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

JAMES B. WHISKER\*

### I. INTRODUCTION

At present there are approximately 20,000 federal, state, county and local laws<sup>1</sup> which control, to one degree or another, the ownership and use of firearms by American citizens. Each legislative session brings additional proposals for legislation in this area of public policy.<sup>2</sup> The growing crime rate in this country has prompted the drafting of a wide variety of anti-crime bills. Many of these seek to control violent crimes by placing additional restrictions on the private ownership of firearms.<sup>3</sup>

The student of the law is often confused by the wide latitude given the right to keep and bear arms by state courts. The question is compounded because the United States Supreme Court has refused to rule directly on the issue in recent years. No major decision has been rendered since before World War II.<sup>4</sup> Annually, appeals are made to the Supreme Court seeking constitutional clarifi-

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<sup>1</sup> This is an estimate provided by the National Shooting Sports Foundation in 1968. NATIONAL SHOOTING SPORTS FOUNDATION, TRUE FACTS ON FIREARMS LEGISLATION (1968).

<sup>2</sup> Fifty-five bills were introduced in the 94th Congress at the time this manuscript was prepared.

<sup>3</sup> *E.g.*, H.R. 2313, 94th Cong., 1st Sess. (1975), which bans the importation, manufacture or sale of handguns, and which requires citizens to surrender all privately held handguns for a \$25 tax credit; H.R. 1685, 94th Cong., 1st Sess. (1975), which provides for universal handgun registration and the licensing of their owners; H.R. 40, 94th Cong., 1st Sess. (1975), which prohibits the importation, manufacture, sale, purchase, possession or transportation of handguns except for military and law enforcement officers; and H.R. 2433, 94th Cong., 1st Sess. (1975), which requires registration of all guns and licensing of their owners and bans "Saturday Night Specials." Apparently there is some considerable popular support for additional restraints on the private ownership of firearms. A Gallup Poll conducted in May of 1975 shows that 67% of the American public favors a system of national firearms registration, and 41% want to remove all handguns from private use. Pittsburgh Post-Gazette, June 5, 1975, at C-1, col. 1.

<sup>4</sup> The principal cases interpreting the second amendment are: *United States v. Cruikshank*, 92 U.S. 542 (1876); *Presser v. Illinois*, 116 U.S. 264 (1886); and *United States v. Miller*, 307 U.S. 174 (1939).

cation of this right. Most seek relief from the plethora of state or local laws; a few ask review of the several federal laws.

In 1966 the American Bar Foundation (ABF) began an in-depth review<sup>5</sup> of both the law and public policy materials in an attempt to better the understanding of the right to keep and own firearms. The ABF admitted in its 1967 published report that "many questions pertinent to intelligent firearms legislation remain unanswered . . . ."<sup>6</sup> They found that "it does seem clear that no really effective legislation is possible without major alteration in present social and political priorities."<sup>7</sup> The ABF found that the task of gathering good data was difficult. In regard to current legislation, "the information about relevant facts and estimates of the effectiveness of existing laws is fragmentary and to an important extent conjectural."<sup>8</sup> Further, "[t]here are no comparable and reliable national, state, or municipal statistics on the number of crimes in which firearms are utilized. . . . It must be stressed, however, that the sparsity of relevant record keeping practices makes it impossible to state with confidence the frequency of criminal use of firearms . . . ."<sup>9</sup> Additionally, the size of the problem of control is unknown. "How many guns are being talked about in the proposals for control of firearms? Nobody knows. . . . The best that can be done is to draw inferences from certain relevant but inconclusive data on the periphery of the question. . . . Testimony and opinion from knowledgeable people usually takes the form of such non-quantitative expressions as 'huge,' 'enormous,' and 'staggering.'"<sup>10</sup>

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

The United States government has found that, in at least one way, firearms ownership and use is of considerable value to it. A research report<sup>11</sup> done for the United States Army in 1966, found that:

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<sup>5</sup> AMERICAN BAR FOUNDATION, FIREARMS AND LEGISLATIVE REGULATION (1967).

<sup>6</sup> *Id.* at 1.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Id.*

<sup>11</sup> A. LITTLE, RESEARCH REPORT TO THE UNITED STATES ARMY (1966).

