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# The Right to Bear Arms: A Phenomenon of Constitutional History

RALPH J. ROHNER\*

FEW READERS OF ANY PERIODICAL or daily newspaper can be unaware that there is today much agitation for increased governmental regulation of the sale, shipment, purchase, ownership, and use of firearms,<sup>1</sup> and that with each such eruption there is a vociferous counterattack from individuals and groups who maintain the desirability and need of a free traffic in firearms.<sup>2</sup> Frequently in this debate the notion is interjected that somehow extensive regulation of firearms infringes upon a constitutionally-protected "right to keep and bear

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<sup>1</sup> See, e.g., Bakal, *The Traffic in Guns: A Forgotten Lesson of the Assassination*, Harpers Magazine, February 1964, p. 62; *Battle of the Guns*, Time Magazine, April 16, 1965, p. 24; Batman, *The Case for Registering Guns*, Saturday Review, August 1, 1964, p. 18. From February 9 through April 30, 1965, the Washington Post newspaper, appalled at the number of accidental and criminal shootings in the District of Columbia area, published seventy-seven consecutive editorials calling for the enactment of regulations on the sale and purchase of handguns. On August 1, 1966, the Columbia Broadcasting System's television news coverage of the sniper killings in Austin, Texas, included an interview with author Carl Bakal (see footnote 6), who predicted increased pressures for such legislation. Investigation indicated the sniper had purchased one of the weapons used to slay fifteen persons from a local Sears, Roebuck Co., store that morning, on credit. The following week, CBS Television News repeated a 1964 news special entitled "Murder and the Right to Bear Arms."

The most prominent advocate of firearms regulation on the federal level is Senator Thomas Dodd (D. Conn.), who has introduced myriad bills which would expand existing federal firearms legislation. Invaluable insights into the whole area of firearms control can be found in the 1965 Dodd subcommittee hearings: *Hearings on Bills to Amend the Federal Firearms Act Before the Juvenile Delinquency Subcommittee of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess., May, June, and July, 1965. [Hereinafter cited as *1965 Dodd Hearings*].

<sup>2</sup> See, e.g., Starnes, *A Handbook for Arm Twisters; Letters to Legislators*, Field & Stream, March 1966, p. 20; Starnes, *Anti-gun Extremists Are at it Again*, Field & Stream, April 1964, p. 12; Grahame, *Gun Owners Should Switch to the Offense*, Outdoor Life, November 1963, p. 10; Hess, *Should You Own a Gun*, American Mercury, April 1957, p. 54. And see the testimony of Franklin L. Orth, Executive Vice President, National Rifle Association, in *1965 Dodd Hearings*, *supra* note 1, at 195.

arms."<sup>3</sup> The occasional intimation is that every individual has an undeniable license to own and carry deadly weapons of almost any description, and that consequently any legislation which would prevent or limit access to firearms borders on unconstitutionality. On the other hand, broad federal and state restrictions *do* exist, and their constitutionality has almost universally been sustained; indeed, it has been suggested that despite second amendment protection for a traditional "right to bear arms," times may change to such a degree that no such basic right can be justified in present circumstances, even based on our constitutional heritage.<sup>4</sup>

Seldom, however, has there been in this debate any searching analysis of what the "right to bear arms" means, or to what extent the Federal and various State constitutions protect it. Even the legal literature has been remarkably silent, although several recent articles have treated the question and reached diverse conclusions,<sup>5</sup> and an articulate non-lawyer has published a full-blown book on the subject.<sup>6</sup> It is proposed, therefore, to discuss the genesis of the "right to bear arms" as a constitutional provision, the origins and contemporaneous development of firearms controls, and the litigation involving both, with the hope that this discussion may point toward an understanding of the permissible scope of firearms regulation.<sup>7</sup>

Most discussions of the right to bear arms—however superficial—begin by noting the specific language of 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.

