1288, 1290, n. 5 (CA7 1974); United States v. Johnson, 497 F.2d 548 (CA4 1974); Cody v. United States, 460 F.2d 34 (CA8), cert. denied, 409 U.S. 1010, 93 S.Ct. 454, 34 L.Ed.2d 303 (1972) (the latter three cases holding, respectively, that § 1202(a)(1), § 922(g), and § 922(a)(6) do not violate the Second Amendment).

S. United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)

[The question here was whether the Fourth Amendment protected foreign citizens on foreign soil from unreasonable searches.]

For purposes of this case, therefore, if there were a constitutional violation, it occurred solely in Mexico. . . . The Fourth Amendment . . . text, by contrast with the Fifth and Sixth Amendments, extends its reach only to "the people."

Contrary to the suggestion of amici curiae that the Framers used this phrase "simply to avoid [an] awkward rhetorical redundancy," "the people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." See also U.S. Const., Amdt. 1 ("Congress shall make no law ... abridging ... the right of the people peaceably to assemble") (emphasis added); Art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States").

While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

T. Casey v. Planned Parenthood, 505 U.S. 833, 848 (1992) (dictum)

Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U.S. Const., Amdt. 9. As the second Justice Harlan recognized: "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This `liberty´ is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman,* [367 U.S. 497, 543 (1961)] (opinion dissenting from dismissal on jurisdictional grounds).

[The Harlan quote is also quoted by the plurality in Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977); by Justice Stevens's dissent in Albright v. Oliver, 510 U.S. 266, 306-07 (1994); and by Justice Stewart's concurrence in Roe v. Wade, 410 U.S. 113, 169 (1973).]

U. Concurrence in Printz v. United States, 117 S.Ct. 2365, 2385-86 (1997) (Thomas, J., concurring)

The Court today properly holds that the Brady Act [a federal gun control law] violates the Tenth Amendment in that it compels state law enforcement officers to "administer or enforce a federal regulatory program." . . .

The Second Amendment . . . appears to contain an express limitation on the government's authority. That Amendment provides: "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. [fn1] If, however, the Second Amendment is read to confer a personal right to "keep and bear arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections. [fn2] As the parties did not raise this argument, however, we need not consider it here. Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms "has justly been considered, as the palladium of the liberties of a republic."

[fn1] Our most recent treatment of the Second Amendment occurred in *United States v. Miller,* in which we reversed the District Court's invalidation of the National Firearms Act, enacted in 1934. In *Miller,* we determined that the Second Amendment did not guarantee a citizen's right to possess a sawed-off shotgun because that weapon had not been shown to be "ordinary military equipment" that could "contribute to the common defense." The Court did not, however, attempt to define, or otherwise construe, the substantive right protected by the Second Amendment.

[fn2] Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the "right to keep and bear arms" is, as the Amendment's text suggests, a personal right. [Citing various books and articles.] Other scholars, however, argue that the Second Amendment does not secure a personal right to keep or to bear arms. [Citing various other articles.] Although somewhat overlooked in our jurisprudence, the Amendment has certainly engendered considerable academic, as well as public, debate.

V. Dissent in Muscarello v. United States, 118 S.Ct. 1911, 1921 (1998) (Ginsburg, J., joined by Rehnquist, C.J., and Scalia and Souter, JJ.)

[The question in the case was whether the statutory phrase "carries a firearm" is limited to carrying on the person, or also includes carrying in a car which the person is accompanying. The dissent said the phrase was limited to carrying on the person.]

At issue here is not "carries" at large but "carries a firearm." . . . Surely a most familiar meaning is, as the Constitution's Second Amendment ("keep and *bear* Arms") (emphasis added) and Black's Law Dictionary, at 214, indicate: "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person."

VII. Relevant Statutes

A. Militia Act of 1792

Sec. 1. *Be it enacted* . . . That each and 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 (except as is herein after excepted) shall severally and respectively be enrolled in the militia . . . . That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder. . . .

Sec. 2. [Exempting the Vice President, federal judicial and executive officers, congressmen and congressional officers, custom-house officers and clerks, post-officers and postal stage drivers, ferrymen on post roads, export inspectors, pilots, merchant mariners, and people exempted under the laws of their states.] 23

B. The currently effective Militia Act

(a) The militia of the United States consists of all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.

(b) The classes of the militia are --

(1) the organized militia, which consists of the National Guard and the Naval Militia; and

(2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia. 24

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1. 1 Wm. & Mary sess. 2, ch. 2 (1689).

2. Ct. Const. art. I, § 17 (1818). Connecticut had no Constitution until 1818.

3. Ky. Const. art. XII, § 23 (1792).

4. Mass. Const. pt. 1, art. 17 (1780).

5. N.C. Const. Bill of Rights, § XVII (1776).

6. Penn. Const. Declaration of Rights, cl. XIII (1776).

7. Penn. Const. art. IX, § 21 (1790).

8. R.I. Const. art. I, § 22 (1842). Rhode Island had no Constitution until 1842.

9. Tenn. Const. art. XI, § 26 (1796).

10. Vt. Const. ch. I, art. 16 (1777).

11. Va. Const. art. I, § 13 (1776).

12. *See* The Complete Bill of Rights 181-83 (Neil H. Cogan ed. 1997).

13. *See generally* Eugene Volokh, *The Commonplace Second Amendment*, 73 NYU L. Rev. 793 (1998) (giving more such provisions, and discussing them in more detail).

14. R.I. Const. art. I, § 20 (1842).

15. Mass. Const. pt. I, art. XVI (1780); *see also* N.H. Const. pt. I, art. XXII (1784) ("The Liberty of the Press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved").

16. Mass. Const. pt. I, art. XXI (1780); *see also* N.H. Const. pt. I, art. XXX (1784) (same); Vt. Const. chap. I, art. XVI (1786) (same, but with "either house of" omitted).

17. N.H. Const. pt. I, art. XVII (1784).

18. You may want to remind the students that William Blackstone was the leading British legal commentator of the 1700s, and was widely read in the Colonies; he was writing about the more limited right found in the English Bill of Rights.

19. St. George Tucker's *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* (1803), contained the earliest prominent commentary on the U.S. Constitution. Tucker taught law at the University of William and Mary, and was a Virginia state judge. This material is from p. 143 of book 1 and p. 300 of the Appendix.

20. *See, e.g.*, Malcolm, *supra* note 29, at 122-34.

21. U.S. Supreme Court Justice Joseph Story was, of course, the leading constitutional commentator of the early 1800s.

22. Michigan Supreme Court Justice Thomas Cooley was probably the leading constitutional commentator of the late 1800s.

23. 2nd Cong. sess. I, ch. 33 (1792).

24. 10 U.S.C. § 311 (enacted 1956, amended 1958).