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

## II. HISTORICAL BASIS OF THE SECOND AMENDMENT

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

Where social contract thinkers such as John Locke<sup>14</sup> and Jean-Jacques Rousseau<sup>15</sup> sought to place the burden of protection of the individual, his family, and his property on the state, they still recognized that there were incidents when the state would be unable to properly perform its duty. International law very clearly recognizes the right of the individual to defend himself, his home, his family, and his nation.<sup>16</sup> Such a right presumes the existence of some set of devices permitting the individual to exercise these rights.

As the modern nation came into being, a threefold defense pattern was developed. By medieval times the system was divided clearly into the standing army, the trained reserves, and the untrained civilian population.<sup>17</sup> In England the term "housecarls" was most often used to describe the real army. These were the mounted troops, recognized today in such concrete forms as knights, the bowman and the "king's men" of history. They were

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<sup>12</sup> *Id.*

<sup>13</sup> See generally PLATO, *LAWS* (Pantheon ed. 1961); ARISTOTLE, *POLITICS* (Everyman's Lib. ed. 1935); N. MACHIAVELLI, *THE PRINCE* (Mod. Lib. ed. 1945).

<sup>14</sup> J. LOCKE, *TWO TREATISES OF CIVIL GOVERNMENT* (Everyman's Lib. ed. 1947).

<sup>15</sup> J. ROUSSEAU, *THE SOCIAL CONTRACT* (Everyman's Lib. ed. 1950).

<sup>16</sup> Q. WRIGHT, *A STUDY OF WAR* 305 (2d ed. 1965) [hereinafter cited as WRIGHT]; see also Universal Declaration of Human Rights, G.A. RES. 265, 3 U.N. GAOR at 71, U.N. Doc. A/810 (1948).

<sup>17</sup> Smail, "Art of War," in *I MEDIAEVAL ENGLAND* 137 (L. Poole ed. 1937).

clearly professional soldiers. Many were mercenaries fighting for pay either as “freebooters” or “soldiers of fortune” or for a king who would rent out their services for a set price.<sup>18</sup>

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

The “great fryd” or “arriereban”<sup>21</sup> was a concept which meant generally that there existed an obligation of untrained citizens at large to defend their nation. In some cases this involved men and women, at other times, it meant the able-bodied men within a certain age bracket. Generally, the “great fryd” was not required to leave its home territory and normally could not be required to fight during harvest or planting season. Few laws required them to serve longer than thirty days at a time. Occasionally, the more fit could be mustered into the “select fryd” or drafted into the “housecarts.”

The masses of men were generally required to keep certain basic, unsophisticated weapons in their homes. Often these weapons were items such as bows with a supply of arrows, a short sword

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<sup>18</sup> C. HOLLISTER, *THE MILITARY ORGANIZATION OF NORMAN ENGLAND* (1965) [hereinafter cited as HOLLISTER].

<sup>19</sup> M. POWICKE, *MILITARY OBLIGATION IN MEDIEVAL ENGLAND* (1962) [hereinafter cited as POWICKE].

<sup>20</sup> L. BOYNTON, *THE ELIZABETHAN MILITIA 1558-1638* (1967) [hereinafter cited as BOYNTON].

<sup>21</sup> L. KENNETT, *FRENCH ARMIES IN THE SEVEN YEARS’ WAR* (1967).

or a pike. In short, the weapons required to be kept were the ordinary infantry weapons of the time period. Those who either failed to keep their weapons in good order or did not have the weapon required of them by law, according to class, were subject to stiff fines or imprisonment.<sup>22</sup>

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

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

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

While Americans believed they held the same basic concep-

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<sup>22</sup> See HOLLISTER, *supra* note 18; and POWICKE, *supra* note 19.

<sup>23</sup> The Laws of Ethelbert, King of Kent (circa 602), Laws of Cnut (circa 1020) and the Assize of Arms of Henry II (1181) in I & II ENGLISH HISTORICAL DOCUMENTS (D. Douglas ed. 1955, 1953).

