

RIGHT TO BEAR ARMS IN STATE CONSTITUTIONS

Alabama:

That every citizen has a right to bear arms in defense of himself and the state.

Ala. Constitution Article I, Section 26.

Alaska:

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.

Alaska Constitution Article I, Section 19

Arizona:

The right of the individual citizen to bear arms in defense of himself or the state shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.

Arizona Constitution Article 2, Section 26.

Arkansas:

The citizens of this State shall have the right to keep and bear arms for their common defense.

Ark. Constitution Article II, Section 5

Colorado:

The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.

Colo. Constitution Article II, Section 13

Connecticut:

Every citizen has a right to bear arms in defense of himself and the state.

Conn. Constitution Article I. Section 15

Delaware:

A person has the right to keep and bear arms for the defense of self, family, home, and State, and for hunting and recreational use.

Delaware Constitution Article I, Section 20.

Florida:

The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.

Fla. Constitution Article I, Section 8.

Georgia:

The right of the people to keep and bear arms, shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne.

Georgia Constitution Article I, Section 1.

Hawaii:

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.

Hawaii Constitution Article I, Section 15.

Idaho:

The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony.

Idaho Constitution Article I, Section 11

Illinois:

Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.

Ill. Constitution Article I, Section 22

Indiana:

The people shall have a right to bear arms, for the defense

of themselves and the State.
Ind. Constitution Article I, Section 32

Kansas:

The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power.
Kan. Constitution, Bill of Rights, 4.

Kentucky:

All men are, by nature, free and equal, and have certain inherent inalienable rights, among which may be reckoned: ... The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.
Ky. Constitution 1.

Louisiana:

The right of each citizen to keep and bear arms shall not be abridged but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person.
La. Constitution Article I, Section 4.

Maine:

Every citizen has the right to keep and bear arms for the common defense; and this right shall never be questioned.
Me. Constitution Article 1, Section 16

Massachusetts:

The people have a right to keep and bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.
Mass. Constitution pt. 1, Article 17.

Michigan:

Every person has a right to keep and bear arms for the defense of himself and the state.
Mich. Constitution Article I, Section 6.

Mississippi:

The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power where thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons.

Miss. Constitution Article III, Section 12.

Missouri:

That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons.

Mo. Constitution Article I, Section 23.

Montana:

The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing contained shall be held to permit the carrying of concealed weapons.

Mont. Constitution Article II, Section 12

Nevada:

Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes.

Nevada Constitution Article 1, Section II, par. 1.

New Hampshire:

All persons have the right to keep and bear arms in defense of themselves, their families, their property, and the state.

New Hampshire Constitution Part First, Article 2-a.

New Mexico:

No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons.

N.M. Constitution Article II, Section 6.

North Carolina:

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; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.

N.C. Constitution Article I, Section 30.

North Dakota:

All individuals are by nature equally free and independent and have certain inalienable rights, among which are ... to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

North Dakota Constitution Art. I, Section 1

Ohio

The people have the right to bear arms for their defense and security; but standing armies, in time of peace are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.

Ohio Constitution Article I, Section 4.

Oklahoma:

The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons.

Okla. Constitution Article II, Section 26.

Oregon:

The people shall have the right to bear arms for the defense

of themselves, and the State, but the Military shall be kept in strict subordination to the civil power.
Oregon Constitution Article I, Section 27.

Pennsylvania:

The right of the citizens to bear arms in defence of themselves and the State shall not be questioned.
Pa. Constitution Article I, Section 21.

Rhode Island:

The right of the people to keep and bear arms shall not be infringed.
R.I. Constitution Article I, Section 22.

South Carolina:

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. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in the manner prescribed by law.
S.C. Constitution Article I, Section 20.

South Dakota:

The right of the citizens to bear arms in defense of themselves and the state shall not be denied.
S.D. Constitution Article VI, Section 24

Tennessee:

That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crimes.
Tenn. Constitution Article I, Section 26.

Texas:

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.
Tex. Constitution Article I, Section 23.

Utah:

The people have the right to bear arms for their security and defense, but the Legislature may regulate the exercise of this right by law.

Utah Constitution Article I, Section 6.

Vermont:

That the 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.

Vt. Constitution ch. 1, Article 16.

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, therefore, the right of the people to keep and bear arms shall not be infringed; 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.

Va. Constitution Article I, Section 13.

Washington:

The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.

Wash. Constitution Article I, Section 24.

West Virginia:

A person has the right to keep and bear arms for the defense of self, family, home, and state, and for lawful hunting and recreational use.

West Virginia Constitution Article III, Section 22.

Wyoming:

The right of the citizens to bear arms in defense of themselves and of the state shall not be denied.

Wyo. Constitution Article I, Section 24.

STATES WITHOUT CONSTITUTIONAL PROVISIONS:

Eight states do not have (as of June 1, 1988) constitutional provisions on the right to keep and bear arms. They are California, Iowa, Maryland, Minnesota, Nebraska, New Jersey, New York, and Wisconsin.

right. This article⁵ reviews the historical background of that right, and the consequent signaling of judicial trend⁶ rejecting the exclusively collective right theory of the right of the people to keep and bear arms.

The exclusively collective right theory stands for the proposition that the "right of the people to keep and bear arms" - as expressed in the second amendment of the United States Constitution,⁷ or as specified in various ways in thirty-seven state constitutions⁸ - is strictly limited to guaranteeing a collective right of the organized militia or National Guard.⁹ However, both the Indiana and the Oregon courts rejected the exclusively collective right theory in favor of a theory that recognizes both a private individual constitutional right and a collective right.¹⁰ Because these decisions set forth with great clarity the underlying fundamental issues in a concrete context, a rather detailed review of the reasoning of these decisions is useful in understanding their important implications.¹¹ Moreover, the Oregon court in *State v. Kessler*¹² based its decision on an explicit acceptance of the English legal traditions of the right of self-defense and the right of the individual citizen to have arms for that purpose. Accordingly, this tradition will be explored first, followed by a review of the holdings of *Schubert* and *Kessler*.¹³ Finally, this article will explore the implications of these cases regarding the exclusively collective right theory of

the right of the people to bear arms.

I. English Background on Arms Possession

The first limitation in England on the right of a law-abiding person to keep and bear arms was enacted as one of the provisions in the 1181 Statute of Assize of Arms.¹⁴ It prohibited the possession and ordered the disposition of all coats of mail or breastplates in the hands of Jews.¹⁵ The next prohibition apparently came in the 1328 Statute of Northampton under King Edward III,¹⁶ and banned all private persons from using any force in public "in affray of the peace," or from going or riding armed in public at all.¹⁷ This Statute of Northampton was re-enacted with increased penalties under Richard II:¹⁸ In its re-enacted version the statute focused solely on going or riding armed, that is, regardless of an affray of the peace. Nevertheless, by 1686 the English common law courts had placed a judicial gloss on these statutes and required for a conviction thereunder, that the accused had gone armed "malo animo" (with evil intent) or "to terrify the King's subjects."¹⁹ Specifically, in *Rex v. Knight*,²⁰ the accused had been charged with violating the Statute of Northampton by "walk[ing] about the streets armed with guns, and go[ing] into the church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King's subjects."²¹ Under the judge's instructions, that an essential element of the crime of violating the Statute of Northampton was "go[ing]

armed to terrify the King's subjects,"²² the jury acquitted the accused.²³ The court further noted that the Statute of Northampton was "but an affirmance" of the common law.²⁴ Interestingly, the same court alleged an elitist statutory policy that the carrying of arms implied that "the King [was] not able or willing to protect his subjects."²⁵ Nevertheless, the court imposed a judicial gloss on the Statute, that for a conviction the prosecution must prove that the carrying of arms was "to terrify the King's subjects"²⁶ or "with evil intent,"²⁷ in order to preserve the common law principle of allowing "Gentlemen to ride armed for their Security."²⁸

The reason for this judicial interpretation of the Statute of Northampton, requiring the element of evil intent in addition to going armed in public, may be understood from the judicial experience and societal conditions underlying the late nineteenth century observation of Jean Jules Jusserand, French ambassador to the United States, 1902-1915, and Pulitzer prize-winning historian, concerning fourteenth century England: "[M]anners being violent, the wearing of arms was prohibited, but honest folk alone conformed to the law, thus facilitating matters for the others..."²⁹ That is, unilateral personal disarmament of law-abiding citizens simply did not work. Accordingly, despite the literal language of the Statute of Northampton, the English rule was that "persons of quality are in no [d]anger of offending [the

Statute of Northampton] by wearing common [w]eapons."³⁰

Subsequent eighteenth century English decisions recognized the right to keep guns in the home for defense, as well as the right to carry ordinary arms in public in a peaceful manner, the forest and game laws notwithstanding. Thus, in 1738, a conviction for keeping a gun contrary to the 1707 Statute of Anne,³¹ which prohibited unqualified persons³² from possessing certain listed hunting devices "or any other Engines to kill and destroy the Game"³³ was quashed on appeal. The court reasoned that a gun "differs from nets and dogs, which can only be kept for an ill purpose."³⁴ The defendant had successfully argued that a "gun is necessary for defense of a house, or for a farmer to shoot crows."³⁵ Later, in a 1752 civil action for trover, plaintiff claimed that defendants had unlawfully converted his gun, while the defendants claimed that their seizure of the gun had been lawful because the lord of the manor where the gun had been kept had ordered them to seize it.³⁶ The court held that, since there was no allegation in defendants' plea that the gun had actually been used to kill any game, the plaintiff's demurrer to the defendant's plea should be sustained. Accordingly, the court rendered judgment for the plaintiff. One of the judges noted that "as a gun may be kept for the defence of a man's house, and for divers other lawful purposes, it was necessary [for defendants] to allege...that the gun had been used for killing game."³⁷ Thus, Professor Edward Christian

commented: "Every one is at liberty to keep or carry a gun, if he does not use it for the destruction of game."³⁸ Accordingly, Professor Christian disagreed³⁹ with Blackstone's assertion that one of the purposes of the game laws was "prevention of popular insurrections and resistance to the government, by disarming the bulk of the people."⁴⁰ Professor Christian maintained that such a purpose "did not operate upon the minds of those who framed the game laws."⁴¹ On the other hand, Blackstone was probably referring to the Game Act of 1671⁴² enacted under Charles II, which prohibited any person who did not have an annual income of at least 100 pounds (except persons of or above the rank of esquire and owners or keeper of forests) from keeping any gun, bow, greyhound, setting dog, or long dog. This latter statute, however, did not judicially survive the English Bill of Rights of 1689,⁴³ with its provision for the right to keep arms.⁴⁴ At any rate, the Game Act of 1671 was not explicitly repealed by legislation until the 1831 Act to Amend the Game Laws.⁴⁵

II. English Bill of Rights of 1689: Legislative History of Provision for Right to Have Arms

To understand the background of the 1689 English Bill of Rights' provision on the right to have arms,⁴⁶ it is important to review the earlier disarmament tactics of Charles II (1660-1686) and James II (1686-1688).⁴⁷ Specifically, the Militia Act of 1662,⁴⁸ which centralized the control of the militia

in the King and his lord lieutenants, empowered these lieutenants or their deputies to authorize searches of the person and the home of anyone adjudged by these lieutenants or their deputies to be "dangerous to the peace of the Kingdom,"⁴⁹ and to "seize all arms in the custody or possession"⁵⁰ of these "dangerous" persons. This Militia Act of 1662 also provided for the abolition of a portion of the earlier militia system, the "trained bands."⁵¹

Soon after ascending to the throne in 1686, King James II utilized a combination of the Militia Act of 1662⁵² and the Game Act of 1671⁵³ to inform his lieutenants that "a great many persons not qualified by law under pretence of shooting matches kept muskets or other guns in their houses,"⁵⁴ and the militia was ordered to "cause strict search to be made for such muskets or guns and to seize and safely keep them till further order."⁵⁵ After the Glorious Revolution and the flight of James II from England in 1688, a Convention Parliament met on January 22, 1689 to declare the rights of the people⁵⁶ in an instrument known as the Declaration of Right, which was, after the ascension of William and Mary, turned into a regular act of the legislature as a statute,⁵⁷ the Bill of Rights of 1689.

The provisions of the English Bill of Rights of 1689 touching on the right to have arms were originally proposed on February 2, 1689, by the House of Commons Committee "to bring in the general Heads of such Things as are absolutely necessary to be considered for the better securing our Religion, Laws and Liberties,"⁵⁸ and

the House agreed upon the following:

5. The Acts concerning the Militia are grievous to the Subject...

6. The raising or keeping a Standing Army within this Kingdom in time of Peace, unless it be with the Consent of Parliament, is against the Law...

7. It is necessary for the public Safety, that the Subjects which are Protestants, should provide and keep Arms for their common Defence: And that the Arms which have been seized, and taken from them, be restored...⁵⁹

It is thus clear, from the foregoing provisions, that the earlier arms seizures by the King and his militia⁶⁰ were prime motivating factors for the provisions on the right to keep arms, and that an armed populace was considered "necessary for the public safety."⁶¹

In any event, after some conferences with, and at the request of, the House of Lords, the House of Commons on February 11, 1689 modified the phrase "provide and keep," in provision 7, to "have,"⁶² and also deleted the word "common"⁶³ and added the phrase "suitable to their Condition, and as allowed by Law," after the word "Defence."⁶⁴ As finally passed on February 12, 1689, by the House of Lords, the text of the English Bill of Rights' provision on the right to keep arms read: "[t]hat the Subjects which are Protestants may have Arms for their

Defence, suitable to their Condition, and as allowed by Law."⁶⁵

Among other things, this legislative history demonstrates that the English Bill of Rights' provision on the right to keep arms was a reaction to previous seizures of privately held arms, and that the solemn understanding was reached that such seizures should never occur again. Thus, the initially proposed purpose of this right for their "common Defence"⁶⁶ was transformed into a right "for their Defence"⁶⁷ that is, to include an individual right of armed self-defense as had obtained under the common law. It is noteworthy that an apparent attempt to restrict the right to keep and bear arms, in the United States Bill of Rights, to "the common defence"⁶⁸ was defeated just 100 years later, in the first Senate of the United States in the floor debates on the proposal for what became the second amendment.

Another English statute was enacted in 1689,⁶⁹ which was repealed in 1844,⁷⁰ banning any "papist or reputed papist"⁷¹ who refused to take an oath⁷² prescribed by the new regime of William and Mary from keeping any arms, except upon a demonstration before the justices of the peace that such arms were "necessary"⁷³ for the defense of "home or person."⁷⁴ This religiously discriminatory legislation, however, did not give rise to any reported litigation. Nevertheless, this legal history shows the essentially political nature of arms control legislation, as well as the intent of the English Bill of Rights of 1689 to guarantee a private individual the right to have arms for "self preservation and defence."⁷⁵

III. Opinion of the Recorder of London, 1780, on the Scope of the Right to Have Arms in England

In eighteenth century England, there were various voluntary armed associations dedicated to assisting constables in the apprehension of criminals and the suppression of riots,⁷⁶ it being considered "the right and duty of every subject, under common law, to help maintain the Queen's peace."⁷⁷ In 1780, one of the foremost of such associations, the London Military Foot Association, sought the advice of the Recorder of London,⁷⁸ as to its legal standing.⁷⁹ His long, clearly reasoned reply was of wide interest, especially in view of the frequency with which such associations appeared for many years afterwards.⁸⁰ Further, his reply remains of interest because of its succinct and cogent interpretation of the scope of the English people's right to keep and bear arms. The Recorder stated:

It is a matter of some difficulty to define the precise limits and extent of the rights of the people of this realm to bear arms, and to instruct themselves in the use of them, collectively; and much more so to point out all the acts of that kind, which would be illegal or doubtful in their nature.

The right of his majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of

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

From the proposition, that the possession and the use of arms, to certain purposes, is lawful, it seems to follow, of necessary consequence, that it cannot be unlawful to learn to use them (for such lawful purposes) with safety and effect...and, by the same mode of reasoning, from the right of using arms, in some cases, collectively and in bodies, follows the right of being collectively, as well as individually, instructed in the use of them, if it be true, which I apprehend it most clearly is, that the safe and effectual use of arms in collective bodies cannot be taught to separate individuals.⁸¹

Beyond this point, however, there were difficulties. The question arose: would it be lawful for a vast multitude of many thousands of armed men, "without any visible occasion or apparent lawful object, unauthorized by government or any magistrate, to assemble together, and march where they pleased, for the purpose, as they professed, of instructing and

exercising themselves in the use of arms?"⁸² The Recorder answered: "[t]o this question, stated in these unlimited terms, I should certainly answer in the negative; because, in my opinion, an affirmative answer would amount to a dissolution of all government and a subversion of all law."⁸³ In short, there was no right to wanton behavior. Where then could a line be drawn, and how could the number and manner of assembling to exercise the use of arms be defined to determine the legality of such acts? The Recorder felt it impossible "to draw any such precise line, or to lay down any proposition respecting the legality of armed societies, which would hold true at all times and in all cases, without qualification or restriction. The circumstances of the case...must decide upon the legality of every such meeting."⁸⁴

Four broad indications, however, were given for determining the legality of the activities of armed societies. First, the professed purpose and object of any such society had to be lawful. Second, they had to at all times, when assembled, conduct themselves in a peaceable and orderly manner and conform to their professed purpose; every breach of the peace on their part would have been greatly aggravated by the very circumstance of being committed by a body of armed men. Third, the numbers of such a society could not manifestly and greatly exceed the professed objects of their instruction. Fourth, they could not, in any case, except for the suppression of a sudden, violent, and felonious breach of the peace, proceed to act without the authority of the civil magistrates.⁸⁵ With these

restrictions, the Recorder was clearly of the opinion that it was lawful, "and, in many cases, highly meritorious,"⁸⁶ for the citizens to instruct themselves in the use of arms in private, orderly societies. Besides "immediate self-defence,"⁸⁷ the lawful purposes for which arms could be used included the "suppression of violent and felonious breaches of the peace, the assistance of the civil magistrate in the execution of the laws, and the defence of the kingdom against foreign invaders."⁸⁸ Therefore, whenever those occasions occur, "the use of arms becomes not only a the right, but the duty,"⁸⁹ of every citizen capable of bearing arms.

Finally, the recorder of London reasoned that, to avoid being subject to the military command and discipline of the Crown, the London Association should "consider themselves as part of the civil, and not a military association, and confine themselves, in the present state of things, to those civil objects which will, upon the principles before laid down, sufficiently justify them in exercising, and perfecting themselves in the use of arms, without any commission whatever."⁹⁰ The Recorder thus emphasized the fundamental social value and the legality of purely civil bodies in the maintenance of internal law and order, and differentiated sharply between that function and the employment of the regular forces in opposing foreign enemies.⁹¹ On the other hand, the Recorder's starting point was the right of the private individual to have arms for self-defense purposes in cases of sudden, felonious attacks,⁹²

i.e., where there is no time to invoke the aid of established authority. In short, the Recorder's opinion reaffirmed the unqualified individual right to keep and bear arms as at common law, and the qualified collective right to bear arms.

IV. Common Law and Constitutional Standards for the Right to Keep and Bear Arms

As with other constitutional provisions, the right to keep and bear arms cannot be understood without reference to common law standards:

The language of the Constitution cannot be interpreted safely except by reference to the common law and British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient,...but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.⁹³

These same considerations apply to the state constitutional conventions. Thus the state

provisions for a constitutional right to keep and bear arms are likewise illuminated by the common law. In particular, the right to keep and bear arms should, therefore, be interpreted in terms of the common law, both as to the type of arms which are constitutionally protected and as to the permissible conditions, manner, and mode under which the right may be exercised. It is, therefore, useful to look at the corresponding facets of the common law on keeping and bearing arms, as well as their adaptation to state constitutional provisions for a right to keep and bear arms.

The foregoing Recorder of London's opinion⁹⁴ is a thorough exposition of the common law principle that although the law-abiding person may not march with arms in groups whenever, wherever, and howsoever he pleases,⁹⁵ he is, nevertheless, entitled to keep ordinary arms at home and carry those arms "to protect himself when he is going singly or in a small party upon the road where he is traveling or going for the ordinary purposes of business."⁹⁶ As expounded by the thirteenth century scholar Henry de Bracton:

But whether it be armed force or unarmed force, all such force is not injurious, because some arms are used for protection, and what a person may do for the protection of his own person or of his own right he seems to have done justly. Likewise there are arms of peace and of justice, and arms of disturbance of peace and of injustice. There are likewise arms of usurpation of another's property, and such force may be called ablative, whence it will be allowable to him, who justly possesses, to repel with arms any one coming with arms against the peace [of the realm] to expel him, that by the arms of self-protection and of peace, which are the arms of justice, he may repel injury and unjust violence and arms of injury; but nevertheless with the moderation of such discretion, that he does not cause an injury, for he may not

under such pretext kill a man,
or wound him, or ill-treat him,
if he can in any other way
protect his possession. And
therefore against him, who
wishes to use his strength, he
may resist with his utmost
strength, with arms or without,
according to the saying, when a
strong man armed, &c: but
nevertheless persons may not
walk about with arms at all
times [as they please]
without some cause.⁹⁷

In the last century, the American authority on criminal law, Francis Wharton, paraphrasing the eighteenth century English Serjeant-at-Law William Hawkins, expounded upon the provisions in the 1328 Statute of Northampton,⁹⁸ on using force and carrying arms in public places:

A [person] cannot excuse wearing such armor [dangerous and unusual weapons, in such a manner as will naturally cause terror to the people] in public by alleging that a particular person threatened him, and that he wears it for safety against such assault; but it is clear that no one incurs the penalty of the statute [of Northampton, 1328, 2 Edw. 3, ch.3] for assembling his neighbors and friends in his own house, to resist those who threaten to do him any violence therein, because a man's house is his castle.⁹⁹

As William Hawkins explained:

[Y]et it seems certain That in some Cases there may be an Affray where there is no actual Violence; as where a Man arms himself with dangerous and unusual Weapons in such a Manner as will naturally cause a Terror to the People, which is said to have been always an Offense at Common Law, and is strictly forbidden by many Statutes...

[T]hat no Wearing of Arms is within the Meaning of this Statute [of Northampton, 1328, 2

Edw. 3 ch.3], unless it be accompanied with such circumstances as are apt to terrify the People; from whence it seems clearly to follow, that Persons of Quality are in no Danger of offending against this Statute by wearing common Weapons or having their usual Number of Attendants with them, for their Ornament or Defence, in such Places, and upon such Occasions, in which it is the common Fashion to make use of them, without causing the least Suspicion of an Intention to commit Any act of Violence or Disturbance of the Peace...[And] that no person is within the Intention of the said Statute, who arms himself to suppress dangerous Rioter [sic], Rebels, or Enemies, and endeavors to suppress or resist such Disturbers of the Peace or Quiet of the Realm...¹⁰⁰

Of particular interest here was the clear exemption, from the ban of the statute, of "common weapons" as opposed to "Dangerous and unusual weapons in such a manner as will naturally cause a terror to the people." Sir William Blackstone, echoing this approach, wrote:

The offense of riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land, and is particularly prohibited by the Statute of Northampton, 2 Edw. 3, c.3, upon pain of forfeiture of the arms, and imprisonment

during the king's pleasure.¹⁰¹

Interestingly, in 1914 the Irish Court for Crown Cases Reserved quashed a conviction¹⁰² under the Statute of Northampton¹⁰³ on the ground that the indictment under that statute was defective in alleging merely that the defendant "did go about on the public road...armed,"¹⁰⁴ in that the indictment failed to "negative lawful occasion, and conclude in terrorem populi [to the terror of the populace]."¹⁰⁵ The Attorney General unsuccessfully argued that the indictment was sufficient in view of the evidence at trial because, "it being usual for persons to be unarmed, the presence of an armed man, particularly with such a dangerous weapon as is proved here, must be 'apt to terrify' those with whom he comes in contact."¹⁰⁶ That is, the simple fact of being armed inherently would "bring terror upon others;"¹⁰⁷ the weapon in question being a "loaded revolver."¹⁰⁸ In rejecting this argument of the Attorney General, the Irish Court thus considered a loaded revolver to be a common weapon within the meaning and protection of the common law.

The distinction between the absolute right to keep arms and the more qualified right to carry arms, pursuant to the common law and the Statute of Northampton,¹⁰⁹ was also discussed by Sir Edward Coke. Lord Coke, "widely recognized by the American colonists 'as the greatest authority of his time on the laws of England',"¹¹⁰ cogently wrote:

And yet in some cases a man may not only [sic] use force and arms, but assemble company also.

As any man may assemble his friends and neighbors, to keep his house against those that come to rob him, or kill him, or to offer him violence in it, and is by construction excepted out of this Act [Statute of Northampton]...for a man's house is his castle, & domus sua cuique est tutissimuyum refugium [a home is for everyone his safest refuge]; for where shall a man be safe, if it be not in his house? And in this sense it is truly said

Armaque in armatos sumere jura sinunt. [The laws allow taking up arms against armed persons.]

But he cannot assemble force, though he be extremely threatened, to go with him to Church, or market, or any other place, but that is prohibited by this Act [Statute of Northampton, 2 Edw. 3, ch. 3 (1328)].¹¹¹

In support of this approach, Coke cited the 1506 Yearbook case which had originated the doctrine that a man's house is his castle in the following terms:

If one is in his house, and hears that such a one will come to his house to beat him, he may assemble folk of his friends and neighbors to help him, and aid in the safeguard of his person; but if one were threatened that if he should come to such a market, or into such a place, he should there be beaten, in that case he could not assemble persons to help

him go there in personal safety, for he need not go there, and he may have a remedy by surety of the peace. But a man's house is his castle and his defense, and where he has a peculiar right to stay...¹¹²

The "true doctrine,"¹¹⁴ according to Beale, had been expressed by the Supreme Court of California¹¹⁵ in these terms:

One who expects to be attacked is not always compelled to employ all the means in his power to avert the necessity of self-defence before he can exercise the right of self-defence. For one may know that if he travels along a certain highway he will be attacked by another with a deadly weapon and be compelled in self-defence to kill his assailant, and yet he has the right to travel that highway, and is not compelled to turn out of his way to avoid the expected unlawful attack.¹¹⁶

And a "well reasoned" opinion,¹¹⁷ according to Beale, had been delivered by the Supreme Court of Missouri,¹¹⁸ similarly upholding the right of self-defense in public places with arms, in these terms:

If the mere expectation of an assault from an adversary is to deprive the expectant of the right of self-defence, merely because he goes armed in the vicinity of his enemy, or goes out prepared upon the highway where he is likely at any moment to meet him, then he has armed himself in vain, and self-defence ceases wherever expectation begins. We do not so understand the law. The very object

of arming one's self is not to destroy
expectation of a threatened attack,
but to be prepared for it should it
unfortunately come.¹¹⁹

It should be stressed that Professor Beale was no champion of the "Macho" spirit; rather, he was a staunch advocate of the minority American rule¹²⁰ requiring retreat as far as possible with safety, even from a sudden murderous assault (absent a larcenous intent), before using deadly force in a defense against the murderous assault. Indeed he derided the contrary rule (not requiring retreat)s prevalent in "the West and South,"¹²¹ as founded in the "ethic of the duelist, the German officer, and the buccaneer."¹²² Nevertheless even Beale would not require a person to constrict his ordinary business travels in an effort to avoid criminal threats.¹²³ Otherwise the criminals would dictate the ordinary course of business travels. Accordingly, there was no doubt at common law that an individual was permitted to carry common arms "to protect himself when he is going singly or in a small party upon the road where he is traveling or going for the ordinary purposes of business."¹²⁴ The 1506 Yearbook case forbade a person only to "assemble persons to help him go there."¹²⁵

With this common law background in mind, it is important to realize that a right to keep and bear arms inherently carries with it the right to use those arms for various lawful purposes. For example, the American constitutional right to keep and bear arms has been squarely held to protect the right to use those arms in self-defense in the home against burglars:

The Constitutions of the United States and Louisiana give us the right to keep and bear arms. It follows logically, that to keep and bear arms

gives us the right to use the arms for the intended purpose for which they were manufactured.¹²⁶

As to the type of arms protected by state constitutional provisions for a right to keep and bear arms, common law standards were adopted by the Texas Supreme Court in 1875 in connection with the then thirteenth section of the Texas Bill of Rights ("Every person shall have the right to keep and bear arms in the lawful defense of himself or the State, under such regulations as the Legislature may prescribe.")¹²⁷ The court stated:

[W]e do not adopt the opinion...that the word "arms," in the Bill of Rights, refers only to the arms of a militiaman or soldier...The arms which every person is secured the right to keep and bear (in the defense of himself or the State, subject to legislative regulation), must be such arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense, as well as such as are proper for the defense of the State.¹²⁸

Later, in 1912, the highest court of New York State held constitutional a statutory ban against possession of certain (but not all) weapons because "the act in question relates to instruments which are ordinarily used for criminal and improper purposes and which are not amongst those ordinary legitimate weapons of defense and protection which are contemplated by

the Constitution and the Bill of Rights."¹²⁹ Similarly implementing the common law standard of "common weapons"¹³⁰ as the type of arms embedded in the Michigan state constitutional provision that "[e]very person has a right to bear arms for the defense of himself and the State,"¹³¹ the Supreme Court of Michigan in 1931 declared:

Some arms, although they have a valid use for the protection of the State by organized instructed soldiery in time of a war or riot, are too dangerous to be kept in a settled community by individuals, and in times of peace, find their use by bands of criminals and have legitimate employment only by guards and police. Some weapons are adapted and recognized by the common opinion of good citizens as proper for private defense of person and property. Others are the peculiar tools of the criminal. The police power of the State to preserve public safety and peace and to regulate the bearing of arms cannot fairly be restricted to the mere establishment of conditions under which all sorts of weapons may be privately possessed, but it may take account of weapons may be privately possessed, but it may take account of the character and ordinary use of weapons and interdict those whose customary employment by individuals is to violate the law. The power is, of course, subject to the limitation that its exercise must be reasonable

and it cannot constitutionally result in the prohibition of the possession of those arms which, by the common opinion and usage of law-abiding people, are proper and legitimate to be kept upon private premises for the protection of person and property.¹³²

Accordingly, the Supreme Court of Michigan in 1931 upheld a statutory ban on such weapons as blackjacks, bombs, and rockets,¹³³ because the statute did not ban "ordinary guns, swords, revolvers, or other weapons usually relied upon by good citizens for defense or pleasure."¹³⁴ This approach echoed that of Justice Oliver Wendell Holmes in writing for the United States Supreme Court in the 1914 case of *Patsone v. Pennsylvania*,¹³⁵ in which the Court upheld a ban on the possession in the hands of aliens of rifles and shotguns, as a hunting control measure, because the ban did not extend to pistols that presumably would be "needed occasionally for self-defence."¹³⁶ Thus the common law exemptions of common weapons¹³⁷ from the ban of the Statute of Northampton¹³⁸ had been firmly established as American standards for constitutionally protected arms by the middle of the present century.

