Two linked pillars of the North American Model

Equity in Access to Hunting and the Right to Bear Arms

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A powerful pen will come out in the next few months when the United States Supreme Court is expected to rule on two Second Amendment cases before it. The cases are challenging the court to rule on our constitutional rights as individuals to bear arms. Our Second Amendment rights are steeped in history, dating back to our forefathers in England. To understand what our Supreme Court justices might consider in their decision, a little history lesson is in order.

History teaches that firearm ownership and access to hunting land are separate concepts, but solidly intertwined. The right to own firearms and access to hunting land went hand in hand throughout most of English history and that of the early United States. After the American Revolution, however, these two concepts separated in this country. Both evolved in the United States, and the pivotal case today in front of the U.S. Supreme Court will likely define the ability of the state you live in to define the terms of your freedom to own a firearm and thus, potentially hunt.

Equitable access to hunting land for personal use is a mainstay for one of the world's longest standing and most effective approaches to wildlife conservation. This approach, through policies, laws, and institutions is recognized today as the North American Model of Wildlife Conservation.

What happened in England with firearm ownership and hunting created the framework of our federal constitution and the Bill of Rights, including the long-debated Second Amendment. English law of hunting began with a royal prerogative. All lands were held by grant from King Charles I, and the King had the right to hunt anywhere he wanted. It was his "Royal Prerogative." He also set aside all of the Royal Forests for his exclusive use.

Sir William Blackstone was the greatest English legal commentator of the 18th Century. In his famous Commentaries on the Law of England, he attributed the English game laws to a desire by the feudal rulers (kings and nobility after the Norman Conquest) of England to keep the average person disarmed. Restricting hunting by the average person would naturally cause that person to be less likely skilled with a weapon. The policy in the original English game acts was to restrict hunting to the king and higher nobility. Later game acts restricted hunting to major landowners.

The most dramatic change in the English game acts came after the English Civil War of the 1650s, fought between King Charles I and Parliament. Parliamentary armies won, Charles I was beheaded, and his sons driven into exile. His supporters, who were largely from the landowning gentry, were stripped of power. In English history the gentry were the smaller landowners who usually had no title higher than knight or baron.

Eventually, however, the English recalled Charles I's son, Charles II, to return as king. The gentry returned to power, and part of their revenge took the form of the Game Act of 1671, which prohibited the people from keeping firearms.

The 328-year-old statute declared that any person who is not wealthy enough to hunt is forbidden to own not only things that could be used in poaching, but also anything to defend yourself such as guns and bows.

The law had many oppressive provisions. First, in order to own a firearm, you had to own land worth 100 pounds sterling per year. This was an enormous amount of land, fifty times the land required for the voting franchise. It is estimated that well under five percent of Englishmen were qualified to hunt. Second, it added guns to the list of things that a non-hunter could not own. Third, it empowered any authorized hunter to search the homes of anyone not qualified to hunt, and confiscate their guns. Finally, a qualified hunter could hunt on another person's private property, just as the King had been able to do. It was truly a case of the richer gentry striking back for the wrongs cast on them from the English Civil War.

ROYAL PREROGATIVE Portrait of Charles I Hunting, oil painting by Sir Anthony Van Dyck, 1635; in the Louvre, Paris.

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."

After Charles II's death, his brother James II came to power. James II was unpopular and widely suspected of wanting to create a tyranny.

James II vigorously used the Game Act to disarm Englishmen. The English Calendar of State Papers reveals the types of reports he was getting of supposed plots to overthrow his government with this letter from the Earl of Sunderland to the Earl of Burlington: "The King, having received information that a great many persons not qualified by law under pretence of shooting matches keep muskets or other guns in their houses, it is his pleasure that you should send orders to your deputy lieutenants to cause strict search to be made for such muskets or guns and to seize and safely keep them till further order."

As he became more unpopular and insecure, he ordered his lord's lieutenant, who ran the militia system for him, to engage in mass searches for guns and to confiscate any guns whose owner was not qualified under the Game Act to possess the weapon.