And in various similar provisions, the constitutions of thirty-five states<sup>8</sup> guarantee expressly the right to bear arms. Though it is submitted below<sup>9</sup> that there may be significant distinctions between the protection afforded by the federal and state constitutions, for our purposes here we are concerned pri-

<sup>3</sup> *E.g., For a Strong America; Article II, the Bill of Rights*, Field & Stream, April 1964, p. 10; Rummel, *To Have and Bear Arms*, American Rifleman, June 1964, p. 38.

<sup>4</sup> McKenna, *The Right to Keep and Bear Arms*, 12 MARQ. L. REV. 138, 149 (1928): "... it is quite possible that jurists and publicists may some day universally deny that man has any inherent natural right to keep and bear arms."

<sup>5</sup> Feller & Gotting, *The Second Amendment: A Second Look*, 61 NW. U.L. REV. 46 (1966); Sprecher, *The Lost Amendment*, 51 A.B.A.J. 554, 665 (1965); Fletcher, *The Corresponding Duty to the Right of Bearing Arms*, 39 FLA. B.J. 167 (1965); Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & M. L. REV. 381 (1960).

<sup>6</sup> BAKAL, *THE RIGHT TO BEAR ARMS* (1966).

<sup>7</sup> It is obviously impossible in these pages to describe or analyze all the various statutory restrictions on firearms, both federal and state. An excellent survey may be found in Note, *Firearms Legislation*, 18 VAND. L. REV. 1362 (1965). See also the following student notes: 15 DE PAUL L. REV. 164 (1965); 31 U. CHI. L. REV. 780 (1964); 98 U. PA. L. REV. 905 (1950).

<sup>8</sup> These provisions are set out in the Appendix, p. 81, *infra*.

<sup>9</sup> See text at footnotes 83-88.

marily with the origin of a written constitutional guarantee for a right to bear arms; it thus seems sufficient to note generally that the state "guarantees" were for the most part adopted after, and modeled upon, the federal constitution.

On its face the constitutional language ties the "right to keep and bear arms" to the need for an organized militia. Much of the controversy over the nature of the right stems directly from that juxtaposition of clauses—*i.e.*, is there any individual right to keep and bear arms for purposes other than collective security through a well-organized militia?<sup>10</sup> From the polar answers to this question derive the sundry viewpoints that hunting, target-shooting, personal self defense, or pure rugged-individualism, do or do not enjoy constitutional protection.

### I. CONSTITUTIONAL BACKGROUND

The language of the second amendment, after some changes in wording by the various draftsmen,<sup>11</sup> was adopted as part of the Bill of Rights to the Federal Constitution in 1791.<sup>12</sup> It may be recalled that when the federal constitution was submitted to the states for ratification, several states (notably Virginia through its convention Member, George Mason) cited the lack of a bill, or declaration, of basic human rights such as was included in the recent constitutions of a number of the states.<sup>13</sup> Congress, at its first session, drafted a bill containing twelve of these basic "items," the last ten of which were ratified by the States and became our Bill of Rights. The first ten amendments, then, represented the prevailing view of the thirteen states (*nee* colonies) that certain

<sup>10</sup> Another commonly recurring question is whether the right guaranteed is a "collective" or an "individual" one—*i.e.*, does it reside only in the people as a whole, or in individual citizens? Aside from the metaphysical difficulty of how something can exist in a whole without existing in any of its parts, it is submitted that this is really a meaningless distinction—the better question being couched in terms of the purposes for which arms may be kept and borne. Do those constitutionally protected purposes include, for example, personal self-defense or recreation? If so, then the right can easily be said to extend to bona fide hunters, or to those reasonably fearing for their safety, so long as they are keeping or bearing arms for those purposes. If, on the other hand, the only keeping and bearing encompassed by the amendment is that which has the collective security of the people as its purpose, then the keeping and bearing may properly be limited to those individuals exercising that function.

<sup>11</sup> Madison's original form of the amendment read:

The right of the 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.

