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and added that both constitutional and natural rights were at stake. Contending that the state governments were prohibited from violating the rights to assembly and petition, against unreasonable searches and seizures, to an impartial jury in criminal prosecutions, and to assistance of counsel, the court continued:

> Nor is the right involved in this discussion less comprehensive or valuable: "The right of the people to bear arms shall not be infringed." The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this right. . . . Id. at 251.

In the Texas case of *Cockrum* v. *State*, 24 Tex. 394 (1859), the Court explained that the object of the Second Amendment was that "the people cannot be effectually oppressed and enslaved, who are not first disarmed." Id. at 401, and added:

> The right of a citizen to bear arms, in lawful defense of himself or the State, is absolute. He does not derive it from the State government. It is one of the "high powers" delegated directly to the citizen, and "is excepted out of the general powers of government." A law cannot be passed to infringe upon or impair it, because it is above the law, and independent of the lawmaking power. Id. at 401–402.

C. SLAVERY AND THE DRED SCOTT DILEMMA

Despite the general rule in the antebellum courts that the Second Amendment guaranteed an individual right to keep and bear arms free from both federal and state infringement, to disarm blacks a few courts took the view that only citizens could have arms and that the Second Amendment did not apply to the states. In some states, free and slave blacks were disarmed by law to maintain their servile condition. State legislation which prohibited arms bearing by blacks was held to be constitutional owing to the lack of status of African Americans as citizens, despite the fact that the United States Constitution and most state constitutions referred to arms bearing as a right of "the people" rather than "the citizen."

In *State* v. *Newsom*, 27 N.C. 203 (1844), the Supreme Court of North Carolina upheld "an act to prevent free persons of color from carrying fire arms" on the ground that "the free people of color cannot be considered as citizens." Id. at 204. The court also stated: "in the second article of the amended Constitution, the States are neither mentioned nor referred to. It is therefore only restrictive of the powers of the Federal Government." Id. at 207. In *Cooper* v. *Savannah*, 4 Ga. 72 (1848), Georgia found its similar provision constitutional on the following logic: "Free persons of

color have never been recognized here as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office." Id. at 72.

The practical hardships suffered by individual blacks due to restrictive legislation is exemplified in *State* v. *Hannibal*, 51 N.C. (6 Jones) 57 (1859), which indicates that in the eighteenth century it was not illegal for a black to carry guns, but he was required to obtain a court certificate to hunt. An enactment in 1854 provided that "no slave shall go armed with a gun, or shall keep such weapons," with a penalty of up to 39 lashes. Id. at 57. In this instance, a master had given two slaves guns to guard his store at night, and the slaves were sentenced to twenty lashes each. Id. at 57.

Just as virtually the only antebellum state cases which limited the right to have arms functioned to disarm blacks, the ruling of the U.S. Supreme Court in *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857), conceded that if members of the African race were "citizens," they would be "entitled to the privileges and immunities of citizens" and would be exempt from special "police regulations" applicable to them.

> It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies . . .; and it would give them full liberty of speech . . .; to hold public meetings upon political affairs, and *to keep and carry arms wherever they went.* (emphasis added) 60 U.S. at 417.

It is clear, therefore, that the Supreme Court included among the rights of every citizen the right to have arms wherever he goes; it is equally evident that in granting citizenship to African Americans by Amendments XIII and XIV, blacks were later guaranteed the fundamental rights of citizens. The Court's language also suggests that the right to have and carry arms anywhere is a right of national citizenship which the states cannot infringe any more than can the federal government—that the Second Amendment applies to the states.

Explaining further the rights of citizens, Chief Justice Taney observed that:

> The Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully, deny any right which it has reserved. . . . Nor can Congress deny the people the right to keep and bear arms, nor the right to trial by jury, nor compel anyone to be a witness against himself in a criminal proceeding. 60 U.S. at 450.
>
> III. The Framers of the fourteenth amendment intended that the guarantees of the second amendment would be applied to the States

After the War Between the States, judicial commentators continued to interpret the Second Amendment as protecting an individual right from both state and federal infringement. The right to keep and bear arms and other Bill of Rights freedoms were viewed

as common law rights explicitly protected by the Constitution. T. Farrar, Manual of the Constitution, 59, 145 (1867). Joel P. Bishop wrote in 1865:

> The constitution of the United States provides, that, "a well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." This provision is found among the amendments; and; though most of the amendments are restrictions on the General Government alone, not on the States, this one seems to be of a nature to bind both the State and National legislatures. II J. Bishop, Commentaries on the Criminal Law, Section 121 (1865).

Yet Bishop's references to "statutes relating to the carrying of arms by negroes and slaves" (II J. Bishop, supra, n. 2, at 120, n. 6), and to an 'act to prevent free people of color from carrying firearms" (*Id.* at 125, n. 2) exemplified the need for further constitutional guarantees to clarify and protect the rights of all individuals.

A. FIREARMS AND THE ABOLITION OF SLAVERY

Having won their national independence from England through armed struggle, post-Revolutionary War Americans were acutely aware that the sword and sovereignty go hand-in-hand, and that distribution of firearms among the oppressed ushered in a new epoch in the human struggle for freedom. Furthermore, both proponents and opponents of slavery were cognizant that an armed black population meant the abolition of slavery, although some blacks were trusted with arms to guard property, for self defense, and for hunting. This sociological fact explained not only the legal disarming of blacks, but also the advocacy of a weapons culture by abolitionists. Having employed the instruments for self-defense against his pro-slavery attackers, abolitionist and Republican Party founder Cassius Marcellus Clay wrote that "'the pistol and the Bowie knife' are to us as sacred as the gown and the pulpit." 7 The Writings of Cassius Marcellus Clay, 257 (H. Greeley ed. 1848).

B. THE CIVIL RIGHTS ACT OF 1866

After the Civil War, the slave codes, which limited access of blacks to land, to arms, and to the courts, began to reappear in the form of black codes, (W. DuBois, Black Reconstruction in America, 167, 172, and 223 (1962); E. Coulter, The South During Reconstruction 40 (1947)) and United States legislators turned their attention to the protection of the freedmen. In support of Senate Bill No. 9, which declared as void all laws in the rebel states which recognized inequality of rights based on race, Sen. Henry Wilson (R., Mass.) explained in part: "In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages on them. . . ." Cong. Globe, 39th Cong., 1st Sess., pt. 1, 40 (Dec. 13, 1865).

When Congress took up Senate Bill No. 61, which became the Civil Rights Act of 1866, (14 Stat. 27 (1866)) Sen. Lyman Trumbull (R., Ill.), Chairman of the Senate Judiciary Committee, indicated

that the bill was intended to prohibit inequalities embodied in the black codes, including those provisions which "prohibit any negro or mulatto from having fire-arms." Cong. Globe, 39th Cong., 1st Sess., pt. 1, 474 (Jan. 29, 1866). In abolishing the badges of slavery, the bill would enforce fundamental rights against racial discrimination in respect to civil rights, the rights to contract, sue and engage in commerce, and equal criminal penalties. Sen. William Saulsbury (D., Delaware) added:

> In my State for many years, and I presume there are similar laws in most of the southern states, there has existed a law of the State based upon and founded in its police power, which declares that free negroes shall not have the possession of firearms or ammunition. This bill proposes to take away from the States this police power. . . ." Id. at 474.

The Delaware Democrat opposed the bill on this basis, anticipating a time when "a numerous body of dangerous persons belonging to any distinct race" endangered the state, for "the State shall not have the power to disarm them without disarming the whole population." Id. at 478. Thus, the bill would have prohibited legislative schemes which in effect disarmed blacks, but not whites. Still, supporters of the bill were soon to contend that arms bearing was a basic right of citizenship or personhood.