V. The Indiana Schubert Decision

*Schubert v. DeBard*¹³⁹ involved the Indiana gun control statute which provides that, before the Superintendent of State Police may issue a pistol-carrying license, an investigation must be made concerning

the applicant.¹⁴⁰ If it appeared to the Superintendent "that the applicant has a proper reason for carrying a handgun and is of good character and reputation and a proper person to be so licensed,"¹⁴¹ then the Superintendent "shall issue to the applicant either a qualified or an unlimited license to carry any handgun or handguns lawfully possessed by the applicant."¹⁴² In Schubert the applicant for a pistol-carrying license had been denied the license by the Superintendent of Indiana State Police on the sole ground of lack of sufficient "need".¹⁴³ The trial court upheld¹⁴⁴ the Superintendent on the ground that he had properly exercised administrative discretion delegated to him by the statutory provision of "proper reason" for carrying a handgun. The Indiana Court of Appeals, however, held in 1980 that the statutory delegation of these powers and duties to the Superintendent could not be constitutionally construed as allowing him to deny a pistol-carrying license merely because the applicant had failed to demonstrate, to the satisfaction of the Superintendent, that he "needed"¹⁴⁵ to defend himself. The Indiana Supreme Court subsequently declined to review this decision.¹⁴⁶

In Schubert, the Superintendent had held a hearing on the issue of the pistol-carrying license applicant's "need" for self-protection and had denied the license solely on the administrative finding that "the evidence disclosed that...applicant does not have a proper reason to be so licensed."¹⁴⁷ The Superintendent contended that the statutory specification for "a proper reason for carrying a handgun,"¹⁴⁸ as a

prerequisite for a pistol-carrying license vested in him the power and duty: (1) to evaluate the facts underlying an applicant's assertion of "self-defense"¹⁴⁹ as a stated reason for desiring the license, and (2) to grant or deny the license upon the basis of an administrative evaluation of whether or not the applicant "needed"¹⁵⁰ to defend himself. The Schubert majority¹⁵¹ held that this approach of the Superintendent, of factually evaluating the sufficiency of an applicant's "need" for a pistol-carrying license," contravenes the essential nature of the constitutional guarantee."¹⁵² The Indiana constitution, adopted in 1851, provides that "the people shall have a right to bear arms, for the defense of themselves and the State."¹⁵³

The Schubert majority was of the opinion that the general and ordinary sense of the words used, as well as the framers' intention evinced by the legislative history of the right to bear arms provision of the Indiana State Constitution, led to the conclusion that the Superintendent of State Police could not, consistent with the Constitution, look behind the pistol-carrying license applicant's stated reason of "self-defense" and then deny the license on the grounds of an insufficient factual showing by the applicant of "need" to defend himself.¹⁵⁴ The Schubert majority alluded to the 1850 constitutional debate over this Indiana provision for a right of the people to bear arms and noted that one stage of that debate had opened with "[t]he twelfth [now 32nd] section, providing that no law should restrict the right of the people to bear arms, whether in

defense of themselves or the State, next came up in order."¹⁵⁵

The statutory requirement of "proper reason" for a pistol-carrying license was interpreted by the Schubert court as having been satisfied by the applicant's assigned reason of "self-defense" which stood "unrefuted"¹⁵⁶ by the Superintendent, such assigned reason being "constitutionally a 'proper reason' within the meaning of [the Indiana Statute]."¹⁵⁷ The Schubert court thus interpreted the Indiana statutory requirement of "proper reason" for a pistol-carrying license as a delegation of authority to the Superintendent of State Police that was very narrow in scope because of the Indiana constitutional provision for "the right of the people to bear arms for the defense of themselves and the State."¹⁵⁸ Because, however, of an unresolved question as to the applicant's suitability of character to be licensed, an issue which had arisen at the hearing conducted by the Superintendent, the Schubert court remanded the case to the Superintendent for a new hearing and determination on that question.

Interestingly one of the two judges in the Schubert majority stated in a concurring opinion¹⁶⁰ that he would have joined in the 1958 dissent of Judge Emmert in *Matthews v. State*.¹⁶¹ In *Matthews*, the Indiana Supreme Court, in a 4 to 1 decision, had upheld the facial constitutionality of the Indiana statutory pistol licensing scheme, with Judge Emmert dissenting on the basis of the Indiana constitutional provision for the right of the people to bear arms.

The dissenting judge in Schubert,

Judge Staton, was sharply critical of the Schubert majority for allegedly failing to follow the legal principles previously enunciated in Matthews. The majority in that case had stated that the question of whether a pistol-carrying license applicant satisfied the statutory requirement of having a "'proper reason for carrying a pistol and [of being] of good character and reputation and a suitable person to be so licensed' are questions of fact; and the Legislature may delegate the function of determining these facts upon which the execution of the legislative policy, as expressed in the Act, is dependent."¹⁶² More specifically, the 4 to 1 majority in Matthews had stated that "the Superintendent of State Police, with his special training and experience and with the facilities which he has at his command for securing information, is capable and qualified to determine whether an applicant for a license to carry a pistol has a 'proper reason' therefor, and whether he is a 'suitable person' to have a pistol in his possession at will."¹⁶³ Accordingly, Judge Staton contended that under the Matthews decision the Indiana Supreme Court had thus 'rejected the very proposition of law that the [Schubert] majority has tendered here today: that the Superintendent's capacity to evaluate the factual basis for an applicant's stated need of self-defense violated...the Indiana Constitution."¹⁶⁴ In sharp reply, the Schubert majority maintained that allowing a denial of a license grounded solely upon an administrative determination by the Superintendent of an insufficiency of the factual basis or showing of need

by the applicant would "supplant a right with a mere administrative privilege which might be withheld simply on the basis that such matters as the use of firearms are better left to the organized military and police forces even where defense of the individual citizen is involved."¹⁶⁵

Judge Staton further complained that "the upshot of the Majority's approach, were it given effect, would be the deregulation of handguns,"¹⁶⁶ and that subsequent to the Matthews¹⁶⁷ decision "numerous studies have confirmed that handgun restrictions promote the public safety and welfare."¹⁶⁸ Judge Staton cited four such studies.¹⁶⁹ Of these four studies, however, all done in the 1960's, only two of them were statistical, factual studies: the 1969 staff report of Newton and Zimring to the National Commission on the Causes and Prevention of Violence entitled *Firearms and Violence in American Life*,¹⁷⁰ and the 1969 Geisel study entitled *The Effectiveness of State and Local Regulation of Handguns: A Statistical Analysis*.¹⁷¹ This latter Geisel study was severely criticized, as statistically dubious, in a subsequent comprehensive statistical study by Douglas Murray,¹⁷² which pointed out the mathematical defects and weaknesses in the Geisel study.¹⁷³ Not least among such defects was the Geisel mathematical determination of weighting coefficients by "random testing,"¹⁷⁴ which could produce weights that are the result of chance correlation with the dependent variables and consequently are probably useful for only this one set of data, severely limiting the generalizability of their [Geisel]

conclusions."¹⁷⁵ In other words, Geisel had failed to firmly establish the statistical criteria for his analysis before analyzing the data, such prior establishment of criteria being essential for an unbiased determination of correlations, or of any other statistical inferences, from a given sample set of data. Moreover, Douglas Murray's comprehensive analysis showed no "significant effect [of gun control laws] on lowering rates of violence associated with firearms."¹⁷⁷ Moreover, Franklin Zimring, one of the authors of the 1967 staff report to the National Commission on the Causes and Prevention of Violence,¹⁷⁸ cited by Judge Staton, recently stated, in response to a question posed on the efficacy of gun control laws as a deterrent to violent crime, that "this whole notion of cause and effect is suspect. Criminologists are very much like forecasting economists and gypsy fortunetellers. We cannot explain gun-related behavior, so how can we say what has affected it, either up or down."¹⁷⁹

The basic disagreement between the Schubert majority¹⁸⁰ and dissenting Judge Staton thus concerned the proper scope of power delegated to the Superintendent of State Police by virtue of the statutory specification that a pistol-carrying license applicant have "a proper reason for carrying a handgun"¹⁸¹ in view of the Indiana constitution's provision that the "people shall have a right to bear arms, for the defense of themselves and the state."¹⁸² Judge Staton was of the opinion that there was no constitutional impediment to the Superintendent's using his training,

experience, and investigatory capabilities to go behind a bare "self-defense"¹⁸³ assertion by the applicant, and then making an independent finding of fact as to whether there was sufficient evidence that the applicant had a "genuine need to carry a handgun"¹⁸⁴. On the other hand, the Schubert majority held that the Indiana constitutional provision for a right to bear arms constricted the scope of authority delegated by the statute to the Superintendent, to the extent of forbidding him, in the fact-finding process, to evaluate the actual degree of need for the pistol-carrying license, while still allowing him to deny the license if he found, based upon his expertise, that there was substantial evidence that the applicant in fact, had an improper reason for carrying a handgun.¹⁸⁵ Absent finding such improper reason, the Schubert majority would allow a pistol-carrying license to be denied only if there was a valid finding by the Superintendent that the applicant was deficient in the statute's personal character requirements of "good character and reputation and a proper person to be so licensed."¹⁸⁶ Accordingly, the Schubert majority remanded the cause for a determination of these personal character requirements.¹⁸⁷ In so doing, the Schubert majority, confronted by a state constitutional guarantee of the individual's right to bear arms, treated a license to carry a pistol in public places somewhat analogously to the federal courts' treatment of permits to speak and disseminate information, in a public forum ("speech plus"): precise, open, and accessible licensing.¹⁸⁸

VI. The Oregon Kessler Decision

A month before the Indiana Supreme Court unanimously refused to review the court of appeals decision in Schubert,¹⁸⁹ the Oregon Supreme Court unanimously handed down a landmark decision in State v. Kessler.¹⁹⁰ In Kessler, the court held that an Oregon statute¹⁹¹ banning the private possession of various listed weapons was unconstitutional in view of the provision in the Bill of Rights of the Oregon constitution for a right to bear arms.¹⁹²

In Kessler,¹⁹³ the police had entered the defendant's apartment at his own request and had inadvertently found two "billy clubs;"¹⁹⁴ a "billy" being included in the statute's proscribed list of weapons. Mr. Kessler was indicted and convicted for possession of the two billy clubs. The intermediate court of appeals in Oregon rejected defendant's constitutional attack, that the statute was violative of the right to bear arms, on the ground that the statute was a reasonable exercise of the "police power of the State to curb crime."¹⁹⁵ The intermediate Oregon court approvingly quoted an abbreviated portion of the 1931 Michigan Supreme Court's basic theory in People v. Brown:

Some arms, although they have a valid use for protection of the State by organized and instructed soldiery in times of war or riot, are too dangerous to be kept in a settled

community by individuals and, in time of peace, find their use by bands of criminals, and have legitimate employment only by guards and police.¹⁹⁶

The Supreme Court of Oregon unanimously reversed the conviction of Mr. Kessler, under the statute banning private possession of certain weapons, on the ground that the Oregon constitution¹⁹⁷ guaranteed to the individual person the right to possess any "hand-carried weapon commonly used by individuals for personal defense,"¹⁹⁸ such as billy clubs. The court hastened to add that the legislature could, consistent with the constitution, ban the possession any arms by felons and the carrying of any arms by anyone in a concealed manner.¹⁹⁹

The unanimous Kessler court²⁰⁰ reasoned that the wording of the Oregon constitutional provision on the right to bear arms²⁰¹ differed both from that of the second amendment of the United States Constitution,²⁰² which has "not yet been held to apply to state limitations on the bearing of arms,"²⁰³ and from those of many other state constitutional provisions on the right to keep and/or bear arms.²⁰⁴ Nevertheless, all these state constitutional provisions share a common historical background.²⁰⁵ Specifically, the Oregon provision regarding the right to bear arms was taken from the 1851 Indiana Constitution - which provision on this score had been taken unchanged from the Bill of Rights of the original 1816 Indiana Constitution.²⁰⁶ In turn, the drafters of the Indiana Bill of Rights in 1816 borrowed freely from the wording of other state

constitutions - most notably of Kentucky, Ohio, Tennessee, and Pennsylvania, all drafted between 1776 and 1802.²⁰⁷ Moreover, the constitutions adopted by the original colonies generally included a bill or declaration of rights, many of them patterned largely on the English Bill of Rights of 1689,²⁰⁸ which contained a list of alleged illegal actions of James II followed by a declaration of the rights of the people. Among the illegal actions specified in the list and noted by the Kessler court were the assertions that James II:

[D]id endeavor to subvert and extirpate the Protestant religion and Laws and Liberties of this Kingdom...

5. By raising and keeping a Standing army within this Kingdom in Time of Peace without the Consent of Parliament and quartering Soldiers contrary to Law.

6. By causing several good Subjects, being Protestants, to be disarmed at the same Time when Papists were both armed and employed contrary to Law.²⁰⁹

The parallel provisions of the declaration of rights in the English Bill of Rights of 1689 provided:

5. That the raising or keeping a standing Army within the Kingdom unless it be with the Consent of Parliament is against the Law.

6. That the subjects which are Protestants may have arms for their Defence suitable to their Conditions, and as allowed by Law.²¹⁰

The Kessler court further noted that the phrase "for the defense of themselves and the State" in both the Oregon and Indiana constitutional provisions for the right to bear arms appeared in the present-day constitutions of six other states.²¹¹ This language, the Kessler court held, implied three separate justifications and purposes for a state constitutional right to bear arms:

- (a) The preference for a militia over a standing army;
- (b) the deterrence of governmental oppression; and
- (c) the right of personal defense.²¹²

According to Kessler court, the constitutional phraseology "the right to bear arms...for the defense of ... the State" refers to that historical preference for a citizen militia over a standing army,²¹³ whereas the language "a right to bear arms in defense of themselves..." refers to the closely related purpose of "the deterrence of government from oppressing unarmed segments of the population,"²¹⁴ as well as "an individual's right to bear arms to protect his person and home."²¹⁵ Furthermore, the unanimous Kessler court noted that today five state constitutions explicitly provide for the right of an individual person to bear arms "in defense of his home, person and property."²¹⁶

The Kessler court also discussed the type of arms the possession of which by private individuals is thus constitutionally protected in Oregon. The court observed that in the colonial and revolutionary war era

there was an identity of arms used by militiamen and by private citizens in defense of home and person.²¹⁷ It reasoned that, therefore, the drafters of constitutional provisions on the right to bear arms intended to include as constitutionally protected arms those hand-carried arms used by settlers for both personal and military defense,²¹⁸ such as ordinary firearms and other hand-carried weapons commonly used for personal defense,²¹⁹ but not cannon or other heavy ordinance which were not privately kept by militiamen or private citizens.²²⁰ Moreover, the Kessler court further observed that the Industrial Revolution had brought about unprecedented changes in technology and concomitant changes in weaponry.²²¹ Thus, whereas firearms and other hand-carried arms have remained as weapons of personal defense, the more advanced automatic weapons, explosives, and chemicals of modern warfare have never been intended or commonly used for personal possession and protection.²²² Accordingly, today the constitutionally protected arms do not include cannon or other sophisticated modern weapons, but rather include the modern day equivalents of weapons used by colonial militiamen "for defense of the State,"²²³ plus the "hand-carried weapons commonly used by individuals [including police] for personal defense."²²⁴ In adopting this formulation of the individual right to bear arms, together with the stipulation that the legislature could constitutionally prohibit the carrying of any arms by individuals in a concealed manner and the possession of any arms at all by felons,²²⁵ the

Kessler court in effect adopted a modern equivalent of the common law principle that the right to bear arms extended to "persons of quality...wearing common weapons."²²⁶

Almost a year after the Kessler decision, the Oregon Supreme Court handed down another decision, this time on the subject of carrying a "billy" in an automobile.²²⁷ The court held that the same statute was unconstitutional as applied, because the statute "is written as a total proscription of the mere possession of certain weapons, and that mere possession, insofar as a billy is concerned, is constitutionally protected."²²⁸

Conclusion

The collective right theory of the right to bear arms was born in the 1905 decision of the Kansas Supreme Court in *Salina v. Blaksley*.²²⁹ In that case, the court held that solely a collective right was guaranteed by section 4 of the Kansas constitution's bill of rights, which provided: "[t]he people have the right to bear arms for their defense and security."²³⁰ The Kansas Supreme Court declared: "[t]he provision in section 4 of the bill of rights, that 'the people have the right to bear arms for their defense and security,' refers to the people as a collective body."²³¹ Seventy-five years later, under somewhat similar state constitutional provisions for a right of the people to bear arms, the *Indiana Schubert v. DeBard*²³² decision and the *Oregon Sate v. Kessler*²³³ decision squarely rejected the exclusively collective right theory in

favor of an individual right interpretation.²³⁴ Such interpretation was fully in accord with the common law and historical background of the right to keep and bear arms.²³⁵ Accordingly, these recent individual right interpretations can be expected to signal a judicial trend in favor of the right of the individual citizen to keep and carry arms, especially in those states that have constitutional provisions for the right to bear arms. Moreover, the articulation in Kessler of "the deterrence of government from oppressing unarmed segments of the population,"²³⁶ as one of the basic purposes of the right of the people to bear arms under the Oregon constitution, cogently indicates a similar basic purpose and an individual right interpretation for "the right of the people to keep and bear arms"²³⁷ under the second amendment of the United States Constitution.

FOOTNOTES

1. 291 Or. 255, 630 P.2d 824 (1981)
2. 289 Or. 359, 614 P.2d 94 (1980)
3. 425 N.E. 2d 739 (Ind. Ct. App. 1981)
4. 398 N.E.2d. 1339 (Ind. Ct. App. 1980), leave to appeal denied, No. 3-177A10 (Ind. Aug. 28, 1980).
5. See also C.L. Cantrell, The Right to Bear Arms: A Reply, 53 Wisc. Bar Bulletin 21 (1980); D.I. Caplan, Handgun Control: Constitutional or Unconstitutional - A Reply to Mayor Jackson, 10 N.C. Cent. L.J. 53 (1978); S.P. Halbrook,

The Jurisprudence of the Second and Fourteenth Amendments, 4 Geo. Mason U.L. Rev. 1 (1981).

6. Other recent cases adopting the pro-individual view of the right to keep and bear arms include: *Rabbitt v. Leonard*, 36 Conn.Supp. 108, 110, 413 A.2d 489, 491 (Conn. Super. Ct. 1979) (under Connecticut constitution, a citizen has a "fundamental right to bear arms in self-defense, a liberty interest which must be protected by procedural due process"); *Motley v. Kellog*, 409 N.E. 2d 1207 (Ind. Ct. App. 1980) (preliminary injunction ordering Chief of Police of Gary, Indiana, to make applications for handgun licenses available to citizens who desire to apply); *Archibald v. Codd*, 59 A.D. 2d 867, 399 N.Y.S. 2d 235 (1977), leave to appeal denied, 43 N.Y. 2d 649, 403 N.Y.S. 2d 1027 (1978) (no showing of "need" is required either for a pistol license limited to on-premises possession, at home or place of business, or for added pistols on such license); *Salute v. Pitchess*, 61 Cal. App. 3d 557, 132 Cal Rptr. 345 (1976) (sheriff mandated to make investigation and determination on individual basis and not to reject wholesale all pistol-carry license applications submitted by private individuals).

7. The second amendment in the Bill of Rights of the Constitution 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." U.S. Const. amend. II. See 1 Stat. 21 (1845).

8. Provisions of state

constitutions on the right to bear arms. Refer to State Constitutions - Right to Bear Arms.

9. The exclusively collective right theory was first enunciated in *Salina v. Blaksley*, 72 Kan. 230, 232, 83 P. 619, 620 (1905)

10. *Schubert v. DeBard*, 398 N.E. 2d 1339; *State v. Kessler*, 289 Or. 359, 614 P.2d 94.

11. See also Comment, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U. Chi. L. Rev. 185 (1970).

12. 289 Or. 359, 614 P.2d 94.

13. *Schubert v. DeBard*, 398 N.E.2d. 1339; *State v. Kessler*, 289 Or. 359, 614 P.2d.94.

14. Statute of Assize of Arms, art. 3 (1181), printed in W. Stubbs, *Select Charters and Other Illustrations of English Constitutional History* 154, 155 (8th ed. 1900).

15. *Id.*

16. 2 Edw. 3, ch. 3 (1328).

17. *Id.*: That no Man great nor small, of what Condition soever he be, except the King's Servants in his Presence, and his Ministers in executing of the King's Precepts, or of their Office, and such as be in their Company assisting them, and also upon a Cry made for Arms to keep the Peace, and the same in such Places where such Acts happen, be so hardy to come before the King's Justices, or other of the King's Ministers doing their Office with Force and Arms, nor bring no Force in affray of the Peace, nor to go nor ride armed by Night nor by Day, in Fairs, Markets, nor in the Presence of the Justices or other Ministers, nor in no Part elsewhere,

upon Pain to forfeit their Armour to the King, and their Bodies to Prison at the King's Pleasure...

18. 7 Rich. 2, ch. 13 (1383); 20 Rich. 2, ch. 1 (1396).

19. Rex v. Knight, Comb. 38, 39, 90 Eng. Rep. 330; 3 Mod. Rep. 117, 87 Eng. Rep. 75, 76 (K.B. 1686).

20. Id.

21. 3 Mod. Rep. at 117, 87 Eng. Rep. at 76.

22. Id. at 118, 87 Eng. Rep. at 76.

23. Id. at 117, 87 Eng. Rep. at 76

24. Id. at 118, 87 Eng. Rep. at 76.

25. Id.

26. Id.

27. Rex v. Knight, Comb. at 39, 90 Eng. Rep. at 330 ("malo animo").

28. Id. The term "Gentleman" includes "one, who, without any title, bears a coat of arms, or whose ancestors have been freemen..." G.Jacob's New Law Dictionary (10th ed. 1782). This definition would thus include in America all members of the militia; that is, "all citizens capable of bearing arms." *Presser v. Illinois*, 116 U.S. 252, 265 (1886). Compare *infra* note 100.

29. J.J. Jusserand, *A Literary History of the English People from the Origins to the Renaissance* 270 (1895).

30. 1 W. Hawkins, *A Treatise of the Pleas of the Crown* 136 (5th ed. London 1771); See also 1 Russell on Crime 266 (12th ed. 1964).

31. 5 Anne, ch. 14 (1706, 1707 Gregorian calendar.

32. E.g., persons not gamekeepers or lords, etc., Id.

33. Id.

34. Rex v. Gardner, 2 Strange

1098, 93 Eng. Rep. 1056 (K.B. 1739).
See also, same case, Andrews 255,
257, 95 Eng. Rep. 386, 388 ("These
acts restrain the liberty which was
allowed by the common law.")

35. Id.

36. Wingfield v. Stratford,
Sayer 15, 96 Eng. Rep. 787 (K.B.
1752).

37. Id. at 16, 96 Eng. Rep.
at 787 (Lee, C.J., concurring).

38. 2 W. Blackstone,
Commentaries 411 n.2 (E. Christian
ed. 1794).

39. Id.

40. Id. at *412.

41. Id. at 411 n.2.

42. 22 & 23 Car. 2, ch. 25
(1670, 1671 Gregorian calendar).

43. 1 W. & M., Sess. 2, ch. 2
(1688, 1689 Gregorian calendar)

44. Id.

45. 1 & 2 Will. 4, ch. 32
(1831). Except for the provisions
dealing with powers of gamekeepers,
search warrants, and description of
persons who are not allowed to have or
keep for themselves any guns, bows,
greyhounds, or other animals or
things, the 1671 Game Act had been
repealed in 1827. 7 & 8 Geo. 4, ch.
27 (1827).

46. 1 W. & M., Sess. 2, ch. 2
(1688, 1689 Gregorian calendar).

47. For a more comprehensive
treatment of the disarmament tactics
of Charles II, aided by the
enormous power of the royal
proclamation, see, J.L. Malcolm,
Disarmed: The Loss of the Right to
Bear Arms in Restoration England, 1
- 17 (1980).

48. 13 & 14 Car. 2, ch. 3
(1662). An earlier enactment in 1661
had put control over "the militia

and land forces of this kingdom,"
13 Car. 2, ch. 6 parag. 2 (1661)
completely into the hands of the
King, and had held harmless and had
indemnified all those who, in
carrying out earlier royal orders,
had been found guilty of "assaulting,
arresting, detaining or
imprisoning any person suspected to
be fanatick, sectary or disturber of
the peace, or seizing of

arms, or searching of houses for arms, or suspected persons." Id. at parag. 3.

49. 13 & 14 Car. 2, ch. 3(1662).

50. Id.

51. Id. at parag. 20.

52. 13 & 14 Car. 2, ch. 3(1662).

53. 22 & 23 Car. 2 ch. 25 (1670, 1671 Gregorian calendar).

54. Letter from Earl of Sunderland to Earl of Burlington (Dec. 6, 1686), reprinted in 2 Calender of State Papers, Domestic Series, James II 314 (Jan. 1686-May 1687).

55. Id. See also J.L. Malcolm, *supra* note 47, at 15 n.57.

56. 1 B. Schwartz, *The Bill of Rights: A Documentary History* 40 (1971).

57. Id. at 41. See also B. Schwartz, *The Roots of Freedom, A Constitutional History of England 195-98* (1967).

58. 10 H.C. Jour. 15 (1688, 1689 Gregorian calendar).

59. Id. at 17.

60. See *supra* notes 45-53 and accompanying text.

61. The American right to keep and bear arms likewise has been held to be for "maintaining the public security." *Presser v. Illinois*, 116, U.S. 252, 265 (1886).

62. 10 H.C. Jour. at 25-26.

63. Id.

64. Id.

65. 14 H.L. Jour. 125 (1688, 1689 Gregorian calendar).

66. See *supra* note 59 and accompanying text.

67. See *supra* note 63 and accompanying text.

68. 2 B. Schwartz, *The Bill of Rights: A Documentary History* 1153-54

(1971).

69. 1 W. & M., Sess. 1, ch. 15, parag. 4 (1688, 1689 Gregorian calendar).

70. 7 & 8 Vict., ch. 102 (1844).

71. 1 W. & M., Sess. 1, ch. 15, parag. 4 (1688, 1689 Gregorian calendar).

72. Id. at parag. 2, incorporating by reference the earlier oath prescribed in 30 Car. 2, ch. 1, paragraphs 2 and 3 (1677), abjuring the doctrine of "transubstantiation of the elements of bread and wine into the body and blood of Christ" and declaring that "the invocation or adoration of the virgin Mary or any other saint, and the sacrifice of the mass as they are now used in the church of Rome, are superstitious and idolatrous." Id. at parag. 3.

73. 1 W. & M., Sess. 1, ch. 15, parag. 4f (1688, 1689 Gregorian calendar).

74. Id.

75. 1 W. Blackstone, Commentaries *144. See also Rex v. Dewhurst, 1 State Trials (n.s.) 529, 601 (1820), quoting approvingly the idea expressed by Blackstone that the English Bill of Rights provision on the right to have arms was "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." The "due restrictions" were the common law prohibitions against carrying dangerous and unusual weapons in public places "against the public peace, by terrifying the good people of the

land..." 4 W. Blackstone,
Commentaries parag. 149.

76. 4 L. Radzinowicz, A History
of English Criminal Law 107 (1968).

77. Id. at 105

78. Jowitt's Dictionary of
English Law 1510 (2d, ed. 1977)
defines the recorder of London as
follows: One of the justices of oyer
and terminer, and a justice of the
peace of the quorum for putting
the laws in execution for the
preservation of the peace and
government of the City...Being the
mouth of the City, he delivers the
sentences and judgments of the
court therein, and also certifies and
records the City customs, etc. He is
chosen by the Lord Mayor and aldermen.
Id.

79. L. Radzinowicz, supra note
76.

80. Id.

81. W. Blizard, Desultory
Reflections on Police: with an Essay
on the Means of Preventing Crimes
and Amending Criminals 59-61 (1785)
(emphasis in original).

82. Id. at 61.

83. Id. (emphasis in original).

84. 4 L. Radzinowicz, supra note
76, at 108 (emphasis in original).

85. Id.

86. W. Blizard, supra note 81,
at 63.

87. Id.

88. Id.

89. Id.

90. 4 L. Radzinowicz, supra note
76, at 109 (emphasis in original).