<sup>24</sup> C. STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES 223 (1894). The history of the right to keep and bear arms given here follows essentially that given by the Court in *United States v. Miller*, 307 U.S. 174 (1939), *citing*, *Aymette v. State*, 21 Tenn. (2 Humph.) 152 (1840). *See also* *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1922).

<sup>25</sup> See BOYNTON, *supra* note 20.

<sup>26</sup> The English Bill of Rights said that, "the subjects which are protestants, may have arms for their defense suitable to their conditions, and as allowed by law." 9 STATUTES AT LARGE 69 (D. Pickering ed. 1764).

tion of the rights of Englishmen as the people held in England, in fact, the views differed substantially.<sup>27</sup>

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

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

The second amendment to the Constitution was a direct product of state constitutions,<sup>30</sup> as were most of the enumerated rights

<sup>27</sup> T. ANDERSON, *JACOBSON'S DEVELOPMENT OF AMERICAN POLITICAL THOUGHT* (1961).

<sup>28</sup> B. KNOLLENBERG, *ORIGINS OF THE AMERICAN REVOLUTION 1759-1776* (1960); J. SHY, *TOWARD LEXINGTON* (1956).

<sup>29</sup> R. KIRK, *THE ROOTS OF AMERICAN ORDER* (1975). This parallels the thinking of the court in *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921). The court stated: We know that in the past this privilege [the right to bear arms] was guaranteed for the sacred purpose of enabling the people to protect themselves against invasion of their liberties. Had not the people in the Colonies been accustomed to bear arms, and acquired effective skill in their use, the scene at Lexington in 1775 would have had a different result, and when "the embattled farmers fired the shot that was heard around the world," it would have been fired in vain. Had not the common people, the rank and file, those who "bore the burden of the battle" during our great Revolution, been accustomed to the use of arms, the victories for liberty would not have been won and American independence would have been an impossibility.

If our pioneers had not been accustomed to the use of arms, the Indians could not have been driven back, and the French, and later the British, would have obtained possession of the valley of the Ohio and the Mississippi. If the frontiersmen had not been good riflemen, particularly the riflemen from Tennessee and Kentucky, the battle of New Orleans would have been lost and the frontiers of this country would have stood still at the Mississippi.

*Id.* at 577, 107 S.E. at 224.

<sup>30</sup> All constitutions adopted in the thirteen original states had some bill of rights or similar guarantee of the right to keep and bear arms. *AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS 1492-1908* (F. Thorpe ed. 1909).

stated in amendments one through eight.<sup>31</sup> The colonial experience of having seen the keeping and bearing of arms as both an obligation and a right prompted Madison to combine both in the verbage of the second amendment:

A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.<sup>32</sup>

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

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<sup>31</sup> The first eight amendments contain the enumerated rights, including, in the second amendment, the right to keep and bear arms. It is possible to construct an argument to keep and bear sporting arms for sporting purposes which would invoke the unenumerated rights of the ninth amendment, now that this amendment has been given some meaning.

<sup>32</sup> U.S. CONST. amend. II. Madison originally proposed:

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

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

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

<sup>34</sup> After having promised a Bill of Rights to some anti-federalist forces who feared centralized power, Madison wrote the draft for that document. This is well chronicled in R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791* (1955) [hereinafter cited as RUTLAND].



the whole body of the American public would have access to the protection of arms.<sup>35</sup>

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

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<sup>35</sup> There is still considerable debate over the language used in the second amendment. Specifically, the question is asked whether the framers meant to apply it to the states or to the citizens as individuals. See generally Forkosch, *Who are the "People" in the Preamble to the Constitution?* 19 CASE W. RES. L. REV. 644 (1968); also see generally THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION (2d ed. J. Elliot 1861) [hereinafter cited as DEBATES]; and RUTLAND, *supra* note 34. In one specific study of this issue, the authors conclude that, it was "a clear grant to the individual citizen of the right to keep and bear arms." Levine and Saxe, *The Second Amendment: The Right to Bear Arms*, 7 HOUSTON L. REV. 1, 16 (1969) [hereinafter cited as LEVINE & SAXE].