<sup>12</sup> WATSON, *THE CONSTITUTION OF THE UNITED STATES* 1408 (1910). There was then "considerable debate on the subject in the House of Representatives" and the "Committee of Three reported the article substantially as it had been reported by the Committee of Eleven, but it was subsequently changed by Congress to read as now found in the Constitution." *Ibid.* The earlier version of Madison's bolsters the generally held view that the amendment was part and parcel of an attempt to eliminate standing armies by maintaining the militia, and that accordingly it should be construed in that context.

<sup>13</sup> II DOCUMENTARY HISTORY OF THE CONSTITUTION 321-24 (1894).

<sup>14</sup> See, for general discussion of the background of the first ten amendments, RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791* (1955); AMERICAN BAR FOUNDATION, *SOURCES OF OUR LIBERTIES* (Perry & Cooper, eds. 1959); Feller & Gotting, *supra* note 5, at 56-62.

rights were fundamental to a free society, and should be "guaranteed" against governmental intrusion.

Even earlier than 1791—after the Declaration of Independence in 1776—most of the newly-declared states had adopted constitutions of their own. Eight included a bill of rights, and four of these (Pennsylvania, North Carolina, Vermont, and Massachusetts) cited a specific "Right to bear arms."<sup>14</sup> As might be expected, it was from these states that the loudest call for a federal bill originated. The first such state bill was Virginia's, drafted almost exclusively by George Mason; it is therefore noteworthy that Mason's document posited:

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.<sup>15</sup>

No specific "right to bear arms" is included, yet the concept seems latent in the language of the provision. It has been said that "George Mason's document had a profound and pervasive influence"<sup>16</sup> on the other states, and that Mason may have been the "ghost" for Madison's version of a federal Bill of Rights.<sup>17</sup>

But from what source did these colonial draftsmen derive their "bills"—especially the right to bear arms therein? It would indeed have been remarkable had the first ten amendments embodied concepts spontaneously recognized by our forefathers. Rather, it would seem their philosophic and political conviction as to the existence of certain basic rights had its pragmatic foundation in their own revolution and in the oppressions which led to it. Notable among the devices of George III to compel colonial subservience was the maintenance of a large British army in the colonies, and the use of that army to enforce laws themselves oppressive.<sup>18</sup> Any school child knows, for example, that the spark igniting the Revolutionary War was the attempt by the British to seize the supply of militia arms and weapons cached at Lexington and Concord. It is ultimately extremely clear that the constitution's draftsmen would

<sup>14</sup> The whole process of adoption of bills of rights in the colonies is traced in RUTLAND, *op. cit. supra* note 13, at 13-77. See also, Feller & Gotting, *supra* note 5, at 53-56; and Attorney General Nicholas DeB. Katzenbach's "Memorandum Re Federal Firearms Control and the Second Amendment," contained in 1965 *Dodd Hearings*, *supra* note 1, at 41, 46-48.

<sup>15</sup> AMERICAN BAR FOUNDATION, *op. cit. supra* note 13, at 312.

<sup>16</sup> Feller & Gotting, *supra* note 5, at 53.

<sup>17</sup> Pittman, *The Fifth Amendment: Yesterday, Today and Tomorrow*, 42 A.B.A.J. 509, 588 (1956).

<sup>18</sup> The Preamble to the Declaration of Independence cites numerous specific grievances against King George III, among which were the following:

He has kept among us, in times of peace, Standing Armies without the Consent of our Legislatures.

He has affected to render the Military independent of and superior to the Civil power.

not tolerate a standing professional army in the new nation—at least such a federal standing army as would inhibit and intimidate the states or the people in the exercise of their respective sovereignties.<sup>19</sup> The over-riding consideration was to establish by constitutional mandate the status of the militia, the citizen-army, as the proper custodian of the country's liberty, and to eliminate the chance of a recurrence of the "colonial grievances," such as the quartering of troops in private homes, the court-martialing of civilians, and the seizure of militia arms.