91. Id. at 110.

92. Id. at 108.

93. Ex Parte Grossman, 267 U.S.
87, 108-09 (1925). For example,
current standards for the fourth

amendment are controlled by "the common-law understanding." *Payton v. New York*, 445 U.S. 573, 591 (1980). See also *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 302 (1967) (unless "wholly irrational"); and compare *Grosjean v. American Press Co.* 297 U.S. 233, 249 (1936) (unless "never accepted by the American colonists").

94. See *supra* notes 79-92 and accompanying text.

95. See *supra* notes 82-83 and accompanying text; cf. *Presser v. Illinois*, 116 U.S. 252 (1886) (upholding constitutionality of State requirement of license for armed parades in cities).

96. *Rex v. Dewhurst*, 1 State Trials (n.s.) 529, 601-02 (1820).

97. 4 H. De Bracton, *De Legibus Et Consuetudinibus Angliae* f.162b, (3 T. Twiss trans. 23, 1880).

According to Professor Thorne, the fragment ("when a strong man armed, &c") is taken from Luke 11:21 [3 S. Thorne, *Bracton on the Laws and Customs of England* 21 n.9 (1977)], which reads: "When a strong man fully armed guards his residence, his belongings are undisturbed." In the original Latin used by Bracton, the word corresponding to the English term "strong man" is "fortis." The word "fortis" may also be translated as "mentally, brave, courageous,..." Cassell's *Latin Dictionary* 230 (1952). Bracton's works were often "cited by colonial Americans in trying to reach decisions based on English legal tradition." L. Wright, *Magna Carta and the Tradition of Liberty* 39 (1976).

It should be noted that the common law came into being during the reign of Henry II, 12th century (just

before Bracton). Moreover, Henry II was a king "who trusted his people, and who had no standing army, but encouraged his subjects to be armed, as unpopular tyrant dare not do." G. Trevelyan, *A Shortened History of England* 139 (1942). Thus it is no accident that the common law developed with a presupposition of the keeping of arms by the people in their homes.

98. See *supra* notes 16-17 and accompanying text.

99. 3 F. Wharton, *A Treatise on Criminal Law* 2061-62 (11th ed. 1912) (paraphrasing W. Hawkins, *supra* note 30).

100. 1 W. Hawkins, *supra* note 30, at 135-36 (emphasis added). Almost identical language is found in 1 W. Russell, *A Treatise on Crimes and Misdemeanors*, Book II, ch. 26, 589 (6th ed. 1896), and in 1 Russell on Crime 266 (12th ed. 1964). As to the limitation to "persons of quality" it should be remembered that the famous Chapter 39 of Magna Carta was originally intended merely "as a written confirmation of the baronial right, recognized by feudal custom, not to be tried by inferiors, but only by men of baronial rank." B. Schwartz, *The Roots of Freedom* 18 (1967). See also *supra* note 28.

101. 4 W. Blackstone, *Commentaries* *149.

102. *Rex v. Smith*, [1914] 2 Ir. R. 190.

103. 2 Edw. 3, ch. 3(1328), and see *supra* note 17 for text thereof.

104. [1914] 2 Ir. R. at 201.

105. *Id.* at 204.

106. *Id.* at 199.

107. *Id.*

108. *Id.* at 201.

109. See *supra* note 17 for text

thereof.

110. *Payton v. New York*, 445 U.S. 573, 594 (1980), quoting from A. Howard, *The Road From Runnymede* 118-19 (1968).

111. 3 E. Coke, *Institutes* 161-62 (5th ed. 1671). Similar language is found in a case reported by Lord Coke himself, *Semayne's Case*, 77 Eng.Rep. 194, 195 (K.B. 1603) quoted in *Payton v. New York*, 445 U.S. at 596 n.44.

112. Anon., Y.B. Trin. 14 Hen. 7 (1499), reported in Y.B. 21 Hen. 7, f.39, pl. 50 (1506), translated in J.Beale, Jr. *A Selection of Cases and Other Authorities Upon Criminal Law* 569 (2d ed. 1907).

113. Beale, Jr., *Homicide in Self-Defence*, 3 Colum. L. Rev. 526, 543 (1903). Beale believed strongly that the law was and should be: "One whose life is threatened may therefore go about his lawful business regardless of the threats, and may arm himself for his own protection without thereby forfeiting any right to protect himself." *Id.*

114. *Id.*

115. *People v. Gonzales*, 71 Cal 569, 12 P. 783 (1887).

116. *Id.* at 568, 12 P. at 787.

117. See Beale, Jr., *supra* note 113, at 544.

118. *State v. Evans*, 124 Mo. 397, 28 S.W. 8 (1894).

119. *Id.* at 411, 28 S.W. at 11.

120. See Perkins, *Self-Defense Re-Examined*, 1 U.C.L.A. L.Rev. 567, 577 (1903).

121. Beale, Jr. *Retreat From a Murderous Assault* 16 Harv. L. Rev. 567, 577 (1903).

122. *Id.*

123. See Beale, Jr., *supra* note 113. See, *supra* notes 113-17 and

accompanying text.

124. Rex. v. Dewhurst, 1 State
Trials (n.s.) 529, 602 (1820).

125. See Anon., supra note 112.

126. McKellar v. Mason, 159 So.
2d 700, 702 (La.App.), aff'd 245 La.
1075, 162 So.2d 571 (1964)

127. *State v. Duke*, 42 Tex. 455, 458 (1875) (a case cited as among "some of the more important opinions" in *United States v. Miller*, 307 U.S. 174, 182 (1939)).

128. *Id.* (emphasis added).

129. *People v. Persce*, 204 N.Y. 397, 403, 97 N.E. 877, 879 (1912) (emphasis added).

130. 1 W. Hawkins, *supra* note 30, at 136.

131. *People v. Brown*, 253 Mich. 537, 538, 235 N.W. 245, 246 (1931), quoting Mich. Const. art. 2, para. 5 (a case cited among "some of the more important opinions" in *United States v. Miller*, 307 U.S. 174, 182 (1939)).

132. 253 Mich. at 541, 235 N.W. at 246-47 (emphasis added).

133. *Id.* at 544, 235 N.W. at 247-48.

134. *Id.* at 542, 235 N.W. at 247.

135. 232 U.S. 138 (1914).

136. *Id.* at 143.

137. See *supra* notes 30, 100, 130 and accompanying texts.

138. See *supra* notes 16, 17, 103, 109 and accompanying texts.

139. 398 N.E.2d 1339 (Ind. Ct. App. 1980).

140. Ind. Code Ann. sect. 35-23-4.1-5 (Burns 1979).

141. *Id.*

142. *Id.*

143. 398 N.E.2d at 1341 n.5.

144. *Id.* at 1339.

145. *Id.* at 1341.

146. No. 3-177A10 (Ind. Aug. 28, 1980).

147. 398 N.E. 2d at 1342 (Staton, J., dissenting).

148. Ind. Code Ann. Sec. 35-23-4.1-5 (Burns 1979).

149. 398 N.E.2d at 1341.

150. Id.

151. Schubert v. DeBard was a 2 to 1 decision with Judge Hoffman filing a separate concurring opinion. Id. at 1342.

152. Id. at 1341.

153. Ind. Const. art. I, Sec. 32.

154. 398 N.E.2d at 1341-42.

155. Id. at 1341, Citing 2 Debates in Indiana Convention 1391 (1850), and noting that the debate focused upon whether special language should be required to permit the legislature to regulate the carrying of concealed weapons.

156. 398 N.E.2d at 1341.

157. Id. (referring to the Indiana gun control statute, Ind. Code Ann. sect. 35-23-4.1-5 (Burns 1979)).

158. 398 N.E.2d at 1341.

159. Id. at 1341-42.

160. Id. at 1342.

161. 237 Ind. 677, 148 N.E.2d 334 (1958).

162. Id. at 684, 148 N.E. 2d at 337. In 1973, the Indiana legislature replaced the phrase "suitable person" with "proper person." 1973 Ind. Acts P.L. 333, sect. 5. The phrase "proper reason" remained unchanged. See Schubert v. DeBard, 398 N.E.2d at 1343 n.1.

163. 237 Ind. at 684-85, 148 N.E.2d at 337.

164. 398 N.E.2d at 1344.

165. Id. at 1341.

166. Id. at 1344.

167. 237 Ind. 677, 148 N.E.2d 334.

168. 398 N.E.2d at 1344.

169. Final Report, National Commission on the Causes and Prevention of Violence (1969); Newton & Zimring, Firearms and

Violence in American Life 62-67 (Staff Report to the National Commission on the causes and prevention of Violence, No. 7, 1969); Mosk, Gun Control Legislation: Valid and Necessary, 14 N.Y.L. Forum 694 (1968); Geisel, The Effectiveness of State and Local Regulation of Handguns: A Statistical Analysis, 1969 Duke L.J. 647.

170. Newton & Zimring, *supra* note 169.

171. Geisel, *supra* note 169.

172. Murray, Handguns, Gun Control Laws and Firearm Violence. 23 Soc. Probs. 81 (1975).

173. Geisel, *supra* note 169.

174. Murray, *supra* note 172, at 83.

175. *Id.*

176. *Id.* at 91.

177. *Id.*

178. See supra note 169 and accompanying text.

179. Studies on Gun Law Divided on Impact, N.Y. Times, Jan. 21, 1981, at A17, col. 1. See also Briggs, The Great American Gun War, 45 Pub. Interest 37, 38 (1976) ("[N]o policy research worthy of the name has been done on the issue of gun control...[E]ven the most elementary methods of cost-benefit analysis have not been employed."); Wright & Rossi, Weapons and Violent Crime, Executive Summary 8 (1981) ("[E]xisting knowledge about weapons, crime, and the relationships between them is, in general, not adequate as a basis for policy formulation. Even the most basic descriptive questions - for example, the actual number of firearms in private hands, or the crime reduction effects, if any, of weapons measures enacted in the past - remain essentially unanswered to any useful degree of precision."); Kessler, Enforcement Problems of Gun Control: A Victimless Crime Analysis, 16 Crim. L. Bull. 131, 133 (1980) ("[R]esults are mixed.").

180. See supra note 151.

181. Ind. Code Ann. sect. 35-23-4.1-5 (Burns 1979).

182. Ind. Const. art. I, sect. 32.

183. 398 N.E.2d at 1344.

184. Id.

185. Id. at 1342 (Staton, J., dissenting).

186. Id. at 1340, citing Ind. Code Ann. parag. 35-23-4.1-5(a) (Burns 1979) (emphasis added).

187. Id. at 1342.

188. Murdock v. Pennsylvania, 319

U.S. 105 (1943) (license tax unconstitutionally burdensome on dissemination of religious books and pamphlets from house to house); Cox v. New Hampshire, 312 U.S. 569 (1941) (permit system for parades constitutional so long as discretion in licensing official was limited to uniform, nondiscriminatory standards of time, place and manner to prevent confusion by overlapping parades); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) (municipal ordinance requiring advance written notice to police by any person desiring to canvass, solicit, or call from house to house for a charitable or political purpose held void for vagueness); Village of Schaumburg v. Citizens for a Better Environment, 440 U.S. 620 (1980) (requirement that 75% of proceeds of charitable organization must be used directly for charitable purposes held facially unconstitutional); International Soc. for Krishna Consciousness v. Rochford, 585 F.2d 263 (7th Cir. 1978) (regulations adopted by city commissioner of aviation restricting distribution of literature at airports held unconstitutionally vague as well as overly restrictive as to time allotted (1/2 hour per day) for registration of persons wishing to distribute materials); Wright v. Chief of Transit Police, 558 F.2d 67 (2d Cir. 1977) (total ban on sale of newspapers by hand on city subways could not stand without exploration of alternative possibilities short of total ban). Kunz v. New York, 340 U.S. 290 (1957) (local ordinance, requiring a

permit to conduct a religious meeting on New York city streets but containing no standard to guide administrative action in granting or denying the permit, held unconstitutional).

189. 398 N.E.2d 1339.

190. 289 Or. 359, 614 P.2d 94 (180).

191. Or. Rev. Stat. sect. 166.510(1) (1965).

192. "The people shall have the right to bear arms for the defence of themselves and the State, but the Military shall be kept in strict subordination to the civil power." Or. Const. art. I, sect. 27.

193. 289 Or. at 359, 614 P.2d at 94.

194. Id. at 370, 614 P.2d at 99.

195. State v. Kessler, 43 Or. App. 303, 307, 602 P.2d 1096, 1097 (1979), quoting People v. Brown, 253 Mich. 537, 543, 235 N.W. 245, 247 (1931).

196. 43 Or. App. at 307, 602 P.2d at 1097.

197. Or. Const. art. I, sect. 27.

198. 289 Or. at 371, 614 P.2d at 100.

199. Id. at 370, 614 P.2d at 99.

200. Id. at 359, 614 P.2d at 94.

201. Or. Const. art. I, sect. 27, supra note 192 and accompanying text.

202. U.S. Const. amend. II 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." See. 1 Stat. 21 (1845).

203. 289 Or. at 362, 614 P.2d at 95.

204. Id.

205. Id.

206. Id. at 363, 614 P.2d at 96.

207. Id.

208. Id.

209. Id. at 364, 614 P.2d at 96, citing English Bill of Rights, 1689, 1 W. & M., Sess. 2 ch. 2. For background and legislative history of the English Bill of Rights, see supra notes 46-75 and accompanying text.

210. 289 Or. at 364, 614 P.2d at 96.

211. Id at 366, 614 P.2d at 97. The six other states are Florida (Fla. Const. art. I, sect. 8), Kentucky (Ky. Const. sect. 1), Pennsylvania (PA. Const. art. I, sect. 21), South Dakota (S.D. Const. art. VI, sect. 24), Vermont (Vt. Const. ch. 1, art. 16), Wyoming (Wyo. Const. art. I, sect. 24). See supra note 8 for texts of these provisions.

212. 289 Or. at 366, 614 P.2d at 97. Compare: "Until after the Boer War, there was no real restriction in this country [England] on the carrying of arms. Indeed the right to carry arms would have been defended as a traditional right of Englishmen...an ultimate prerogative - the means to resist unjust government by force." Phelan, Men and Arms, 110 Law J. 131 (1969).

213. 289 Or. at 366, 614 P.2d at 97.

214. Id. at 367, 614 P.2d at 98.

215. Id.

216. Id. at 368 n.14, 614 P.2d at 98 n. 14. The five state constitutional provisions containing the phrase "in defense of his home, person and property" are: Colo. Const. art. II, sect. 13; Miss. Const. art III, sect. 13; Mo. Const. art. I, sect. 23; Mont. Const. art. III, sect. 13; Okla. Const. art. II, sect.

26. See supra note 8 for texts of these provisions.

217. 289 Or. at 368, 614 P.2d at 98. See also *United States v. Miller*, 307 U.S. 174, 179 (1939) ("[T]he Militia comprised all males physically capable of acting in concert for the common defense...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.").

218. 289 Or. at 368, 614 P.2d at 98.

219. *Id.*

220. *Id.*

221. *Id.* at 369, 614 P.2d at 99.

222. *Id.*

223. *Id.*

224. *Id.* at 371, 614 P.2d at 100.

225. *Id.* at 370, 614 P.2d at 99.

226. 1 W. Hawkins, supra note

30. See supra notes 99-100 and accompanying text. See also VI Record of Proceedings, Sixth Illinois Constitutional Convention, Bill of Rights Committee Report sect. 27 (1970) ("The substance of the right is that a citizen has the right to possess and make reasonable use of arms that law-abiding persons commonly employ for purposes of recreation or the protection of person and property.")

227. *State v. Blocker*, 291 Or. 255, 630 P.2d 824 (1981).

228. *Id.* at 257, 630 P.2d at 826.

229. 72 Kan. 230, 83 P.619 (1905).

230. *Id.*, 83 P. at 620.

231. *Id.* at 231, 83 P. at 620.

232. 398 N.E.2d 1339.

233. 289 Or. 359, 614 P.2d 94.

234. See supra text notes 139-

226.

235. See *supra* text notes 14-138.

236. 289 Or. at 367, 614 P.2d at
98.

237. U.S. Const. Am.II (emphasis
added).

THE BILL OF RIGHTS AND THE MILITARY
by Earl Warren

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Review || 37 NYULR 181 (1962) pp. 181-185. | +-----
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It is almost a commonplace to say that free government is on trial for its life. But it is the truth. And it has been so throughout history. What is almost as certain: It will probably be true throughout the foreseeable future. Why should this be so? Why is it that, over the centuries of world history, the right to liberty that our Declaration of Independence declares to be "inalienable" has been more often abridged than enforced?

One important reason, surely, is that the members of a free society are called up-on to bear an extraordinarily heavy responsibility, for such a society is based upon the reciprocal self-imposed discipline of both the governed and their government. Many nations in the past have attempted to develop democratic institutions, only to lose them when either the people or their government lapsed from the rigorous self-control that is essential to the maintenance of a proper relation between freedom and order. Such failures have produced the totalitarianism or the anarchy that, however masked, are the twin mortal enemies of an ordered liberty.

Our forebears, well understanding this problem, sought to solve it in unique fashion by incorporating the concept of mutual restraint into our Nation's basic Charter. In the body of our Constitution, the Founding Fathers insured that the Government would have the power necessary to govern. Most of them felt that the self-discipline basic to a democratic government of delegated powers was implicit in that document in the light of our Anglo-Saxon heritage. But our people wanted explicit assurances. The Bill of Rights was the result.

This act of political creation was a remarkable beginning. It was only that, of course, for every generation of Americans must preserve its own freedoms. In so doing, we must turn time and again to the political consensus that is our heritage. Nor should we confine ourselves to examining the diverse, complicated, and sometimes subordinate issues that arise in the day-to-day

application of the Bill of Rights. It is perhaps more important that we seek to understand in its fullness the nature of the spirit of liberty that gave that document its birth.

Thus it is in keeping with the high purposes of this great University that its School of Law sponsor a series of lectures emphasizing the role of the Bill of Rights in contemporary American life. And it is particularly appropriate, after the splendid lectures of Mr. Justice Black (1) and Mr. Justice Brennan (2) on the relationship of the Bill of Rights to the Federal and State Governments, respectively, that you should delegate to someone the task of discussing the relationship of the Bill of Rights to the military establishment. This is a relationship that, perhaps more than any other, has rapidly assumed increasing importance because of changing domestic and world conditions. I am honored to undertake the assignment, not because I claim any expertise in the field, but because I want to cooperate with you in your contribution to the cause of preserving the spirit as well as the letter of the Bill of Rights.

Determining the proper role to be assigned to the military in a democratic society has been a troublesome problem for every nation that has aspired to a free political life. The military establishment is of course, a necessary organ of government; but the reach of its power must be carefully limited lest the delicate balance between freedom and order be upset. The maintenance of the balance is made more difficult by the fact that while the military serves the vital function of preserving the existence of the nation, it is, at the same time, the one element of government that exercises a type of authority not easily assimilated in a free society.

The critical importance of achieving a proper accommodation is apparent when one considers the corrosive effect upon liberty of exaggerated military power. In the last analysis, it is the military--or at least a militant organization of power--that dominates life in totalitarian countries regardless of their nominal political arrangements. This is true, moreover, not only with respect to Iron Curtain countries, but also with respect to many countries that have all of the formal trappings of constitutional democracy.

Not infrequently in the course of its history the Supreme Court has been called upon to decide issues that bear directly upon the relationship between action taken

in the name of the military and the protected freedoms of the Bill of Rights. I would like to discuss here some of the principal factors that have shaped the Court's response. From a broad perspective, it may be said that the questions raised in these cases are all variants of the fundamental problem: Whether the disputed exercise of power is compatible with preservation of the freedoms intended to be insulated by the Bill of Rights.

I believe it is reasonably clear that the Court, in cases involving a substantial claim that protected freedoms have been infringed in the name of military requirements, has consistently recognized the relevance of a basic group of principles. For one, of course, the Court has adhered to its mandate to safeguard freedom from excessive encroachment by governmental authority. In these cases, the Court's approach is reinforced by the American tradition of the separation of the military establishment from, and its subordination to, civil authority. On the other hand, the action in question is generally defended in the name of military necessity, or, to put it another way, in the name of national survival. I suggest that it is possible to discern in the Court's decisions a reasonably consistent pattern for the resolution of these competing claims, and more, that this pattern furnishes a sound guide for the future. Moreover, these decisions reveal, I believe, that while the judiciary plays an important role in this area, it is subject to certain significant limitations, with the result that other organs of government and the people themselves must bear a most heavy responsibility.

Before turning to some of the keystone decisions of the Court, I think it desirable to consider for a moment the principle of separation and subordination of the military establishment, for it is this principle that contributes in a vital way to a resolution of the problems engendered by the existence of a military establishment in a free society.

It is significant that in our own hemisphere only our neighbor, Canada, and we ourselves have avoided rule by the military throughout our national existences. This is not merely happenstance. A tradition has been bred into us that the perpetuation of free government depends upon the continued supremacy of the civilian representatives of the people. To maintain this supremacy has always been a preoccupation of all three branches of our government. To strangers this might seem odd, since our country was born

in war. It was the military that, under almost unbearable conditions, carried the burden of the Revolution and made possible our existence as a Nation.

But the people of the colonies had long been subjected to the intemperance of military power. Among the grievous wrongs of which they complained in the Declaration of Independence were that the King had subordinated the civil power to the military, that he had quartered troops among them in times of peace, and that through his mercenaries he had committed other cruelties. Our War of the Revolution was, in good measure, fought as a protest against standing armies. Moreover, it was fought largely with a civilian army, the militia, and its great Commander-in-Chief was a civilian at heart. After the War, he resigned his commission and returned to civilian life. In an emotion-filled appearance before the Congress, his resignation was accepted by its President, Thomas Mifflin, who, in a brief speech, emphasized Washington's qualities of leadership and, above all, his abiding respect for civil authority. (3) This trait was probably best epitomized when, just prior to the War's end, some of his officers urged Washington to establish a monarchy, with himself at its head. He not only turned a deaf ear to their blandishments, but his reply, called by historian Edward Channing "possibly, the grandest single thing in his whole career," (4) stated that nothing had given him more painful sensations than the information that such notions existed in the army, and that he thought their proposal "big with the greatest mischiefs that can befall my Country." (5)

Such thoughts were uppermost in the minds of the Founding Fathers when they drafted the Constitution. Distrust of a standing army was expressed by many. Recognition of the danger from Indians and foreign nations caused them to authorize a national armed force begrudgingly. Their viewpoint is well summarized in the language of James Madison, whose name we honor in these lectures:

The veteran legions of Rome were an overmatch for the undisciplined valor of all other nations, and rendered her the mistress of the world. Not the less true is it, that the liberties of Rome proved the final victim of her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments. A

standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and, whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties.(6)

Their apprehensions found expression in the diffusion of the war powers granted the Government by the Constitution. The President was made the Commander-in-Chief of the armed forces. But Congress was given the power to provide for the common defense, to declare war, to make rules for the Government and regulation of the land and naval forces, and to raise and support armies, with the added precaution that no appropriation could be made for the latter purpose for longer than two years at a time--as an antidote to a standing army. Further, provision was made for organizing and calling for the state militia to execute the laws of the Nation in times of emergency.

Despite these safeguards, the people were still troubled by the recollection of the conditions that prompted the charge of the Declaration of Independence that the King had "effected to render the military independent and superior to the civil power." They were reluctant to ratify the Constitution without further assurances, and thus we find in the Bill of Rights Amendments 2 and 3, specifically authorizing a decentralized militia, guaranteeing the right of the people to keep and bear arms, and prohibiting the quartering of troop in any house in time of peace without the consent of the owner. Other Amendments guarantee the right of the people to assemble, to be secure in their homes against unreasonable searches and seizures, and in criminal cases to be accorded a speedy and public trial by an impartial jury after indictment in the district and state wherein the crime was committed. The only exceptions made to these civilian trial procedures are for cases arising in the land and naval forces. Although there is undoubtedly room for argument based on the frequently conflicting sources of

history, it is not unreasonable to believe that our Founders' determination to guarantee the pre-eminence of civil over military power was an important element that prompted adoption of the Constitutional Amendments we call the Bill of Rights.(7)

Earl Warren, former Chief Justice of the United States.

*This article was delivered as the third James Madison Lecture at the New York University Law Center on February 1, 1962.

FOOTNOTES

(1) Black, *The Bill of Rights*, 35 N.Y.U.L. Rev 865 (1960)

(2) Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. Rev. 761 (1961)

(3) 5 Freeman, *George Washington* 477 (1952)

(4) 3 Channing, *A History of the United States* 376 (1912).

(5) 24 *Writings of Washington* 272 (Fitzpatrick ed. 1938)

(6) *The Federalist* No. 41, at 251 (Lodge ed. 1888) (Madison).

(7) See, e.g., Pinkney's recommendations to the Federal Convention, 2 *Records of the Federal Convention* 341 (Farrand ed. 1911), and the discussion by Mason and Madison, *Id.* at 617; *Resolutions on Ratification of the Constitution by the States of Massachusetts, New Hampshire, New York and Virginia*, reprinted in *Documents Illustrative of Formation of the Union of American States*, H.R. Doc. No. 398, 69th Cong., 1st Sess. 1018-20, 1024-44 (1927).

**STANDING ARMIES AND ARMED CITIZENS:
AN HISTORICAL ANALYSIS OF
THE SECOND AMENDMENT
by Roy G. Weatherup**

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1001.! +-----+

I. Introduction: Guns and the Constitution

As a result of a steadily rising crime rate in recent years, a sharp public debate over the merits of federal firearms regulation has developed. "Crime in the streets" has become a national preoccupation; politicians cry out for "law and order;" and the handgun has become a target of attention. The number of robberies jumped from 138,000 in 1965 to 376,000 in 1972, while murders committed by guns shot up from 5,015 to 10,379 in the same period, and the proportion of cases in which the murder weapon was a firearm rose from 57.2 percent to 65.6 percent.¹ The recent attempt on the life of President Ford in Sacramento by an erstwhile member of the "Manson Gang" serves to heighten the terror of a nation already stunned by the assassinations of John F. Kennedy, Martin Luther King and Robert F. Kennedy, and the maiming of George Wallace. Many people assert that these tragedies could have been prevented by keeping the murder weapons out of the hands that used them. Others vehemently dispute this claim.

The free flow of firearms across state lines has undermined the traditional view of crime and gun control as local problems. In New York City, long noted for strict regulation of all types of weapons, only 19% of the 390 homicides of 1960 involved pistols, by 1972, this proportion had jumped to 49 percent of 1,691. In 1973, there were only 28,000 lawfully possessed handguns in the nation's largest city, but police estimated that there were as many as **1.3 million** illegal handguns, mostly imported from southern states with lax laws.² These statistics give credence to the arguments of proponents of gun control that federal action is needed, if only to make local laws enforceable.

The great majority of the American people now support registration of both handguns and rifles. When

the Gallup Poll asked the question: "Do you favor or oppose registration of all firearms?" in a recent survey, more than two-thirds (67 percent) favored the concept, while 27 percent opposed it, and 6 percent had no opinion. Even gunowners endorsed registration by a margin of 55 percent to 39 percent with 6 percent undecided.³ Yet, although the intensity of belief is undoubtedly far stronger in the minority than in the majority Congress has remained dormant.⁴ The zeal of those individuals dedicated to the preservation of the "right to keep and bear arms" in its present form cannot be doubted.

American history has often seen social and political problems transformed into constitutional issues.⁵ The gun control issue is no exception to this phenomenon, and particular attention has been focused on the Second Amendment to the United States Constitution, which 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."

Proponents of gun control seize the phrase "a well regulated Militia" and find in it the sole purpose of the constitutional guarantee. They therefore assert that "the right of the people to keep and bear Arms" is a collective right which protects only members of the organized militia, e.g., the National Guard, and only in the performance of their duties. It is their belief that no one else can claim a personal right to keep and bear arms for any purpose whatsoever, criminal or otherwise.

Opponents maintain that having guns is a constitutionally protected individual right, similar to other guarantees of the Bill of Rights. Some hold this right to be absolute, while others would allow reasonable restrictions, perhaps even licensing and registration. Still others would limit the protection of the Second Amendment to individuals capable of military service and to weapons useful for military purposes. The essential characteristic of the "individualist" interpretation, as opposed to the "collectivist" view, is that the Second Amendment precludes, to some extent at least, congressional interference in the private use of firearms for lawful purposes such as target shooting, hunting and self-defense.

It is one of the ironies of contemporary politics that the many of the most vocal supports of "law and order" are persistent critics of federal firearms regulation.

"Guns don't kill people; people kill people" is their philosophy. Firearms in private hands are viewed as a means of protecting an individual's life and property, as well as a factor in helping to preserve the Republic against foreign and domestic enemies. Whereas strict constructionism is often the preferred doctrine in interpreting the constitutional rights of criminals, such a narrow view of the Second Amendment is unacceptable. Far from being narrowly construed, the Second Amendment is held out to be a bulwark of human freedom and dignity as well as a means of safeguarding the rights of the individual against encroachment by the federal government. It thus becomes a weapon in the arsenal of argument against gun control, and each new proposal is said to infringe upon the rights of the people to keep and bear arms.

The clash between "collectivist" and "individualist" interpretations of the Second Amendment has not been definitely resolved. Even members of Congress believe that their power to regulate firearms is limited by the existence of an individual right to have, to hold, and to use them. Senator Hugh Scott, Republican of Pennsylvania, writes in *Guns & Ammo* magazine: "As my record shows, I have always defended the right-to-bear-arms provision of the Second Amendment. I have a gun in my own home and I certainly intend to keep it."⁶

There has been very little case law construing the Second Amendment, perhaps because there has been very little federal legislation on the subject of firearms. This may change, and it may become necessary for the Supreme Court to rule upon constitutional challenges to federal statutes based on the Second Amendment. Even before this occurs, it would be helpful to dispel the uncertainties that exist in Congress about the extent of federal legislative power.