<sup>36</sup> The anti-federalists used the fear of both a standing army and of a nationalized militia quite successfully in their ill-fated attempt to block ratification of the Constitution. W. RIKER, *SOLDIERS OF THE STATE* 16-18 (1957). See also L. MARTIN, *GENUINE INFORMATION* (1788), as an example of anti-federalist arguments on this point. LEVINE & SAXE, *supra* note 35, conclude that one way in which the second amendment can be viewed is "as a declaration that Federal Government can never fully nationalize all the military forces of this nation" because the masses of men with their own guns constitute "an essentially civilian-manned and oriented set of military forces" who can "inveigh against federal professionalization of the state militias." LEVINE & SAXE, *supra* note 35 at 8. The Preamble to the Declaration of Independence listed as two grievances against King George III that "[h]e has kept among us, in times of peace, standing armies without the consent of our legislatures [and] [h]e has affected to render the military independent of and superior to the Civil power."

<sup>37</sup> U.S. CONST. art. I, § 8.

<sup>38</sup> THE FEDERALIST No. 29 (A. Hamilton).

<sup>39</sup> *Id.* at 179 (Mod. Lib. ed. 1937).

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

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States; and, in 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.<sup>41</sup>

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

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<sup>40</sup> Thomas Paine wrote “[t]his continent hath at this time the largest body of armed and disciplined men of any power under Heaven.” I COLLECTED WORKS OF THOMAS PAINE 31 (1937).

<sup>41</sup> *Presser v. Illinois*, 116 U.S. 252, 265 (1885).

<sup>42</sup> *Id.*

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

the states, was still in effect. It was not until 1925 that *Gitlow*<sup>44</sup> opened the door for what is generally known as the “doctrine of incorporation,” allowing the first nine amendments to be enforced through the fourteenth amendment on the states. The subsequent modification, that of “selective incorporation” of these rights under the criteria set down by Justice Cardozo in the *Palko*<sup>45</sup> case, moved the Court away from concern from the second amendment.<sup>46</sup>

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

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<sup>44</sup> *Gitlow v. New York*, 268 U.S. 652 (1925).

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

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

Thus, the right and obligation to keep and bear arms will endure so long as there is a state.<sup>47</sup>

The importance of the citizen-soldier is well established in old English law from the Assize of Arms<sup>48</sup> to the Stuart period.<sup>49</sup> That role is also found in international law. Originally known in international law as the principle of “levees en masse,”<sup>50</sup> it recog-

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<sup>47</sup> The concept is found in international law, for example the HAGUE CONVENTION NUMBER IV, RESPECTING THE LAWS AND CUSTOMS OF WAR IN LAND AND ANNEXED REGULATIONS, 36 Stat. 2241 (1907). It is found in United States Statute law in such laws as the Militia Act of 1862; Militia Act of 1903 (The Dick Act) and the Volunteer Act of 1914. Each eligible male citizen in 1792 was required to furnish for his use “a good musket or firelock” with appropriate equipment by the Militia Act of 1792. See I MILITARY LAWS OF THE UNITED STATES 95 (1863). See also Murphy, *The American Revolutionary Army and the Concept of Levee en Masse*, MILITARY AFFAIRS, Spring, 1959, at 13.

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

<sup>49</sup> A great amount of Parliamentary debate was held over the right to keep and bear arms. II W. COBBETT, PARLIAMENTARY HISTORY OF ENGLAND 1106, 1357 (1807). The courts have taken note of this also. The Tennessee Supreme Court, in an 1840 case, spoke of the excesses of power of James I of England:

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

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

<sup>50</sup> Wright, distinguishes between true militia and levees en masse in this way: Both systems may be called a “nation in arms” but whereas the first has involved a militarization of the entire population, the second has involved a civilianization of the military services. Both systems must be differentiated from the standing and permanent army.

WRIGHT, *supra* note 16 at 305.

See also HAGUE CONVENTION NO. IV, RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND AND ANNEXED REGULATIONS, 36 Stat. 2241 (1907). Also cited in 2 W. MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS 1776-1937 at 2269 (1910). For a treatment

nizes the right of citizens to take up arms for their defense against foreign invasion. The United Nations Charter notes that "nothing in the charter shall impair the inherent right of individual or collective self-defense . . . ."<sup>51</sup> The United Nations Universal Declaration of Human Rights states in Article three that "[e]veryone has the right to life, liberty and security of person,"<sup>52</sup> and in Article twelve that "no one shall be subjected to arbitrary interference with his private family, home or correspondence . . . ."<sup>53</sup>

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

The significance attributed to the term Militia appears from the debates in the [constitutional] Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.