In 1688, James II was overthrown in a bloodless uprising known as the Glorious Revolution. Parliament composed a Declaration of Rights, which the new rulers were required to uphold.

The Declaration of Rights protected several important rights. One of those was the right of Protestant subjects to have arms for their defense. Catholics were a small, suspect and persecuted minority at that time. In practice, however, Parliament rarely disarmed Catholics of all their defense arms.

Parliament quickly amended the Game Act to remove its prohibition on guns. Tight restriction of hunting on wealthy landowners remained the rule, however. Blackstone attributed the hunting restrictions to a desire to disarm and weaken the average Briton.

In America, colonists and their governments faced an entirely different situation. Here, colonists and frontiersmen faced multiple threats. English, French, Spanish and Dutch colonies attacked each other. Indians raided all of them, and dangerous wildlife abounded.

Early colonies sought to encourage gun ownership by providing liberal hunting rights. This early Virginia law allowed hunting of everything except wild hogs—and even there it provided that the bounty for killing a wolf would be a license to kill a wild hog!

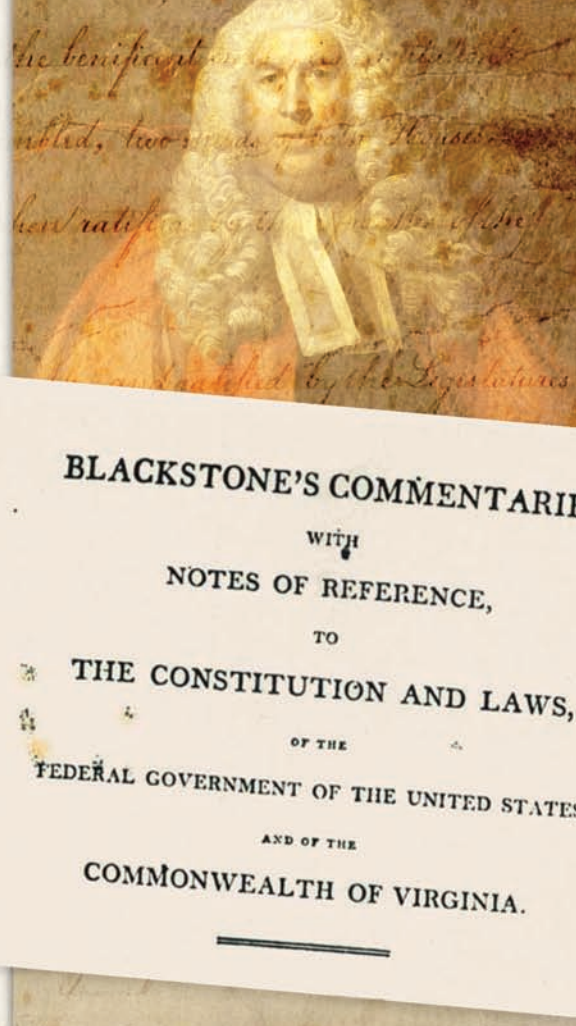
In the colonies, hunting and gun ownership were seen as universal rights, not a matter of royal prerogative or special privilege. All these tendencies were amplified by the American Revolution (1775-1783) in which the citizen soldier using his own gun successfully fought the best army on earth.

The American people eventually settled on a new federal constitution. Many powerful people of the time criticized the constitution because it gave new powers to an untested government and had no Bill of Rights to protect the people.

In 1789 the first Congress proposed what became our Bill of Rights. Several states were demanding a Bill of Rights as a condition of ratifying the original constitution. The Bill of Rights contained the Second Amendment which guaranteed a right to keep and bear arms.