In order to determine accurately the intended meaning of the Second Amendment, it is necessary to delve into history. It is necessary to consider the very nature of a constitutional guarantee - whether it is an inherent, fundamental right, derived from abstract human nature and natural law or, alternatively, a restriction on governmental power imposed after experience with abuse of power.

Historically, the right to keep and bear arms has been closely intertwined with questions of political sovereignty, the right of revolution, civil and military

power, military organization, crime and personal security. The Second Amendment was written neither by accident nor without purpose; it was the product of centuries of Anglo-American legal and political experience. This development will be examined in order to determine whether the "collectivist" or "individualist" construction of the Second Amendment is correct.⁷

II. The Evolution of British Military Power

Victorious at the Battle of Hastings in 1066, William the Conqueror was able to assert personal ownership over all the land of England and sovereignty over its people. All power emanated from the King, and all persons held their property and privileges at his sufferance.

Feudal society was organized along military lines in 1181. King Henry II, great grandson of the Conqueror, issued the Assize of Arms, which formalized the military duties of subjects. The first three articles of the decree specify what armament each level of society to maintain - ranging from the holder of a knight's fee, who must equip himself with a hauberk, a helmet, a shield and a lance, down to the poorest freeman armed only with an iron headpiece and a lance. The philosophy of the law is expressed in the fourth article, which is as follows:

Moreover, let each and everyone of them swear that before the feast of St. Hilary he will possess these arms and will bear allegiance to the lord king, Henry, namely the son of the Empress Maud, and that he will bear these arms in his service according to his order and in allegiance to the lord king and his realm. And let none of those who hold these arms sell them or pledge them or offer them, or in any other way alienate them; neither let a lord in any way deprive his men of them either by forfeiture or gift, or as surety or in any other manner.⁸

The remainder of the statute prescribes rules and procedures governing its administration. The Assize of Arms marked the beginning of the militia system; its clear purpose was to strengthen and maintain the King's authority.

In 1215, the rebellious Norman barons forced King John to sign the Magna Carta, a document justly regarded as the foundation of Anglo-American freedom. The Great Charter consists of sixty-three articles which set forth in great detail certain restrictions on the King's prerogative. Its introductory article concludes, "Ye have also granted to all the free men of Our kingdom, for Us and Our heirs forever, all the liberties underwritten, to have and to hold to them and their heirs of Us and Our heirs."⁹ Implicit in this statement is the fact that sovereignty is deemed to be vested in the office of kingship, and that the King is restricting his powers in favor of his subjects. Roscoe Pound makes this comment on the Magna Carta:

The ground plan to which the common-law polity has built ever since was given by the Great Charter. It was not merely the first attempt to put in legal terms what became the leading ideas of constitutional government. It put them in the form of limitations on the exercise of authority, not of concessions to free human action from authority. It put them as legal propositions, so that they could and did come to be a part of the ordinary law of the land invoked like any other legal precepts in the ordinary course of orderly litigation. Moreover, it did not put them abstractly. In characteristic English fashion it put them concretely in the form of a body of specific provisions for present ills, not a body of general declarations in universal terms. Herein, perhaps, is the secret of its enduring vitality.¹⁰

Centuries were to pass before an English sovereign would again proclaim the doctrine of unrestricted royal power which William the Conqueror had established by force of arms, and which King John had lost in the same manner.

Even though medieval England had not yet developed firearms, the government found it necessary to severely restrict such weapons as did exist. In 1328

Parliament passed the celebrated Statute of Northampton, which made it an offense to ride armed at night, or by day in fairs, markets, or in the presence of king'[s ministers].¹¹

The fifteenth century dynastic struggle known as the War of Roses virtually destroyed the feudal system, and prepared the way for a new consolidation of royal power beginning with the coronation of Henry Tudor as King Henry VII in 1485. The Tudors maintained a large degree of national unity. Their task was made easier by practical applications of gunpowder. The royal cannon made resistance by the nobility futile.

Perhaps because of the weakness of their hereditary claims, the Tudor monarchs attempted to control and manipulate Parliament, rather than assert the royal prerogative in defiance of Parliament. It was even admitted that Parliament could regulate the succession to the throne, acting in conjunction with the reigning monarch, of course. In the reign of Elizabeth, it was declared to be high treason to deny that Parliament and the Queen could "make laws and statutes of sufficient force and validity to limit and bind the crown of this realm, and the descent, limitation, inheritance, and government thereof."¹²

The long war with the Hapsburg Empire that began at the time of the Spanish Armada contributed to an upsurge of national sentiment. Faith in the English militia was vindicated as free men had held their own against the massive, professional standing armies of the Spanish King. Englishmen came to believe the militia was the best security for their country and their liberties.

At the death of Elizabeth I in 1603, King James VI of Scotland ascended the English throne as James I. The advent of the House of Stuart marked the beginning of a century of religious and political struggle between Crown and Parliament. Out of this struggle, what we know as the English Constitution emerged. The monarchy was finally and firmly restricted, but preserved, the supremacy of Parliament was established, the common law became a strong, independent force, and the liberties of the people were encased in a Bill of Rights.

Although a model constitutional monarch in some respects, in the realm of political theory, James I challenged the sensibilities of the nation. He boldly proclaimed the divine right theory of government - that kings hold their thrones by the will of God alone, and not

by the will of peoples or parliaments. Typical of his sentiment are these excerpts from his speech to Parliament on March 21, 1610:

The State of **MONARCHIE** is the spremest thing upon earth: For Kings ar not only **GODS** Lieutenants upon earth, and sit upon **GODS** throne, but even by **GOD** himselfe they are called Gods...In the Scriptures Kings are called Gods, and so their power after a certaine relation compared to the Divine Power.

The King concluded that "to dispute what GOD may doe, is blasphemie," and thus it is "sedition in Subjects, to dispute what a King may do in the height of his power."¹³ Here was a King not restricted by any human law.

Neither the legal profession nor Parliament was willing to accept much a boundless royal prerogative. Having grown up in the civil law tradition of Scotland, James I was indifferent to the common law, but the English lawyers argued that, while the King had many privileges at common law, he was limited by and subordinate to it. When James I asserted that Parliament existed only by "the grace and permission of our ancestors and us,"¹⁴ the House of Commons passed the famous Protestation of December 18, 1621, which asserted:

That the Liberties, Franchises, Privileges and Jurisdictions of Parliament, are the ancient and undoubted birthright and inheritance of the subjects of England; and that the arduous and urgent affairs concerning the King, State and defence of the realm, and of the Church of England, and the making and maintenance of laws, and redress of michiefs and grievances, which daily happen within this realm are proper subjects and matter of counsel and debate in Parliament: and that in the handling and proceeding of those businesses every member of the House hath, and of right ought to have, Freedom of Speech, to propound, treat, reason and bring to conclusion the same...¹⁵

The King's response was to walk into the House of Commons and to tear from the Journal the page

containing these words.

The leading legal theorist of the time was Sir Edward Coke, whose writings and leadership were to enhance the prestige of the common law, and bring it into alliance with Parliament against the monarchy. In response to an inquiry from James I, Coke and his colleagues declared:

That the King by his proclamation cannot create any offence which was not an offence before, for then he may alter the law of the land by his proclamation in a high point; for if he may create an offence where none is, upon that ensues fine and imprisonment...; That the King hath no prerogative, but that which the law of the land allows him...¹⁶

The common law courts asserted jurisdiction to inquire into the legality of acts of servants of the Crown, and thus began the doctrine of the rule of law.

In response to the wars waged by James I's improvident heir, Charles I, Parliament enacted the Petition of Right in 1628, inspired and drafted largely by Coke. The petition was an assertion of the power of Parliament and the common law, and contained a long list of grievances. The abuses of the King's military power - billeting, martial law, imprisonment without trial, and forced loans - were particularly resented. Charles I had no choice but to sign the petition, since he needed revenues from Parliament, but he secretly consulted his judges who assured him that his signature would not be binding. Soon afterward, in 1629, the King dissolved Parliament and began the long period of personal rule which was to end in the Great Rebellion.

Charles I was short of money, and revived an ancient tax; his judges upheld the legality of this action in the famous Ship Money case of 1635. The King also wished to strengthen the Church of England, the mainstay of the monarchy. The ecclesiastical canons of 1640 emphatically affirmed the theory of Divine Right of Kings and, in addition, promulgated the doctrine nonresistance:

For subjects to bear arms against their kings, offensive or defensive, upon any pretence whatsoever, is at least to resist the powers which

are ordained of God; and though they do not invade but only resist, St. Paul tells them plainly they shall receive to them selves damnation.¹⁷

This doctrine of "nonresistance" was to have an important role of religion and politics in both England and America, for the next century and a half.

Faced with a Scottish rebellion, Charles I was forced to summon the English Parliament in 1640 in order to obtain the resources necessary to put down the insurrection. After eleven years of personal royal government, Parliament trusted neither the King nor his leading minister, the Earl of Strafford. Parliament demanded a wide array of religious and political concessions, including the removal of Strafford as governor of Ireland and the disbanding of the strong army he had created there. When the King acceded to these demands, Ireland rebelled.

Charles I was now desperate. Scotland and Ireland were in open rebellion, and the Parliament of England was dominated by the King's enemies. The King had made numerous concessions, but to no avail. Strafford wanted to bring John Pym, the parliamentary leader, to trial for treasonable dealings with the Scottish army invading England, but Pym struck first with a bill of attainder against Strafford. The main charge was the creation of a powerful army in Ireland for the purpose of crushing opposition in England. The bill of attainder passed, and the King was forced to send his ablest servant to the scaffold in 1641.

Still unsatisfied, Parliament presented its Nineteen Propositions as an ultimatum to the King in 1642. The Propositions, if acceded to, would have established a very limited monarchy with the King surrendering the power of the sword and Parliament obtaining complete control over the militia. Instead, the King raised the royal standard at Nottingham and proclaimed Parliament to be in rebellion. Thus began the Civil Wars, which resulted in the decapitation of Charles I and the proclamation of a republic in 1649.

Oliver Cromwell and the Puritans came to power by force of arms and the creation of a disciplined standing army. Cromwell soon quarreled with Parliament and assumed the role of a military dictator. The soldiers supported their leader because Parliament proposed to disband much of the army thus depriving them of their

livelihood, and also because they feared that Parliament might once again come under the control of the Anglicans, who would revive persecution of the Puritan sects.

It was soon proposed that Cromwell be made king, but only because that office would have definite constitutional restrictions. Finally Cromwell assumed the title of Lord Protector in 1653, under a written constitution that gave him virtually royal power. Although Cromwell's government brought domestic peace and ruled efficiently, it did not gain in popularity. The Lord Protector's government was created and maintained by bayonets, and the people came to hate it. The end of the protectorate and its legacy have been described by historian Eric Sheppard as follows:

The great soldier's death in 1658, while the army he had made was still fighting victoriously in Flanders, marked the beginning of the end of that army's rule; its leaders soon had no choice but to accept the inevitable, and in May 1660 the red coats of the New Model were arrayed on Blackheath to do honor to the monarch whom nine years before it had hunted into exile. A few months later, setting an example which has since been followed by all the great armies of England, it...laid down its arms and passed silently and peacefully into the pursuits of peace, leaving behind it, in the minds of governing class and the people, besides a deservedly high military reputation, a legacy of hatred and distrust of all standing armies which has endured to our own day.¹⁸

The mood of England at the restoration of Charles II, son of the martyred Charles I, was one of relief and enthusiasm. An act was swiftly passed which recited that "the people of this kingdom lie under a great burden and charge in the maintenance and payment of the present army," and provided that it should be disbanded with "all convenient speed."¹⁹

Once again reliance for the country's security was placed in the militia system, which had fallen into disuse after two decades of professional armies, civil wars and military government. Statutes were passed in 1661 and 1662 declaring that the King had the sole right of

command and disposition of the militia, and providing for its organization.²⁰ Winston Churchill makes this comment on the Cavalier Parliament, which had restored the monarchy:

It rendered all honour to the King. It had no intention of being governed by him. The many landed gentry who had been impoverished in the royal cause were not blind monarchists. They did not mean to part with any of the Parliamentary rights which had been gained in the struggle. They were ready to make provision for the defence of the country by means of militia; but the militia must be controlled by the Lord-Lieutenants of the counties. They vehemently asserted the supremacy of the Crown over the armed forces; but they took care that the only troops in the country should be under the local control of their own class. Thus not only the King but Parliament was without any army. The repository of force had now become the county families and gentry.²¹

The revival of the militia did not mean that the King was forbidden to raise and maintain armies. He had no means of doing so, however, because Parliament held the purse strings, and the quartering of soldiers had been condemned since the days of the Petition of Right.

Foreign wars made the development of a standing army inevitable, and it reached 16,000 men by the end of the reign of Charles II. It was done with the consent of Parliament, and English country gentlemen were secure in their control of the domestic armed power - the militia. In addition, guns were taken out of the hands of the common people. Among the conditions of a 1670 statute was one that no person, other than heirs of the nobility, could have a gun unless he owned land with a yearly value of L100.²² The protection of the people's liberties was thus committed entirely to Parliament and other legal institutions. The possibility of a citizen army, such as that created by Oliver Cromwell, was precluded.

In the reign of Charles II, religious controversy dominated politics. The Cavalier Parliament wished to maintain the established Anglican Church and persecute dissenters, Catholic and Puritan alike. Parliament was also alarmed by the prospect that the King's Catholic

brother, the Duke of York, would succeed to the throne. A parliamentary attempt to exclude the Duke failed, but in 1673 and 1678, two Test Acts were passed, which barred Catholics from all civil and military offices and from both Houses of Parliament.²³

In 1685, the Catholic Duke of York ascended to the throne of James II. The new King quieted the fears of his subjects by proclaiming his intention to maintain church and state as they were by law established. The people were also comforted by the fact that the heirs to the throne were his Protestant daughters, Mary and Anne, and his Protestant nephew, William of Orange, stadholder of the Dutch Republic and Mary's husband. Because of the Test Acts, James II inherited an entirely Protestant government.

At the same time a rebellion, led by the Duke of Monmouth, broke out in the western counties. The King successfully crushed the uprising, but in the process succeeded in doubling his standing army to 30,000 men, granting commissions to Catholic officers, and bringing in recruits from Catholic Ireland. In addition he quartered his new army in private homes. These arbitrary actions were in direct violation of previous parliamentary proclamations.

James II then asked Parliament to repeal the Test Acts and the Habeas Corpus Act, which Parliament refused to do. The King also asked the representatives of the nation to abandon their reliance on the militia, in favor of standing armies:

My Lords and Gentlemen,

After the storm that seemed to be coming upon us when we parted last, I am glad to meet you all again in so great Peace and Quietness. God Almighty be praised, by those Blessing that Rebellion was suppressed: But when we reflect, what an inconsiderable Number of Men began it, and how long they carried [it] on without any Opposition, I hope everybody will be convinced, that the Militia, which hath hitherto been so much depended on, is not sufficient for such Occasions; and that there is nothing but a good Force of well disciplined Troops in constant Pay, that can defend us from such, as, either at Home or Abroad, are disposed to disturb us...²⁴

John Dryden, the poet, shared the King's attitude toward the militia when he wrote these timeless words:

The country rings around with loud
alarms,
And raw in fields the rude militia
swarms;
Mouths without hands; maintained at vast
expense,
In peace a charge, in war a weak defence;
Stout once a month they march, a
blustering band,
And ever, but in times of need, at hand.
This was the morn when, issuing on the
guard,
Drawn up in rank and file they stood
prepared
Of seeming arms to make a short essay,
Then hasten to be drunk, the business of
the day.²⁵

Parliament adjourned in 1686 without resolving any of the basic issues. The King kept his army and pursued his policies through extraparliamentary means.

To get rid of the Test Act, and to revive the royal prerogative at the same time, the King arranged a collusive lawsuit. A coachman in the service of a Roman Catholic officer brought suit under the Test Act to recover the statutory reward for discovering violators, and the officer pleaded a royal dispensation in defense. The King's judges in **Godden v. Hales**²⁶ upheld the validity of the dispensation and gave judgment for the defendant. Lord Chief Justice Herbert stated:

We are satisfied in our judgments before, and having the concurrence of eleven out of twelve, we think we may very well declare an opinion of the court to be that the King may dispense in this case; and the judges go upon these grounds:

1. That the kings of England are sovereign princes.
2. That the laws of England are the king's laws.
3. That therefore 'tis an inseparable prerogative in the kings of England, to dispense with penal laws in particular cases and upon particular necessary reasons.
4. That of those reasons and those necessities the king himself is sole judge: And then, which is consequent upon all,
5. That this is not a trust invested in or granted to the king by the people, but the ancient remains of the sovereign power and prerogative of the kings of England; which never yet has taken from them, nor can be.²⁷

Thus armed with the law, the King proceeded to dispense with statutes as he saw fit. He replaced Protestants and Catholics at high posts in government, particularly at important military garrisons. The army was further enlarged and 13,000 men were stationed at Hounslow Heath, just outside London, in order to hold the city in subjection if necessary. How far James II planned to carry his religious and political program is unknown, but his powerful standing army made many Protestants fearful and uneasy about the future.

With the birth of a son, who would take precedence over the king's Protestant daughters in the succession, fear led to revolution. Leading subjects sent a secret invitation to William of Orange to come to England in defense of the liberties of the people and his wife's right to the Crown. When William landed with a large Dutch army, the English army and government deserted James II who fled to France. Thus the Glorious Revolution of 1688 was accomplished. James II had believed that his enemies were paralyzed by the Anglican doctrine of nonresistance, but he had so alienated his subjects that he was deposed

without being able to put up any resistance himself.

William and Mary were offered the Crown jointly after they accepted the Declaration of Rights on February 13, 1689. The Declaration was later enacted in the form of a statute, known as the Bill of Rights.²⁸ The document is divided into two main parts: (1) a list of allegedly illegal actions of James II, and (2) a declaration of the "ancient rights and liberties" of the realm.

The sections of the first part of the statute that are relevant to the right to bear arms are the allegations that James II:

did endeavor to subvert and extirpate the Protestant Religion and the Laws and Liberties of this Kingdom...

5. By raising and keeping a Standing army within this Kingdom in Time of Peace without Consent of Parliament and quartering Soldiers contrary to Law.

6. By causing several good Subjects, being Protestants, to be disarmed at the same Time when Papists were both armed and employed contrary to Law.²⁹

It should be pointed out that the King did not disarm Protestants in any literal sense; the reference is to his desire to abandon the militia in favor of a standing army and his replacement of Protestants by Catholics at important military posts.

The parallel sections of the declaration of rights part of the statute are:

5. That the raising or keeping a Standing Army within the Kingdom In Time of Peace unless it be with the Consent of Parliament is against Law.

6. That the subjects which are Protestants may have arms for their Defence suitable to their Conditions, and as allowed by Law.³⁰

The purpose, and meaning of, the right to have arms recognized by these provisions is clear from their historical context. Protestant members of the militia might keep and bear arms in accordance with their militia duties for the defense of the realm. The right was recognized as a restriction on any future monarch who might wish to emulate James II and abandon the militia system in favor of a standing army without the consent of Parliament. There was obviously no recognition of any personal right to bear arms on the part of subjects generally since existing law forbade ownership of firearms by anyone except heirs of the nobility and prosperous landowners.

In summary, the English Bill of Rights represents the culmination of the centuries old problem of the relationship of sovereignty and armed force. The king could have an army, but only with the express consent of Parliament. The king could not, however, dismantle and disarm the militia. There was no individual right to bear arms: the rights of subjects could be protected only by the political process and the fundamental laws of the land.

III. England and Her Colonies

The revolutionary settlement that followed the accession of William and Mary gave the English people permanent security. England, however, had become the center of an Empire, and the relationship between England and the outlying territories raised legal and political problems.

When William and Mary, and later, Queen Anne, all died without heirs, the Crown passed to the distantly-related House of Hanover in Germany. Uprisings led by the son and grandson of James II were suppressed in 1715 and in 1745, and Parliament felt it necessary to deprive the people entirely of the right to bear arms in large parts of Scotland.³¹

The history of the English colonies in America was closely intertwined with that of the Mother Country. The New England colonies had been settled by Puritan refugees from the early Stuart kings. When Cromwell and the Puritans came to power in England, thousands of royalists fled to the southern colonies, swelling their populations.

The foundation of government in the colonies was the charter granted by the king. An important feature of a

charter was the provision securing for the inhabitants of the colony the rights of Englishmen. For example, the 1606 Charter of Virginia contains this passage:

Also we do...DECLARE ...that all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and immunities, within any of our other Dominions, to all Intents and purposes, as if they had been abiding and born, within this our Realm of **England**, or any other of our said Dominions.³²

During the seventeenth century and the first half of the eighteenth century, the North American colonies were essentially self-governing republics following the political and legal model of England. In 1720, Richard West, counsel to the Board of Trade, gave this description of the state of law in the colonies:

The Common Law of England is the Common Law of the Plantations, and all statutes in affirmance of the Common Law, passed in England antecedent to the settlement of a colony, are in force in the colony, unless there is some private Act to the contrary; though no statutes, made since those settlements, are there in force unless the colonies are particularly mentioned. Let an Englishman go where he will, he carries as much of law and

liberty with him, as the nature of things will bear.³³

The legal relationship of Britain and the colonies became more than an academic problem after the end of the Seven Years' War in 1763. That war, known in America as the French and Indian War, brought large British armies to colonies which had hitherto known no armed force but the colonial militia. The cost of the war was enormous, and the British armies to colonies which had hitherto known no armed force but the colonial militia. The cost of the war was enormous, and the British government decided that the colonies should share it.

In his efforts to tax and govern the colonies, George III acted in two capacities: as King, armed with the prerogatives of his office, and as the agent of the British Parliament which at that time was under his personal control. The colonists acknowledged the authority of the King, but only in accordance with their charters and with the same restrictions that limited his power in Britain. Many of the colonists denied the authority of the British Parliament to regulate their internal affairs in any way.

Colonial resistance forced the British government to abandon the Stamp Tax, but Parliament passed the Declaratory Act in 1766 entitled "An Act for the Better securing the Dependency of his majesty's dominions in **America** upon the Crown and parliament of **Great Britain**."

Whereas several of the Houses of Representatives in his Majesty's Colonies and Plantations in **America**, have of late, against Law, claimed to themselves or to the General Assemblies of the same, the sole and exclusive Right of imposing Duties and Taxes upon his Majesty's Subjects in the said Colonies and Plantations; and have, in pursuance of such Claim, passed certain Votes, Resolutions and Orders, derogatory to the Legislative Authority of Parliament, and inconsistent with the Dependency of the said colonies and Plantations upon the Crown of **Great Britain**; and that the King's Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons

of **Great Britain** in Parliament assembled, had, hath, and of Right ought to have, full Power and Authority to make Laws and Statutes of sufficient Force and Validity to bind the Colonies and People of **America**, Subjects of the Crown of **Great Britain**, in all Cases whatsoever.³⁴

The colonists were free-born Englishmen and they were not willing to accept inferior status. They could not admit the authority of Crown and Parliament to bind them "in all cases whatsoever." They fell back on the doctrine of fundamental law as expressed in 1764 by James Otis:

'Tis hoped it will not be considered as a new doctrine, that even the authority of the Parliament of Great-Britain is circumscribed by certain bounds, which if exceeded their acts become those of meer **power** without **right**, and consequently void. The judges of England have declared in favour of these sentiments, when they expressly declare; that **acts of Parliament against natural equity are void**. That **acts against the fundamental principles of the British constitution are void**. This doctrine is agreeable to the law of nature and nations, and to the divine dictates of natural and revealed religion.³⁵

The concept of fundamental law was developed and grounded squarely on the English legal tradition. In 1772, Samuel Adams wrote in response to another writer in the **Gazette**:

Chromus talks of **Magna Charta** as though it were of no greater consequence that an act of Parliament for the establishment of a corporation of button-makers. Whatever low ideas he may entertain of the **Great Charter**...it is affirm'd by Lord Coke, to be declaratory of the principal grounds of the fundamental laws and liberties of England. "It is called **Charta Libertatum Regni, the Charter of the Liberties of the Kingdom**, upon great reason...because **liberos facit, it makes and preserves the people free**."...But if it be declaratory of the principal grounds of the fundamental laws and liberties of England, it cannot be altered in any of its essential

parts, without altering the constitution...Vattel tells us plainly and without hesitation, that "the supreme legislative cannot change the constitution." {...If then according to Lord Coke, **Magna Charta** is declaratory of the principal grounds of the **fundamental** laws and liberties of the people, and Vattel is right in his opinion, that the supreme legislative cannot change the constitution, I think it follows, whether Lord Coke has expressly asserted it or not, that an act of parliament made against Magna Charta in violation of its essential parts, is void.³⁶

This statement of fundamental law later influenced the intellectual foundation of judicial review in the United States.

In order to sustain his claim of full and unrestricted sovereignty, George III sent large standing armies to the colonies. America was outraged. The colonists drew their arguments from Whig political theorists on both sides of the Atlantic who maintained that standing armies in time of peace were tools of oppression, and that the security of a free people was best preserved by a militia.

The American colonists, who had always relied on their own militia, hated and feared standing armies even more than their English brethren. In quartering his redcoats in private homes, suspending charters and laws, and eventually imposing martial law, George III was doing in America what he could not do in England. The royal prerogative had virtually ended in England with the Revolution of 1688, but the King was reviving it in America.

The Fairfax County Resolutions, drawn up under the leadership of George Washington and passed on July 18, 1774, reflect the colonial attitude in the year prior to the outbreak of war. Of particular interest is the following paragraph:

Resolved, That it is our greatest wish and inclination, as well as interest, to continue our connection with, and dependence upon, the **British** Government; but though we are its subjects, we will use every means which Heaven hath given us to prevent our becoming its slaves.³⁷

In October of the same year, the First Continental Congress assembled and stated the position of the colonies in these resolutions:

Resolved,...1. That they are entitled to life, liberty, & property, and they have never ceded to any sovereign power whatever, a right to dispose of either without their consent.

Resolved,...2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.

Resolved,...3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.

Resolved,...4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed...³⁸

After stating these general principles, the Congress listed specific rights that had been violated by George III, including the following:

Resolved,...9. That the keeping a Standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is again law.³⁹

The colonists were asserting, in effect, that the restrictions on royal power that had been won by

Parliament in its long struggle against the Stuart kings were binding against the sovereign, in favor of the colonial legislatures as well as Parliament. In order to make that claim good, the colonists were forced to take up arms.

IV. Popular Sovereignty and the New Nation

America's long war in defense of the rights of Englishmen began in 1775. Although many colonists still hoped for a reconciliation with the mother country, it was necessary to set up state governments in the interim. In Connecticut and Rhode Island, all that was necessary was to strike the King's name from the colonial charters,

which continued to serve for many years as state constitutions.

In other states, written constitutions were drawn up. They generally had these features: 1) an assertion that political power derives from the people; 2) provision for the organization of the government with a three-fold separation of powers; 3) a powerful legislature with authority to pass all laws not forbidden by the Constitution; and 4) a specific bill of rights restricting governmental power in the same way that the English Bill of Rights restricted the King. It is important to emphasize that the concept of enumerated powers had not yet been developed, and that rights were, as always before, conceived to be in the nature of restrictions on power, not as individual freedoms.⁴⁰

The Declaration of Independence substituted the sovereignty of the people for that of the King, and appealed to the "Laws of Nature and of Nature's God," but it did not proclaim a social or legal revolution. It listed the colonists' grievances, including the presence of standing armies, subordination of civil to military power, use of foreign mercenary soldiers, quartering of troops, and the use of the royal prerogative to suspend laws and charters. All of these legal actions resulted from reliance on standing armies in place of the militia.

Although America repudiated the British King, it did not repudiate British law. The Constitution of Maryland, for example, declared:

That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury according to the course of that law, and to the benefit of such of the English statutes as existed on the fourth day of July, seventeen hundred and seventy six, and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and

practiced by the courts of law or equity,...⁴¹

The War for Independence was fought by fourteen different military organizations - the Continental Army under Washington, and the thirteen colonial militias. The debate over the relative merits of standing armies and the militia continued even during the fighting. A defender of standing armies, Washington wrote to the Continental Congress in September of 1776 as follows:

To place any dependence upon Militia, is, assuredly, resting upon a broken staff. Men just dragged from the tender Scenes of domestic life; unaccustomed to the din of Arms; totally unacquainted with every kind of military skill, which being followed by a want of confidence in themselves, when opposed to Troops regularly train'd, disciplined, and appointed, superior in knowledge and superior in Arms, makes them timid, and ready to fly from their own shadows...

The Jealousies of a standing Army, and the Evils to be apprehended from one, are remote' and, in my judgment, situated and circumstanced as we are, not at all to be dreaded; but the consequence of wanting one, according to my ideas, formed from the present view of things, is certain, and inevitable Ruin; for if I was called upon to declare upon Oath, whether the Militia have been most serviceable or hurtful upon the whole; I should subscribe to the latter.⁴²

To maintain the supremacy of civil power over that of the military Article II of the Articles of Confederation provided that each state would retain "its sovereignty, freedom, and independence."⁴³ A provision that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred" was included in Article VI.⁴⁴ In contrast, the military powers of the United States rested in Congress were strictly limited; Congress could not maintain standing armies without the consent of nine of the thirteen states.

The government of the United States under the Articles of Confederation was weak. Experience was to show that it needed to be strengthened in its military powers.