In all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms,

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of the principle of levees en masse, see C. FENWICK, *INTERNATIONAL LAW* 665 (4th ed. 1965) and H. JACOBINI, *INTERNATIONAL LAW* 247-48 (1962).

<sup>51</sup> U.N. CHARTER art. 51.

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

<sup>53</sup> *Id.*

<sup>54</sup> The term "militia" has been defined in a number of ways, most of which agree on certain common points. A representative sample would include the following: Adam Smith defines militia as an obligation enjoyed by "either all the citizens of the military age, or a certain number of them, to join in some measure the trade of a soldier to whatever other trade or profession they may happen to carry on. If this is found to be the policy of a nation, its military force is then said to consist of a militia." A. SMITH, *AN INQUIRY INTO THE CAUSES AND CONSEQUENCES OF THE WEALTH OF NATIONS* 660 (1937). Sir James A. H. Murray defined it as "a military force, especially the body of soldiers in the service of the sovereign of the state [who are] the whole body of men amenable to military service, without enlistment, whether drilled or not . . . a 'citizen army' as distinguished from a body of mercenaries or professional soldiers." 4 J. MURRAY, *A NEW ENGLISH DICTIONARY OF HISTORICAL PRINCIPLES* 439 (1908).

and, with certain exceptions, to cooperate in the work of defense. The possession of arms also implied the possession of ammunition, and the authorities paid quite as much attention to the latter as to the former.<sup>55</sup>

Courts in general have held that the rights of the citizen-soldier to keep and bear arms need have only distant relationship to actual military use of the weapons with which they train.<sup>56</sup> This is to say the courts do not require that the citizen need have immediate use for his weapons, ammunition or skill, but that the potential use of these skills in a hypothetical case is sufficient. In only one isolated case<sup>57</sup> surveyed was the right to keep and bear arms clearly tied to actual militia use. Here the Kansas court appears to be in error, for the court cites an earlier case from Massachusetts<sup>58</sup> as saying something quite different than what appears in an objective reading of the case. The ruling from Massachusetts merely prohibited the public parades of private militia groups which were not part of the state militia along the same lines of reasoning used by the Supreme Court in *Presser*,<sup>59</sup> whereas the Kansas court held that the right to keep and bear arms existed only as a collective right of state militias.<sup>60</sup>

It is quite clear that the right to keep and bear arms does not apply to private militia groups as groups distinct from the standing army or state militias.<sup>61</sup> The courts have excepted military or paramilitary groups from protection under the second amendment. However, the individuals who comprise these groups still have

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

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

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

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

<sup>59</sup> *Presser v. Illinois*, 116 U.S. 252 (1886).

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

<sup>61</sup> *LEVINE & SAXE*, *supra* note 35, at 7 conclude that:

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

their own, individual rights to keep and bear arms. Still, they cannot parade their independent, armed status publicly.

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

### III. CONTROLS ON THE SECOND AMENDMENT

Most controls have taken one of two basic forms. They are either controls through taxation or controls through prohibition. At the federal level prohibition has taken the form of federal control of interstate commerce, rather than a direct prohibition of certain classes of weapons or prohibition to certain classes of persons. Various departments have prepared opinions justifying the use of additional federal powers to combat interstate commerce.<sup>63</sup> This is the case with the most recent federal legislation—the Federal Gun Control Act of 1968.<sup>64</sup>

Earlier firearms controls at the federal level took the form of taxation. The National Firearms Act of 1934<sup>65</sup> was a revenue measure designed to control various "gangster" weapons through the

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<sup>62</sup> Hlothhere and Eadric of Kent in the seventh century noted limitations. See F. ATTENBOROUGH, *THE LAWS OF THE EARLIEST ENGLISH KINGS* 21 (1922). Alfred the Great proclaimed laws against drawing weapons. *Id.* at 69, 73, 81-82. Parliament regulated carrying weapons during the reign of Edward III. Statute of North Hampton of 1328, 2 Edw. 3, C. 3, § 1. Set out in IV CHITTY'S ENGLISH STATUTES 936 (6th ed. 1911). Regulations have been added constantly since early times.