No doubt a valid and vital concern of many individual colonists was personal protection from wilderness animals, brigands, or marauding Indians. Especially on the frontiers, the provision of food itself depended largely on the skill of sharpshooting hunters. But there is no persuasive indication that these considerations influenced Congress or the various state ratifying conventions in adopting the second amendment.<sup>20</sup>

It is equally clear that the Second Amendment was not without precedent, nor was the colonists' fear of standing armies a novel emotion. Indeed it is ironic that the American colonies, finding themselves beset by foreign military rule, patterned their constitutional remedy on a similar provision in the constitution of the offending nation. For there is no doubt that the colonists, and the delegates to the federal convention, were aware that the concept of a Bill of Rights originated in England in times of persecution, from King John in the 13th century to the Stuart kings in the 17th.<sup>21</sup>

<sup>19</sup> See generally, COOLEY, *CONSTITUTIONAL LIMITATIONS* 498-99 (7th ed. 1903); 2 STORY, *COMMENTARIES ON THE CONSTITUTION* 677 (3d ed. 1858); *THE ANTI-FEDERALIST PAPERS* 62-79 (Bordon ed. 1965).

During the federal convention George Mason proposed that article I, section 8, clause 16 of the constitution, authorizing Congress to "provide for organizing, arming, and disciplining the Militia," be prefaced by the following: "That the Liberties of the People may be better secured against the Danger of regular Troops or standing Armies in Time of Peace, . . ." IV FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* 59 (rev. ed. 1937). The modification was rejected, and we may suppose mainly for reasons of style: the proposal embodies a "principle" or "policy" which is out of place in the enumeration of specific powers of Congress, but which would be perfectly appropriate in a bill of rights such as Mason had drafted in Virginia. Cf. Feller & Gotting, *supra* note 5, at 57.

<sup>20</sup> Feller & Gotting, *supra* note 5, at 58-59, note however that amendments apparently to this effect were introduced in the Massachusetts and New Hampshire ratifying conventions.

<sup>21</sup> Patrick Henry, in the Virginia Convention of 1788, cited the English experience as a reason for a Bill of Rights in the federal constitution. III ELLIOTT'S *DEBATES* 316 (2d ed. 1836); Alexander Hamilton, in the *FEDERALIST* No. 84, *Concerning Several Miscellaneous Objections*, argues against the need for a bill of rights since such are peculiarly "stipulations between kings and their subjects, abridgements of prerogative in favour of privilege, reservations of rights not surrendered to the prince." The delegates also may have been aware of Blackstone's admonition regarding standing armies:

In a land of liberty it is extremely dangerous to make a distinct order of the profession of arms. . . . In [free states] no man should take up arms, but with a view to defend his country and its laws: he puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while soldier.

The specific progenitor of the second amendment's right to bear arms is generally conceded to be the provision in the English Declaration of Rights of 1688, that "The subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law."<sup>22</sup> After the Restoration of the Stuart Kings in 1660, the Catholic James II succeeded his brother Charles II in 1685. Whether out of a politically-expedient sense of religious toleration or a genuine Catholic apostolate (it is not certain which), James II initiated a series of prerogative measures,<sup>23</sup> involving both the "dispensing" and "suspending" of the laws of the realm, including the appointment of fellow Catholics to positions in the military, and the maintenance of a large private guard which has been described as "the largest concentration of trained full-time troops that England had ever seen."<sup>24</sup> In near revolt, Parliament, in 1688, drafted a declaration which embodied its understanding of the proper relationship between the Crown, Parliament, and the people, and, with James II in flight, agreed to the accession of William of Orange to the throne of England if he would accept the conditions of the Declaration.<sup>25</sup> The Declaration (subsequently "Bill") of Rights addressed itself to all the grievances prevailing at the time, and so in that sense is similar to our own Declaration of Independence and Constitution. And those grievances were felt so fundamental that the remedies demanded were, even at the time, recognized as basic rights,<sup>26</sup> and included the right to petition for redress and a pro-

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1 BLACKSTONE, COMMENTARIES \*408; and Blackstone's categorization of the right to keep arms as an "auxiliary right" of every English subject. *Id.* at \*143-44.