V. Forging a More Perfect Union

When the War for Independence ended, the government of the Confederation was faced with one gigantic, insoluble problem - money. As troublesome as foreign and domestic bondholders were, there was one stronger pressure group that simply could not be ignored: the former soldiers who had been promised back pay and large pensions. Organized under the name of the Society of Cincinnati, these veterans were viewed with suspicion by many Americans, who nurtured fears of standing armies.

The danger to civil authority from the military was not entirely imaginary. In the summer of 1783 there was a direct attempt to coerce the Confederation into paying what had been promised to the army. Originally intended as a peaceful protest march on the capitol in Philadelphia, the ex-soldiers were soon "mediating more violent measures," including "seizure of the members of Congress."⁴⁴ Alarmed, Congress adjourned and fled to Trenton, New Jersey. The soldiers eventually gave up, and the officers who led them escaped.

Following the abortive demonstrations in Philadelphia in the summer of 1783, Madison and other leaders felt the need to reorder the nation's military structure.

The other important military event that precipitated demands for a stronger national government was Shays' Rebellion in Massachusetts in 1786. Oppressed by debt, farmers in the western part of the state seized military posts and supplies and defied the state government. Although the insurrection was suppressed fairly easily and Shays himself pardoned, exaggerated reports of the uprising circulated among the states, and conservatives were aghast. Madison, in writing the introduction to his notes on the Federal Convention, lists Shays' Rebellion as one of the "ripening incidents" that led to the Convention.⁴⁵

Thomas Jefferson, in contrast, was not alarmed by the apparent dangers of anarchy, and he criticized the clamor of the Federalists. Just after receiving a copy of the proposed Constitution, he wrote from Paris:

...We have had 13 states independent 11 years. There has been one rebellion. That comes to one rebellion in a century & a half for each

state. What country before ever existed a century & a half without rebellion? & what country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms. The remedy is set them right as to facts, pardon & pacify them. What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots & tyrants. It is natural manure. Our Convention has been too much impressed by the insurrection of Massachusetts: and in the spur of the moment they are setting up a kite to keep the henyard in order.⁴⁶

Whatever the merits of Jefferson's beliefs, they were not shared by the majority of the Convention, which wished to prevent insurrections by strengthening the military powers of the general government. The new military powers of Congress were listed in Article I, Section 8 of the proposed constitution, and include the following authority:

To raise and support Armies, but no Appropriation of Money to that use shall be for a longer Term than two Years;

To provide and maintain a Navy;
To make Rules for the Government and Regulation of the land and naval Forces;
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 State, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress:

The spirited debate over these provisions in the Federal Convention reflects the purposes and fears of the framers of the Constitution.

There was universal distrust of standing armies. For example, in June of 1787, Madison stated:

...A standing military force, with an overgrown Executive will not long be safe companions to liberty. The means of defence agst. foreign danger, have been always the instruments of tyranny at home. Among the Romans it was a standing maxim to excite a war, whenever a revolt was apprehended. Throughout all Europe, the armies kept up under the pretext of defending, have enslaved the people. It is perhaps questionable, whether the best concerted system of absolute power in Europe cd. maintain itself, in a situation, where no alarms of external danger c. tame the people to the domestic yoke. The insular situation of G. Britain was the principal cause of her being an exception to the general fate of Europe. It has rendered less defence necessary, and admitted a kind of defence wch. c. not be used for the purpose of oppression.⁴⁷ (sic)

The defense "which could not be used for the purpose of oppression" was the militia, which was still revered on both sides of the Atlantic, even with its shortcomings.

Yet, despite the preference for the militia, it was generally agreed that Congress must have authority to raise and support standing armies in order to protect

frontier settlements, the national government, and the nation when threatened by foreign powers. However, a few members were still fearful. Elbridge Gerry and Luther Martin, both of who later opposed the Constitution, moved that a definite limit - two or three thousand men be placed on the size of the national standing army. Voting by states, as always, the Convention unanimously rejected the motion. The judgment of Congress and the two year appropriation limitation were thought to be sufficient safeguards.⁴⁸

The proper extent of federal authority over the militia was much more heatedly debated. The subject was introduced by George Mason, author of the Virginia Bill of Rights, who later opposed the Constitution, but who now maintained that uniformity of organization, training, and weaponry was essential to make the state militias effective. His hope was that the need for a standing army would be minimized; perhaps only a few garrisons would be required. Mason's opinions were shared by Madison, who gave this analysis:

The primary object is to secure an effectual discipline of the Militia. This will no more be done if left to the states separately than the requisitions have been hitherto paid by them. The states neglect their militia now, and the more they are consolidated into one nation, the less each will rely on its own interior provisions for its safety, and the less prepare its militia for that purpose; in like manner as the militia of a state would have been independently charged with the care of its militia. The discipline of the militia is evidently a **national** concern, and ought to be provided for in the **national** Constitution.⁴⁹

Despite such explanations, there were still opponents to the militia clauses. Gerry, for example, declared:

This power in the United States, as explained, is making the states drill sergeants. He had as lief-let the citizens of Massachusetts be disarmed as to take the command from the states and subject them to the general legislature. It would be regarded as a system of despotism.⁵⁰

Later, as the Convention moved toward resolution of the issue, Gerry marshaled his final arguments. One can sense his feeling of outrage, as he solemnly warned of the dangers of centralized military power: "Let us at once destroy the state governments, have an executive for life or hereditary, and a proper Senate; and then there would be some consistency in giving full powers to the general government..."⁵¹ But as the states are not to be abolished, he wondered at the attempts that were made to give powers inconsistent with their existence. He warned the Convention against pushing the experiment too far. Some people will support a plan of vigorous government at every risk. Others, of a more democratic cast, will oppose it with equal determination; and a civil war may be produced by the conflict.

Madison rose immediately and answered Gerry in these words:

As the greatest danger is that of disunion of the states, it is necessary to guard against it by sufficient powers to the common government; and as the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good militia.⁵²

The last discussion of the militia clauses took place on September 14, 1787, just before the Convention finished its work. Mason moved to add a preface to the clause that allowed federal regulation of the militia, in order to define its purpose. His proposed addition was "that the liberties of the people may be better secured against the danger of standing armies in time of peace." The motion was opposed as "setting a dishonourable mark of distinction on the military class of citizens," and was rejected.⁵³

Thus ended the Convention's debate over the relative merits and difficulties of standing armies and the militia. The debate was soon to be revived, however, as the new nation prepared to consider the proposed new form of government.

VI. The Ratification Controversy and the Bill of Rights

The new Constitution was signed on September 17, 1787 and the contest over its ratification soon began.

The controversy was carried on mainly through the printed media. It was an unequal contest because the proponents of the new government, who now called themselves Federalists, controlled most of the newspapers. The Antifederalists resorted mainly to pamphlets and handbills.

Because the Antifederalist effort was decentralized and local in nature, it is difficult to generalize about the arguments used against the Constitution. The unifying theme, to the extent there was one, was that the new government would overreach its powers, destroy the states, deprive the people of their liberty, and create an aristocratic or monarchical tyranny. In finding evidence of such dangers, the Antifederalists often made inconsistent interpretations of what the Constitution provided. In the case of the militia powers, for example, it was said that Congress would disarm the militia in order to remove opposition to its standing army; at the same time it was argued that Congress would ruthlessly discipline the militia and convert it into a tool of oppression.

Bearing in mind the inconsistency of the Antifederalist position, some of the pamphlets and articles will be examined in order to show how the fears of military power existed. One of the most scurrilous critics of the Constitution was "Philadelphiensis." His identity is uncertain, but he is believed to have been Benjamin Workman, a radical Irishman and a tutor at the University of Pennsylvania. His comments include the following:

Who can deny but the **president general** will be a **king** to all intents and purposes, and one of the most dangerous kinds too; a king elected to command a standing army? Thus our laws are to be administered by this **tyrant**; for the whole, or at least the most important part of the executive department is put in his hands.

The thoughts of military officer possessing such powers, as the proposed constitution vests in the president general, are sufficient to excite in the mind of a freeman the most alarming apprehensions; and ought to rouse him to oppose it at **all events**. Every freeman of America ought to hold up this idea to himself, **that he has no superior but God and the laws**. But this tyrant will be so much his superior, that he

can at any time he thinks proper, order him out in the militia to exercise, and to march when and where he pleases. His officers can wantonly inflict the most disgraceful punishment on a peaceable citizen, under pretense of disobedience, or the smallest neglect of militia duty.⁵⁴

Another anonymous writer, Brutus, appealed to history as proof that standing armies in peacetime lead to tyranny:

The same army, that in Britain, vindicated the liberties of that people from the encroachments and despotism of a tyrant king, assisted Cromwell, their General, in wresting from the people that liberty they had so dearly earned...

I firmly believe, no country in the world had ever a more patriotic army, than the one which so ably served this country in the late war. But had the General who commanded them been possess of the spirit of a Julius Caesar or a Cromwell, the liberties of this country ...[might have] in all probability terminated with the war.⁵⁵

Still another unknown, styling himself "A Democratic Federalist," asserted that the Revolution had proved the superiority of the militia over standing armies:

Had we a standing army when the British invaded our peaceful shores? Was it a standing army that gained the battles of Lexington and Bunker Hill, and took the ill-fated Burgoyne? Is not a well-regulated militia sufficient for every purpose of internal defense? And which of you, my fellow citizens, is afraid of any invasion from foreign powers that our brave militia would not be able immediately to repel?⁵⁶

Some writers, such as "Centinel," feared that national control over the militia would transform that bulwark of democracy into a tool of oppression:

This section will subject the citizens of these states to the most arbitrary military discipline: even death may be inflicted on the disobedient; in the character of militia, you may

be dragged from your families and homes to any part of the continent and for any length of time, at the discretion of the future congress; and as militia you may be made the unwilling instruments of oppression, under the direction of government; there is no exemption upon account of conscientious scruples of bearing arms, no equivalent to be received in lieu of personal services. The militia of Pennsylvania may be marched to Georgia or New Hampshire, however incompatible with their interests or consciences; in short, they may be made as mere machines as Prussian soldiers.⁵⁷

Other Antifederalist propagandists believed that the true motive for assertion of national control over the militia was not to use it, but to destroy it, and thus eliminate any opposition to the new standing army. The Bostonian who used the pseudonym "John De Witt" asked these questions about the militia clauses:

Let us inquire why they have assumed this great power. Was it to strengthen the power which is now lodged in your hands, and relying upon you and **you solely** for aid and support to the civil power in the execution of all the laws of the new Congress? Is this probable? Does the complexion of this new plan countenance such a supposition? When they unprecedently claim the power of raising and supporting armies, do they tell you for what purposes they are to be raised? How they are to be employed? How many they are to consist of, and where stationed? Is this power fettered with any one of those restrictions, which will show they depend upon the militia, and not upon this infernal engine of oppression to execute their civil laws? The nature of the demand in itself contradicts such a supposition, and forces you to believe that it is for none of these causes - but rather for the purpose of consolidating and finally destroying your strength, as your respective governments are to be destroyed. They well know the impolicy of putting or keeping arms in the hands of a nervous people, at a distance from the seat of a government, upon whom they mean to

exercise the powers granted in that government...

It is asserted by the most respectable writers upon government, that a well regulated militia, composed of the yeomanry of the country, have ever been considered as the bulwark of a free people. Tyrants have never placed any confidence on a militia composed of freemen.⁵⁸

Anonymous pamphleteers and propagandists were not the only persons concerned about standing armies and the militia. Richard Henry Lee, in a letter that was widely circulated in Virginia, combined the contradictory arguments that the militia would be abandoned in favor of a standing army, and that the militia would be strengthened and forged into an instrument of tyranny. He foresaw that a small proportion of the total militia would be made into a select unit, much like a standing army, while the rest of the militia would be disarmed:

Should one fifth, or one eighth part of the men capable of bearing arms, be made a select militia, as has been proposed, and those the young and ardent part of the community, possessed of but little or no property, and all the others put upon a plan that will render them of no importance, the former will answer all the purposes of any army, while the latter will be defenceless.⁵⁹

A necessary premise underlying Antifederalist attack on the militia clauses of the Constitution was that these clauses operated to place exclusive jurisdiction over the militia in the hands of the general government. Though the Federalists denied this premise, it was affirmed even by Luther Martin and Elbridge Gerry, who had been members of the Federal Convention, but who now opposed the Constitution. Martin is particularly interesting because he advanced all of the contradictory arguments used by the antifederalists. Speaking on November 29, 1787 to the Maryland legislature, he said:

...Engines of power are supplies by the standing Army - unlimited as to number or its duration, in addition to this Government has the entire Command of the Militia, and may call the

whole Militia of any State into Action, a power, which it was vainly urged ought never to exceed a certain proportion. By organizing the Militia Congress have taken the whole power from the State Governments; and by neglecting to do it and encreasing the Standing Army, their power will increase by those very means that will be adopted and urged as an ease to the People.⁶⁰

Martin later invoked the opposite approach, that the militia would be subject to ruthless discipline and martial law, and would be marched to the ends of the continent in the service of tyranny. In a letter published on January 18, 1788, Martin wrote that the new system for governing the militia was "giving the states the last coup de grace by taking from them the only means of self preservation."⁶¹

Elbridge Gerry, like many of the pamphleteers, viewed centralized military power as inseparable from monarchy:

By the edicts of authority vested in the sovereign power by the proposed constitution, the militia of the country, the bulwark of defence, and the security of national liberty is no longer under the control of civil authority; but at the rescript of the Monarch, or the aristocracy, they may either be employed to extort the enormous sums that will be necessary to support the civil list - to maintain the regalia of power - and the splendour of the most useless part of the community, or they may be sent into foreign countries for the fulfilment of

treaties, stipulated by the President and two thirds of the Senate.⁶²

The supporters of the proposed constitution were well-prepared to meet these and similar arguments. They had the support of America's two national heroes, George Washington and Benjamin Franklin, and this helped make the Constitution respectable, as well as alleviating fears. Articles favoring the Constitution, such as the **Federalist Papers**, were often reprinted in distant states. Intelligent and well-educated, the proponents of the new government carefully and consistently answered the arguments of their rivals.

To the general argument that there were not sufficient restrictions on the power of the proposed general government, the federalists replied that no bill of rights was necessary. This was because the Constitution would establish a novel type of government, one of enumerated power; restrictions were necessary only where full sovereignty was conferred. In Federalist Number 84, Alexander Hamilton made the argument in these words:

It has been several times truly remarked that Bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince Such was MAGNA CHARTA, obtained by the barons, sword in hand from King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the Petition of Right assented to by Charles, in the beginning of this reign. Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of parliament called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants.⁶³

To particular criticism of the military clauses of the proposed Constitution, both Hamilton and Madison

replied in detail in the Federalist Papers.

Hamilton denied that a standing army was unnecessary, citing recent experience:

Here I expect we shall be told that the militia of the country is its natural bulwark, and would be at all times equal to the national defence. This doctrine, in substance, had like to have lost us our independence. It cost millions to the United States that might have been saved...

The American militia, in the course of the late war, have, by their valor on numerous occasions, erected eternal monuments to their fame; but the bravest of them feel and know that the liberty of their country could not have been established by their efforts alone, however great and valuable they were. War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice.⁶⁴

Hamilton did not, however, go so far as to say that standing armies were a good thing. Instead, he argued that a strong militia would minimize the need for them.⁶⁵

Madison also addressed himself to the fear that the new national government would disarm the militia and destroy state government. He first argued that the states would still have concurrent power over the militia, thus denying that the proposed Constitution gave exclusive jurisdiction over the militia to the general government. He also pointed out that the militia, comprised of half a million men, was a force that could not be overcome by any tyrant.⁶⁶

The arguments of the federalists appear to have quieted the fears of their countrymen, since the early state conventions were all easy victories for the new Constitution. Between December 7, 1787 and January 9, 1788, Delaware, Pennsylvania, New Jersey, Georgia and Connecticut all ratified unconditionally and overwhelmingly; the vote was unanimous in three of these states. In Massachusetts, the contest was close. On February 6, 1787, the state convention ratified the new Constitution by a narrow margin.

On the other hand, Maryland overwhelmingly approved the Constitution on April 28, 1787. South Carolina was next, on May 23, 1787. Eight states had

now ratified the document and only one more was needed. All of the ratifications, except Massachusetts, had been by majorities of two-thirds or more. The remaining states were to see close contests, and all of them would suggest that a Bill of Rights be added to the Constitution.

New Hampshire, on June 21, 1787, became the ninth state to approve the form of government, thus assuring that the proposed Constitution would go into effect. The New Hampshire convention proposed some amendments in its ratifying resolution. Among the proposals were a three-fourths vote requirement for keeping standing armies, a flat prohibition on quartering troops, and a prohibition against Congressional disarmament of the militia. Although no records were kept of the debates, it seems likely that the delegates feared that New England's experiences with General Gage's redcoats would be repeated.

As yet undecided, Virginia was vital to the Union as the largest, richest, and most populous state. The Virginia convention was also important because it was the only one in which the military clauses of the Constitution were extensively discussed.

The main protagonist of the Virginia debates was Patrick Henry, backwoods lawyer, ardent republican, and incomparable orator. By means of the rhetorical question, Henry was able to capture the fears and emotions which led to the adoption of the Second Amendment:

A standing army we shall have, also, to execute the execrable commands of tyranny; and how are you to punish them? Will you order them to be punished? Who shall obey these orders? Will your mace-bearer be a match for a disciplined regiment? In what situation are we to be?...

Your militia is given up to Congress, also, in another part of this plan: they will therefore act as they think proper: all power will be in their own possession. You cannot force them to receive their punishment: of what service would militia be to you when, most probably, you will not have a single musket in the state? For, as arms are to be provided by Congress, they may or may not furnish them...

By this, sir, you see that their control over our last and best defence is unlimited. If they neglect or refuse to discipline or arm our militia,

they will be useless: the states can do neither - this power being exclusively given to Congress...

If we make a king, we may prescribe the rules by which he shall rule his people, and interpose such checks as shall prevent him from infringing them; but the President, in the field, at the head of his army, can prescribe the terms on which he shall reign master, so far that it will puzzle any American ever to get his neck from under the galling yoke...⁶⁷

While other critics lacked Henry's oratorical talents, they also feared disarmament of the militia by the new national government. George Mason, for example, spoke as follows:

... There are various ways of destroying the militia. A standing army may be perpetually established in their stead. I abominate and detest the idea of government, where there is a standing army. The militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless - by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments can not do it, for Congress has an exclusive right to arm them...⁶⁸

Mason then went on to cite the case of a former British governor of Pennsylvania who had allegedly advised disarmament of the militia as part of the British government's scheme for "enslaving America." The suggested method was not to act openly, but "totally disusing and neglecting the militia."⁶⁹ Mason said:

This was a most iniquitous project. Why should we not provide against the danger of having our militia, our real and natural strength, destroyed? The general government ought, at the same time, to have some such power. But we need not give them power to abolish our militia...⁷⁰

In these words lie the origin of the Second Amendment. The new government should be allowed to

keep its broad general military powers, but it should be forbidden to disarm the militia.

Madison, leader of the Federalist forces, still argued that the militia clauses were adequate as written. He said the states and national government would have concurrent power over the militia. In response to a question, he explained why the general government was to have power to call out the militia in order to execute the laws of the union:

If resistance should be made to the execution of the laws, he said, it ought to be overcome. This could be done only in two ways - either by regular forces or by the people. If insurrections should arise, or invasions should take place, the people ought unquestionably to be employed, to suppress and repel them, rather than a standing army. The best way to do these things was to put the militia on a good and sure footing, and enable the government to make use of their services when necessary.⁷¹

It is interesting to note that Madison used the words "people" and "militia" as synonymous, as does the Second Amendment, which he was later to draft.

The Federalists still maintained that a bill of rights was unnecessary where there was a government of enumerated powers. Governor Randolph, who had attended the Philadelphia Convention and had refused to sign the Constitution, but who was now supporting its adoption, spoke as follows:

On the subject of a bill of rights, the want of which has been complained of, I will observe that it has been sanctified by such reverend authority, that I feel some difficulty in going against it. I shall not, however, be deterred from giving my opinion on this occasion, let the consequence be what it may. At the beginning of the war, he had no certain bill of rights; for our charter cannot be considered as a bill of rights; it is nothing more than an investiture, in the hands of the Virginia citizens, of those rights which belonged to British subjects. When the

British thought proper to infringe our rights, was it not necessary to mention, in our Constitution, those rights which ought to be paramount to the power of the legislature? Why is the bill of rights distinct from the Constitution? I consider bills of rights in this view - that the government should use them, where there is a departure from its fundamental principles, in order to restore them.⁷²

This statement is very important, because it clearly explains how men in the eighteenth century conceived of a right. A right was a restriction on governmental power, necessitated by a particular abuse of that power.

The Virginia convention, however, decided that it would be wise to impose restrictions on the power of the general government before abuses occurred. So the delegates appended to their ratification resolution a long document recommended to the consideration of the Congress. This document is divided into two distinct parts: a declaration of principles and specified suggested amendments to the Constitution designed to secure these principles.

The declaration of principles tells much about the social and political philosophy of eighteenth century Americans. The theory of government as a social compact is affirmed. There are five provisions that relate directly to the background of the Second Amendment.

The third principle condemns the Anglican doctrine of nonresistance as "absurd, slavish, and destructive of the good and happiness of mankind."⁷³ This is not surprising, since Virginia had recently disestablished the Anglican Church, and had taken up arms to resist the authority of the head of that church.

The seventh principle is "that all power of suspending laws or the execution of laws by any authority, without the consent of the representatives of the people in the legislature is injurious to their rights, and ought not to be exercised."⁷⁴ The attempt to assert such power had cost James II his throne and George III his American colonies, even though both Kings had been backed by powerful standing armies.

The seventeenth, eighteenth and nineteenth principles are as follows:

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.

Eighteenth, That no Soldier in time of peace ought to be quartered in any house without the consent of the owner, and in the time of war in such manner only as the laws direct.

Nineteenth, That any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead.⁷⁵

These words encapsulate the Whig point of view in the long debate over the relative merits of standing armies and the militia. The specific amendments that were proposed to protect these principles were:

Ninth, That no standing army or regular troops shall be raised or kept up in time of peace, without the consent of two thirds of the members present in both houses.

Tenth, That no soldier shall be enlisted for any longer term than four years, except in time of war, and then for no longer term than the continuance of the war.

Eleventh, That each State respectively shall have the power to provide for organizing, arming and disciplining it's own Militia, whensoever Congress shall omit or neglect to provide for the same. That the Militia shall not be subject to Martial law, except when in actual service in time of war, invasion, or rebellion; and when not in the actual service of the United States, shall be subject only to such fines, penalties and punishments as shall be directed

or inflicted by the laws of its own State.⁷⁶

It is important for our purposes to note that there is no mention here of any individual right.

The Purpose of the Second Amendment

There might never have been a federal Bill of Rights had it not been for one alarming event that is almost forgotten today. As part of the price of ratification in New York, it was agreed unanimously that a second federal convention should be called by the states, in accordance with Article V of the Constitution, to revise the document. Governor Clinton wrote a circular letter making this proposal to the governors of all the states.

Madison feared that a new convention would reconsider the whole structure of government and undo what had been achieved. Professor Merrill Jensen, in **The Making of the American Constitution**, analyzes the situation as follows:

The Bill of Rights was thus born of Madison's concern to prevent a second convention which might undo the work of the Philadelphia Convention, and also of his concern to save his political future in Virginia. On the other side such men as Patrick Henry understood perfectly the political motives involved. He looked upon the passage of the Bill of Rights as a political defeat which would make it impossible to block the centralization of all power in the national government.⁷⁷

Madison had out maneuvered the antifederalist by drafting the Bill of Rights very soon after the First Congress met.

Madison's original draft of the provision that eventually became the Second Amendment read:

The right of the people to keep and bear arms shall not be infringed; a well armed but well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.⁷⁸

There was debate in Congress over the religious exemption, and it was removed. Otherwise, there was general discussion of standing armies and the militia, and widespread support for the proposal. It became part of the Constitution with the rest of the Bill of Rights on December 15, 1791.

Considering the immediate political context of the Second Amendment, as well as its long historical background, there can be no doubt about its intended meaning. There had been a long standing fear of military power in the hands of the executive, and, rightly or wrongly, many people believed that the militia was an effective military force which minimized the need for such executive military power. The proposed Constitution authorized standing armies, and granted sweeping Congressional power over the militia. Some even feared disarmament of the militia. The Second Amendment was clearly and simply an effort to relieve that fear.

Neither in the Philadelphia Convention, in the writings of the Second Amendment rather than the "individualist" interpretation is supported by history. It thus becomes necessary to examine the decisions of the Supreme Court in order to determine whether that body has expanded the right to bear arms beyond what was intended in 1789.

VII. Supreme Court Interpretation of the Second Amendment

The Second Amendment has been directly considered by the Supreme Court in only four cases: **United States v. Cruikshank**,⁷⁹ **Presser v. Illinois**,⁸⁰ **Miller v. Texas**⁸¹ and **United States v. Miller**.⁸²

In **Cruikshank**, the defendants had been convicted of conspiracy to deprive negro citizens of the rights and privileges secured to them by the Constitution and laws of the United States, in violation of the criminal provisions of the Civil Rights Act of 1870. Among the rights violated were the right to peaceably assemble and the right to keep and bear arms for a lawful purpose.

Chief Justice Waite, speaking for the majority, held that the rights violated by the defendants were not secured by the Constitution or laws of the United States, and thus the judgment of conviction was affirmed. The chief justice began with a long discussion of the nature of the federal system in general, and the attributes of state and national citizenship in particular. The only rights protected by the national government were those necessary for participation in that government. The right to petition Congress would be such a right, but a person must look to this state government for protection of similar rights in other situations.

In particular reference to the Second Amendment, the opinion states:

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**, 11 Pet. 139, 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.⁸³

The only dissenter in **Cruikshank** was Justice Clifford, who found the indictment vague on its face. He thus concurred in the result reached by the majority without discussing any constitutional issues.

The next, and undoubtedly the most important Second Amendment case was **Presser v. Illinois**,⁸⁴ decided in 1886. Herman Presser, a German-American, was the leader of **Lehr und Wehr Verein**, a fraternal, athletic and paramilitary association incorporated under Illinois law. He was convicted for parading and drilling with men under arms, in violation of an Illinois Statute, and was fined ten dollars.

On appeal to the United States Supreme Court, it was contended that the Illinois statute conflicted with the military powers given to Congress by the Constitution, with federal statutes passed in pursuance of those powers, and with various other parts of the Constitution, including the Second Amendment. The Supreme Court, unanimously rejected all of these claims and affirmed the conviction.

It should be emphasized that Presser was argued and decided as a case presenting broad issues of the relationship of state and federal military power, and that the Second Amendment was only one aspect of that question. In reference to the Illinois statute, the Court observed:

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 States.⁸⁵

The Court cited **Cruikshank** in support of this proposition. The inapplicability of the Second

Amendment to the states was a sufficient ground for rejecting Presser's Second Amendment contentions, but the Court did not stop there. It preferred to discuss the problem further and make clear the nature of the right protected by the Second Amendment.

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 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.⁸⁶

One view of the Second Amendment suggests that this dicta constitutes the first step toward incorporating the right to bear arms into the Fourteenth Amendment,⁸⁷ apparently forgetting that the Court was laying the Second Amendment "out of view." The Court had stated that the Illinois law does not have the effect of depriving the federal government of its military capacity.

To further clarify its view that the Second Amendment is concerned only with military matters, the opinion focuses on **Presser**:

The plaintiff in error was not a member of the organized volunteer militia of the State of Illinois, nor did he belong to the troops of the United States or to any organization under the militia law of the United States. On the contrary, the fact that he did not belong to the organized militia or the troops of the United States was an ingredient in the offence for which he was convicted and sentenced. The question is, therefore, had he a right as a citizen of the United States, in disobedience of the State law, to associate with others as a military company, and to drill and parade with arms in the towns and cities of the State? If the plaintiff in error has any such privilege he must be able to point to

the provision of the Constitution or statutes of the United States by which it is conferred.⁸⁸

The obvious implication here is that any right to bear arms by virtue of the Second Amendment, even if asserted against the national government, is contingent upon military service in accordance with statutory law. This implication is confirmed later in the opinion, as the Court declared:

The right to voluntarily associate together as a military company or organization, or to drill or parade with arms, without, and independent of, an act of Congress or law of the State authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country.

They cannot be claimed as a right independent of law.⁸⁹

Thus the **Presser** case clearly affirms the meaning of the Second Amendment that was intended by its framers. It protects only members of state militia, and it protects them only against being disarmed by the federal government. There is no individual right that can be claimed independent of state militia law. Furthermore, the dicta relating to preservation of the nation's military capacity could not be used as the basis for questioning any regulation of private firearms, unless such a regulation violated an act of Congress: Congress is obviously the best judge of the proper means of preserving the nation's military capacity.

The third, and least important, of the Second Amendment cases was **Miller v. Texas**.⁹⁰ A convicted murderer asserted that the state had violated his Second and Fourth Amendment rights. The Supreme Court unanimously dismissed the claim in one sentence, relying on the inapplicability of these provisions to the states, and citing **Cruikshank** and other cases.

The fourth and last time that the Supreme Court considered the Second Amendment was in **United States v. Miller**.⁹¹ The result reached by Justice McReynolds for a unanimous Court was obviously correct, but the opinion is so brief and sketchy that it has undoubtedly caused much of the uncertainty that exists today about the meaning of the Second Amendment.