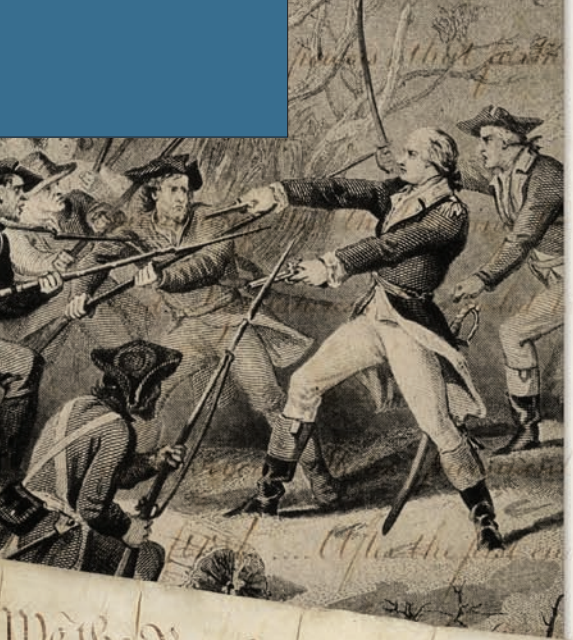
Pennsylvania also called for a right to hunt and fish in the Bill of Rights. Interestingly, around this same time frame in 1777, the state of Vermont, whose constitution anticipated the U.S. Bill of Rights by a dozen years, included in its state constitution a constitutional right to hunt. The text reads... Vermont Constitution: Vermont. Constitutional right. Chapter II, § 67 to the Vermont Constitution (1777). Hunting, fowling and fishing. The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not enclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly.

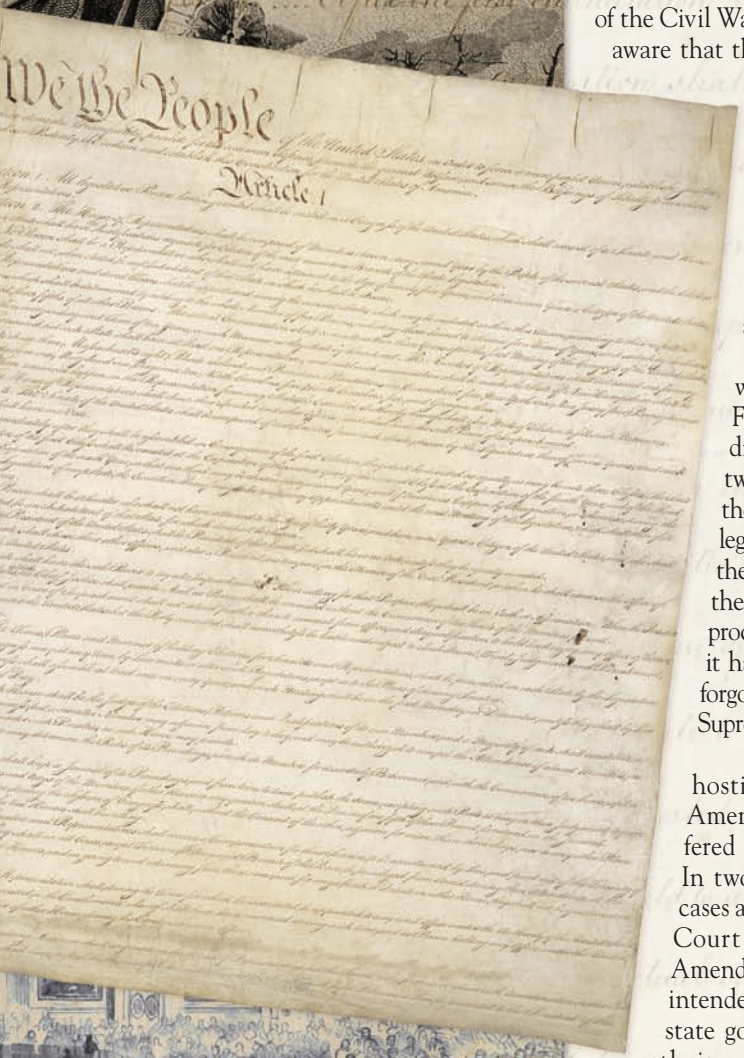
Today 13 states (Alabama, California, Georgia, Louisiana, Minnesota, Montana, North Dakota, Rhode Island, Vermont, Virginia, West Virginia, Oklahoma and Wisconsin) have constitutional provisions addressing an individual "right" to hunt, fish and/or trap. California and Rhode Island have a "right to fish" only, with California's right to fish passed in 1910. Three other states, Arkansas, Tennessee, and South Carolina have the constitutional right to hunt provision on their 2010 ballots. A state that has a constitutional right to hunt in its state constitution discourages local units of government from passing ordinances that prohibit hunting in their communities, makes it harder for anti-hunting groups to challenge hunting and is an affirmative statement that