In the meantime, the legislators turned their attention to the Freedman's Bureau Bill. Rep. Thomas D. Eloit (R., Mass.) attacked an Opelousas, Louisiana ordinance which deprived blacks of various civil rights, including the following provision: "No freedman who is not in the military service shall be allowed to carry firearms, or any kind of weapons, within the limits of the town of Opelousas without the special permission of his employer . . . and approved by the mayor or president of the board of police." Id. at 517 (Jan. 30, 1866). And Rep. Josiah B. Grinnell (R., Iowa) complained: "A white man in Kentucky may keep a gun; if a black man buys a gun he forfeits it and pays a fine of five dollars, if presuming to keep in his possession a musket which he has carried through the war." Id. at 651 (Feb. 5, 1866).

As debate returned to the Civil Rights Bill, Rep. Henry J. Raymond (R., N.Y.) explained of the rights of citizenship: "Make the colored man a citizen of the United States and he has every right which you or I have as citizens of the United States under the laws and Constitution of the United States. . . . He has a defined status; he has a country and a home; a right to defend himself and his wife and children; a right to bear arms. . . ." Id., pt. 2, 1266 (Mar. 8, 1866). Rep. Roswell Hart (R., N.Y.) concluded that it was the duty of the United States to guarantee that the states have a republican form of government. "A government . . . where 'no law shall be made prohibiting a free exercise of religion;' where 'the right of the people to keep and bear arms shall not be infringed;' . . ." Id. at 1629 (Mar. 24, 1866).

Rep. Sidney Clarke (R., Kansas) objected to an 1866 Alabama law providing: "That it shall not be lawful for any freedman, mulatto, or free person of color in this State to own firearms, or carry about his person a pistol or other deadly weapon." Id. at 1838 (April 7,

1866). Clarke also attacked Mississippi, "whose rebel militia, upon the seizure of the arms of black Union soldiers, appropriated the same to their own use." Id. at 1838.

> Sir, I find in the Constitution of the United States an article which declares that "the right of the people to keep and bear arms shall not be infringed," For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in ther local laws. . . . Id. at 1838.

C. THE FOURTEENTH AMENDMENT

The need for a more solid foundation for the protection of freedmen as well as white citizens was recognized, and the result was a significant new proposal—the Fourteenth Amendment. A chief exponent of the amendment, Sen. Jacob M. Howard (R., Mich.), referred to the "personal rights guaranteed and secured by the first eight amendments of the Constitution; such as freedom of speech and of the press; . . . *.the right to keep and to bear arms. . .* " *[emphasis added]* Cong. Globe, 39th Cong. 1st Sess. pt. 3, 2765 (May 23, 1866). Adoption of the Fourteenth Amendment was necessary because these rights were not then effectively guaranteed against state legislation. "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." Id. at 2766.

The Fourteenth Amendment was viewed as necessary to buttress the objectives of the Civil Rights Act of 1866. Rep. George W. Julian (R., Ind.) noted that the act

> Is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. South Carolina has the same enactments. . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact. Id. at pt. 4, 3210 (June 15, 1866.)

D. THE ANTI-KKK ACT

Within three years of the adoption of the Fourteenth Amendment in 1868, Congress was considering enforcement legislation to suppress the Ku Klux Klan. The famous report by Rep. Benjamin F. Bulter (R., Mass.) on violence in the South assumed that the right to keep arms was necessary for protection not only against the militia, but also against local law enforcement agencies. Noting instances of "armed confederates" terrorizing the negro, the report stated that "in many counties they have preceded their outrages upon him by disarming him, in violation of his right as a citizen to 'keep and bear arms,' which the Constitution expressly says shall never by infringed," 1464 H.R. Rep. No. 37, 41st Cong., 3rd Sess. 3 (Feb. 20, 1871). The congressional power based on the Fourteenth Amendment to legislate to prevent states from depriving any U.S. citizen of life, liberty, or property accounted for the following provision of the committee's anti-KKK bill:

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> That whoever shall, without due process of law, by violence, intimidation, or threats, take away or deprive any citizen of the United States of any arms or weapons he may have in his house or possession for the defense of his person, family, or property, shall be deemed guilty of a larceny thereof, and be punished as provided in this act for a felony. Cong. Globe, 42nd Cong., 1st Sess., pt. 1, 174 (Mar. 20, 1871).

Rep. Butler explained the purpose of this provision in these words:

> Section eight is intended to enforce the well-known constitutional provision guaranteeing the right in the citizen to 'keep and bear arms,' and provides that whoever shall take away, by force or violence, or by threats and intimidation, the arms and weapons which any person may have for his defense, shall be deemed guilty of larceny of the same. This provision seemed to your committee to be necessary, because they had observed that, before these midnight marauders made attacks upon peaceful citizens there were very many instances in the South where the sheriff of the county had preceded them and taken away the arms of their victims. This was specially noticeable in Union County, where all the negro population were disarmed by the sheriff only a few months ago under the order of the judge. . . .; and then, the sheriff having disarmed the citizens, the five hundred masked men rode at night and murdered and otherwise maltreated the ten persons who were in jail in that county. H.R. Rep. No. 37, supra, note 38, at 7-8.

The bill was referred to the Judiciary Committee, and when later reported as H.R. No. 320 the above section was deleted—undoubtedly because its proscription extended to simple individual larceny over which Congress had no constitutional authority, and because state or conspiratorial action involving the disarming of blacks would be covered by more general provisions of the bill. Supporters of the rewritten anti-KKK bill continued to show the same concern over the disarming of freedmen as they had prior to the adoption of the Fourteenth Amendment. Sen. John Sherman (R., Ohio) stated the Republican position: "Wherever the negro population preponderates, there they [the KKK] hold their sway. for a few determined men. . . can carry terror among ignorant negroes . . . without arms, equipment, or discipline." Cong. Globe, 42nd Cong. 1st Sess., pt. 1, 154 (Mar. 18, 1871).

Further comments clarified that the right to arms was a necessary condition for the right of free speech. Sen. Adelbert Ames (R., Miss.) averred: "In some counties it was impossible to advocate Republican principles, those attempting it being hunted like wild beasts; in others, the speakers had to be armed and supported by not a few friends." Id. at 196. (Mar. 21, 1871). Rep. William L. Stoughton (R., Mich.) added: "If political opponents can be marked for slaughter by secret bands of cowardly assassins who ride forth with impunity to execute the decrees upon *the unarmed and de-*

fenseless, it will be fatal alike to the Republican party and civil liberty." [Emphasis added] Id. at 321 (Mar. 28, 1871).

Section 1 of the bill, which was taken partly from Section 2 of the Civil Rights Act of 1866, and survives today as 42 U.S.C. 1983 was meant to enforce Section 1 of the Fourteenth Amendment by establishing a remedy for deprivation under color of state law of federal constitutional rights of all people, not only former slaves. This portion of the bill provided:

> That any person who, under color of any law, statute, ordinance, regulation, custom or usage of any State shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities to which . . . he is entitled under the Constitution or laws of the United States, shall . . . be liable to the party injured in an action at law, suit in equity, or other propoer proceeding for redress . . . Id. pt. 2. Appendix, 68. 17 Stat. 13 (1871).

Rep. Washington C. Whitthorne (D., Tenn.), who complained that "in having organized a negro militia in having disarmed the white man," the Republicans had "plundered and robbed" the whites of South Carolina through "unequal laws," objected to Section 1 of the anti-KKK bill on these grounds.

