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The Right to Bear Arms in Texas: The Intent of the Framers of the Bills of Rights

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"The right to bear arms is essential to freedom. For it is the policy of governments to disarm the people, that they may have the opportunity to oppress them."

--Robert Emmett Bledsoe Baylor, 1845

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I. Introduction

As Texas ends the sesquicentennial celebration of its first bill of rights and as the nation observes the bicentennial of the federal Bill of Rights, "the right of the people to keep and bear arms" still guaranteed in each is perhaps the most controversial and least understood enumerated right. Indeed, bearing arms is probably the only "right" that is often treated as a criminal offense.

In its 1989 session, the Texas legislature rejected bills that would ban the mere possession of many conventional rifles and pistols, as well as a bill that would legalize carrying handguns by providing for a permit. [1] Bills to ban firearms recently have been introduced or enacted in other states, and the United States Congress is considering legislation to ban various rifles, pistols, and shotguns.

The public debate over the issue of firearms prohibition is incomplete without a thorough understanding of constitutional limitations. In the words of James P. Hart, "As the historic conditions that first inspired bills of rights recede further into the dim past, the danger increases that guarantees of personal liberties will not be fully appreciated No more serious responsibility rests upon the legal profession than the preservation of the bill of rights, which embodies the essence of free government." [2]

While the original language of article I, section 23 of the Texas Constitution provided for no legislative power to regulate the right, today's provision contains language almost identical to that enacted in 1836: "Every citizen shall have the right to keep and bear arms in the lawful defence of himself or the State; but the Legislature shall have power by law to regulate the wearing of arms, with a view to prevent crime." The federal second amendment provides somewhat different wording: "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 U.S. Supreme Court has never determined whether the fourteenth amendment incorporates the second amendment so as to limit the state or local prohibition of rifles, pistols, or shotguns. [3] In recent times, the Supreme Court has retreated from earlier stances which favored civil liberties over police action, while many state courts have protected such liberties by the rediscovery of and increased reliance on the state bills of rights. [4] Notwithstanding this recent trend, a Texas legal scholar prophetically stated thirty years ago:

It has become almost a fixed attitude of mind to look only to the United States Constitution and ultimately to the Supreme Court of the United States, for protection against unreasonable state statutes affecting the citizens of that state. For those who would halt, or at least slow down, the expansion of federal power and who would revitalize state governments, the careful drafting of a state bill of rights to include all liberties which should be guaranteed against state action (even if they may also be protected by the fourteenth amendment) offers a major challenge. If the states cannot protect their citizens' fundamental liberties, or are careless about such protection, then obviously the basic, fundamental vitality of state governments is immeasurably weakened. [5]

The arms guarantee was expressed in different versions of the Texas Constitutions of 1836, 1845, 1869, and 1876. The constitutions of these dates coincide with milestones in Texas legal

and political history: the founding of the republic, statehood, Reconstruction, and the return to majority rule. The fate of the right to bear arms in that forty year period reflects the kind of epic that has made Texas famous.

Tracing the constitutional development of the right to bear arms in the period 1836-1876 serves a useful purpose aside from constructing another colorful sesquicentennial tale to amuse Texans and other Americans alike. A fundamental method of constitutional interpretation is to rely on the intent of the framers and the common understanding of the people. [6] The arms guarantee in the current Texas Bill of Rights was adopted in 1876 and has remained unchanged to this day. Further, the intent of those who adopted the 1876 Constitution must be determined in the context of events which began when Santa Anna tried to disarm the Texans in 1835, sparking the Revolution.

Despite its stereotype of being a state where cowboys promiscuously tote six-shooters, Texas is one of the few states that absolutely prohibits the bearing of pistols by private individuals. [7] The only off-premises exception is for travelers, who may bear arms for self-defense, as the constitution allows, either openly or concealed. [8] The only other exception is for hunters and other sportsmen, who bear arms for recreation and not for self-protection. [9]

By contrast, most states either allow arms to be carried openly in public and/or require permits to carry concealed arms. The Southern and Western states generally allow arms to be borne openly but require permits for carrying concealed arms off one's premises. [10] The Northern states generally require permits or licenses to bear arms either openly or concealed. [11] Vermont is unique in allowing weapons to be carried hidden from view without a permit. [12] Unlike Texas, even the reputedly most restrictive jurisdictions such as Massachusetts, New York City, and Washington, D.C. provide for the issuance of permits to carry a firearm for self-protection. [13]