Defendants Miller and Layton were indicted for violation of the National Firearms Act of 1934,⁹² which was designed to help control gangsters, and which infringed the right to keep and bear sawed off shotguns, among other arms. The District Court of the United States for the Western District of Arkansas sustained a demurrer and quashed the indictment, holding the 1934 Act unconstitutional on Second Amendment grounds. The government appealed to the Supreme Court, which reversed and remanded.

When **Miller** was argued before the High Court, there was no appearance for the defendants. With only one side presenting a case, it is easy to understand why the Court viewed the issues as rather simple, and not needing very much analysis.

The Court began by observing that the National Firearms Act was a valid revenue measure, and not a

usurpation of the police powers of the states. The opinion then addresses itself to the Second Amendment issue:

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.⁹³

It is this paragraph that is the source of the uncertainty and confusion arising from the **Miller** case. The Court was merely correcting the error of the district judge, but it made the mistake of looking at the weapon, rather than the person, in determining that the Second Amendment is not applicable.

Fortunately, however, Justice McReynolds went on and partially clarified the ambiguity in the above paragraph. He cited the militia clauses of the Constitution and said:

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.⁹⁴

These words alone undercut any individual right interpretation of the Second Amendment.

Justice McReynolds then proceeded to give a brief history of the militia, stressing its function as a military force. He then considered the relevance of state interpretations of the right to bear arms, and noted:

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.⁹⁵

He concluded that such decisions did not support the trial judge's ruling. He then referred the reader to "some of the more important opinions" concerning the militia. First among these opinions was **Presser v. Illinois**.⁹⁶

Thus, in spite of some ambiguity in the Court's opinion in **Miller**, there is no reason to suppose that there was any change in the established view that the Second Amendment defines and protects a collective right that is vested only in the members of the state militia.

VII. Conclusion

In the last angry decades of the twentieth century, members of rifle clubs, paramilitary groups and other misguided patriots continue to oppose legislative control of handguns and rifles. These ideological heirs of the vigilantes of the bygone western frontier era still maintain that the Second Amendment guarantees them a personal right to "keep and bear arms."⁹⁷ But the annals of the Second Amendment attest to the fact that its adoption was the result of a political struggle to restrict the power of the national government and to prevent the disarmament of state militias.⁹⁸ Not unlike their English forbears, the American revolutionaries had a deep fear of centralized executive power, particularly when standing armies were at its disposal. The Second Amendment was adopted to prevent the arbitrary use of force by the national government against the states and the individual.

Delegates to the Constitutional Convention had no intention of establishing any personal right to keep and bear arms. Therefore the "individualist" view of the Second Amendment must be rejected in favor of the "collectivist" interpretation, which is supported by history and a handful of Supreme Court decisions on the issue.

As pointed out previously, the nature of the Second Amendment does not provide a right that could be interpreted as being incorporated into the Fourteenth Amendment. It was designed solely to protect the states against the general government, not to create a personal right which either state or federal authorities are bound to respect.

The contemporary meaning of the Second

Amendment is the same as it was at the time of its adoption. The federal government may regulate the National Guard, but may not disarm it against the will of state legislatures. Nothing in the Second Amendment, however, precludes Congress or the states from requiring licensing and registration of firearms; in fact, there is nothing to stop an outright congressional ban on private ownership of all handguns and all rifles.

FOOTNOTES

1. U.S. Bureau of the Census, Statistical Abstract of the United States: 1974, at 147-51. (95th ed. 1974).

2. N.Y. Times, Dec. 2, 1973, Sec. 1, at 1, col. 5 (city ed.).

3. L.A. Times, June 5, 1975, Sec. 1, at 29, col. 1.

4. Congressional lethargy cannot be attributed to a lack of proposed legislation. At every session of the Congress, a number of bills for the control of handguns and other weaponry are introduced, only to be shunted to committee and never heard from again. For example, the following is only a partial listing of proffered statutes for the First Session of the 94th Congress: S. 750 was introduced by Senator Hart (Mich.) to prohibit the importation, manufacture, sale, purchase, transfer, receipt, possession or transportation of handguns unless authorized by federal or state authorities. S. 1477, introduced by Senator Kennedy (Mass.) and known as the Federal Handgun Control Act of 1975 is basically a registration and licensing statute. It would prohibit the private sale or manufacture of handguns under six inches in length. (Both bills are currently pending in the Senate Judiciary Subcommittee on Juvenile Delinquency.)

S. 1880, authored by Senator Bayh (Ind.) was passed by the Senate by a vote of 678 to 25, only to die on the floor of the House of Representatives. Entitled the Violent Crime and Repeat Offender Act of 1975, it would have provided additional penalties for felonies committed with firearms, and required the prompt reporting of theft of firearms by licensees.

In addition, there is a major bill pending in the House of Representative which is not duplicated in the Senate. H.R. 2381 would prohibit the importation and manufacture of hollow-point bullets. This bill is now pending in the House Ways and Means Committee as well as in the House Interstate and Foreign Commerce

Committee.

5. See, e.g., *Roe V. Wade*, 410 U.S. 113 (1973) (the question of abortion); *Schechter Corp. v. United States*, 295 U.S. 495 (1935) (the New Deal's National Recovery Administration); *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (the spread of slavery controversy).
6. Scott, **Leading Senator Admits Gun Law Mistake**, Mar 1970 *Guns & Ammo*.
7. For an earlier article which discusses the "collectivist" versus the "individualist" approach to the Second Amendment, see Feller & Gotting, *The Second Amendment: A Second Look*, 61 *Nw. U.L. Rev.* 46 (1966-67). The authors conclude: "[t]he 'right of the people' refers to the collective right of the body politic of each state to be under the protection of an independent, effective state militia". *Id.* at 69. (citation omitted). But see Hays, **The Right to Bear Arms, a Study in Judicial Misinterpretation**, 2 *Wm. & Mary L. Rev.* 381 (1960). Hays contends that the right to bear arms is an individual one.
8. **The Assize of Arms**, Par. 4 (1181), in 2 **English Historical Documents** 416 (D. Douglas & G. Greenaway ed. 1953).
9. **Magna Carta: Text and Commentary 34** (A.E.D. Howard ed. 1964).
10. R. Pound, **The Development of Constitutional Guarantees of Liberty** 18-19 (1957).
11. **Statute of Northampton**, 2 *Edw. 3*, c.3 (1328).
12. *Treasons Act*, 13 *Eliz. 1*, c. 1 (1571).
13. **King James I, The Workes of the Most High and mightie Prince James** 529, 531 (1616).
14. 1 *Parl. Hist. Eng. 1351 (1621)*.
15. *Id.* at 1361.
16. 7 **The Reports of Sir Edward Coke**, *KNT 76* (G. Wilson trans. 1777).
17. *Constitutions and Cannons Ecclesiastical, Treated Upon by the Archbishops of Canterbury and York (1640)*, in 1 *Synodalia* 390-91 (E. Cardwell ed. 1842).
18. **E. Sheppard, A Short History of the British Army** (4th ed. 1959).
19. *Disbanding Act*, 12 *Car. 2*, c. 15 (1660).
20. *First Militia Act*, 13 *Car. 2*, *Stat. I*, c. 6 (1661); *Second Militia Act*, 14 *Car. 2*, c. 3 (1662).
21. 2 **W. Churchill, A History of the English-Speaking Peoples** 336 (1956).
22. *Game Preservation Act*, 22 *Car. 2*, c. 25, Sec. **3

(1670).

23. Test Act, 25 Car. 2, c. 2, (1673): Parliamentary Test Act, 30 Car. 2, Stat. 2, c. 1 (1678) (an exemption allowed the Duke of York to retain his seat in the House of Lords).

24. 9 **H.C. Jour.** 756 (1685).

25. **J. Dryden, Cymon and Iphigenia, in the Poetical Works of John Dryden** 641 (W. Christie ed. 1893).

26. Godden v. Hales, 89 Eng. Rep. 1050 (Ex. 1686), as reported in, 11 **State Trials** 66 (T. Howell comp. 1811).

27. **Id.** at 1199.

28. Bill of Rights, 1 W. & M., sess. 2, c.2 (1689).

29. **Id.**

30. **Id.** Securing the Peace in Scotland Act.

31. 1 Geo. 1, Stat. 2, c. 54 (1715).

32. **Va. Charter** (1606), in 7 **The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies** 3788 (F. Thorpe ed. 1909) [hereinafter cited as Constitutions].

33. 1 **G. Chalmers, Opinions of Eminent Lawyers on Various Points of English Jurisprudence** 194, 195 (1814).

34. Declaratory Act, 6 Geo. 3, c. 12 (1766).

35. **J. Otis, The Rights of the British Colonies Asserted and Proved** 72-73 (1764).

36. S. Adams, **Candidus Letters** (1772), in 2 **The Writings of Samuel Adams** 324-26 (H. Cushing ed. 1906).

37. Fairfax Co. Resolutions, (1774) in A.E.D. Howard, **The Road From Runnymede: Magna Carta and Constitutionalism in America** 435 (1968).

38. 1 **Journals of the Continental Congress 1774-1789**, 67-68 (Oct. 14, 1774) (W.C. Ford ed. 1904-1907).

39. **Id.** at 70.

40. For example, the Virginia Bill of Rights, adopted June 12, 1776, declared: "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, 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." Va. Const., Bill of Rights, Section 13 (1776) in 7 **Constitutions** 3814.

The comparable provision in Massachusetts was as follows: "The people have a right to keep and to bear

arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it." **Mass. Const.**, Declaration of Rights, art. 17 (1780) in 3 Constitutions 1892. (Considered in its context, the meaning of the "right to keep and bear arms" is clear. The words "for the common defence" makes it obvious that a collective right is intended. The people of Massachusetts did not want to risk a second British occupation.)

41. **Md. Const.**, Declaration of Rights, art. 3 (1851), in 3 Constitutions 1713.

42. Letter from George Washington to the President of Congress, Sept. 24, 1776, in 6 **The Writings of George Washington** 110, 112 (F. Fitzpatrick ed. 1931-1944).

43. **See generally** M. Jensen, *The New Nation: A History of the United States During the Confederation, 1781-1789* (1950).

44. Debates of the Congress of the Confederation (June 2, 1783), in 5 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 93 (J. Elliot ed. 1836-1845) [hereinafter cited as *State Debates*].

45. *Drafting the Federal Constitution: A Rearrangement of Madison's Notes Giving Consecutive Developments of Provisions in the Constitution of the United States* 10 (A. Prescott ed. 1941) [hereinafter cited as *Madison Rearranged*].

46. Letter from Thomas Jefferson to William Stephen Smith, Nov. 13, 1787, in 4 *The Works of Thomas Jefferson* 362 (P. Ford ed. 1892-1899).

47. 1 *The Records of the Federal Convention of 1787*, at 465 (M. Farrand ed. 1911).

48. *Madison Rearranged* 513-26

49. **Id.** at 522.

50. **Id.** at 521.

51. **Id.** at 523-24.

52. **Id.** at 524.

53. **Id.** at 525.

54. 'Philadelphiensis' **Letter**, *Independent Gazetteer* (Phila.), Feb. 7, 1788.

55. 'Brutus' **Letter**, *N.Y. Journal*, Jan. 24, 1788.

56. 'A Democratic Federalist' **Letter**, *Pa. Packet* (Phila.), Oct. 23, 1787.

57. 'John De Witt' **Letter**, Am. Herald (Boston), De. 3. 1787.
59. R. H. Lee Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention 24-25 (1787).
60. 3 The Records of the Federal Convention of 1787, at 157 (M. Farrand ed. 1911).
61. Martin, **Letter**, Md. Journal, Jan. 18, 1788.
62. E. Gerry, Observations on the New Constitution and on the Federal and State Conventions 10 (1788).
63. The Federalist No. 84, at 536 (H. Lodge ed. 1888) (A. Hamilton).
64. **Id.** No. 25 at 150 (A. Hamilton).
65. Hamilton explained: "If a well-regulated militia be the most natural defence of a free country, it ought certainly to be under the regulation and at the disposal of that body which is constituted the guardian of the national security. If standing armies are dangerous to liberty, an efficacious power over the militia, in the body to whose care the inducement and the pretext to such unfriendly institutions. If the federal government can command the aid of the militia in those emergencies which call for the military arm in support of the civil magistrate, it can the better dispense with the employment of a different kind of force. If it cannot avail itself of the former, it will be obliged to recur to the latter. To render an army unnecessary will be a more certain method of preventing its existence than a thousand prohibitions upon paper." **Id.** No. 29, at 169 (A. Hamilton).
66. **Id.** No. 46, at 297-99 (J. Madison).
67. Spoken at the Virginia Convention 3 State Debates 51-59.
68. **Id.** at 379.
69. **Id.** at 380.
70. **Id.**
71. **Id.** at 378.
72. **Id.** at 466.
73. J. Madison, The Debates in the Federal Convention of 1787s 6760 (G. Hunt & J.B. Scott ed. 1920).
74. **Id.** at 661.
75. **Id.** at 662.
76. **Id.** at 663.
77. M. Jensen, the Making of the American Constitution 149 (1964).

78. 1 Annals of Cong. 434 (1789).
79. 92 U.S. 542 (1875).
80. 116 U.S. 252 (1886).
81. 153 U.S. 535 (1894).
82. 307 U.S. 174 (1939).
83. 92 U.S. at 553 (1875).
84. 116 U.S. 252 (1886).
85. **Id.** at 264-65.
86. **Id.** at 265.
87. **See generally** H. Black, The Bill of Rights, 35 N.Y.U.L. Rev. 865 (1960).
88. **Id.** at 266.
89. **Id.** at 267.
90. 153 U.S. 535 (1894).
91. 307 U.S. 174 (1939).
92. National Firearms Act **as amended** 26 U.S.C. Sections 5801-5872 (1972).
93. 307.U.S. at 178>
94. **Id.**
95. **Id.** at 182.
96. 116 U.S. 252 (1886).
97. A recent call to action was made by an organization which calls itself the **Sheriff's Posse Comitatus**. This group, dismayed over claimed violations of the Second Amendment promises to "come together and do something about it." Its propaganda concludes rather ominously, "The PEOPLE are the rightful masters to both congress and courts, not to over throw (sic) the Constitution, but to over throw (sic) the men who pervert the Constitution." **Flyer, Sheriff's Posse Comitatus, Petaluma, California, 1975.**
98. See notes 60-66 and accompanying test.

HISTORICAL DEVELOPMENT AND SUBSEQUENT EROSION OF THE RIGHT TO KEEP AND BEAR ARMS

by James B. Whisker

I. Introduction

At present there are approximately 20,000 federal, state, county and local laws¹ which control, to one degree or another, the ownership and use of firearms by American citizens. Each legislative session brings additional proposals for legislation in this area of public policy.² The growing crime rate in this country has prompted the drafting of a wide variety of anti-crime bills. Many of these seek to control violent crimes by placing additional restrictions on the private ownership of firearms.³

The student of the law is often confused by the wide latitude given the right to keep and bear arms by state courts. The question is compounded because the United States Supreme Court has refused to rule directly on the issue in recent years. No major decision has been rendered since before World War II.⁴ Annually, appeals are made to the Supreme Court seeking constitutional clarification of this right. Most seek relief from the plethora of a state or local laws; a few ask review of the several federal laws.

In 1966 the American Bar Foundation (ABF) began an in-depth review⁵ of both the law and public policy materials in an attempt to better the understanding of the right to keep and own firearms. The ABF admitted in its 1967 published report that "many questions pertinent to intelligent firearms legislation remain unanswered..."⁶ They found that "it does seem clear that no really effective legislation is possible without major alteration in present social and political priorities."⁷ The ABF found that the task of gathering good data was difficult. In regard to current legislation, "the information about relevant facts and estimates of the effectiveness of existing laws is fragmentary and to an important extent conjectural."⁸ Further, "[t]here are no comparable and reliable national, state, or municipal statistics on the number of crimes in which firearms are utilized ... It must be stressed, however, that the sparsity of relevant record keeping practices makes it impossible to state with confidence the frequency of criminal use of firearms..."⁹ Additionally, the size of the problem of control is unknown. "How many guns are being talked about in the proposals for control of firearms? Nobody knows...The best that can be done is to draw inferences from certain relevant but inconclusive data on the periphery of the question,... Testimony and opinion from knowledgeable people usually takes the form of such non-quantitative expressions as 'huge,' 'enormous,' and 'staggering.'"¹⁰

The ABF did not attempt to create model legislation or to suggest the extent of either individual ownership of firearms or the degree of control over firearms permitted within the confines or the objective interpretation of either state or federal constitutions.

The United States government has found that, in at least one way, firearms ownership and use is of considerable value to it. A research report¹¹ done for the United States Army in 1966, found that:

[S]hooting experience, and particularly marksmanship instruction, with military-type small arms prior to entry into military service contributes significantly to the training of the individual soldier. [Further,] the more marksmanship instruction, practice, competition and shooting experience individuals got before entering [military] service the more effective [these] rifle units will be in combat and fewer casualties they will suffer.¹²

II. Historical Basis of the Second Amendment

The right to keep and bear arms is one of man's most ancient prerogatives.¹³ It antedates the purely legalistic right in as much as it is fundamental to primitive man's hunting and defense activities. Long before governmental institutions came into being, man kept and carried weapons for such purposes. In this sense, at least, it ranks as a "natural" right.

Where social contract thinkers such as John Locke¹⁴ and Jean-Jacques Rousseau¹⁵ sought to place the burden of protection of the individual, his family, and his property on the state, they still recognized that there were incidents when the state would be unable to properly perform its duty. International law very clearly recognizes the right of the individual to defend himself, his home, his family, and his nation.¹⁶ Such a right presumes the existence of some set of devices permitting the individual to exercise these rights.

As the modern nation came into being, a threefold defense pattern was developed. By medieval times the system was divided clearly into the standing army, the trained reserves, and the untrained civilian population.¹⁷ In England the term "housecarls" was most often used to describe the real army. These were the mounted troops, recognized today in such concrete forms as knights, the bowman and the "king's men" of history. They were clearly professional soldiers. Many were mercenaries fighting for pay either as "freebooters" or "soldiers of fortune" or for a king who would rent out their services for a set price.¹⁸

The "select fryd" was similar to the present day National Guard or reserves and like the "trained bands" of Stuart England. They were semi-professional soldiers who could, and at least occasionally did, practice other professions, or they were selected para-military personnel who operated at several levels.¹⁹ Many were constables or other local law officers who had some military training. Some were retired or even partially disabled soldiers. They occasionally practiced with arms and undertook other large scale training. Generally, these men had to be released to return to their homes for harvesting or planting of their crops. Important to the discussion is the concept that English law was quite specific about which classes of the "select fryd" had to keep what kinds of arms in their own homes so that these arms were available at a moment's notice. Since class membership in medieval England brought varying class-oriented prerogatives, it is not surprising that one had to have a class of armor or weapon according to his class standing.²⁰

The "great fryd" or "arriereban"²¹ was a concept which meant generally that there existed an obligation of untrained citizens at large to defend their nation. In some cases this involved men and women, at other times, it meant the able-bodied men within a certain age bracket. Generally, the "great fryd" was not required to leave its home

territory and normally could not be required to fight during harvest or planting season. Few laws required them to serve longer than thirty days at a time. Occasionally, the more fit could be mustered into the "select fryd" or drafted into "housecarls."

The masses of men were generally required to keep certain basic, unsophisticated weapons in their homes. Often these weapons were items such as bows with a supply of arrows, a short sword or a pike. In short, the weapons required to be kept were the ordinary infantry weapons of the time period. Those who either failed to keep their weapons in good order or did not have the weapon required of them by law, according to class, were subject to stiff fines or imprisonment.²²

Medieval law required all free men to keep and, under certain circumstances, bear arms.²³ In certain cases even slaves were required to bear arms, and, on specified occasions, were allowed to keep arms. The classification of arms one might be permitted to keep depended upon one's social or political status and not on one's type of military association.

The colonists, when they left England for the New World, found the basic military organization of medieval England to be most useful. The British supplied the standing army and the colonists the militia units. The relationship between the militia men and the British regulars is well known through historical accounts such as Braddock's defeat and the French and Indian wars.²⁴

While the possession of arms was clearly an obligation owed by the citizens in the early colonial period, the colonists came to think of this as a basic right of Englishmen. The English who resisted the tyranny of the Stuarts during the same period helped establish the same precedent when they demanded the right to keep and bear arms for the Puritan "trained bands."²⁵ Hence the English Bill of Rights incorporated this right in the basic law of the land, albeit imperfectly.²⁶ Americans assumed that they possessed all the basic rights of Englishmen.

While Americans believed they held the same basic concept of the rights of Englishmen as the people held in England, in fact, the views differed substantially.²⁷

Englishmen came to view the retention of arms by individuals or by private groups as productive only of rebellion or insurrection. Of course, savages and foreign invasion were not a threat to the people in the home country. The colonials saw the maintenance of arms and munitions stores a necessity and a basic right of Englishmen. Thus, the stage was set for the confrontation at Lexington and Concord over the Colonials' arms and munitions stores. This of course directly precipitated the American revolution.²⁸

The colonials then sought to protect forever what they had come to view as the rights of Englishmen. State constitutions during this period universally contained language protecting these rights of Englishmen, including, the right to bear and keep arms.²⁹

The second amendment to the Constitution was a direct product of state constitutions,³⁰ as were most of the enumerated rights stated in amendments one through eight.³¹ The colonial experience of having seen the keeping and bearing of arms as both an obligation and a right prompted Madison to combine both in the verbiage of 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.³²

In historical context Madison was clearly trying to combine the ancient archaic idea of an obligation to keep and bear arms which was necessary "to the security of a free state" with the much more modern idea of a legal right to do the same and to do this in such a way as to guarantee that it "shall not be infringed."³³ As the Congress,³⁴ and subsequently the state legislatures saw it, there had to be a device which would ensure a supply of trained and skilled riflemen for the army while simultaneously ensuring that the whole body of the American public would have access to the protection of arms.³⁵

The founding fathers had a grave fear of a standing army. They created both constitutional and philosophical mechanisms to ensure against the potential tyranny which a standing and permanent army threatened.³⁶ Article I, section 8, in the Constitution provides for power "to raise and support armies," but limits the period for which money can be appropriated, saying that no "money to that use shall be for a longer term than two years."³⁷ Hamilton, especially in the Federalist Papers, warned of the evils of standing armies.³⁸ But, Hamilton suggested, should the armed forces support a tyranny, "if circumstances should at any time oblige the government to form any army of magnitude, that army can never be formidable to the liberties of the people while there is a large body of citizens, little, if any, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens."³⁹

The objections to standing armies have continued and even added importance to the sentimental role of the citizen-soldier. The parallel in the contemporary mind to Cincinnatus was obvious.⁴⁰ The small federal army placed heavy burdens on the citizen-soldier throughout American military service from the War of the Revolution through Vietnam. In one of the very few rulings given by the Supreme Court on the second amendment the Court paid great attention to this point:

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 a 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.⁴¹

Presser is noteworthy for a number of reasons. First, although the second amendment has not been incorporated under the fourteenth amendment so as to apply directly to the protection of citizen rights against state encroachment, as is true of virtually every other of the first eight amendment liberties, the Supreme Court clearly states its intention to protect the right from destruction at the hands of state governments.⁴² Second, the right to keep and bear arms was first in consideration for federal protection against state encroachment. At the time of the **Presser** decision, 1885, the principle established in **Barron v. Baltimore**⁴³ which held that the Bill of Rights limited only the federal government and not the states, was still in effect. It was not

until 1925 that **Gitlow**⁴⁴ opened the door for what is generally known as the "doctrine of incorporation," allowing the first nine amendments to be enforced through the fourteenth amendment on the states. The subsequent modification, that of "selective incorporation" of these rights under the criteria set down by Justice Cardozo in the **Palko**⁴⁵ case moved the Court away from concern from the second amendment.⁴⁶

Third, the **Presser** decision suggests that the real protection for the right to keep and bear arms lies not in its articulation in the Bill of Rights but in the need for citizen-soldiers. In a way, the **Presser** decision seems to suggest that the right is coextensive and coterminous with one of the primary interests of the state - its interest in self-defense and self-protection. In short, the need for manpower which can be mustered into the armed forces quickly and which has the knowledge of common weapons which the common soldier would encounter will exist as long as the state exists. Thus, the right and obligation to keep and bear arms will endure so long as there is a state.⁴⁷

The importance of the citizen-soldier is well established in old English law from the Assize of Arms⁴⁸ to the Stuart period.⁴⁹ That role is also found in international law. Originally known in international law as the principle of "levees en masse,"⁵⁰ it recognizes the right of citizens to take up arms for their defense against foreign invasion. The United Nations Charter notes that "nothing in the charter shall impair the inherent right of individual or collective self-defense..."⁵¹ The United Nations Universal Declaration of Human Rights states in Article three that "[e]veryone has the right to life, liberty and security of person,"⁵² and in Article twelve that "no one shall be subjected to arbitrary interference with his private family, home or correspondence..."⁵³

The United States Supreme Court has attempted to define what was meant by the term "militia"⁵⁴ as it would be applied to the citizen-soldier. The Court related the term to established laws of other nations and to our own colonial experience:

The significance attributed to the term Militia appears from the debates in the [constitutional] 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.

In all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defense. The possession of arms also implied the possession of ammunition, and the authorities paid quite as much attention to the latter as to the former.⁵⁵

Courts in general have held that the rights of the citizen-soldier to keep and bear arms need have only distant relationship to actual military use of the weapons with which they train.⁵⁶ This is to say the courts do not require that the citizen need have immediate use for his weapons, ammunition or skill, but that the potential use of these skills in a hypothetical case is sufficient. In only one isolated case⁵⁷ surveyed was the

right to keep and bear arms clearly tied to actual militia use. Here the Kansas court appears to be in error, for the court cites an earlier case from Massachusetts merely prohibited the public parades of private militia groups which were not part of the state militia along the same lines of reasoning used by the Supreme Court in **Presser**,⁵⁹ whereas the Kansas court held that the right to keep and bear arms existed only as a collective right of state militias.⁶⁰

It is quite clear that the right to keep and bear arms does not apply to private militia groups as groups distinct from the standing army or state militias.⁶¹ The courts have excepted military or paramilitary groups from protection under the second amendment. However, the individuals who comprise these groups still have their own, individual rights to keep and bear arms. Still, they cannot parade their independent, armed status publicly.

Clearly it is established that there is a very strong tradition within American history and law, derived from both our experience as a nation, and from our European heritage, to sustain the individual's right to keep and bear arms because of the right's relationship to the training of experienced citizens-soldiers. However, this right, like all other rights, is not without limitations.⁶² One of the great roles of the courts is deciding what these limitations are. In this area the courts, and especially the federal courts, have provided fewer guidelines than have been provided for other fundamental rights.

III. Controls on the Second Amendment

Most controls have taken one of two basic forms. They are either controls through taxation or controls through prohibition. At the federal level prohibition has taken the form of federal control of interstate commerce, rather than a direct prohibition of certain classes of weapons or prohibition to certain classes of persons. Various departments have prepared opinions justifying the use of additional federal powers to combat interstate commerce.⁶³ This is the case with the most recent federal legislation - the Federal Gun Control Act of 1968.⁶⁴

Earlier firearms controls at the federal level took the form of taxation. The National Firearms Act of 1934⁶⁵ was a revenue measure designed to control various "gangster" weapons through the imposition of a series of taxes on importer, manufacturers and dealers in such arms. A transfer tax, normally \$200, was assessed on sales of these weapons. To insure the payment of such taxes, all weapons covered by the transfer tax had to be individually registered. Possession of such weapons unless registered was a felony offense.⁶⁶

The 1934 legislation was augmented by the passage on 1938 of the Federal Firearms Act,⁶⁷ which followed the earlier precedent in that it was essentially a revenue measure. One of its primary functions was to license, for a nominal fee, manufacturers, importers, and dealers in all forms of firearms, not just the "gangster" weapons covered by the act. The licensing procedure set certain basic criteria for the licensees. For example, holders could not be either felons or fugitives from justice. These licenses applied only to those dealing in interstate or foreign commerce, but the act did rather effectively reach the overwhelming majority of gun dealers. The act attempted an interface with state legislation by making it a felony offense to ship a gun to anyone, dealer or citizen, within a state if that state required a permit to receive that gun unless

the permit was displayed as was appropriate. The 1938 law hinted more strongly at the argument for controls based in the regulation of interstate commerce than did the 1934 law, but it was still a revenue bill.

In May of 1939 these acts were tested in the United States Supreme Court.⁶⁸ The weapon in question was what is commonly called "a sawed off shotgun" - a shotgun with a barrel less than eighteen inches in length. The Court could find no "reasoned relationship to the preservation or efficiency of a well regulated militia" in that particular gun, or, by inference, in any gun covered by the National Firearms Act. The tax and license fees were upheld by the high court.⁶⁹

Little has been said in recent years about an expansion of federal control over firearms by expanding the federal taxing power. The bulk of recently considered legislation, including the Federal Gun Control Act of 1968,⁷⁰ has concentrated on the regulation of interstate commerce. As a result, the Congress has run afoul of the courts.

There is a strong voice within the liberal minority of the United States Supreme Court to reinterpret the second amendment in such a way as to invalidate the general practice of permitting citizens to bear arms, if not to possess them as well. In a recent decision⁷¹ Justices Marshall and Douglas aired this view:

The police problem is an acute one...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...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...Critics say that proposals like this water down the Second Amendment...But if watering-down is the mood of the day, I would prefer to water down the Second rather than the Fourth Amendment...⁷²

However, the Supreme Court stated in another case⁷³ that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"⁷⁴ by going into "traditionally sensitive areas"⁷⁵ such as the regulation of certain criminal activities "readily denounced as criminal by the States."⁷⁶ The regulation of handguns which do not have a demonstrated nexus with interstate commerce were held to be within that category of state regulation, and hence not the proper area of jurisdiction for the federal government.