> It will be noted that by the first section suits may be instituted without regard to amount or character of claim by any person within the limits of the United States who conceives that he has been deprived of any right, privilege, or immunity secured him by the Constitution of the United States, under color of any law, statute, ordinance, regulation, custom, or usage of any State. This is to say, that if a police officer of the city of Richmond or New York should find a drunken negro or white man upon the streets with a loaded pistol flourishing it, &c., and by virtue of any ordinance, law or usage, either of city or State, he takes it right away, the officer may be sued, *because the right to bear arms is secured by the Constitution*, and such suit brought in distant and expensive tribunals. [Emphasis added] Cong. Globe, 42nd Cong., 1st Sess., pt. 1, 337 (Mar. 29, 1871).

The Tennessee Democrat assumed that the right to bear arms was absolute, deprivation of which created a cause of action against state agents under Section 1 of the anti-KKK bill. In the minds of the bill's supporters, however, the Second Amendment as incorporated in the Fourteenth Amendment recognized a right to keep and bear arms safe from state infringement, not a right to commit assault or otherwise engage in criminal conduct with arms by pointing them at people or brandishing them so as to endanger others. Contrary to the congressman's exaggerations, the proponents of the bill had the justified fear that the opposite development would occur, i.e. that a black or white man for political reasons would be unconstitutionally deprived of his right to possess arms by state action. Significantly, none of the representative's colleagues disputed his statement that state agents could be sued

under the predecessor to Section 1983 for deprivation of the right to keep arms.

Debate over the anti-KKK bill naturally required exposition of Section 1 of the Fourteenth Amendment, and none was better qualified to explain that section than its draftsman, Rep. John A. Bingham (R., Ohio):

> Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States . . . .
>
> These eight articles . . . never were limitations upon the power of the States, until made so by the fourteenth amendment. The words of that amendment, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" are an express prohibition upon every State of the Union . . . . Id. at pt. 2, Appendix 84 (Mar. 31, 1871).

This is a most explicit statement of the incorporation thesis by the architect of the Fourteenth Amendment. Although he based the incorporation on the Privileges and Immunities Clause and not the Due Process Cause as have subsequent courts of selective incorporation, Rep. Bingham could hardly have anticipated the judicial metaphysics of the twentieth century in this respect. In any case, whether based on the Due Process Cause or on the Privileges and Immunities Clause, the legislative history supports the view that the incorporation of Amendments I-VIII was clear and unmistakable in the minds of the legislators attempting to effectuate the provision of the Fourteenth Amendment.

Rep. Henry L. Dawes (R. Mass.) also asserted the incorporation thesis when he argued:

> The rights, privileges and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject-matter of this bill. . . .
>
> In addition to the original rights secured to him in the first article of amendments he had secured the free exercise of his religious belief, and freedom of speech and of the press. Then again he has secured to him the *right to keep and bear arms in his defense*. . . . [Dawes then summarizes the remainder of the first eight amendments.]
>
> And still later, sir, after the bloody sacrifice of our four years' war, we gave the most grand of all these rights, privileges, and immunities, by one single amendment to the Constitution, to four millions of American citizens. . . .
>
> [I]t is to protect and secure to him in these rights, privileges, and immunities this bill is before the House. [emphasis added] *Cong. Globe*, 42nd Cong., 1st. Sess., pt. 1, 475-476 (April 5, 1871).

E. THE CIVIL RIGHTS ACT OF 1875

After passage of the anti-KKK bill, discussion concerning arms persisted as interest developed toward what became the Civil Rights Act of 1875, now 42 U.S.C. 1984. A report on affairs in the South by Sen. John Scott (R., Penn.) indicated the need for further enforcement legislation: "negroes who were whipped testifed that those who beat them told them they did so because they had voted the radical ticket, and in many cases made them promise that they would not do so again, and wherever they had guns took them from them." 1484 S. Rep. No. 41, 42nd Cong., 2nd Sess., pt. 1, 35 (Feb. 19, 1872).

Following the introduction of the Civil Rights Bill the debate over the meaning of the Privileges and Immunities Clause returned. Sen. Matthew H. Carpenter (R., Wisc.) cited *Cummings* v. *Missouri*, 71 U.S. 277, 321 (1866) a case contrasting the French legal system, which allowed deprivation of civil rights, "and among these of the right of voting, . . . of bearing arms," with the American legal system, stating that the Fourteenth Amendment prevented states from taking away the privileges of the American citizen. *Cong. Globe*, 2nd Sess., pt. 1, 762 (Feb. 1, 1872).

Sen. Allen G. Thurman (D., Ohio) argued that the "rights, privileges, and immunities of a citizen of the United States" were included in Amendments I–VIII. Reading and commenting on each of these amendments, he said of the Second: "Here is another right of a citizen of the United States, expressly declared to be his right—the right to bear arms; and this right, says the Constitution, shall not be infringed." *Id.* at pt. 6, Appendix, 25–26 (Feb. 6, 1872).

The incorporationist thesis was stated succinctly by Senator Thomas M. Norwood (D., Ga.) in one of the final debates over the Civil Rights Bill. Referring to a U.S. citizen residing in a Territory, Senator Norwood stated:

> His right to bear arms, to freedom of religious opinion, freedom of speech, and all others enumerated in the Constitution would still remain indefeasibly his, whether he remained in the Territory or removed to a State.
>
> And those and certain others are the privileges and immunities which belong to him in common with every citizen of the United States, and which no State can take away or abridge, and they are given and protected by the Constitution. . . .
>
> The following are most, if not all, the privileges and immunities of a citizen of the *United States:*
>
> The right to the writ of *habeas corpus;* of peaceable assembly and of petition; . . . *to keep and bear arms;* . . . from being deprived of the right to vote on account of race, color or previous condition of servitude. [emphasis added] *Cong. Rec.*, 43rd Cong., 1st Sess., pt. 6, Appendix 241–242 (May 4, 1874).

Arguing that the Fourteenth Amendment created no new rights but declared that "certain existing rights should not be abridged by States," the Georgia Democrat explained:

> Before its [Fourteenth Amendment] adoption any State might have established a particular religion, or restricted freedom of speech and of the press, or *the right to bear arms*. . . . A State could have deprived its citizens of any of the privileges and immunites contained in those eight articles, but the *Federal Government* could not. . . .
>
> . . . And the instant the fourteenth amendment became a part of the Constitution, every State was at that moment disabled from making or enforcing any law which would deprive any citizen of a State of the benefits enjoyed by citizens of the United States under the first eight amendments to the Federal Constitution. (emphasis added) *Id.* at 242.

In sum, in the understanding of Southern Democrats and Radical Republicans alike, the right to keep and bear arms, like other Bill of Rights freedoms, was made applicable to the states by the Fourteenth Amendment.

REFERENCES

1. Although the common law in effect in the colonies did not develop any limitation on the absolute right of individuals to keep arms, it did recognize certain restrictions on the manner in which individuals could *use* arms.

2. Individual colonists, of course, kept their own firearms, with powder and shot, in their residences.

3. Justice Story wrote in 1833: "The militia is the natural defense of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample on the rights of the people. *The right of the citizen to keep and bear arms has justly been considered, as the palladium of the liberties of a republic;* since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them." (emphasis added.) 3 *Commentaries on the Constitution of the United States*, Section 1890, pp. 746–747 (1833).

4. Actually, the militia embraces a larger class of persons than today's statutory unorganized militia since it consists of at least all persons "physically capable of acting in concert for the common defense." *U.S. v. Miller*, 307 U.S. 174, 179 (1939). The Virginia Constitution, upon which the Bill of Rights was modeled, provides that the militia is "composed of the body of the people." Article I, Section 13.