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

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

<sup>65</sup> National Firearms Act, 26 U.S.C. §§ 5801-5862 (1934).

imposition of a series of taxes on importers, manufacturers and dealers in such arms. A transfer tax, normally \$200, was assessed on sales of these weapons. To insure the payment of such taxes, all weapons covered by the transfer tax had to be individually registered. Possession of such weapons unless registered was a felony offense.<sup>66</sup>

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

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

Little has been said in recent years about an expansion of federal control over firearms by expanding the federal taxing power. The bulk of recently considered legislation, including the Federal Gun Control Act of 1968,<sup>70</sup> has concentrated on the regula-

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<sup>66</sup> *Id.*

<sup>67</sup> Federal Firearms Act, 18 U.S.C. §§ 921-928 (1938).

<sup>68</sup> United States v. Miller, 307 U.S. 174 (1939).

<sup>69</sup> *Id.* at 178.

<sup>70</sup> Federal Gun Control Act of 1968, ch. 368, tit. I, 82 stat. 1213 (codified in



tion of interstate commerce. As a result, the Congress has run afoul of the courts.

There is a strong voice within the liberal minority of the United States Supreme Court to reinterpret the second amendment in such a way as to invalidate the general practice of permitting citizens to bear arms, if not to possess them as well. In a recent decision<sup>71</sup> Justices Marshall and Douglas aired this view:

The police problem is an acute one . . . because of the ease with which anyone can acquire a pistol. A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment . . . There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted. There is no reason why pistols may not be barred from anyone with a police record. There is no reason why a State may not require a purchaser of a pistol to pass a psychiatric test. There is no reason why all pistols should not be barred to everyone except the police . . . Critics say that proposals like this water down the Second Amendment . . . But if watering-down is the mood of the day, I would prefer to water down the Second rather than the Fourth Amendment . . .<sup>72</sup>

However, the Supreme Court stated in another case<sup>73</sup> that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"<sup>74</sup> by going into "traditionally sensitive areas"<sup>75</sup> such as the regulation of cer-

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scattered sections of 18, 26 U.S.C.).

<sup>71</sup> *Adams v. Williams*, 417 U.S. 143 (1972).

<sup>72</sup> *Id.* at 150-51 (Douglas & Marshall, JJ., dissenting). Justice Brennan, dissenting, also noted that the real police problem was in having to deal with an armed population. "Connecticut allows its citizens to carry weapons, concealed or otherwise, at will, provided only they have a permit . . . and gives its police officers no special authority to stop for the purpose of determining whether the citizen has one." *Id.* at 151-52. In both dissenting opinions the Justices seemed to find that a permit system was a minor annoyance. They did not comment on the relative difficulties of obtaining such permits. They also noted that the second amendment "must be interpreted and applied with the view of maintaining a 'militia.'" *Id.* at 150, quoting *United States v. Miller*, 307 U.S. 174, 178-79 (1939). This nexus would become increasingly more difficult to prove as we moved further away from the concept of a citizen soldier and toward the standing army, a defense system hated by the framers of the Constitution and its first ten amendments. See also *United States v. Miller*, 307 U.S. 174, 178-79 (1939).

<sup>73</sup> *United States v. Bass*, 404 U.S. 336 (1971).

<sup>74</sup> *Id.* at 349.

<sup>75</sup> *Id.*

tain criminal activities “readily denounced as criminal by the States.”<sup>76</sup> The regulation of handguns which do not have a demonstrated nexus with interstate commerce were held to be within that category of state regulation, and hence not the proper area of jurisdiction for the federal government.