The Court interpreted the Omnibus Crime Control and Safe Streets Act of 1968⁷⁷ to control only firearms which had a connection with interstate commerce. The government's error in the case had been that it assumed that the act "banned all possessions and receipts of firearms by convicted felons, and that no connection with interstate commerce had to be demonstrated in individual cases."⁷⁸ Reading the various views expressed in Congress on the intent of the legislation at the time of the passage of the law did not help the Court find that Congress had intended to assume control of weapons connected only with interstate commerce.⁷⁹ Hence, the Court refused to allow the application of the act unless the government was able to demonstrate that the

weapon was "in [interstate] commerce or affecting [interstate] commerce."⁸⁰

Seemingly, unless Congress is willing to enter into an area heretofore reserved to the states and unless there is proof that the firearm which the government sought to remove from the criminal in the 1968 and other firearms control legislation was connected with interstate commerce then the states must do their own controlling of such weapons. The effect of **Bass** will very likely be to reduce to some considerable degree the number of federal prosecutions of the misuse of firearms. It would also seem from **Bass** as well as from the strong dissenting opinions in **Adams** that the federal courts may be bringing some pressure to bear on the states to remove firearms, especially handguns, from general usage through state and federal gun control laws. Probably the Supreme Court would be unlikely to approve additional federal firearms legislation unless Congress is willing to acknowledge that it is altering the whole nature of federal-state relations in the area of criminal law.⁸¹

IV Conclusion

Two serious challenges exist to the effectiveness of any form of firearms control program. One has been tested in the courts and the other has not. If either or both are accepted, then no firearms control legislation will be effective.⁸²

First, there is the question of prior restraint which would apply primarily to firearms registration or licensing legislation. In 1931 the Supreme Court held that the states cannot preclude the publication of a newspaper simply because that publication had a history of libelous activity.⁸³ In short, prior censorship was not permitted regardless of the circumstances. Instead of enjoining an individual from publishing, the most the state can do in the exercise of its police power is to exercise its power to punish individuals for violations of the law as these breaches occur.⁸⁴

If the principle of prior restraint is applicable to the right to keep and bear arms, and no court has yet held that it is, then the states could not enjoin the citizen-soldier from owning firearms as would be allowed under court definitions. The state could then punish at will violations of the law when and if a citizen used his firearm illegally, but it could not prevent him from owning a firearm through some form of prior restraint mechanism.

Because of the grave dangers which firearms can present, the courts might allow the states or the federal government to prevent certain classes of people from bearing or keeping arms within the mitigated doctrine of prior restraint provided that this decision is made on a rational basis. Such groups could include, for example, former convicted felons, drug addicts or alcoholics.

The second challenge to the effectiveness of firearm control programs involves a citizen's right against self-incrimination. In a series of 1968⁸⁵ decisions the Supreme Court invalidated a federal gambling tax stamp on the grounds that to identify one's self as a gambler pursuant to federal law might subject an individual to state prosecution. The Court also indicated that a criminal might not have to follow certain provisions of the 1968 Federal Gun Control Act for the same reason. This might mean, as it is interpreted further by the courts, that only law abiding citizens would have to abide by provisions of this law and any similar subsequent legislation.

If this principle is judiciously continued the right against self-incrimination

could be more significant in the protection of the right to keep and bear arms than the second amendment. Presumably, the same protection could be offered against state controls since the fifth amendment has been incorporated through the fourteenth amendment and is thus applicable to the states.

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FOOTNOTES

1. This is an estimate provided by the National Shooting Sports Foundation in 1968. National Shooting Sports Foundation, True Facts on Firearms Legislation (1968).
2. Fifty-five bills were introduced in the 94th Congress at the time this manuscript was prepared.
3. **E.G.**, H.R. 2313, 94th Cong., 1st Sess. (1975), which bans the importation, manufacture or sale of handguns, and which requires citizens to surrender all privately held handguns for a \$25 tax credit; H.R. 1685, 94th Cong., 1st Sess. (1975), which provides for universal handgun registration and the licensing of their owners; H.R. 40, 94th Cong., 1st Sess. (1975), which prohibits the importation, manufacture, sale, purchase, possession or transportation of handguns except for military and law enforcement officers; and H.R. 2433, 94th Cong., 1st Sess. (1975), which requires registration of all guns and licensing of their owners and bans "Saturday Night Specials." Apparently there is some considerable popular support for additional restraints on the private ownership of firearms. A Gallop Poll conducted in May of 1975 shows that 67% of the American public favors a system of national firearms registration, and 41% want to remove all handguns from private use, Pittsburgh Post-Gazette, June 5, at C-1, col. 1.
4. The principal cases interpreting the second amendment are: *United States v. Cruikshank*, 92 U.S. 542 (1876); *Presser v. Illinois*, 116 U.S. 264 (1886); and *United States v. Miller*, 307 U.S. 174 (1939).
5. American Bar Foundation, *Firearms and Legislative Regulation* (1967).
6. **Id.** at 1.
7. **Id.**
8. **Id.**
9. **Id.** at 2.
10. **Id.**
11. A. Little Research Report to the United States Army (1966).
12. **Id.**
13. See generally Plato, *Laws* (Pantheon ed. 1961); Aristotle, *Politics* (Everyman's Lib. ed. 1935); N. Machiavelli, *The Prince* (Mod. Lib. ed. 1945).
14. J. Locke, *Two Treatises of Civil Government* (Everyman's Lib. ed. 1947).
15. J. Rousseau, *The Social Contract* (Everyman's Lib. ed. 1950).
16. Q. Wright, *A Study of War* 305 (2d ed. 1965) [hereinafter cited as Wright]; see also Universal Declaration of Human Rights, G.A. Res. 265, 3 U.N. GAOR at 71, U.N. Doc. A/810 (1948).

17. Smail, "**Art of War**," in *I Mediaeval England 137* (L.Poole ed. 1937).
18. C. Hollister, *The Military Organization of Norman England* (1965) [hereinafter cited as Hollister].
19. M. Powicke, *Military Obligation in Medieval England* (1962) [hereinafter cited as Powicke].
20. L. Boynton, *The Elizabethan Militia 1558-1638* (1967) [hereinafter cited as Boynton].
21. L. Kennett, *French Armies in the Seven Years' War* (1967).
22. See Hollister, **supra** note 18; and Powicke, **supra** note 19.
23. The Laws of Ethelbert, King of Kent (circa 602), Laws of Cnut (circa 1020) and the Assize of Arms of Henry II (1181) in *I & II English Historical Documents* (D. Douglas ed. 1955, 1953).
24. C. Stevens, *Sources of the Constitution of the United States* 223 (1894). The history of the right to keep and bear arms given here follows essentially that given by the Court in *United States v. Miller*, 307 U.S. 174 (1939), citing, *Aymette v. State*, 21 Tenn. (2 Humph.) 152 (1840). **See also** *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1922).
25. See Boynton, **supra** note 20.
26. The English Bill of Rights said that, "the subjects which are protestants may have arms for their defense suitable to their conditions, and as allowed by law." 9 Statutes at Large 69 (D. Pickering ed. 1764).
27. T. Anderson, *Jacobson's Development of American Political Thought* (1961).
28. B. Knollenberg, *Origins of the American Revolution 1759-1776* (1960); J. Shy, *Toward Lexington* (1956).
29. R. Kirk. *The Roots of American Order* (1975). This parallels the thinking of the court in *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921). The court stated:

We know that in the past this privilege [the right to bear arms] was guaranteed for the sacred purpose of enabling the people to protect themselves against invasion of their liberties. Had not the people in the Colonies been accustomed to bear arms, and acquired effective skill in their use, the scene at Lexington in 1775 would have had a different result, and when "the embattled farmers fired the shot that was heard around the world,; it would have been fired in vain. Had not the common people, the rank and file, those who "bore the burden of the battle" during our great Revolution, been accustomed to the use of arms, the victories for liberty would not have been won and American independence would have been an impossibility.

If our pioneers had not been accustomed to the use of arms, the Indians could not have been driven back, and the French, and later the British, would have obtained possession of the valley of the Ohio and the Mississippi. If the frontiersmen had not been good riflemen, particularly the riflemen from Tennessee and Kentucky, the battle of New Orleans would have been lost and the frontiers of this country would have stood still at the Mississippi.
- Id.** at 577, 1007 S.E. at 224.
30. All constitutions adopted in the thirteen original states had some bill of rights or similar guarantee of the right to keep and bear arms. *American Charters, Constitutions and Organic Laws 1492-1908* (F. Thorpe ed. 1909).
31. The first eight amendments contain the enumerated rights, including, in the second

amendment, the right to keep and bear arms. It is possible to construct an argument to keep and bear sporting arms for sporting purposes which would invoke the unenumerated rights of the ninth amendment, now that this amendment has been given some meaning.

32. U.S. Const. amend. II. Madison originally proposed:

The right of people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.

I The Debates and Proceedings in the Congress of the United States 435 (J. Gales ed. 1834). However, Elbridge Gerry objected that the verbiage suggested that those in power "can declare who are religiously scrupulous and prevent them from bearing arms." **Id.** It is noteworthy that Gerry and Madison both would not have been concerned if they had meant the right to apply only to militia units. Also note that the original language shows more clearly that the right to apply other than to national guard units. Further, the language was changed only so that it would reflect the intent of the authors better, a right to units other than militia. The original language, finally, shows that the phrase about the militia is merely a way of stating a use and rationale for the right given to individuals. Beyond this, it should be noted that Madison was a master of the English language. Had he wished to grant such a right only to militia units he could have done so with great precision and without an iota of equivocation.

33. These points are made, and indeed, emphasized in both *United States v. Miller*, 307 U.S. 174 (1939) and *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1922).

34. After having promised a Bill of Rights to some anti-federalist forces who feared centralized power, Madison wrote the draft for that document. This is well chronicled in R. Rutland, *The Birth of the Bill of Rights 1776-1791* (1955) [hereinafter cited as Rutland].

35. There is still considerable debate over the language used in the second amendment. Specifically, the question is asked whether the framers meant to apply it to the states or to the citizens as individuals. See generally Forkosch, **Who are the "People" in the Preamble to the Constitution?** 19 Case W. Res. L. Rev. 644 (1968); also see generally *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* (2d ed. J. Elliot 1861) [hereinafter cited as *Debates*]; and Rutland, **supra** note 34. In one specific study of this issue, the authors conclude that, it was "a clear grant to the individual citizen of the right to keep and bear arms." Levine and Saxe, *The Second Amendment: The Right to Bear Arms*, 7 *Houston L. Rev.* 1, 16 (1969) [hereinafter cited as *Levine & Saxe*].

36. The anti-federalists used the fear of both a standing army and of a nationalized militia quite successfully in their ill-fated attempt to block ratification of the Constitution. W. Riker, *Soldiers of the State* 16-18 (1957). **See also** L. Martin, *Genuine Information* (1788), as an example of anti-federalist arguments on this point. Levine & Saxe, **supra** note 35, conclude that one way in which the second amendment can be viewed is "as a declaration that Federal Government can never fully nationalize all the military forces of this nation" because the masses of men with their own guns constitute "an essentially civilian-manned and oriented set of military forces" who can "inveigh against federal professionalization of the state militias." Levine & Saxe, **supra** note 35

at 8. The Preamble to the Declaration of Independence listed as two grievances against King George III that "[h]e has kept among us, in times of peace, standing armies without the consent of our legislatures [and] [h]e has affected to render the military independent of and superior to the Civil power."

37. U.S. Const. art. I, **i.

38. The Federalist No. 29 (A. Hamilton).

39. **Id.** at 179 (Mod. Lib. ed. 1937).

40. Thomas Paine wrote "[t]his continent hath at this time the largest body of armed and disciplined men of any power under Heaven." *I Collected Works of Thomas Paine* 31 (1937).

41. *Presser v. Illinois*, 116 U.S. 252, 265 (1885).

42. **Id.**

43. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). See also *United States v. Cruikshank*, 92 U.S. 542 (1875); *Twitchell v. Commonwealth*, 74 U.S. (7 Wall.) 321 (1868); *Pervear v. Connecticut*, 72 U.S. (5 Wall.) 475 (1866); *Withers v. Buckley*, 61 U.S. (20 How.) 84 (1857); *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855); *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847). The party decisions had a certain validity in that Madison's amendment which prohibited state encroachment on or violations of the other Bill of Rights was rejected by the State Conventions. 3 Debates, **supra** note 35 at 660.

44. *Gitlow v. New York*, 268 U.S. 652 (1925).

45. *Palko V. Connecticut*, 302 U.S. 319 (1937). The criteria Cardozo suggested for incorporation included: protection of those rights whose denial would be "so acute and shocking that our polity will not endure it" and which were "implicit in the concept of ordered liberty." **Id.** at 328, 325. In short, Cardozo did not seek total incorporation of the whole Bill of Rights. He sought to bring under the fourteenth amendment only those he and his colleagues viewed as important today. Justice Douglas saw this as an unfortunate trend. As he pointed out, "[t]he closest the Framers came to the **affirmative** side of liberty was in 'the right to bear arms.' Yet this too has been greatly modified by judicial construction." Douglas, **The Bill of Rights is Not Enough**, 38 N.Y.U.L. Rev. 207, 233 (1963). Douglas says that in the minds of some "[a] few provisions of our Bill of Rights...have no immediate relation to any modern problem." **Id.** at 211. He spoke of the "default of the judiciary" in properly interpreting the Bill of Rights in the way the Framers intended; "the courts have diluted the specific commands of the Constitution." **Id.** at 216.

46. As noted above, the Supreme Court showed concern for the states' abridgment of this right in **Presser**, before **Gitlow**; the hint of concern is also seen in *Robertson v. Baldwin*, 165 U.S. 275 (1897), wherein the Court seems to be saying that although "the right of the people to keep and bear arms is not infringed by laws prohibiting the carrying of concealed weapons" the Court is concerned about the right in general. **Id.** at 281-82. The Court did not have to consider involving itself in a question like that of **Barron** because the case at hand did involve a legitimate control over the right to keep and bear arms. If the Court had not entertained the possibility of interposing itself between state law and the citizen of that state, no review would have been justified here.

47. The concept is found in international law, for example the Hague Convention Number IV. Respecting the Laws and Customs of War in Land and Annexed

Regulations, 36 Stat. 2241 (1907). It is found in United States Statute law in such laws as the Militia Act of 1862: Militia Act of 1903 (The Dick Act) and the Volunteer Act of 1914. Each eligible male citizen in 1792 was required to furnish for his use "a good musket or firelock" with appropriate equipment by the Militia Act of 1792. See I Military Laws of the United States 95 (1863). See also Murphy, **The American Revolutionary Army and the Concept of Levee en Masse**, Military Affairs, Spring, 1959, at 13.

48. Item II of the Assize of Arms required that "the whole body of freemen have quilted doublets and a head piece of iron and a lance [that he must] bear allegiance to the lord king, Henry...and that he will bear these arms in his service according to his order and in allegiance to the lord king and his realm." II D. Douglas, English Historical Documents 416 (1956). Previously, references to the right are found in the Laws of Ethelbert, King of Kent, I.D. Douglas, English Historical Documents 358 (1956); the Laws of Hlothhere and Eadric, Kings of Kent, **Id.** at 361; the Laws of Alfred, **Id.** at 379; and Cnut, whose sixtieth statute states that "[i]f anyone illegally disarms a man, he is to compensate him..." **Id.** at 427.

49. A great amount of Parliamentary debate was held over the right to keep and bear arms. II W. Cobbett, Parliamentary History of England 11067, 1357 (1807). The courts have taken note of this also. The Tennessee Supreme Court, in an 1840 case, spoke of the excesses of power of James I of England:

[I]f the people had retained their arms, they would have been able, by a just and proper resistance to those oppressive measures, either to have caused the king to respect their rights, or surrender...the government into other hands...If the subjects had been armed, they could have resisted the payment of excessive fines, or the infliction of illegal and cruel punishments.

Aymette v. State, 21 Tenn. (2 Humph.) 155 (1840).

50. Wright distinguishes between true militia and levees en masse in this way:

Both systems may be called a "nation in arms" but whereas the first has involved a militarization of the entire population, the second has involved a civilianization of the military services. Both systems must be differentiated from the standing and permanent army.

Wright, **supra** note 305.

See also Hague Convention No. IV, Respecting the Laws and Customs of War on Land and Annexed Regulations, 36 Stat. 2241 (1907). Also cited in 2 W. Malloy, Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers 1776-1937 at 2269 (1910). For a treatment of the principle of levees en masse, see C. Fenwick, International Law 665 (4th ed. 1965) and H. Jacobini, International Law 247-48 (1962).

51. U.N. Charter art. 51.

52. Universal Declaration of Human Rights, G.A. Res. 265, 3 U.N. GAOR at 71, U.N. Doc. A/810 (1948).

53. **Id.**

54. The term "militia" has been defined in a number of ways, most of which agree on certain common points. A representative sample would include the following: Adam Smith defines militia as an obligation enjoyed by "either all the citizens of the military age, or a certain number of them, to join in some measure the trade of a soldier to

whatever other trade or profession they may happen to carry on. If this is found to be the policy of a nation, its military force is then said to consist of a militia." A. Smith, *An Inquiry Into the Causes and Consequences of the Wealth of Nations* 660 (1937). Sir James A. H. Murray defined it as "a military force, especially the body of soldiers in the service of the sovereign of the state [who are] the whole body of men amenable to military service, without enlistment, whether drilled or not...a citizen army' as distinguished from a body of mercenaries or professional soldiers." 4 J. Murray, *A New English Dictionary of Historical Principles* 439 (1908).

55. *United States v. Miller*, 307 U.S. 174, 179-80 (1939). Similar state court opinions include, *Aymette v. State*, 21 Tenn. (2Humph.) 154 (1840), and *Andrews v. State*, 50 Tenn. (3 Heisk) 165 (1871).

56. Cf. *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921).

57. *Salina v. Blaksley*, 72 Kan. 230, 83 P. 619 (1905).

58. *Commonwealth v. Murphy*, 166 Mass. 171, 44 N.E. 138 (1896).

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

60. *Salina v. Blaksley*, 72 Kan. 230, 83 P. 619 (1905).

61. *Levine & Saxe*, *supra* note 35, at 7 conclude that:

[E]ven if the original draft intended that the "people" were to fill the breach created by the nullification of any State right to independently arm and organize the militia, the State would still have the right to regulate the keeping and bearing of arms. One cannot read the second amendment as a guarantee of individual rights, at least insofar as state citizenship is concerned. "The people" must be treated as a "collectivity" in this arena. However, this does not preclude viewing "the people" as "individuals" in the federal arena.

62. Hlothhere and Eadric of Kent in the seventh century noted limitations. See F. Attenborough, *The Laws of the Earliest English Kings* 21 (1922). Alfred the Great proclaimed laws against drawing weapons. *Id.* at 69, 73, 81-82. Parliament regulated carrying weapons during the reign of Edward III, Statute of North Hampton of 1328, 2 Edw. 3, C. 3, Sect. 1. Set out in *Iv Chitty's English Statutes* 936 (6th ed. 1911). Regulations have been added constantly since early times.

63. Memorandum from Fred B. Smith, Acting General Counsel, to the Secretary of the Treasury Department, on the Constitutional Basis for Federal Firearms Control Legislation, May 17, 1965 at 15, which stated, in part, that the Federal Firearms Act could be strengthened "within the power of Congress to regulate interstate commerce...and...subject to no limitation prescribed in the Constitution."

64. Federal Gun Control Act of 1968, ch. 368, tit. I, 82 stat. 1213 (codified in scattered sections of 18, 26 U.S.C.).

65. National Firearms Act, 26 U.S.C. Sects. 5801-5862 (1934).

66. *Id.*

67. Federal Firearms Act, 18 U.S.C. Sects. 921-928 (1938).

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

69. *Id.* at 178.

70. Federal Gun Control Act of 1968, ch. 368, tit. I, 82 stat. 1213 (codified in scattered sections of 18, 26 U.S.C.).

71. *Adams v. Williams*, 417 U.S. 143 (1972).

72. *Id.* at 150-51 (Douglas & Marshall, J.J., dissenting). Justice Brennan, dissenting,

also noted that the real police problem was in having to deal with an armed population. "Connecticut allows its citizens to carry weapons, concealed or otherwise, at will, provided only they have a permit...and gives its police officers no special authority to stop for the purpose of determining whether the citizen has one." **Id.** at 151-52. In both dissenting opinions the Justices seemed to find that a permit system was a minor annoyance. They did not comment on the relative difficulties of obtaining such permits. They also noted that the second amendment "must be interpreted and applied with the view of maintaining a 'militia.'" **Id.** at 150, **quoting** *United States v. Miller*, 307 U.S. 174, 178-79 (1939). This nexus would become increasingly more difficult to prove as we moved further away from the concept of a citizen soldier and toward the standing army, a defense system hated by the framers of the Constitution and its first ten amendments. **See also** *United States v. Miller*, 307 U.S. 174, 178-79 (1939).

73. *United States v. Bass*, 404 U.S. 336 (1971).

74. **Id.** at 349

75. **Id.**

76. **Id.** **See generally**, *Younger v. Harris*, 401 U.S. 37 (1971); Geisel, Roll and Wettick, **The Effectiveness of State and Local Regulation of Handguns: A Statistical Analysis**, 1969 *Duke L.J.* 647, 652-53.

77. 42 U.S.C. Sect. 3701 (1970).

78. *United States v. Bass*, 404 U.S. 336, 338 (1971).

79. *See Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1954). In *Bass* the Court cited *Universal Camera* and held that "the legislative history of [the] act hardly speaks with the clarity of purpose which Congress supposedly furnished courts in order to enable them to enforce its true will." *United States v. Bass*, 404 U.S. 336, 346 (1971). **See also** *F.C.C. v. Columbia Broadcasting System*, 311 U.S. 132 (1940).

80. *United States v. Bass*, 404 U.S. 336 (1971). The Court in **Bass** held that:

The Critical textual question is whether the statutory phrase "in commerce or affecting commerce" applies to "possess" and "receives" as well as "transports." If it does, then the Government must prove as an essential element of the offense that a possession, receipt or transportation was "in commerce or affecting commerce? - a burden not undertaken in this prosecution for possession.

Id. at 339.

81. The dissenting opinion of Justice Blackmun in **Bass** quoting from the congressional Record shows a potential willingness to support such federal pre-emptory legislation:

All of these murders [the killer of civil rights worker Medgar Evers and others] had shown violent tendencies before they committed the crime for which they are most infamous. They should not have been permitted to possess a gun. Yet, there is no Federal law which would deny possession to these undesirables.

It has been said that Congress lacks the power to outlaw **mere possession** of weapons.

[P]ossession of a deadly weapon by the wrong people can be controlled by Congress, without regard to where the police power resides under the Constitution.

Without question, the Federal Government does have power to control

possession of weapons where such **possession** could become a threat to interstate commerce.

State gun control laws where they exist have proven inadequate to bar **possession** of firearms from those most likely to use them for unlawful purposes.

United States v. Bass, 404 U.S. 336, 355 (1971) (Blackmun, J., dissenting).

82. It is not the argument here that the right to keep or to bear arms is unlimited. The right can be reasonably mitigated. In State v. Johnson, 16 S.C. 187 (1881), the court supported the power of the legislature to prohibit absolutely the carrying of all deadly weapons. The same idea is to be found in State v. Costen, 17 del. [1 Penn.] 19 (1897); State v. Chippey, 14 Del. [9 Houst.] 583 (1892); Hugent v. State, 104 Neb. 235, 176 N.W. 672 (1920). The early laws of the English kings contained limitations on the right. See I English Historical Documents 358, 379, 427 (1956). The vast bulk of state court cases which deal with this right represent an attempt to construct a reasonable level of human freedom along with responsibility for the use of arms.

83. Near v. Minnesota, 283 U.S. 697 (1931).

84. **Id.** See also New State Ice Co. v. Liebmann, 285, U.S. 262, 279 (1932), where the Court stated, "its is plain that unreasonable or arbitrary interference or restrictions cannot be saved from the condemnation of [the fourteenth amendment]...merely by calling them experimental." See also Burns Baking Co. v. Bryan, 264 U.S. 504, 513 (1924) where the Court held that it is beyond the power of a state "under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." See generally Stromberg v. California, 283 U.S. 359 (1931); Chicago Ry. co. v. Holmberg, 282 U.S. 162 (1930); Manley v. Georgia, 279 U.S. 1 (1928); Washington **ex rel.** Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928); Liggett Co. v. Baldridge, 278 U.S. 105 (1928); Nixon v. Herndon, 273 U.S. 536 (1927); Tumey v. Ohio, 273 U.S. 510 (1927); Pierce v. Soc'y. of Sisters, 268 U.S. 510 (1925); Dorchy v. Kansas, 264 U.S. 286 (1924); Wolff Packing Co. v. Industrial Court, 262 U.S. 522 (1923).

85. See Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968). See also United States v. Freed, 401 U.S. 601 (1971); Haynes v. United States, 390 U.S. 85 (1968). See generally G. Newton and F. Zimlong, Firearms and Violence in American Life 263 (1969); McKay, **Self-incrimination and the New Privacy**, 1967 Sup. Ct. Rev. 193; Note, **Required Information and the Privilege Against Self-incrimination**, 65 Colum. L. Rev. 681 (1965).

In Marchetti, the Court reversed United States v. Kahriger, 345 U.S. 22 (1953) and Lewis v. United States, 348 U.S. 419 (1955) holding that a person may not be compelled under the law to furnish any government or agency with any "link in a chain" of evidence which could be used to convict him. 390 U.S. at 54. See generally Corwin, **The Supreme Court's Construction of the Self-incrimination Clause**, 29 Mich. LO. Rev. 191 (1930).

THE RIGHT TO BEAR ARMS:
THE DEVELOPMENT
OF THE AMERICAN EXPERIENCE

by John Levin*

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I. Introduction

As the crime rate in the United States grows and pressures mount for laws restricting the use of firearms, the need for an understanding of the development of the "right to bear arms" has increased. Perhaps more than any other "right" enumerated in the federal and state constitutions, the "right" to bear arms was directed to maintaining a balance of power within our society. The "right to bear arms" developed at a time when a well-armed population was necessary for defense, and when the social and political structure was kept in balance by a balance of armed power.

While the American "right to bear arms" developed at the time of the Revolution, it grew out of the duty imposed on the early colonists to keep arms for the defense of their isolated and endangered communities. The definition of "bearing arms" as the phrase was used in legal instruments up to revolutionary times was "serving in an organized armed force."¹ It did not imply any personal right to possess weapons. For example, when Parliament in drafting the English Bill of Rights², or Blackstone in his Commentaries on the Laws of England³, intended to convey the meaning of a personal right to possess arms, they spoke of the right to have arms, not of the right to bear arms.

II. Early History

A. The Colonial Period

The earliest colonial statutes requiring that the colonists arm themselves were Virginia statutes of 1623 stating that "no man go or send abroad without a sufficient party will [sic] armed," and that "men go not to worke in the ground without their arms (and a centinell upon them)."⁴ In 1658 Virginia required that "every man able to beare armes have in his house a fixt gunn."⁵ The colony, being unable to afford to arm its militia or troops, required them to arm themselves.⁶ If the militia, however, found itself under-armed, the county courts could levy on the population for the provision of arms and distribute them to those not provided - the distributes then paying for the arms at a reasonable rate.⁷

Massachusetts in 1632 required each person to "have...a sufficient musket or other serviceable peece for war...for himself and each man servant he keeps able to beare arms."⁸ In the Code of 1672 men were to provide their own arms, but arms would be supplied to those unable to obtain them. In New York, each town was to keep a stock of arms, and each man between 16 and 60 was to have arms.⁹ Even those not obligated to serve in the militia were required to keep arms and ammunition in their houses.¹⁰ The militia provisions of the Connecticut Code of 1650 said, "All persons...shall beare arms...; and every male person...shall have in continuall readiness, a good muskitt or other gunn, fitt for service." South Carolina had similar codes.¹¹

This duty to keep and bear arms was limited by the interest of colonial governments in preventing the use of firearms for harmful ends. In order to prevent civil disturbances the colonial governments strove to keep arms from falling into the "wrong hands." To provide against Negro insurrections, Virginia forbade Negroes from carrying arms without their masters' certificate.¹² Pennsylvania had a similar provision by 1700,¹³ and South Carolina even required that the master keep all arms not in use safely locked up in his house.¹⁴ Virginia forbade the sale of arms or ammunition to Indians,¹⁵ and Massachusetts required that Indians possess a license to carry a gun within certain areas of the colony.¹⁶

In times of civil disturbance the colonies controlled arms to protect the security of orderly government. For example, in 1692 the Massachusetts Assembly felt it necessary to arrest "such as shall ride, or go armed offensively before any of their majesties' justices or other of their officers or ministers doing their office or elsewhere by night or by day, in fear or affray of their majesties' people."¹⁷

In addition to those laws preventing arms from falling into the hands of those groups openly hostile to colonial society, statutes regulated the conditions under which arms could be used. As the settlements grew crowded, shooting was restricted in order to protect people and livestock. By 1678 Massachusetts forbade shooting "so near or into any House, Barn, Garden, Orchards or High-Wayes in any town or towns of this Jurisdiction, whereby any person or person shall be or may be killed, wounded or otherwise damaged."¹⁸ In order to prevent fires caused by gunfire, Pennsylvania in 1721 forbade firing a gun within the city of Philadelphia without a special license from the governor.¹⁹ Pennsylvania also forbade hunting by anyone on improved lands without the permission of the owner, and forbade those not qualified to vote from hunting on unimproved lands without the permission of the owner.²⁰

Colonial statutes established a duty to keep and bear arms for the defense of the colonies and regulated the use of the arms in circulation. The American Revolution in turn provided fertile ground for the growth of the concept of the right of revolution and the related right to bear arms.