5. Of the twelve proposed amendments, all but the first two dealt with the protection of the rights of individuals; all but the first two were ratified. Since, of the ten remaining, Amendments 1 and 3 through 10 have repeatedly been held to secure fundamental individual rights, it is logical that the Second Amendment also secures a fundamental individual right.

6. The word "people" as used in the First, Fourth, Ninth, and Tenth Amendments has consistently been construed to mean individual.

7. This view is supported by the Congressional Research Office of the Library of Congress which has observed, "At what point regulation or prohibition of what classes of firearms would conflict with the [Second] Amendment, whether there would be a conflict, the *Miller* case does little more than cast a faint degree of illumination toward answering." *The Constitution of the United States of America. Analysis and Interpretation*, Senate Document No. 92-32.

8. Applying this test, the defendant would have little difficulty today in demonstrating that possession of such a shotgun is protected by the Second Amendment, since shotguns were military issue in both World Wars, Korea, and Vietnam.

9. Numerous cases have held that a handgun is an arm for constitutional purposes. for example, in *State v. Kerner*, 181 N.C. 574, 107 S.E. 222, 224 (1921), the Court observed that the "historical use of pistols as 'arms' of offense and defense is beyond controversy. . . ." Similar holdings are found in *In re Brickey*, 8 Ida. 597, 70

P. 609 (1902) and *State* v. *Rosenthal*, 75 Vt. 295, 55 A. 610 (1903). Moreover, in colonial times pistols saw considerable service as a personal weapon. As a noted historian observed:

It was considered normal for civilians to carry pocket pistols for protection while traveling . . . Among eighteenth century civilians who traveled or lived in large cities, pistols were common weapons. Usually they were made to fit into pockets, and many of these small arms were also carried by military officers. George C. Neumann, The History of Weapons of the American Revolution, pp. 150-151 (Bonanza Books, N.Y. 1967).

10. Although *Tot* was appealed to the Supreme court, the Second Amendment issue was not addressed by that Court.

11. This view, moreover, is consistent with the common law which prohibited the bearing of arms when carried in such a manner as would terrify the people. 4 Blackstone Commentaries 149. Furthermore it is consistent with the concept of the militia as a body of persons who maintained firearms in their homes for self-defense and to be ready to contribute to the common defense.

12. But see *State* v. *Reid*, 1 Ala. Reports 612, 616-7 (1840), while holding that a statute prohibiting the carrying of concealed weapons was not incompatible with the right to keep and bear arms in defense of self and state, added: "A statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional."

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

JOHN LEVIN*

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 Rights[2] or Blackstone in his *Commentaries on the Laws of England*[3] 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

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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 (1766).

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 distributees 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

[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 (1665-1675).
[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.

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 persons 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

[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, § 3 (1721).

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 balan f military powe: between the governmental bodies of the union. The state governments feared that if they entrusted too much power in the hands of the centra! 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 Arms[25] gave the presence of royal troops a pr minent role in that 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

[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.

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 in 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

[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.

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

[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.

> 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 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

[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 1781-1789 (1962).

[41] M. Farrand, II The Records of the Federal Convention of 1787 329-30 (1966).

of the states which raised them,[43] and by 1788 the Army of the Confederation consisted of only 679 officers and men.[44] The question of the balance of military power between the states 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."[45] 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."[46] Oliver Ellsworth believed that "the whole authority over the Militia ought by no means to be taken away from the States whose consequence would pine away to nothing after such a sacrifice of power."[48] 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

[43] H. Commager, I Documents of American History 112-13 (7th ed. 1963).
[44] *Supra* n.41 at 365.
[45] *Id.* at 330.
[46] *Id.* at 331.
[48] *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.

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 was 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 states 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 sub-

[50] *Id.*

> ject 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 have exclusive right of establishing regulations for their Government and Discipline, which the States 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 it 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

[51] *Id.* III at 118-19.
[52] *Id.* at 208-09.
[53] The Federalist, No. 28 (Hamilton).

> 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 a 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 Representatives 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:

[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.

> 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."[60] New Hampshire supported a provision that "Congress shall never disarm any citizen unless such as are or have been in Actual Rebellion."[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

[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).

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."[43] 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, unabridgable, and personal is rare. Most cases follow the reasoning of a Texas court which asked "How far personal liberty may be restrained for the prevention of crime."[44]

A few states adopted the thinking of the early Tennessee case of *Aymette v. State*[45] 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*:[46]

> 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.[47]

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*[48] 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 of the

[43] *Id.* at 91.
[44] English v. State, 35 Tex. 437, 477 (1872).
[45] 2 Tenn. 154 (1840).
[46] 38 Ark. 564 (1882).
[47] *Id.* at 566.
[48] 4 Ark. 18, 24 (1843).

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 rare in judicial opinions. 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

[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. 1929).
[74] 50 Tenn. 165, 193 (1871).

those arms which, by the common opinion and usage of law-abiding people, are [to be kept for] protection of person and property."[15]

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 has 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."[16] 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."[17] Similar situations have occurred in several states.[18] 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. Cruick-*

[15] People v. Brown, 253 Mich. 537, 541, 235 N.W. 245, 246 (1931).

[16] Carlton v. State, 63 Fla. 1, 9, 58 So. 486, 488 (1912).

[17] Davis v. State, 146 So.2d 892, 893 (Fla. 1962).

[18] *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).

shank,[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.

Cruickshank 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 *Cruickshank* 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

[79] 92 U.S. 542 (1874).
[80] 116 U.S. 252 (1886).
[81] *Id.* at 264.
[82] *Id.* at 265.

> 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 reliance to governmental power.

For many years after *Presser* the issue of the second amendment appeared in federal courts only in reaffirming the *Cruickshank* holding that the second amendment did not apply to the states.[84] In the 1930's Congress passed two laws, the Federal Firearms Act[85] 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 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.[90]

The difficulty with such an interpretation is that were a weapon to have

[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. 463 (1943).
[89] 307 U.S. 174 (1939).
[90] *Id.* at 178.

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

[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).

> 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.[96]

Even thought 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

[96] *Id.* at 501.
[96] *See* R. Claser, Age of Excess (1963), and references cited therein.
[97] R. Pound, The Development of Constitutional Guarantees of Liberty 91 (1957).

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 becomes more futile, meaningless and dangerous.

John Levin. "The Right to Bear Arms: The Development of the American Experience." Chicago - Kent Law Review, Fall-Winter 1971.

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Standing Armies And Armed Citizens: An Historical Analysis of The Second Amendment

By ROY G. WEATHERUP*

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 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 13 percent 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 31,000 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 enforcible.

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

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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, § 1, at 1, col. 5 (city ed.).

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 gun-owners 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

3. L.A. Times, June 5, 1975, § 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 68 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 to territory).

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 supporters 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

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6. Scott, *Leading Senator Admits Gun Law Mistake!*, Mar. 1970 GUNS & AMMO., 46, 47.

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 is 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 every one 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

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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.

> in any way deprive his men of them either by [illegible], or by 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]

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8. The Assize of Arms, ¶ 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 Northhampton, 2 Edw. 3, c.3 (1328).

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 are not onely 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 blas-

12. Treasons Act, 13 Eliz. 1, c. 1 (1571).

phemie," and thus it is "sedition in Subjects, . . . 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 such 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 mischiefs 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

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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).

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 of 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 themselves damnation.[17]

This doctrine of "nonresistance" was to have an important role in 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.

17. Constitutions and Cannons Ecclesiastical, Treated Upon by the Archbishops of Canterbury and York (1640), in 1 SYNODALIA 390-91 (E. Cardwell ed. 1842).

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 the 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]

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18. E. Sheppard, A Short History of the British Army (4th ed. 1959).
19. Disbanding Act, 12 Car. 2, c. 15 (1660).