The Texas courts have in several opinions sought to reconcile the general statutory prohibition of bearing arms for self-defense with the constitutional right to bear arms for defense of self and state. These courts, as well as the United States Supreme Court, have commented on the status of statutory prohibitions under the second amendment to the Federal Constitution. While this article concentrates on the meaning of the right to bear arms under the pertinent state constitutions adopted between 1836 and 1876, the central involvement of Texas in second and fourteenth amendment jurisprudence warrants analysis of the state prohibition on bearing arms under the Federal Constitution.

II. Every Citizen Shall Have the Right: From the Revolution to Secession

A. "It Has Demanded Us to Deliver Up Our Arms": Texians Revolt Against Santa Anna's Dictatorship

In 1827, Noah Smithwick left Kentucky for Texas "with all [his] . . . worldly possessions, consisting of a few dollars in money, a change of clothes, and a gun, of course . . ." [14] At one point in some Texas wilderness he lost his property and found himself "weak, unarmed, not even

a pocket knife." [15] Meeting a wild animal, he "felt around for a good sized club. . . . Thus armed, I started on." [16]

Firearms, knives, and blunt implements have evolved technologically, but remain the primary types of arms possessed for self-protection. Austin's colony was occasionally raided by Indians, but an early visitor noted that "traveling with arms is thought safe." [17] "We had left our guns at San Felipe, . . . but we had our pistols with us, and our new companion went better armed with his rifle." [18] Besides protection, rifles and pistols were used for hunting and in shooting matches. [19]

The right to keep and bear arms was both a republican principle, brought by the Anglos from the United States, and a practical necessity for the early settlers. The independence of Texas became inevitable when Mexican authorities attempted to deprive the settlers of this right.

In 1835, the government of Santa Anna sought to make its rule absolute through the spread of military garrisons, declarations of martial law, and attempts to disarm the inhabitants of the Mexican states. Santa Anna's puppet congress passed a law providing for the replacement of the local militias by his standing army. Stephen F. Austin explained: "This 'reform' reduced the militia of the States to *one militia-man* for every five hundred inhabitants, and disarmed all the rest. The people of Zacatecas resisted this iniquitous law, but were unfortunate, and compelled, for the time being, to submit to the military power of the reformers." [20]

After smashing republicanism in Zacatecas, Santa Anna turned his attention to Texas. At a time when Texans were hoping that freedom would not be destroyed in Mexico, Samuel Houston (after becoming Commander-in-Chief of the Army of Texas) wrote:

[T]he Dictator required the surrender of the arms of the civic militia, that he might be enabled to establish, on the ruins of the Constitution, a system of policy which would forever enslave the people of Mexico. Zacatecas, unwilling to yield her sovereign rights to the demand, which struck at the root of all liberty, refused to disarm her citizens of their private arms. Ill-fated State! her power, as well as her wealth, aroused the ambition of Santa Anna, and excited his cupidity. Her citizens became the first victims of his cruelty, while her wealth was sacrificed in payment for the butchery of her citizens. The success of the usurper determined him in exacting from the people of Texas submission to the Central form of Government; and, to enforce his plan of despotism, he despatched a military force to invade the Colonies, and exact the arms of the inhabitants. The citizens refused the demand, and the invading force was increased. The question then was, shall we resist oppression and live free, or violate our oaths, and wear a despot's stripes? [21]

Specifically, in September 1835 Santa Anna sent his brother-in-law, General Martin Perfecto de Cós, to Texas to confiscate the inhabitants' arms and to arrest Santa Anna's political opponents. Referring to the causes of the Texian Revolution, Rev. C. Newell observed:

The next and last of the leading causes alluded to, was an order received from Gen. Cós in the course of the month of September, requiring the citizens of

Brazoria, Columbia, Velasco, and other places, to deliver up their arms to the Mexican authorities: thus attempting to carry out in Texas the plan adopted by Santa Anna, and put in execution in many parts of Mexico, of disarming those whom he suspected of being disaffected to his Government. This . . . showed the people of Texas what sort of government they were to expect--that of the bayonet, and the entire sway of military. [22]