Game Act of 1671

...are hereby declared to persons by the laws of this realm not allowed to have or keep for themselves, any guns, bows, greyhounds, setting-dogs, ferrets, nets, snares, or other engines aforesaid, but shall be and are hereby prohibited to have, keep, or use the same.





our hunting heritage is important enough to be safeguarded in the state constitution.

But there were limits to the federal Bill of Rights. Early on, the Supreme Court ruled that it only applied to the federal government and not to the states—meaning the states were free to do whatever was not forbidden by their own constitutions. For example, some states kept their state-owned churches after the federal Bill of Rights was ratified, even though the First Amendment provided that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

This all began to change in the wake of the Civil War. In 1866, Congress became aware that the former confederate states had passed laws, such as the Kentucky statute, forbidding black Americans to own guns. Some of those being disarmed were Union veterans who brought home their muskets. The punishment was often 39 lashes with a whip.

Congress responded with what would become the Fourteenth Amendment. It was directed at the states and had two major provisions. It forbad the states to infringe the "privileges or immunities" of citizens of the United States and also forbad them to deprive anyone of "due process of law." Congress thought it had the problem solved but it forgot it had to reckon with a U.S. Supreme Court.

The Supreme Court was hostile to the new Fourteenth Amendment and thought it interfered too much with state power. In two cases, the Slaughterhouse cases and Cruikshank, the Supreme Court rejected the Fourteenth Amendment holding that it was not intended to limit the powers of the state governments with respect to their own citizens and that the Second Amendment "has no other effect than to restrict the powers of the national government".

But how was the Supreme Court going to get around the command in the language of the 14th Amendment that states shall not infringe the privilege or immunities of U.S. citizens? The "privilege or immunities" language appears in two places in the U.S. Constitution (Article IV and in the Fourteenth Amendment). The purpose of these clauses is to place the citizens of each state upon the same footing with citizens of other states so far as the advantages resulting from citizenship in those states is concerned.

The Supreme Court played a word game with the amendment. It eventually wound up ruling that even if a state agent had disarmed people, broken up their assembly and killed them, the agent did not deprive anyone of their "privileges or immunities." The Supreme Court said the privileges or immunities of citizens could only be those rights that were in existence when the United States was formed. For example, the right to free assembly, to bear arms and the right to life itself were natural rights that existed before the United States did so were not protected under the privilege or immunities clause of the Fourteenth amendment. This view prevailed until the 20th century when the courts started to focus on the other part of the Fourteenth Amendment—the "due process" clause.

In the 20th century, the Supreme Court ruled that depriving a person of certain rights guaranteed by the federal Bill of Rights would deprive them of due process of law, thus the due process clause made at least certain rights binding on the states. The problem was the court ruled on one right at a time, and so far the U.S. Supreme Court has not gotten to the Second Amendment.

The stage for whether or not the Second Amendment prohibits the states from prohibiting firearm ownership was set by D. C. v Heller, decided by the U.S. Supreme Court on June 26, 2008. Heller was a Washington, D.C., security guard who could carry his handgun while on the job protecting others, but could not keep one in his home to protect his family. He applied to register a handgun, but the District refused. He filed suit, on Second Amendment grounds, seeking to enjoin D.C. from enforcing the ban on handgun registration and keeping a handgun in your home. The Heller case established that the Second Amendment was an individual right and D.C. had to accept the registration of the firearm and couldn't prohibit Heller from having a handgun in his home. Since the District of Columbia is a federal entity, the court did not have to address the issue of whether the Second Amendment applies to the state.