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 an 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 £100.[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

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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, § 3 (1670).

were passed which barred [illegible]
and from both Houses of Parliament.[23]

In 1685, the Catholic Duke of York ascended to the throne as 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, stadtholder 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 every-body 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.

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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).

> 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 extra-parliamentary 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.

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25. J. Dryden, Cymon and Iphigenia, in The Poetical Works of John Dryden 64 (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.

Leading subjects set [illegible]
to England in defense of the liberties [illegible]
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

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28. Bill of Rights, 1 W. & M., sess. 2, c. 2 (1689).
29. *Id.*
30. *Id.* Securing the Peace in Scotland Act.

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

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

> 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 that 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 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,

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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).

> 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* be it declared . . . That the said Colonies and Plantations in *America* have been, are, and of Right ought to be, subordinate unto, and dependent upon, the Imperial Crown and Parliament 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*:

> Chronus 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. . . . Vatel tells us plainly and without hesitation, that "the supreme legislative can-

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

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

> not change the constitution." . . . If then according to Lord Coke, *Magna Charta* is declatory of the principal grounds of the *fundamental* laws and liberties of the people, and Vatel 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.

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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).

> *Resolved*, . . .3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their decendants 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 against 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

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38. 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, 67-68 (Oct. 14, 1774) (W. C. Ford ed. 1904-1907).

39. *Id.* at 70.

developed, and that rights were [illegible] 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 organization—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 domestick life; unaccustomed to the din of Arms; totally unac-

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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, § 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.

> quainted 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,"

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42. Letter from George Washington to the President of Congress, Sept. 24, 1776, in 6 THE WRITINGS OF GEORGE WASHINGTON 110, 112 (J. Fitzpatrick ed. 1931-1944).

43. *See generally* M. JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789 (1950).

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 hen-yard 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.

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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).

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 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;

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]

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 whom 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 unani-

47. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 465 (M. Farrand ed. 1911).

mously 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 still more neglected than it has been, if each county had 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 marshalled 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.

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48. MADISON REARRANGED 513-26.
49. *Id.* at 522.
50. *Id.* at 521.
51. *Id.* at 523-24.

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.

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52. *Id.* at 524.
53. *Id.* at 525.

Bearing in mind the inconsistency of [illegible], 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 a 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 possessed 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

54. 'Philadelphiensis' *Letter*, Independent Gazetteer (Phila.), Feb. 7, 1788.
55. 'Brutus' *Letter*, N. Y. Journal, Jan. 24, 1788.

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]

56. 'A Democratic Federalist' *Letter*, Pa. Packet (Phila.), Oct. 23, 1787.
57. 'Centinel' *Letter*, Independent Gazetteer (Phila.), Nov. 8, 1787.
58. 'John De Witt' *Letter*, Am. Herald (Boston), Dec. 3, 1787.

Anonymous pamphleteers and [illegible] persons concerned about standing armies [illegible] Henry Lee, in a letter that was widely circulated in Virginia, [illegible] 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 supplied 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 milita 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:

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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.

> 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 powers; 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 I, in the beginning of his 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.

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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).

Hamilton denied that a standing army was necessary, 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.

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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 protection of the state is committed ought, as far as possible, to take away 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).

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 new 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 [illegible] . . . 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 cannot 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]

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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.

It is interesting to note that Madison uses 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 dis-

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72. *Id.* at 466.

73. J. Madison, The Debates in the Federal Convention of 1787 660 (G. Hunt & J.B. Scott ed. 1920).

established the Anglican Church 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 inlisted 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.

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74. *Id.* at 651.
75. *Id.* at 662.
76. *Id.* at 663.

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 outmanuevered the antifederalists 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 pro-

77. M. JENSEN, THE MAKING OF THE AMERICAN CONSTITUTION 149 (1964).
78. 1 ANNALS OF CONG. 434 (1789).

posed Constitution authorized standing armies without 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 pamphleteers, in the newspapers, in the convention debates, nor in Congress was there any reference to hunting, target shooting, duelling, personal self-defense, or any other subject that would indicate an individual right to have guns. Every reference to the right to bear arms was in connection with military service.

Thus the inevitable conclusion is that the "collectivist" view 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

79. 92 U.S. 542 (1875).
80. 116 U.S. 252 (1886).
81. 153 U.S. 535 (1894).
82. 307 U.S. 174 (1939).

to his 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

83. 92 U.S. at 553 (1875).
84. 116 U.S. 252 (1886).

> 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 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.[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 gov-

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85. *Id.* at 264-65.
86. *Id.* at 265.
87. *See generally* H. Black, *The Bill of Rights*, 35 N.Y.U.L. Rev. 365 (1960).
88. *Id.* at 266.

ernment, 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 a 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 capability 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

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. §§ 5801-5872 (1972).

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]

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93. 307 U.S. at 178.
94. *Id.*
95. *Id.* at 182.

...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.

VIII. 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.

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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 text.

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.

SOURCE:
HASTINGS CONSTITUTIONAL
LAW QUARTERLY
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THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 West 44th Street, New York, N.Y. 10036

Gun Control Legislation

By THE COMMITTEE ON FEDERAL LEGISLATION

INTRODUCTION

Since the enactment of the Gun Control Act of 1968 there has been a substantial increase in the incidence of gun-related crimes and it has become evident that the existing system of law is inadequate. Efforts have been underway in both Houses of Congress to enact further gun control legislation and the Executive Branch has indicated support for stronger gun control. Both the Subcommittee on Crime of the House Committee on the Judiciary and the Subcommittee on Crime and Juvenile Delinquency of the Senate Committee on the Judiciary have accumulated a substantial factual record on which to base legislation.

We believe that the contribution of handguns to the current increase in homicide and other violent crimes requires immediate and comprehensive action. In our opinion, the continued existence of an unwarranted supply of handguns is an underlying factor in the decline of our major urban centers. This Committee does not find any substantial justification for the continued widespread public possession of handguns, and, accordingly, we strongly endorse the legislative proposals calling for a prohibition on the manufacture, importation, sale, and private possession of handguns.[1] Whether or not our recommendations are politically feasible at this moment in time, we are of the firmly held conviction that a complete ban on handguns should be the ultimate objective of any new federal gun control legislation.

This report is divided into four parts. Part I describes the current federal law and the congressional proposals for change. Part II examines the constitutional bases for Congress legislating a prohibition on the manufacture, importation, sale, and private possession of handguns. Part III discusses the need for adopting far-reaching gun control legislation. Our recommendations are contained in Part IV.

II. *GUN CONTROL AND THE CONSTITUTION*

To determine whether a federal statute restricting handguns would be constitutional, two questions must be answered: (A) Is there a constitutional right to possession of handguns which cannot be infringed by legislation, and (B) does regulation of handguns fall within the scope of any of the subjects on which Congress is empowered by the Constitution to legislate? A review of the relevant decisions demonstrates that Congress may constitutionally enact legislation restricting and prohibiting the possession of handguns by private citizens.[10]

A. *Is There a Constitutional Right to Possess Handguns?*

Debates on the merits of gun control legislation are regularly punctuated by claims of a constitutional right to possess firearms. The source of these claims is the Second Amendment to the 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."

Although spirited controversy as to the meaning of the Second Amendment continues unabated among commentators,[11] courts over a long period of time have consistently given the amendment a very narrow construction. The Second Amendment as so interpreted places no restrictions on Congress' ability to regulate handguns.