<sup>22</sup> 1 W. & M., sess. 2, c. 2 (1689), set out in full in III CHITTY'S ENGLISH STATUTES 659 (6th ed. 1912): "An Act declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown."

<sup>23</sup> In defiance of an Act of Charles II's reign, James had, in reliance upon his ecclesiastical supremacy, erected a new court of High Commission. He had levied customs duties before they had been regularly granted to him by Parliament. He had prosecuted the Seven Bishops who had presented a respectful petition. He had allowed Papists to be officers in his army, and refused Protestants the right to carry arms.

6 HOLDSWORTH, HISTORY OF ENGLISH LAW 241 (1927).

<sup>24</sup> CHURCHILL, *The New World*, 2 HISTORY OF THE ENGLISH SPEAKING PEOPLES 409 (1962).

<sup>25</sup> The full scope of the Revolution settlement in England in 1688 is too broad to be discussed fully here. See generally: II TAYLOR, ORIGIN AND GROWTH OF THE ENGLISH CONSTITUTION 409-51 (1898); 6 HOLDSWORTH, HISTORY OF ENGLISH LAW 240-41 (1927); LOVELL, ENGLISH CONSTITUTIONAL AND LEGAL HISTORY 361-414 (1962); KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 446-50 (1942).

<sup>26</sup> The preamble to the Declaration asserted that it contained the "true, ancient, and indubitable rights of the people of this realm."

The Declaration of Rights thus put forth was a summing up in a dogmatic form of that code of positive law regulating the prerogatives of the crown, the privileges of parliament, and the liberty of the subject now generally known as the "Law of the Constitution," as distinguished from that body of political maxims, of silent understandings, undefined either by common or statute law, which have been invented since the beginning of the reign of William III, as the most convenient means of regulating the changed relations of the two houses to each other and of the crown to both, necessarily

hibition against standing armies. On February 13, 1689, William, speaking in his own name and in that of his wife Mary, announced, "We thankfully accept what you have offered us," thereby declaring their willingness to reign on Parliament's terms.<sup>27</sup>

What is noteworthy in the English Bill of Rights is of course the specific provision allowing Protestants to bear arms, but this must be appreciated in its historical setting. Parliament did not appear to be claiming for the people a right of individual self-defense or self-effacement, but rather the general right, as a populace, to remain armed in the face of possible military impositions.<sup>28</sup> The resulting guarantee that Protestants might have arms for their defense necessarily related to the political grievances against King James which resulted in the Act of Settlement requiring the King to be a member of the Church of England. More specifically, the grievance underlying the guarantee was that Protestants had been deprived of weapons "at the same time when Papists were . . . armed."<sup>29</sup> The imposition lay more in the discrimination than in the disarming.<sup>30</sup>

Thus, that same element of pragmatic necessity was involved in the formulation of the English Bill of Rights as was present in our own. Since this was the earliest appearance of an express right to bear arms, it might then be argued that the right, as a *constitutional* principle, has no roots deeper than 1688, or even 1791. Yet the language of the second amendment and most of the state equivalents presumes the existence of some identifiable right to bear arms, and merely guarantees that right. And, no matter how convincing is made the argument that the second amendment took its form and existence from the circumstances of the American Revolution or the earlier English upheaval, the amendment seems to have been intended to embody a principle fundamental to human society and hence a principle with roots deeper than the exigencies of the day. If this is true, then it appears inappropriate to seek the full definition of the "right to keep and bear arms" in the circumstances

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resulting from the transfer through the Revolution of the sovereignty of the state from the crown to the legislature.

II TAYLOR, *op. cit. supra* note 25, at 415.

<sup>27</sup> II TAYLOR, *op. cit. supra* note 25, at 415.