B. The Revolutionary Period

During the revolutionary period the issue of arms and the bearing of arms developed along two distinct lines. One line of development related to the balance of military power between the people and their respective governments. The people feared that if the state or federal government became too powerful, that government would abridge the liberties of the people and impose its will by force. The other line of development related to the balance of military power between the governmental bodies of the union. The state governments feared that if they entrusted too much power in the hands of the central government, that government would destroy the political and military independence of the states. Both lines of development concerned the creation of a military balance within the political structure which would result in the maintenance of liberty of the constituent parts-whether personal liberty under a government or state liberty in a union; and both lines of development resulted in the creation of a "right to bear arms" in order to insure the liberty of those constituent parts.

The colonists, fearful of oppression by governmental power, and being aware of the events of 17th Century England, believed that liberty was guaranteed by giving the rulers as little power as possible and by balancing governmental power

with popular power.²¹ The foremost factor in this balance of power was the existence of a standing army. Standing armies had been used by the English crown and by continental monarchs to impose their will on their subjects,²² and royal forces had been used by the English crown to intimidate and control the colonies.²³ In 1774 the Continental Congress declared that keeping a "standing army in these colonies, in time of peace, without the consent of the legislature of that colony, in which such army is kept, is against law."²⁴ In 1775 the draftsmen of the Declaration of the Causes and Necessity of Taking up Arms²⁵ gave the presence of royal troops a prominent role in the declaration, and several sections of the Declaration of Independence were given to the issue.²⁶ Colonial mistrust of standing armies extended even to colonial troops. In 1776 Sam Adams wrote:

[A] standing army, however necessary it be at some times, is always dangerous to the liberties of the people. Soldiers are apt to consider themselves as a body distinct from the rest of the citizens. They have their arms always in their hands. Their rules and their discipline is severe. They soon become attached to their officers and disposed to yield implicit obedience to their commands. Such a power should be watched with a jealous eye.²⁷

III. Constitutional Provisions

The state constitutions framed during the War for Independence reflected the fears of a standing army. The framers felt that such an army would create an overbearing force at the disposal of the state governments. All the states included provisions regarding standing armies and militia in their bills of rights. Several had provisions similar to Virginia's:

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.²⁸

Several others were similar to that of Maryland:

XXV. That a well-regulated militia is the proper and natural defense of a free government.

XXVI. That standing armies are dangerous to liberty, and ought not to be raised or kept up, without the consent of the Legislature.

XXVII. That in all cases, and at all times, the military ought to be under strict subordination to and control of the civil power.

XXVIII. That no soldier ought to be quartered in any house, in time of peace, without the consent of the owner; and in time of war, in such manner only, as the Legislature directs.

XXIX. That no person, except regular soldiers, mariners, and Marines in the service of this State, or militia when actual service, ought in any case to be subject to or punishable by martial law.²⁹

Some specifically mentioned a "right to bear arms," such as Pennsylvania's:

That the people have a right to bear arms for the defense 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.³⁰

North Carolina included a "right to bear arms" for the "defense of the State,"³¹ and Massachusetts included such a right for the common defense."³² Widespread copying by the draftsmen of state constitutions created, in part, the similarity between provisions.³³ These provisions were to be the basis of the militia provisions in the federal Constitution and Bill of Rights.

When the draftsmen of the majority of the state bills of rights wrote of replacing the standing army with a popular militia, they believed it would remove a source of arbitrary military power from the hands of the state governments and replace it with a military less likely to oppress the people.³⁴ They attempted to

structure the political and military balance in the new states by making the governments less powerful and the citizens more powerful. The "right to bear arms" was a more extreme and revolutionary manifestation of this restructuring. By having a right to "bear arms," i.e., to serve in the armed forces of the state, the people would have far greater military power than if the militia were merely the preferred defense, for the state governments would be unable to maintain a narrowly based standing army against the interests of the people. Rather the people would rely on their "right" to bear arms and demand that the defense force be broadly based.

The "right to have arms" was an adjunct to the right of revolution. The right of revolution is the natural right of a people to overthrow their government when that government no longer serves the purpose for which it was formed. By the middle of the 18th century, Blackstone had recognized that the primary rights of Englishmen—"personal security, personal liberty, and private property"—could not be maintained solely by law, for "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."³⁵ There were auxiliary rights in order to enable the subject to preserve the primary rights, and,

The fifth and last auxiliary right of the subject...is that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law. Which...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.³⁶

The provisions in the state constitutions granting a "right to bear arms" were not intended to permit a public allowance of the right of revolution. In the first place, the phrase "to bear arms" only meant serving in an organized armed force.³⁷ In the second place, the right of revolution, or at least a statement of the principle of that right, was specifically contained in other sections of most state constitutions.³⁸ In the third

place, the guaranty of the "right to bear arms" or similar statements of preference for the militia was contained in that section of the constitutions directly concerned with controlling the military power of the state and not in the section recognizing the right of revolution.

When the Constitutional Convention met on May 14, 1787, it was faced with some issues quite dissimilar to those which had troubled the states. In the years during and immediately following the Revolution, the doctrine of the natural right of revolution was an accepted part of colonial political theory.³⁹ After the Revolution, however, the need for stable and orderly government grew, and the philosophy of rebellion withered.⁴⁰ The fundamental problem facing the convention was not to support and nourish a revolutionary situation, but to create a viable federal government out of the jealous and independent states. One of the major aspects of this problem was the creation of a national army. The delegates to the convention feared that if the new federal government could obtain sufficient military power, it could then impose its will on the states and on the people.

The delegates, however, did not consider the new federal standing army to be a danger to the states or the people since Congress would have strict control over the appropriations for troops, and most delegates assumed that the standing army would be small.⁴¹ The Articles of Confederation had left complete control of land forces in the hands of the states which raised them,⁴² and by 1788 the Army of the Confederation consisted of only 679 officers and men.⁴³ The question of the balance of military power between the state and the federal government was raised rather on the issue of federal control over the state militia.

On August 18, 1787, a motion was made in the convention to give Congress the power "to make laws for the regulation and discipline of the Militia of the several 'states reserving to the States the appointments of Officers."⁴⁴ Here the military power of the states was at stake. John Dickinson exclaimed that "we are come now to a most important matter, that of the sword...The states never would or ought to give up all authority over the Militia."⁴⁵ Oliver Ellsworth believed that "the whole authority over the Militia ought by no means to be taken away from the States who's consequence would pine away

to nothing after such a sacrifice of power."⁴⁶
Supporters of the motion recalled how ineffectual the militia was during the Revolution. They stressed the need for an effective and centralized military.⁴⁷

When the debate continued on August 23rd, Edmund Randolph felt that the militia could be trusted to look after the liberties of the people. He asked, "What dangers there could be that the Militia could be brought into the field and made to commit suicide on themselves. This is a power that cannot from its nature be abused, unless indeed the whole mass should be corrupted."⁴⁸ Elbridge Gerry stated, when a motion was made to allow the federal government to appoint the general officers, that "as the States are not to be abolished, he wondered at the attempts that were made to give powers inconsistent with their existence."⁴⁹ James Madison replied: "As the greatest danger is that of disunion of the States it is necessary to guard against it by sufficient powers to the Common Government and as the greatest danger to the liberty is from large standing armies, it is best to prevent them by an effectual provision for a good Militia."⁵⁰

A compromise was reached whereby the federal government would maintain a standing army plus have the authority to regulate and call out the militia, and the states would have authority over the militia except when it is called into federal service. The results of the compromise appear in article I, section 8 of the United States Constitution declaring that Congress shall have power:

To make Rules for the Government and Regulation of the land and naval Forces;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer term than two Years:

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Parts of them as may be employed in the Service of the United States, reserving to the States respectively the Appointment of the Officers,

and the Authority of training the Militia according to the discipline prescribed by Congress;

Thus, a tentative military balance was achieved between the federal government and the states.

Before the Constitution was ratified, however, its provisions were debated before the state legislatures and in the press. The militia provisions were again argued in terms of the balance of military power between the state and the federal government. Charles Pinckney argued for a federalized militia to give the federal government the power to impose its will on the states:

The exclusive right of establishing regulations for the Government of the Militia of the United States ought certainly to be vested in the Federal Councils. As standing Armies are contrary to the Constitutions of most of the States, and the nature of our Government, the only immediate aid and support that we can look up to, in case of necessity, is the Militia ... Independent of our being obliged to rely on the Militia as a security against Foreign Invasions or Democratic Convulsions, they are in fact the only adequate force the Union possesses, if any should be requisite to coerce a refractory or negligent Member, and to carry the Ordinances and Decrees of Congress into execution. This, as well as the cases I have alluded to, will sometimes make it proper to order the Militia of one State into another. At present the United States possesses no power of directing the Militia, and must depend upon the States to carry their Recommendations upon this subject into execution...To place therefore a necessary and Constitutional power of defense and coercion in the hands of the Federal authority, and to render our Militia uniform and national, I am decidedly in opinion they should be bound to comply with, as well as with their Regulations for any number of Militia, whose march into another State, the Public safety or benefit should require.⁵¹

Luther Martin, speaking before the Maryland legislature, argued against the federalized militia as it would give the federal government so great a power that it could destroy the integrity of the states:

[Through] this extraordinary provision, by which the Militia, the only defense and protection which the State can have for the security of their rights against arbitrary encroachments of the general government, is taken entirely out of the power of their respective States, and placed under the power of Congress...It was argued at the Constitutional convention that, if after having retained to the general government the great powers already granted, and among those, that of raising and keeping up regular troops, without limitations, the power over the Militia should be taken away from the States, and also given to the general government, it ought to be considered as the last coup de grace to the State governments; that is must be the most convincing proof, the advocates of this system design the destruction of the State governments, and that no professions to the contrary ought to be trusted: and that every State in the Union ought to reject such a system with indignation, since, if the general government should attempt to oppress and enslave them, they could not have any possible means of self-defense...⁵²

Superimposed upon this debate over the balance of power between the states and the federal government was the issue of the balance of power between the people themselves and the new government. To assuage fears that the new federal government would infringe upon the rights of the people, the authors of The Federalist raised the factors of militia, arms, and the right of revolution in describing how the new government could be controlled. Federalist Number 28 mentioned the right of revolution:

If the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self-defense which is paramount to all

positive forms of government.⁵³
And the military power of the states:

When will the time arrive that the federal government can raise and maintain an army capable of erecting a despotism over the great body of the people of an immense empire, who are in a situation, through the medium of their States governments, to take measure for their own defense, with all the celerity, regularity and system of independent nations?⁵⁴

The 46th Federalist by Madison discussed the armed population and its relationship to the militia and the central government:

Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments to which the people are attached, and by which the Militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which is simple government of any form can admit. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms.⁵⁵

Though the Constitution was ratified, the issue of the federal militia was not resolved until adoption of the second amendment. Several of the states had suggested during their ratifying conventions that a bill of rights be added to the United States Constitution.⁵⁶ When such a bill of rights was debated in the First Congress, the militia amendment was first reported out of committee of the House of Representative reading:

A well-regulated Militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.⁵⁷

Several of the representatives objected to the provision excusing those people "religiously scrupulous" from bearing arms. Elbridge Gerry stated that as the purpose of the militia "is to prevent the establishment of a standing army" it was "evident, that under this provision, together with their own powers, Congress could take such measures with respect to a Militia, as to make a standing army necessary." This could be accomplished by Congress using "a discretionary power to exclude those from the Militia who have religious scruples."⁵⁸ In such event, so many citizens would attempt to avoid Militia duty on religious grounds that a standing army would be necessary for national defense.

In any event the religious exemption from the militia was dropped and the amendment in its final form read:

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.⁵⁹

From the debates it seems clear that the intent of Congress in passing the second amendment was to prevent the federal government from destroying the state militia. Pinckney would keep a defense force uniform and at the disposal of the federal government. Martin was assured that the federal government would not emasculate the states and leave them at the mercy of federal troops. The "right to bear arms" was a corporate right used to insure that a desired balance between liberty and authority within the union would be maintained.

Attempts were made to include a personal right to have arms in the Bill of Rights. Sam Adams introduced a bill in the Massachusetts legislature that the state support an amendment holding that the "Constitution be never construed to authorize Congress to...prevent the people of the United States, who are peaceable citizens from keeping their own arms."⁶¹ Though these provisions were never adopted, they indicate that there has never been any absolute "American" philosophy on the right to bear arms. "This confusion arises from America's

situation of being a frontier nation created out of revolution and espousing a belief in revolution but which also desires and needs to create an orderly social and political structure.

The result has been the use of the concept of the right to bear arms to support several different, and often contradictory, theories of the relation of armed citizens to the government. The judicial opinions of the courts of the various jurisdictions in the United States best exemplify this situation.

IV. Relevant Court Decisions

A. State Courts

The first pronouncement on the right to bear arms was by a Kentucky court in *Bliss v. Commonwealth*.⁶² The court held that "the right of the citizens to bear arms in defense of themselves and the State must be preserved entire," and all legislative acts "which diminish or impair it as it existed when the Constitution was framed are void."⁶³ Thus an act prohibiting the wearing of concealed arms was declared void. This point of view which considers the right to bear arms as absolute, unbridgable, and personal is rare. Most cases follow the reasoning of Texas court which asked "How far personal liberty may be restrained for the prevention of crime."⁶⁴

A few states adopted the thinking of the early Tennessee case of *Aymette v. States*,⁶⁵ which held that the right to bear arms was a right of the people to enable them to rise up and defend their rights against an oppressive government. This concept was similar to Blackstone's presentation of the right to bear arms as a public allowance of the right of revolution. Courts holding this theory consider that, as the right is by public allowance, the state can regulate the use of arms to insure the public peace and welfare. This position was well presented by the Arkansas court in *Haile v. State*:⁶⁶

The constitutional provision sprung from the former tyrannical practice, on the part of governments, of disarming the subjects, so as to render them powerless against oppression. It is

not intended to afford citizens the means of prosecuting, more successfully, their private broils in a free government. It would be a perversion of its object to make it a protection to the citizen, in going, with convenience to himself, and after his own fashion, prepared all time to inflict death upon his fellow citizens, upon the occasion of any real or imaginary wrongs.⁶⁷

While most courts have not attempted to counter the assertion of the right of revolution, an earlier Arkansas court had stated in *State v. Buzzard*⁶⁸ that such a right was unnecessary under a free, republican government which could be changed at the will of the people.

The Aymette line of cases is perhaps truest to the intention of the draftsmen of the state bills of rights. The right to bear arms was a means of preserving the liberty of the people by balancing the military power in the hands of the state by military power in the hands off the people. The desire to maintain such a balance has had a long history dating from feudal times, through the English revolution to the present day. Such thinking, however, is a rare in judicial opinion. Similarly rare is the unitary concept of society and government expressed by the Kansas court in *City of Salina v. Blakesly*.⁶⁹

The provision...that 'the people have the right to bear arms for their defense and security' refers to the people as a collective body. It was the safety and security of society that was being considered when this provision was put into our Constitution...The provision in question applies only to the right to bear arms as a member of the State Militia, or some other military organization provided for by the law.⁷⁰

Such thinking indicates belief that there is no need to provide for a military balance within the political and social structure when that structure is responsive to the people.

Most state courts have never spoken of the right to bear arms in the sophisticated terms of political balance, but rather treated the right as synonymous with the right of self-defense. In 1950 an Illinois court

warned in the construction of an arms control statute "that it is aimed at persons of criminal instincts, and for the prevention of crime, and not against use in the protection of person or property."⁷¹ In *Andrews v. State*,⁷² a dissenting judge found that "the right exists only for the purpose of defense: and this is a right which no constitutional or legislative enactment can destroy." The dissent in the Oklahoma case of *Pierce v. State*,⁷³ proclaimed-"From time immemorial, the home, be it ever so humble, has been sacred-the castle of the occupant-with the right to repell [sic] invasion or any trespass."

Answers to such claims vary from the flat declaration in *Buzzard* that individuals have surrendered the right of self-defense to the society as a whole, to the more moderate holding in *Andrews* that "every good citizen is bound to yield his preference as the means to be used, to the demands of the public good."⁷⁴ A Michigan court put forth a novel answer saying that the state's power is "subject to the limitation that its exercise be reasonable [and does not result] in the prohibition of those arms which, by the common opinion and usage of law-abiding people, are [to be kept for] protection of person and property."⁷⁵

These debates over the issue of the right of self-defense, though of primary interest today, have little relation to the intent of the draftsmen of the Bill of Rights. The right of self-defense had had a long history; but its history was parallel to, not connected with, the right to bear arms. The use of the right of self-defense to support a right to bear arms is of modern usage. Nevertheless, its modernity does not affect its relevance. The concept is the supreme law in several states of the union, and is a concept to be considered by any legislature hoping to pass restrictive arms legislation.

The confusion in the state courts over the right to bear arms is partly due to the judicial process itself. A court generally does not base its decision on political theory but considers the facts of the particular case before it. If a court feels a particular restrictive arms statute to be necessary and fair, and if the facts of the case before it are favorable, then the court will uphold the statute using whatever language and doctrine is required to so hold. If the statute appears

unfair, if the times are unfavorable, or if the factual situation is difficult, then the court will use the language and doctrine necessary to overturn the statute. For example, a Florida court stated in 1912 that the right to bear arms "was intended to give the people the means of protecting themselves against oppression and public outrage, and was not designed as a shield for the individual man."⁷⁶ Fifty years later the court declared that "doubtless the guarantee was intended to secure to the people the right to carry weapons for their protection."⁷⁷ Similar situations have occurred in several states.⁷⁸ The development of federal doctrine, however, has followed a more constant and evolutionary course.

B. Federal Courts

Cases concerning the second amendment arose in the federal courts only after the Civil War. The first of such cases, *U.S. v. Cruikshank*,⁷⁹ implied that there was a personal right to bear arms upon which Congress could not infringe. The central point of the opinion, however, was to state that the second amendment did not apply to state governments, and such governments could pass whatever legislation they desired without fear of federal sanction.

Cruikshank was not directly concerned with the right to bear arms or the militia, but with civil rights legislation. The first federal case to be directly concerned with arms was *Presser v. Illinois*.⁸⁰ *Presser* was convicted for leading a military parade in violation of an Illinois statute which forbade such parades by any group but the state militia. *Presser* claimed that the Illinois statute was in violation of the second amendment. The court relied on *Cruikshank* in stating that the "amendment is a limitation only upon the power of Congress and the National Government, and not upon that of the States,"⁸¹ but added a restriction upon the State's power:

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.⁸²

This principle harkens back to the citizen army of Saxon times and had little relevance in 1886. It was understandable, however, that only twenty years after the Civil War, the Supreme Court would be concerned with state attempts to weaken the central government by withholding arms and troops from national service. Nevertheless, the restriction is a complete reversal from the aims of the draftsmen of the Constitution and Bill of Rights which was to restrict the military power of the central government and give the state more leverage.

On one subject Presser was quite clear--there was no right to band together in paramilitary organizations:

Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the State and Federal Governments, acting in due regard to their respective prerogatives and powers.⁸³

Thus, whatever right to bear arms was recognized, that right was limited to arms and organizations that did not threaten the security of the government. The court did not approve of an armed population as a balance to governmental power.

For many years after Presser the issue of the second amendment appeared in federal courts only in reaffirming the Cruikshank holding that the second amendment did not apply to the states.⁸⁴ In the 1930's Congress passed two laws, the Federal Firearms Act⁸⁵ and the National Firearms Act,⁸⁶ to control commerce in certain types of dangerous weapons. Both acts were attacked in court for being in violation of the second amendment. In upholding the National Firearms Act, the

district court held in *United States v. Adams*⁸⁷, that the second amendment "refers to the Militia, a protective force of government; to the collective body and not individual rights." This language was quoted verbatim by another district court in *United States v. Tot*⁸⁸, in upholding the Federal Firearms Act. Neither court went into the problem of the extent to which the collective right could be regulated, but both made clear that no personal right to own arms existed under the federal Constitution.

The issue of regulating the collective right arose in *United States v. Miller*⁸⁹, in which the Supreme Court held that as long as the weapon regulated did not have a direct relationship to the arms used in maintaining a well-regulated militia, they could be controlled:

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 had 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.⁹⁰

The difficulty with such an interpretation is that were a weapon to have such a "reasonable relationship" it would be a protected weapon under the second amendment. The circuit court in *Cases v. United States*⁹¹ recognized this problem saying: "But to hold that the Second Amendment limits the federal government to regulations concerning only weapons which can be classed as antiques or curiosities,-almost any other might bear some reasonable relationship to the preservation or efficiency of a well-regulated militia unit of the present day,-is in effect to hold that the limitation of the second amendment is absolute."⁹² The court also recognized that such an interpretation would prohibit the federal government from prohibiting private ownership of heavy weapons "even though under the circumstances of such possession or use it would be inconceivable that a private person could have any legitimate reason for having such a weapon."⁹³ The court then decided it would be impossible to formulate any general test to determine the limits of the second

amendment and each case would have to be decided on its individual merits.

The federal courts have interpreted the right to bear arms contained in the second amendment very narrowly. The right exists only to the extent that the arms are required for a well-regulated militia. Since Presser, however, the second amendment has been interpreted as a source of federal power and not as a protection of state power. The need for the old military balance between state and national governments had disappeared, and the federal courts no longer recognized its existence.

Similarly, the federal courts no longer recognized the need for a military balance between the population and its government. Rather, the courts have held that the interests of order and stability must be balanced against the need for revolution, and such interests may outweigh any need for the right of revolution. Thus, there could also be restrictions on other, subsidiary natural rights such as the right to bear arms. As Justice Vinson said in *Dennis v. United States*,⁹⁴ in upholding the Smith Act:

That it is within the power of the Congress to protect the government of the United States from armed rebellion is a proposition which requires little discussion. Whatever theoretical merit there may be to the argument that there is a "right" to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change. We reject any principle of governmental helplessness in the face of preparations for revolution, which principle, carried to its logical conclusion, must lead to anarchy.⁹⁵

Even though the right of revolution has never been recognized by the courts of the United States, armed rebellion has been - and still is - an important part of the American political tradition. From the early Republic to the present day dissident elements who have not been able to achieve their goals within the political structure have resorted to arms as a final resort.⁹⁶ In many instances, such elements have been punished as rebellious or treasonable, but in others

the use or threat of violence has forced the political structure to compromise with the dissidents. Though not protected by the Constitution, this use of arms is the most important and relevant use of arms today.

v. Conclusion

Regardless of the long history of violence and assassination in the United States, the right to bear arms has remained closely and jealously guarded. This right appears to provide the individual with the means of protecting himself against other individuals and of protecting himself against his government. The maintenance of a military balance within the political structure was the genesis of this right, and the desire to continue such a balance will promote its continuation. The right to bear arms supports man in his fear of being defenseless in the face of personal danger or oppression.

The possibility, however, of maintaining a military balance within a political structure has become smaller as society has become more complex and warfare more destructive. In the words of Roscoe Pound:

In the urban industrial society of today a general right to bear efficient arms so as to be enabled to resist oppression by the government would mean that gangs could exercise an extra-legal rule which could defeat the whole Bill of Rights.⁹⁷

Thus, after over three centuries, the right to bear arms is becoming anachronistic. As the policing of society becomes more efficient, the need for arms for personal self-defense becomes more irrelevant; and as the society itself becomes more complex, the military power in the hands of the government more powerful, and the government itself more responsive, the right to bear arms become more futile, meaningless and dangerous.

FOOTNOTES

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- 1 See the materials on the colonial statutes and on
the United States Constitution discussed below.
- 2 1 W & M. I, St. 2, ch. 2 (1689)
- 3 W. Blackstone, Commentaries on the Law of England
143-44 (1776)
- 4 Acts of the Grand Assembly 1623-1624, Nos. 24 and 25
- 5 Acts of the Grand Assembly 1658-1659, Act 25.
- 6 Acts of the Grand Assembly 1684, Act 4.
- 7 Acts of the Grand Assembly 1673, Act 2.
- 8 The Compact with the Charter and General Laws of
the Colony of New Plymouth 44-45 (1836)
- 9 Duke of York's Laws (1665-1676).
- 10 First Gen. Assembly, 2d Sess., ch. 20 (October 1684).
- 11 S.C. Stat., No. 206 (1703)
- 12 Acts of the Grand Assembly 1680, Act 10.
- 13 Penn. Stat., ch. 61 5 (1700)
- 14 S.C. Stat., No. 314 (1712)
- 15 Acts of the Grand Assembly 1633, Act 10.
- 16 Gen. Ct., Sess. of May 23, 1677
- 17 Province Laws 1692-1693, ch. 18, 6.
- 18 Council held in Boston, March 28, 1678.
- 19 Penn. Stat., ch. 245, 4 (1721)
- 20 Penn. Stat., ch. 246, 3d (1721).
- 21 C.E. Merriam, A History of American Political
Theories 83 (1926).
- 22 See e.g., G.M Trevelyan, I-III History of
England (1953)
- 23 S. Morison, The Oxford History of the American
People ch. XII, XIII, and XIV (1965).
- 24 R. Perry and J. Cooper, Sources of our Liberties
288 (1959) (hereinafter cited as Sources).
- 25 Id. at 295
- 26 Id. at 319
- 27 Letter to James Warren, quoted in M. Jensen, The

New Nation - A History of the United States During the Confederation 1781-1789 29 (1962).

28 Sources at 312.

29 Id. at 348

30 Id. at 330

31 Id. at 356

32 Id. at 376

33 R. Rutland, *The Birth of the Bill of Rights 1776-1791* passim (1962)

34 See the material on the discussion of the United States Constitution below

35 Supra n.3 at 140

36 Supra n.3 at 143-144.

37 See text at n.1, n.2, and n.3.

38 E. Douglas, *Rebels and Democrats* passim (1965)

39 C. Becker, *The Declaration of Independence* 7-8 (1942).

40 M. Jensen, *The New Nation - A History of the United States During the Confederation*

41 M. Farrand, II *The Records of the Federal Convention of 1787* 329-30 (1966).

42 H. Commager, I *Documents of American History* 112-13 (7th ed. 1963).

43 Supra n.41 at 365.

44 Id. at 330

45 Id. at 331

46 Id.

47 Id.

48 Id. at 387. For a discussion of the relation of the militia to popular uprisings in colonial America, see P. Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 28 *Wm. & Mary Q.* (3rd Ser. 1970).

49 Supra n.41 at 388

50 Id.

51 Id. III at 118-19.

52 Id. at 208-09

53 *The Federalist*, No. 28 (Hamilton)

54 Id.

55 *The Federalist*, No. 46 (Madison)

56 For a study of the forces at work to create a bill of rights, supra n.33.

57 1 *Annals of Congress* 778.

58 Id. at 778-79

59 U.S. Const. Amend. II.

60 Pierce & Hale, *Debates of the Massachusetts*

Convention of 1788 86-87, quoted in Feller and Gotting.
The Second Amendment: A Second Look, 61 Nw. U.L. Rev. 47
(1966).

61 Feller and Gotting, The Second Amendment: A
Second Look, 61 Nw. U.L. Rev. 59 (1966).

62 2 Ky. 90 (1822).

63 Id. at 91

64 English v. State, 35 Tex. 437, 477 (1872)

65 2 Tenn. 154 (1840)

66 38 Ark. 564 (1882).

67 Id. at 566

68 4 Ark. 18,24 (1843).

69 70 Kan. 230, 83 P. 619 (1905).

70 Id. at 231-32, 83 P. at 620

71 People v. Liss, 406 Ill. 419, 424, 94 N.E.2d 320,
323 (1950).

72 50 Tenn. 165 (1871).

73 275 P. 393, 397 Okla. Crim. Ct. App. 1829).

74 50 Tenn. 165, 193 (1871).

75 People v. Brown, 253 Mich. 537, 541, 235 N.W. 245,
246 (1931).

76 Carlton v. State, 63 Fla. 1,9,50 So. 486, 488 (1912)

77 Davis v. State, 146 So.2d 892, 893 (Fla. 1962).

78 Cf. State v. Buzzard, 4 Ark. 18 (1843); Wilson
v. State, 33 Ark. 557 (1878); Haile v. State, 38 Ark.
564 (1882); City of Akron v. Williams, 172 N.E.2d 28 (Mun.
Ct. Akron, Ohio 1960); City of Akron v. Williams, 177
N.E.2d 802 (Ct. App. Ohio 1960), aff'd without opinion,
172 Ohio St. 287, 175 N.E.2d 174 (1961).

79 92 U.S. 542 (1874)

80 116 U.S. 252 (1886).

81 Id. at 264.

82 Id. at 265

83 Id. at 266-67.

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

85 15 U.S.C.A. 901-909.

86 26 U.S.C.A. 5801-5862

87 11 F.Supp. 216, 219 (S.D. Fla. 1935).

88 28 F.Supp. 900, 903 (D. Conn. 1939); rev'd on
other grounds, 319 U.S. 403 (1943).

89 307 U.S. 174 (1939).

90 Id. at 178.

91 131 F.2d 916, (1st Cir. 1942); cert. den. sub.
nom. Cases Velasquez v. United States, 319 U.S. 770
(1943); rehearing denied, 324 U.S. 889 (1945).

92 Id. at 922

93 Id.

94 341 U.S. 494 (1951).

95 Id. at 501

96 See R. Ginger, *Age of Excess* (1965), and
references cited therein.

97 R. Pound, *The Development of Constitutional
Guarantees of Liberty* 91 (1957)