A constitutional provision concerning the right to "bear Arms" is directed at checking power. The question is what the framers of the Constitution intended. There are basically three relationships which could have been intended to be affected: (1) the individual against the world; (2) the populace against the government, whether state or federal; and (3) the state government against the federal government. The first possibility, that the framers were concerned with the right of individuals to protect their homes and their persons from whatever depredations might confront them, appears to be without historical support.[12] The amendment itself speaks of the "security of a free State." The disputes have centered around the second and third possibilities.

The initial question is the proper interpretation of the term "Militia." The practice in Europe of maintaining large standing armies while prohibiting the general populace from having guns led to a preference in colonial America for the militia as the primary military force. This force would be drawn from the people and would be active only in time of military need.[13]

Some have argued that the militia was regarded as the populace at large—or at least those members of the populace capable of bearing arms.[14] To these commentators, militia meant the "unorganized militia," so that the Second Amendment must be read as permitting the populace to maintain arms as a check against excesses of any or all government. This position is sometimes characterized as more extreme than it really is. The framers of the

Constitution need not have created a "right to revolution" or a license to band together in paramilitary organizations to have established a check on the government by permitting the populace to keep and bear arms.[16] Whatever the merits of the "unorganized militia" analysis may be, however, it has never found judicial favor.

The federal courts have long regarded the Second Amendment as concerned only with the "organized militia" maintained by the states. In 1875, the Supreme Court ruled in *United States* v. *Cruickshank*[16] that the Second Amendment restricted Congress alone and not state governments. More recently, in *United States* v. *Miller*,[17] the Supreme Court held that Congress could regulate firearms so long as there was no evidence of a relationship between the regulation and the preservation or efficiency of the state militia. The Court said that Miller could not attack his indictment for interstate shipment of a sawed-off shotgun under the Second Amendment:

> "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."[18]

Some have argued that the *Miller* case should be read narrowly, since evidence of a military use can be shown as a matter of fact for most kinds of weapons.[19] However, federal courts after *Miller* have read the decision as requiring a showing that the challenged legislation actually interfered with the state militia. Under this standard, Second Amendment challenges to federal gun control legislation uniformly have been rejected.[20]

Further, even if the Second Amendment were to be interpreted to refer to an "unorganized militia," it would not follow that Congress would be barred from regulating the ownership of handguns. Such regulation would still be constitutional unless handguns were regarded as "Arms" within the meaning of the Second Amendment. It appears instead that the "Arms" of the militia were understood to consist of rifles and muskets.

In addition to the constitutional provisions and old state statutes quoted in *United States* v. *Miller*[21] and other secondary sources,[22] there are a number of early cases considering whether handguns are "Arms" within the meaning of the Second Amendment. While the decisions are not uniform, the weight of authority is that handguns do not constitute such "Arms."[23]

This position is most effectively expressed in *State* v. *Workman*,[24] where the Supreme Court of Appeals of West Virginia wrote:

> ". . . in regard to the kind of arms referred to in the amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets,—arms to be used in defending the state and civil liberty,—and not to pistols, bowie-knives,

> brass knuckles, billies, and such other weapons as are usually employed in brawls, street fights, duels, and affrays and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the state."[25]

Thus, in our view, the Second Amendment poses no barrier to congressional efforts to reduce "the terror of the community and the injury of the state" by prohibiting the private possession of handguns.

B. *Does Congress Have Power to Regulate the Manufacture, Possession and Sale of All Handguns?*

While several congressional powers could be invoked in support of gun control legislation,[26] justification is ordinarily found under Congress' power to regulate interstate and foreign commerce.[27] There can be no serious dispute that certain kinds of gun-related activities—for example, interstate sales of firearms—can be regulated under the commerce clause. The disagreements arise over how far Congress may go in regulating local gun activity under its power to regulate matters "affecting" commerce.

In *United States* v. *Bass*,[28] the Supreme Court recently avoided a constitutional issue concerning 18 U.S.C. § 1202, which prohibits the transportation, receipt or possession of guns by felons, by holding that proof that the prohibited conduct in each case was in commerce or affected commerce was required by the statute. Prior courts of appeals decisions had differed as to whether that statute was a constitutional exercise of the commerce power without such proof.[29]

However, in *Perez* v. *United States*,[30] a case decided shortly before the *Bass* case, the Supreme Court had laid the groundwork for the power to create a federal criminal law under the commerce clause. The *Perez* case concerned the constitutionality of a provision in Title II of the Consumer Credit Protection Act, 18 U.S.C. §§ 891 *et seq.*, making loansharking a federal crime. In holding that Perez had been lawfully convicted despite the absence of proof of the effect of his conduct on commerce, the Court cited a variety of reports and statistical studies providing evidentiary support for the congressional finding that, in the aggregate, loansharking had an effect on commerce. It concluded, therefore, that Congress could prohibit the practice regardless of the extent to which the activities of each particular loanshark may have affected commerce.

An examination of *Perez* and its progeny, and of other federal criminal legislation regulating local activity, points out what may have led the Supreme Court to take a very narrow position in the *Bass* case, namely the lack of any substantial legislative findings. In *Perez*, the Court put great emphasis on the findings made by Congress of the impact of loan sharking on interstate commerce, even as a local activity, and on the very substantial evidence which was available to Congress to support those findings. In *Bass*, in contrast, there was virtually no legislative history to guide the Court in its interpretation of congressional intentions.

The implication of the limitation on Congress' attempted exercise of

power in the *Bass* case is that if gun control legislation is supported by substantial documentation and carefully drawn congressional findings concerning the effects of the proscribed activity on interstate commerce generally, the Supreme Court would sustain the exercise of power under the commerce clause even if the activity of specific individuals were purely local in nature.

In a number of cases involving federal gun control legislation arising after *Bass*, courts have followed *Perez* to uphold the power of Congress to regulate firearms felonies without a showing in each case of a nexus with interstate commerce.[31] In *United States* v. *Nelson*,[32] the Fifth Circuit affirmed a conviction under 18 U.S.C. § 922(a)(6), which prohibits the making of false statements in connection with the acquisition of a firearm, in spite of a failure to show a nexus between the defendant's false statements to the gun dealer and interstate commerce. Although the individual activity was clearly local, the court found that under *Perez* the Congress does have the power to regulate an intrastate activity, an isolated instance of which may have no direct connection with interstate commerce, because that intrastate activity in the aggregate does impose a burden on interstate commerce.[33]

The decision in *Nelson* leaves open the question whether Congress has the power under the *Perez* theory to regulate possession of a firearm. It could be argued that the manufacture and sale of firearms presents a stronger case for federal regulation since a potential impact on interstate commerce is discernible, while possession of a firearm could be an entirely and perpetually local activity in a given instance. Such an argument ignores the aggregate effect on commerce of a substantial number of people possessing firearms. In an analogous situation, regulation of the possession of narcotics and other controlled substances under 21 U.S.C. §§ 811 and 844, and predecessor statutes, courts have upheld the regulation without a showing in each case of a nexus with interstate commerce.

In *Deyo* v. *United States*,[34] for example, the Ninth Circuit affirmed a conviction for possession and sale of a drug against the contention of the defendant that the conviction was invalid because there had been no proof of a connection between the defendant's activities and interstate commerce. The court described at length the congressional findings supporting federal control of the possession of these drugs. The court concluded that effective interstate regulation was not possible if intrastate transactions were not also regulated.[35]

The conclusion to be drawn from the narcotics possession cases is that if it can be shown through proper congressional findings that possession of handguns as a class of activity has an effect on interstate commerce, then individual possession could be legitimately proscribed without any showing in each case of a nexus with interstate commerce, notwithstanding that a particular weapon had never been in interstate commerce. Indeed it is the possession of handguns that can be viewed as being responsible for their manufacture, importation and sale. Thus, if undertaken after congressional findings of effect on interstate commerce based on substantial investigation, federal legislation banning the manufacture, sale and possession of handguns would in our view be authorized by the commerce clause.