<sup>28</sup> Feller & Gotting, *supra* note 5, at 48-49. But: "One able European scholar firmly maintained that this right, and the right of petition, were the only 'individual rights' in the English Bill of Rights." RUTLAND, *op. cit. supra* note 13, at 9 n.12, citing JELLINEK, *THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS* 49 (Fairand trans. 1901). A similar view with respect to the second amendment is expressed in BISHOP, *STATUTORY CRIMES* 536 (3d ed. 1901).

<sup>29</sup> I W. & M., sess. 2, c. 2 (1689) (Preamble). See III CHITTY'S *ENGLISH STATUTES* 659 (6th ed. 1912).

<sup>30</sup> This thought is suggested—almost accidentally—in AMERICAN BAR FOUNDATION, *SOURCES OF OUR LIBERTIES* 231 (Perry & Cooper eds. 1959): "The discrimination against the right of Protestants to bear arms led to the seventh clause in the list of rights in the [English] Bill of Rights."



of Revolutionary America, or of Jamesian England, or in a combination of the similar characteristics of the two crises.

Yet since a specific “right to bear arms” has not manifested itself in other constitutional schemes,<sup>31</sup> it seems a peculiarly Anglo-American phenomenon premised on a longstanding mistrust of standing armies<sup>32</sup> and a concomitant reliance on the armed citizen-soldier.<sup>33</sup> Nowhere is there any respectable authority for the proposition that, as of 1791, the Constitution’s guaranty of the right to bear arms extended generally to personal self-defense as that concept was applied in the common law. The right guaranteed was that of the populace to respond in kind to political oppressions *vi et armis*.

A possible explanation for the popular sentiment that the right was a long-standing one is the fact that one of the incidents of the feudal system in England was the obligation of the people generally to respond to a “call to arms” to put down insurrection or to quell a public disturbance. In such a situation, there was a clearly recognized *duty* to keep and bear arms,<sup>34</sup> which had long been ingrained in the political and social structure of the country. Similarly, the first Congress enacted legislation requiring militiamen to maintain a store of weapons and ammunition in case of need.<sup>35</sup> These “duties” implied no corresponding “right” on their face, but it seems a fair conclusion that they may have been so understood by the citizens of the day: if they were required to keep arms to help assure public tranquility, did they not have a right to that tranquility, and hence a right to the weapons needed to assure it? Even if this inference is allowed, it does not expand the “right” beyond the *purpose* of collective security in its broadest sense.

We are led, then, to the threshold of the conclusion that the “right to keep and bear arms”, as it is guaranteed in the American and British constitutions, is a political right of the populace generally to maintain a state of military preparedness against the possibility of domestic or foreign military impositions. The only obstacle to crossing the threshold and embracing this conclusion is the faint echo and uncertain language of courts, commentators, and

<sup>31</sup> For example, the French Revolution’s “Declaration of the Rights of Man and of the Citizen,” of August 26, 1789, affirms a right of “resistance to oppression” but contains no explicit reference to arms-bearing. II CONSTITUTIONS OF NATIONS 21 (Peaslee ed. 1956). Nor does the United Nations Charter specifically acknowledge such a right.

<sup>32</sup> Popular mistrust of standing armies—especially mercenaries—has been traced at least as far back as the Magna Charta in 1215. Sprecher, *The Lost Amendment*, 51 A.B.A.J. 554, 555 (1965).

<sup>33</sup> Blackstone notes that King Alfred established a national militia in the 9th century. 1 BLACKSTONE, COMMENTARIES \*409.

<sup>34</sup> Originating in the Assize of Arms in 1181 [27 Hen. II], and continued in the Statute of Winchester [13 Edw. I, c. 6 (1285)]. Cf. 1 BLACKSTONE, COMMENTARIES \*410-11. And compare the language of the Statute of Northampton of 1328 (*infra*, text at note 39) which allowed arms-bearing “upon a cry made for arms to keep the peace.”

<sup>35</sup> Act of May 8, 1792, ch. 33, 1 Stat. 271.

legislatures, suggesting that the "right" long antedates any constitutional recognition of it, and includes purposes broader than collective security.