The Texians responded by preparing for armed resistance. One Mexican captain proclaimed to the citizens of Anahuac: "The General Congress have passed a law ordering every state to disband their militia and I here find that in defiance of the Government you are organizing and arming yourselves and have forcibly seized upon the arms of the Mexican nation." [23] The *Brazoria Texas Republican* urged its readers to make contributions for the purchase of arms. [24] Stephen Austin called for "a great immigration from Kentucky, Tennessee, etc., each man with his rifle" [25]

The "Lexington" of the Texas Revolution was sparked at Gonzales, where the Mexicans tried to seize a small cannon the settlers used to scare away Indians. [26] "That one old bushed cannon was our only artillery, and our only arms were Bowie knives and long single-barreled, muzzle-loading flintlock rifles, the same that our forefathers won their independence with," recalled Smithwick. [27] A "few of us had pistols." [28] The Texians raised a flag which stated "Come and Take It," some shots were fired, and the Mexicans retreated. [29]

Elated by this victory, Texians were urged to collect at Gonzalez "armed and equipped for war even to the knife." [30] Meanwhile the *Austin Telegraph* warned that near the mouth of the Brazos Mexican troops were landing, "under the command of general Cós with the declared intention of 'disarming the people,' erecting a military government, and confiscating the property of the rebellious" [31] The newspapers began comparing Santa Anna to George III, and reprinted such documents as the Declaration of Causes of Taking up Arms of July 6, 1775, including the complaint that General Gage agreed to allow the people of besieged Boston to leave town only after they deposited their arms with their magistrates.

They accordingly delivered up their arms; but in open violation of honour, in defiance of the obligation of treaties, which even savage nations esteemed sacred, the Governour ordered the arms deposited as aforesaid, that they might be preserved for their owners, to be seized by a body of soldiers; detained the greatest part of the inhabitants in the town, and compelled the few who were permitted to retire, to leave their most valuable effects behind. [32]

Like the Americans in 1775 who demanded their English common-law rights, the Texians of 1835 demanded their rights under the liberal Mexican Constitution of 1824. These rights could be protected only by an armed populace. Sam Houston, commander of the Texan citizens army, urged the North Americans: "Let each man come with a good rifle and one hundred rounds of ammunition--and . . . come soon. Our war cry is 'LIBERTY OR DEATH!!'" [33]

Many hoped that resistance by other Mexican states would overthrow Santa Anna. The *Telegraph* reported:

The state of Puebla, with the governor at its head, has refused to publish the law of centralism [decreed on Oct. 3, 1835]; and by last accounts, it appears that the citizens were arming *en masse* to defend their liberties and rights.

The state of Morelia . . . has protested, in the strongest terms, against a change of system, were arming their "milicia civica," and had a respectable body of liberal troops in the southern part of the state, prepared for the field. [34]

While Santa Anna snuffed out these Mexican rebellions, the Texian volunteers captured General Cós and his army at San Antonio de Bexar on December 10, 1835. Despite lenient treatment and parole of the captives, including Cós, the Mexican military's response was that "all foreigners . . . who enter [Mexico] armed and for the purpose of attacking our territory shall be treated and punished as pirates. . . . Foreigners who introduce arms and ammunition" into Texas would also be executed. [35] Soon Santa Anna included legal settlers "in the sweeping decree of 'death to every man taken in arms.'" [36]

Like their ancestors of 1776, the Texians realized in 1836 that only independence would suffice. A convention met beginning March 1 at Washington-on-the-Brazos. Its delegates included former members of the United States Congress and framers of southern state constitutions. [37]

George C. Childress, a lawyer and former editor of the *Nashville Banner* who in the United States had raised funds and volunteers for the Texas army, was appointed chairman of a committee of five to draft a Declaration of Independence. [38] On March 2 Childress drafted and reported the Declaration, which the convention adopted the same day. [39] The Declaration charged of Santa Anna's government: "It has demanded us to deliver up our arms, which are essential to our defence--the rightful property of freemen--and formidable only to tyrannical government." [40]

On March 9, delegate Palmer, chairman of the committee to draft a constitution, reported a Declaration of Rights which the convention adopted the same day. [41] Article 14 declared: "Every citizen shall have the right to bear arms in defence of himself and the republic." [42] The same convention had already required able-bodied males to provide their own arms for militia service. [43]

Unknown to the convention, the Alamo fell just before the Declaration of Rights was adopted. Jim Bowie with his famous knife, Davy Crockett with his long rifle "Old Betsy," William Travis with sword and pistols, and 180 other armed patriots withstood two weeks of seige by Santa Anna's forces only to be overrun and killed on March 6.