DISTRIB. BY V. FISCHER.

M E M O R A N D U M

MUNICIPALITY OF ANCHORAGE

To: Members of the Senate
From: Chip Dennerlein
Re: SJR 39

The Municipality has been asked to comment on the present form of SJR 39, including any potential effects the resolution might have on existing municipal ordinances concerning the possession and use of firearms. First, it is our understanding that the intent of SJR 39 is to clarify the constitutional right to keep and bear arms as an "individual" right in Alaska, and to give Alaskans the opportunity to vote on this proposition. We support this intent and approach.

However, the language of SJR 39 raises a serious question beyond the basic intent. That is, does SJR 39 override existing municipal code regarding the prohibition against carrying concealed weapons? Based on careful review by legal counsel, the answer is yes. I will explain.

The language provides specifically for the "lawful defense of self, etc." This insures that the "use" of arms which is protected by SJR 39 is "lawful" use. However, the actual keeping and bearing of arms (their "posession") has no such qualifier. In other words, while "use" must be "lawful", "possession" is an absolute constitutional "right". As long as a person uses or intends to use a firearm in a lawful manner, that person can carry it in any manner he or she chooses. As currently written SJR 39 would authorize the carrying of concealed weapons, overriding municipal code.

The Municipality has previously suggested language to correct this problem. Please refer to the attached letter from the Anchorage Municipal Attorney.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH V STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

MEMORANDUM March 18, 1986

SUBJECT: "Commentary on Proposed Amendment to Alaska Right to Bear Arms Guarantee" [CSSJR 39(Judiciary)]

TO: Senator Pat Rodey
Chair, Senate Judiciary Committee

FROM: Richard A. Bradley
Legislative Counsel

Suzanne LaPierre has asked that I comment on a "Commentary on Proposed Amendment to Alaska Right to Bear Arms Guarantee." While the lack of time has prevented a more thorough analysis, I have some few reservations about points made within the "commentary."

The commentary addresses SJR 39 in the form that it was introduced.

The commentary states that the provision "explicitly protects the traditional rights that gun owners in Alaska always assumed were guaranteed." The statement is problematical: I believe that the existing provision of the Constitution is entitled to that reading and I am concerned with the suggestion that a changed constitutional provision will be read as being more traditional than the existing provision.

The problem may be with the understanding of what is included in the "traditional rights of gun owners." While I am not a follower of that question, it seems that there have been numerous controversies over just what rights the constitutional provisions guaranteed.

I. To Whom the Right Belongs

The commentary notes that SJR 39 speaks in terms of "each citizen of the state." The commentary suggests that the

"full enjoyment" of the rights of citizenship is not enjoyed by "convicted felons, lunatics, and illegal aliens."

I accept the statement and even its relevance to SJR 39; I have come to doubt the suggestion that the constitutional provision should limit the right to citizens. While it is accurate to say that the group described does not have the "full enjoyment" of the "rights of citizenship", it does not follow that the right to bear arms may be limited to those enjoying the "full benefits" of citizenship. And, of course, the provision in not written in that framework: It does not limit the right to bear arms to those "enjoying the full benefits of citizenship."

I would like to pass quickly over the phrase regarding "convicted felons, lunatics, and illegal aliens." An individual convicted of a felony not involving moral turpitude may vote. Art. V, sec. 2, Alaska Constitution. Even a person convicted of a felony involving moral turpitude may sue. Bush v. Reid, 516 P.2d 1215 (Alaska 1973). The term "lunatic" is, for better or worse, in disuse. To deprive an individual of the right to vote in this context an affirmative judicial determination of "unsound mind" is required. But that even here, while the individual suffering from such a determination may not vote, the person retains citizenship and can probably own a weapon. AS 11.66.200 - 11.66.220.

Concepts of citizenship would exclude all aliens, legal as well as illegal. Since legal aliens have many of the protections of the U.S. and Alaska Constitution though not the right to vote, the provision may be overbroad. Both the due process clause of the U.S. Constitution (14th Amendment, sec. 1) and the equal protection clause of the Alaska Constitution (art. I, sec. 1) protect "persons" without regard to citizenship.

While I assume that the purpose is not to permit discrimination against nonresident or noncitizen hunters, I note that the provision, if adopted, would seem to authorize legislation to prevent nonresident hunters from hunting in the state because as noncitizens, they may not bear arms.

Finally, while I have not reviewed the law review article from Oklahoma cited, I believe that the suggested reliance on State v. Kessler, 289 Or. 359, 614 P.2d 94, 99 (1980) is misplaced since the analagous Oregon constitutional provision extends the privilege to "the people", without regard to citizenship, unlike SJR 39.

II. What Constitutes Arms.

Several points:

I have less information than the author of the Commentary on the arms that are kept by Alaskans. Others will have to determine whether Alaskans currently use machine guns, bazookas, and other more unusual weapons or only more "commonly" kept weapons.

Assuming that Alaskans do not use the less "commonly" used weapons, however, it seems clear that the basis for the understanding is something apart from the words of the resolution itself.

There does seem to be a legal history of such legislation going back to 1689, in England, according to State v. Kessler, 289 Or. 359, 614 P.2d 94 (Oregon 1980). The English Bill of Rights enacted in 1689 apparently contains the first instance of a legislature granting citizens the right "to have Arms for their Defence, suitable to their Conditions, and allowed by Law." See Kessler, 614 P.2d at 96.

There are, therefore, understandings regarding the meanings of similar provisions, at least when the language of the later provision was not inconsistent with the understandings. That is, these provisions are placed within the historical context unless the language in the particular provisions was so clear that there was no need to resort to the historical development of the idea.

The Kessler case as well as State v. Delgado, 692 P.2d 610 (Oregon 1984) present the problem. Oregon has a simple and direct provision: "The people have the right to bear arms for the defence [sic] of themselves, and the State, . . ." [Art. I, sec. 27, Oregon Const.] The two cases raise the question of the limits of the understanding of what is meant by "arms". The Kessler case was concerned with a "slugging weapon", a "billy".

The court noted that in the colonial and revolutionary war era, weapons used by militiamen and in defense of the person or the home were the same. The court noted that the historical analysis of the provision indicates that

> the drafter intended "arms" to include the hand-carried weapons commonly used by individuals for personal

> defense. The club is an effective, hand-carried weapon which cannot logically be excluded from this term. We hold that the defendant's possession of a billy club in his home is protected by Article I, section 27, of the Oregon Constitution. [614 P.2d at 100.]

The Delgado case presents the question of the possession of a "switchblade" knife.

> The appropriate inquiry in the case at bar is whether a kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during either the revolutionary or postrevolutionary era, or in 1859 when Oregon's constitution was adopted. In particular, it must be determined whether the drafters would have intended the word "arms" to include the switch-blade knife as a weapon commonly used by individuals for self defense. [692 P.2d at 612.]

The court agreed that if the law sought to prescribe possession of the "jackknife" or "mere pocketknives", the statute would be unconstitutional.

> The only difference is the presence of the spring-operated mechanism that opens the knife. We are unconvinced by the state's argument that the switch-blade is so "substantially different from its historical antecedent" (the jackknife) that it could not have been within the contemplation of the constitutional drafters. They must have been aware that technological changes were occurring in weaponry as in tools generally. [692 P.2d at 614.]

To a large extent, the language of the Oregon Constitution is identical in function to that contained within SJR 39 (apart from the "people"/"citizen" problem). It would, therefore, be reasonable to expect them to be construed similarly. The provisions of the Alaska Statutes now prohibit possession of a switchblade. AS 11.66.200(e)(1)(D).