The Court interpreted the Omnibus Crime Control and Safe Streets Act of 1968<sup>77</sup> to control only firearms which had a connection with interstate commerce. The government’s error in the case had been that it assumed that the act “banned all possessions and receipts of firearms by convicted felons, and that no connection with interstate commerce had to be demonstrated in individual cases.”<sup>78</sup> Reading the various views expressed in Congress on the intent of the legislation at the time of the passage of the law did not help the Court find that Congress had intended to assume control of weapons connected only with interstate commerce.<sup>79</sup> Hence, the Court refused to allow the application of the act unless the government was able to demonstrate that the weapon was “in [interstate] commerce or affecting [interstate] commerce.”<sup>80</sup>

Seemingly, unless Congress is willing to enter into an area heretofore reserved to the states and unless there is proof that the firearm which the government sought to remove from the criminal in the 1968 and other firearms control legislation was connected with interstate commerce then the states must do their own controlling of such weapons. The effect of *Bass* will very likely be to

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

<sup>77</sup> 42 U.S.C. § 3701 (1970).

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

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

<sup>80</sup> *United States v. Bass*, 404 U.S. 336 (1971). The Court in *Bass* held that: The critical textual question is whether the statutory phrase “in commerce or affecting commerce” applies to “possess” and “receives” as well as “transports.” If it does, then the Government must prove as an essential element of the offense that a possession, receipt or transportation was “in commerce or affecting commerce?—a burden not undertaken in this prosecution for possession.

*Id.* at 339.

reduce to some considerable degree the number of federal prosecutions of the misuse of firearms. It would also seem from *Bass* as well as from the strong dissenting opinions in *Adams* that the federal courts may be bringing some pressure to bear on the states to remove firearms, especially handguns, from general usage through state and federal gun control laws. Probably the Supreme Court would be unlikely to approve additional federal firearms legislation unless Congress is willing to acknowledge that it is altering the whole nature of federal-state relations in the area of criminal law.<sup>81</sup>

#### IV. CONCLUSION

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

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<sup>81</sup> The dissenting opinion of Justice Blackmun in *Bass* quoting from the Congressional Record shows a potential willingness to support such federal preemptory legislation:

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

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

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

Without question, the Federal Government does have power to control *possession* of weapons where such *possession* could become a threat to interstate commerce.

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

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

<sup>82</sup> It is not the argument here that the right to keep or to bear arms is unlimited. The right can be reasonably mitigated. In *State v. Johnson*, 16 S.C. 187 (1881), the court supported the power of the legislature to prohibit absolutely the carrying of all deadly weapons. The same idea is to be found in *State v. Costen*, 17 Del. [1 Penn.] 19 (1897); *State v. Chippey*, 14 Del. [9 Houst.] 583 (1892); *Hugent v. State*, 104 Neb. 235, 176 N.W. 672 (1920). The early laws of the English kings contained limitations on the right. See I ENGLISH HISTORICAL DOCUMENTS 358, 379, 427 (1956).

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

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

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

The second challenge to the effectiveness of firearm control programs involves a citizen's right against self-incrimination. In a

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The vast bulk of state court cases which deal with this right represent an attempt to construct a reasonable level of human freedom along with responsibility for the use of arms.

<sup>83</sup> *Near v. Minnesota*, 283 U.S. 697 (1931).

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

series of 1968<sup>85</sup> decisions the Supreme Court invalidated a federal gambling tax stamp on the grounds that to identify one's self as a gambler pursuant to federal law might subject an individual to state prosecution. The Court also indicated that a criminal might not have to follow certain provisions of the 1968 Federal Gun Control Act for the same reason. This might mean, as it is interpreted further by the courts, that only law abiding citizens would have to abide by provisions of this law and any similar subsequent legislation.

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

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<sup>85</sup> See *Grosso v. United States*, 390 U.S. 62 (1968); *Marchetti v. United States*, 390 U.S. 39 (1968). See also *United States v. Freed*, 401 U.S. 601 (1971); *Haynes v. United States*, 390 U.S. 85 (1968). See generally G. NEWTON and F. ZIMLONG, *FIREARMS AND VIOLENCE IN AMERICAN LIFE* 263 (1969); McKay, *Self-incrimination and the New Privacy*, 1967 SUP. CT. REV. 193; Note, *Required Information and the Privilege Against Self-incrimination*, 65 COLUM. L. REV. 681 (1965).

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