Rifles and shotguns with short barrels, large and small pistols, swords and knives, tomahawks, and similar arms used by the Texans at the Alamo [44] and declared as constitutionally protected arms in 1836 are currently illegal to bear in Texas. With the exception of long barrelled rifles and shotguns, it is today a crime to bear or, in some cases, even to keep these arms. [45] At some point in Texas' weapons-control history, "Remember Santa Anna" replaced "Remember the Alamo!" [46]

The type of knife named after James Bowie, a founding father of Texas who died at the Alamo, is today an "illegal knife." [47] Yet the Bowie knife was generally used as the main eating implement, to cut limbs from trees, and to skin and butcher game. [48] An early settler in Texas, Bowie led the Texas volunteers at the Battles of Concepcion, the Grass Fight, San Antonio, and the Alamo. [49] In their final victory at San Jacinto, the Texans "used rifles and rifle butts, pistols and finally their Bowie knives." [50]

The self-armed civilians who defeated Mexico's professional standing army used all kinds of weapons. Kentucky rifles, muskets, carbines, short barreled shoulder firearms, large holster pistols, pocket pistols, shotgun fowling pieces, the blunderbuss, tomahawks, swords, and butcher knives were the commonly possessed arms which won Texan independence. [51] Like the United States sixty years before, the Republic of Texas was created by an armed citizenry unwilling to permit government to trammel their fundamental rights.

B. The Constitutional Convention of 1845

Just as Santa Anna's troops were storming the Alamo, Samuel Colt was granted a patent for his revolving pistol. [52] Before long, the Colt revolver became known as "the Texas Arm" as it was widely used first in Texas. [53] Colts became standard arms in wars with the Indians and Mexicans. [54] Captain Samuel Walker of the Texas Rangers worked with Samuel Colt in improving the revolver's design. [55] According to an account of the Rangers written in the 1840s, "each man was armed with a rifle, a pistol, and a knife." [56]

Texas civilians probably acquired more Colt revolvers than the private citizens of any other antebellum state. The large Dragoon Colt, equipped with an attachable shoulder stock, was a popular revolver which converted into a short barrel rifle. [57] The Walker-Colt model "was used successfully for frontier defense against Indians and outlaws. . . . Standard side-arm for the Rangers, the six-shooter was also useful to mounted cattlemen The revolver is credited, along with the windmill and the barbed wire fence, as being a prime factor in the opening of the plains area to settlement." [58]

In 1845, a convention assembled at Austin to frame a new constitution in anticipation of the admission of the Republic of Texas into the United States. The convention considered several bill of rights proposals recognizing the right to keep and bear arms, and ended by adopting the strongest version proposed for this right.

Judge William B. Ochiltree [59] began the debate by proposing "that the free citizens of this state shall have a right to keep and bear arms for their common defense, provided that the Legislature shall have the right to pass laws prohibiting the carrying of deadly weapons secretly." [60] The following discussion ensued:

Mr. Evans objected that this would give the right to carry bowie knives.

Mr. Hogg inquired whether it would secure the right of taking deadly weapons about the person?

Mr. Ochiltree said: He was as much opposed to that as any body. How shall it be remedied? The legislature has the right to say, they shall not be carried secretly.