It is fair to say that the reference in SJR 39 to "lawful" uses may well be adequate to authorize legislative regulation of an "unlawful" use of arms. I note simply that a constitutional provision granting the legislature the authority to characterize uses as unlawful may authorize

more regulation than was intended, notwithstanding several assurances in the commentary to the contrary.

III. The Right to Keep and Bear Arms

The comments seem generally accurate.

IV. The Right Shall Not be Infringed by the State or a Municipality

Much of what is suggested seems safe. I don't believe that much light is shed on the authority of a municipality under SJR 39 by the phrase stating that a municipality "could only enact legislation which was absolutely necessary and uniquely necessary" for the particular municipality; it does seem that this statement may be inconsistent with the suggestion of a required "uniformity throughout the state."

V. Conclusions

The commentary concludes with some generalities that may be accurate.

For my own part, I suspect that the Oregon legislature was probably advised that its bills regulating the use of billys and switchblades were within the ambit of possible legislation. The Supreme Court of Oregon disagreed. The cases point up the problems in predicting what a court will do in its construction of similar constitutional provisions.

With regard to the "individual"/"collective" question, I suggest that an individual right may be recognized by language granting the right to a "person" or an "individual". I suggest that the concept of the rignt of belonging to a "citizen" be abandoned as unnecessary and diversionary from your more basic goals.

If I may be of further assistance, please advise.

RAB:mkr
m4/015

CONSTITUTIONAL AMENDMENTS FOR THE RIGHT TO KEEP AND BEAR ARMS

"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."

These words, from the Second Amendment of the Constitution of the United States, have been used both in defense of, and as an argument against, the individual American's right to keep and bear arms.

Strengthening of a state's constitutional protection of the right to keep and bear arms--or a first-statement of that right--is needed for the following reasons:

First, although it was clearly intended by the framers of the 14th Amendment that states would be precluded from infringing on the right to keep and bear arms, the 2nd Amendment's protections have not yet been incorporated by judges using the 14th Amendment. For the right to be protected from state and local interference, the guarantee must be in the state constitution.

Second, despite the clear intentions of the authors of state constitutions which include the right to keep and bear arms, some judges feel all to free to write their own views into the state constitution. Such judges too frequently take the view that the protection was not of an individual right (despite its listing among other personal rights) or is subject to almost any regulation which does not prohibit possession of all kinds of firearms by persons (even if the restriction is such that it is necessary to take time, effort, money, and even hire a lawyer in order to exercise a constitutionally recognized "right"); or judges just say times have changed, and the framers wouldn't really want widespread gun ownership. In short, they rewrite state constitutions according to their own ideologies, claiming that people really want "gun control" and that the state constitution wouldn't include such protection of the right to keep and bear arms were it being written today.

Thus, it is necessary to make it clear that people want the state constitutions to clarify matters for judges and localities. It must be re-emphasized that the right to keep and bear arms is an individual right (as recognized by seven-eighths of the public--DMI '75 and '78), one which is intended to restrict state and local interference with the ability of law-abiding citizens to own and use firearms for protection of person and property (as well as for the common defense) and for sporting purposes. As shown in public opinion surveys and state referenda and initiatives, the right is overwhelmingly by the people. The guarantees, their meaning, and their contemporaneity must be made clear to local legislative bodies and to the judiciary.

[redacted]

JUSTIFICATION

Thirty-nine states have constitutional amendments on the right to keep and bear arms. Most recently, the states of New Hampshire and Nevada approved of constitutional amendments which stressed an individual right to bear arms. Both states' provisions were approved by over seventy percent of the voters in those states during the 1982 election.

Senator Orrin Hatch's Sub-Committee on the Constitution report, completed this past year, has documented the right to keep and bear arms as a major individual right of American citizens. The Senate Sub-Committee, charged with the responsibility of interpretating the Constitution for the Senate, stated that: "The conclusion is thus inescapable that the history, concept, and wording of the Second Amendment to the Constitution of the United States, as well as its' interpretation by every major commentator and court in the first half-century after its ratification, indicates that what is protected is an individual right of a private citizen to own and carry firearms in a peaceful manner."

Some have argued that the Second Amendment applies only to the Federal Government, and the states can adopt gun laws without worrying about it.

The Sub-Committee points out that the Bill of Rights was originally intended to limit only federal actions. The Sub-Committee observed that the three Supreme Court decisions holding that the Second Amendment does not apply to the states come from the last century when most of the rights found in the Bill of Rights (including freedom of speech) were considered not to be restrictions on the states.

The case continually cited by "gun control" advocates as the Supreme Court's definitive ruling against the individual's right to keep and bear arms is U.S. v. Miller, 307 U.S. 174 (1939). In that case, the Supreme Court implicitly recognized that the rights guaranteed by the Second Amendment protected all individuals and not merely those who are members of the militia.

In more recent years, state courts, like the Supreme Courts of Colorado (City of Lakewood v. Pillow), Oregon (State v. Kessler), and Montana (State v. Nickerson), and the Courts of Appeals in Indiana (Schubert v. DeBard), Missouri (Taylor v. McNeal), and New Mexico (City of Las Vegas v. Moberg), in interpretating state constitutional provisions similar to the Second Amendment, have concluded that the right to keep arms guarantees the right to keep and bear arms, such as pistols and revolvers, for self-defense.

In some cases, members of the legislature have expressed concern that the absence of language providing for legislative regulation in a right to arms amendment would preclude regulation of the right of arms.

Old and new cases have shown that reasonable regulation is permissible although a state constitutional guarantee does not contain language authorizing regulation of right.

Article II of the Arkansas Constitution guarantees: "The citizens of this State shall have the right to keep and bear arms for their common defense." Authority to regulate the right was upheld in Haile v. State, 38 Ark. 564, 567 (1882). Article I of the Alabama Constitution guarantees: "That every citizen has a right to bear arms in defense of himself and the state." In Hyde v. Birmingham, 392 So. 2d 1225 (Ala. Crim. App. 1980), the court stated the right was subject to reasonable regulation. Article I of the Oregon Constitution guarantees: "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." The right to arms was held to be subject to reasonable regulation in State v. Kessler, 614 P. 2d 94, 99 (Or. 1980).

The Sub-Committee concluded that "given the legislative history of the Civil Rights Acts, and the Fourteenth Amendment, and the more expanded views of incorporation which have become accepted in our own century, it is clear that the right to keep and bear arms was meant to be, and should be, protected under the civil rights statutes and the Fourteenth Amendment against infringement of officials acting under color of state law."

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : CSSJR 39 (JUd)am
Title : "Proposing an amendment to the Constitution of the State of Alaska relating..right...to keep and bear arms."
Sponsor : Rodey
Requestor : House Judiciary
Date of Request : _____

FISCAL DETAIL

Agency Affected : Public Safety
BRU : DPS Administration
Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING : (Thousands of Dollars)

GENERAL FUND		0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL		0	0	0	0	0

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by : Kathy Niles, Admin Assistant
Division : Commissioner's Office
Phone : 465-4336
Date : 3/24/86

Approved by Commissioner : _____
Date : 3/25/86
Agency : Public Safety

Distribution (by Agency preparing fiscal note) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER - CSSJR 39 (Jud) am

Support

March 27, 1986

CSSJR 39(Jud) am - "Proposing an amendment to the Constitution of the State of Alaska relating to the right of a citizen to keep and bear arms."

The Department supports the concept of this resolution as the intent does not abrogate existing laws related to firearms control and use, as well as possible future weapon laws needed for the protection and safety of the state populace.

Robert J. Sundberg