The popular view by legal analysts going into the argument in the Heller case was that there were four justices on each side of the argument of whether the Second Amendment was an individual right. Then there was Justice Kennedy whose feelings were unknown. Whoever got Justice Kennedy's vote would win.

Not two minutes into the D.C. attorney's argument, Justice Kennedy tipped his hand as to how he might vote. Read the

historic moment, a discussion between D.C.'s attorney and Justice Kennedy during the U.S. Supreme Court arguments on the Heller case:

Walter Dellinger, for the District of Columbia: "…the second clause, the phrase 'keep and bear arms,' when 'bear arms' is referred to, is referred to in a military context, that is so that even if you left aside—"

Justice Kennedy: "It had nothing to do with the concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that?"

The Heller majority ruled by a 5-4 vote that the ban on handgun possession in the home and the ban on having any firearm assembled in the open violated the Second Amendment. Justice Kennedy voted with the four justices that believed the Second Amendment protected an individual's right to possess a firearm. Which in turn brings us to the court cases now pending in the U.S. Supreme Court.

In National Rifle Association v. City of Chicago, 567 F.3d 856 (7th Cir. 2009) and McDonald v. Chicago, 2009 WL 1631802 (2009), the Supreme Court will decide whether the Second Amendment—like most other Bill of Rights guarantees—applies to the states through the Fourteenth Amendment. This issue will be resolved in the context of whether Chicago may continue to ban handguns. In Chicago, unless your gun was purchased before the ban went into effect in 1982, it is illegal to possess a handgun within city limits. Only a few, such as police officers and aldermen, are exempt from the ban. While long guns can be registered, handguns cannot be registered and are considered illegal. In the Chicago case, the Supreme Court is asked to overturn the early Cruikshank and Slaughterhouse rulings from the 1870s that destroyed the "privileges or immunities" clause. As backup, the cases argue that the Second Amendment is protected by the due process clause, which protects an individual's rights over that of government.

Argument in the cases is scheduled for March 2, 2010, and the court could rule anytime this term, which extends into June, 2010. This is a critically important case for our right to keep and bear arms as the court will determine whether the Second Amendment applies to all Americans, not just the residents of Washington, D.C.

Thankfully, equal rights to hunt in this country have been less controversial than gun control.

The North American Model has two principles that stem from the right to arms and equitable access to hunting concepts. They are numbers 3 and 4:

No. 3: The allocation of wildlife is by law, not power, wealth or position. In Canada and the United States, every man and woman has a fair and equitable opportunity under the law to participate in hunting and fishing. No one group, hunters or non-hunters, can legally exclude others from access to game within the limitations of private property rights.

No. 4: Under the law, every man and woman has an equal opportunity to hunt and fish. This principle protects against the rise of elites who would appropriate wildlife to themselves (as occurred in Europe). All citizens can participate in court if necessary in developing systems of wildlife conservation and use.

So, what would the Second Amendment do for wildlife conservation in the United States if hunters were only those who owned land and those they let on that land? The Second Amendment guarantees the right to own firearms for lawful purposes including defense and hunting. The Second Amendment prohibits modern day feudal rulers (whoever is in power in the White House) from disarming the average person.

Firearm ownership and equal access to hunting are separate concepts but solidly intertwined. History, as early as Blackstone Commentaries, teaches that hunting restrictions disarm and weaken the average person. The U. S. Supreme Court will help decide the fate of our hunting heritage in the Chicago handgun ban cases this summer. If the Supreme Court rules that owning firearms is not protected by the U. S. Constitution, then the states and local units of government will be the decision makers on whether we can own firearms to hunt or even to defend ourselves. ■

Fourteenth Amendment

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The North American Model of Wildlife Conservation

The Seven Principles:

1. Wildlife is a public trust resource.
2. Market and commercial hunting is banned.
3. Allocation of wildlife is by law, not power, wealth or position.
4. Under the law, every man and woman has an equal opportunity to hunt and fish.
5. Wildlife could be killed for food, fur, self-defense or property protection.
6. Wildlife is an international resource and should be managed as such.
7. Scientific management is the cornerstone to maintain viable populations.