But certainly he was not to be prevented from carrying them if he thought it necessary. If this is not inserted, there is no telling how far the legislature, in their extreme philanthropy may go. They may go the extent of saying, that a man shall not wear them under any circumstances. He might be compelled to allow himself to be assassinated, or his property to be invaded, by being denied the use of necessary weapons. We might be placed in the condition of the people of Ireland, and a large portion of England, who are denied the right of having firearms about their houses. One of the first principles of freedom, is the right to bear arms. It is true, it may have been prostituted to the worst of purposes; but it is too great a right to deny on that account. Such cases always attend the settlement of new countries; and public opinion will reform the abuse after a while. Under a similar provision, precisely, the legislature of Alabama has proscribed the carrying of weapons secretly, and the supreme tribunals have decided that it is not an infraction of the Constitution." [61]

The case referred to was *State v. Reid*, [62] in which the Alabama Supreme Court found a prohibition on carrying concealed weapons compatible with the right to bear arms. That court added: "A statute which, under the pretence of regulating, amounts to a destruction of the right, or requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional." [63]

Mention of the Alabama precedent by Judge Ochiltree, who had studied law in that state, prompted the following response:

Mr. Baylor fully agreed with the gentleman, that the right to bear arms is essential to freedom. For it is the policy of governments to disarm the people, that they may have the opportunity to oppress them. This great right ought to be guaranteed; but it is subject to great abuse. The gentleman has correctly stated the decision of the Supreme Court of Alabama. But there is a conflict upon this subject. The Supreme Court of Kentucky decided, in a similar case, that the legislature could not pass any law upon the subject. For if it had the right to proscribe one mode of wearing arms, it had the right to proscribe another, and thus it might finally defeat the great end and object. [64]

In *Bliss v. Commonwealth*, [65] Kentucky's highest court declared a prohibition on carrying a concealed sword cane or other weapon to be violative of the right to bear arms for defense of self and state.

The right existed at the adoption of the constitution; it had then no limits short of the moral power of the citizens to exercise it, and in fact consisted in nothing else but in the liberty of the citizens to bear arms. Diminish that liberty, therefore, and you necessarily restrain the right; and such is the diminution, and restraint, which the act in question most indisputably imports, by prohibiting the citizens wearing weapons in a manner which was lawful to wear when the constitution was adopted. [66]

As delegate Robert E.B. Baylor pointed out in the Texas convention, the Kentucky court reasoned that if concealed arms could be banned, so could openly carried weapons, a result inconsistent with the right to bear arms. [67] Baylor had been admitted to the Kentucky bar, and served in the Kentucky and Alabama legislatures and the U.S. Congress before coming to Texas, where he became a Justice of the Texas Supreme Court and was one of the founders of Baylor University. [68]

After Baylor's remarks, John Hemphill stated: The object of inserting a declaration that the people shall have a right to bear arms is, that they may be well armed for the public defence; it is in order that the law regulating the militia should be kept up. It is not a supposition which can arise in a country where the common law prevails, that it is necessary to bear arms for protection against a citizen. [69]

Hemphill then offered a substitute for Ochiltree's amendment worded after the federal 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." [70]

The Hemphill substitute, which the convention then adopted, was understood to guarantee an individual right to bear arms in order to support militia readiness. War with Mexico was known to be imminent due to the expected annexation of Texas by the United States. Mr. Mayfield, a supporter of the Hemphill substitute, [71] had stated just before debate on the arms guarantee began: "We may individually and collectively be called upon, perhaps in a short time, to burnish our arms, and march to the defence of our country from an invading foe." [72]

The Convention was cognizant that, consistent with the ruling of Kentucky's highest court explained by Mr. Baylor, the language of the federal second amendment proposed by Hemphill contained no authorization for the legislature to prohibit individuals from carrying weapons concealed. Accordingly, Joseph L. Hogg moved for, and the convention adopted, the following amendment: "Provided, that the Legislature may pass laws to suppress the practice of bearing arms concealed, in the private walks of life." [73]

In what must have been further intense debate which went unrecorded, the convention took a sharp turn in favor of the right to bear arms for individual self-protection and against a legislative power to prohibit the bearing of concealed arms. Mr. Armstrong offered a substitute for the Hemphill-Hogg language which had passed:

"Every citizen shall have a right to bear arms in the lawful defence of himself and the state." Adopted.

Mr. Hemphill moved to amend the additional section, by inserting before the word "bear," "keep and." Adopted.

Mr. Everts offered the following amendment:

"Provided the Legislature shall have power to prevent the carrying of concealed weapons, under such restrictions as may be prescribed." Rejected. [74]