## II. DEVELOPMENT OF WEAPONS REGULATION

If there is no evidence that a "right to keep and bear arms" had achieved any constitutional status prior to 1688, the correlative legislative and judicial power to regulate weapons had been long ago established. Blackstone, writing in the 1750's, could cite only an ancient law of Solon to the effect that every Athenian who walked about the city in armor was subject to a fine;<sup>36</sup> yet there appear to have been early weapons regulations in England as well. In pre-Norman times, Hlothhere and Eadric, Kings of Kent in the 7th century, ordained that:

If, where men are drinking, a man draws his weapon, but no harm is done there, he shall pay a shilling to him who owns the house and twelve shillings to the king.<sup>37</sup>

Similarly, Alfred the Great, reigning at the end of the 9th century, established fines and penalties for "anyone [who] fights, or draws his weapon" in the king's halls, in the presence of an archbishop, at public meetings, or in the "house of a commoner."<sup>38</sup>

Then, in 1328, during the reign of Edward III, Parliament enacted the Statute of Northampton<sup>39</sup> which provided:

1. *No man great or small, of what condition soever he be, except the king's servants in his presence, and his ministers in executing of the king's precepts, or of their office, and such as be in their company assisting them, and also upon a cry made for arms to keep the peace, and the same in such places where such acts happen, be so hardy to come before the king's justices, or other of the king's ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the king, and their bodies to prison at the king's pleasure. [Emphasis added].*

Thus was established the statutory misdemeanor of "going about armed" as it is frequently called.<sup>40</sup> The few English cases which have applied the law

<sup>36</sup> 4 BLACKSTONE, COMMENTARIES \*149.

<sup>37</sup> ATTENBOROUGH, THE LAWS OF THE EARLIEST ENGLISH KINGS 21 (1922).

<sup>38</sup> *Id.* at 69, 73, 81-82.

<sup>39</sup> 2 Edw. III, c. 3 (1328). Set out in IV CHITTY'S ENGLISH STATUTES 936 (6th ed. 1911), and in I STATUTES OF THE REALM 258 (1963).

<sup>40</sup> 10 HALSBURY, LAWS OF ENGLAND 583 (3d ed. 1955); PERKINS, CRIMINAL LAW 365 (1957); I BISHOP, CRIMINAL LAW 329 (5th ed. 1872); Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473 (1915).

indicate further that the restriction it imposed was not new, but that the proscribed conduct was, even without the statute,<sup>41</sup> a common law crime.<sup>41</sup>

These limitations, however, only marginally inhibited a person's right to *own* or *possess* weapons. They were really restrictions on the manner of bearing the arms, and not their "keeping." A note appended to Blackstone's Commentaries, however, suggests that: "Whoever examines the forest and game laws in the British code will readily perceive that the right of keeping arms is effectually taken away from the people of England."<sup>42</sup> And Blackstone himself admits "that the prevention of popular insurrections and resistance to government by disarming the bulk of the people . . . is a reason oftener meant than avowed by the makers of the forest and game laws."<sup>43</sup> One such statute provided that no person other than heirs of nobility, who did not own lands with a yearly value of £100, should be allowed even to keep a gun.<sup>44</sup> Reading this proscription together with the Statute of Northampton, one writer has concluded that "a right to keep and bear arms was not regarded as a fundamental right of every Englishman."<sup>45</sup> Whether so regarded or not, the eminent Joseph Story noted in 1833 that the English "right to bear arms" was "more nominal than real, as a defensive privilege."<sup>46</sup>

In this country, the colonies by and large applied the English criminal law,<sup>47</sup> and of course it is well known that most states, by statute or otherwise, specifically adopted the common law of England as their guiding rules of law. Thus, the common law crime of "going about armed" was recognized in the United States in a few early cases.<sup>48</sup> If it can properly be said that the draftsmen of the American Bill of Rights were cognizant of the English experience in that regard, it seems an equally permissible inference that those draftsmen were also aware of the longstanding limitations on the free ownership or use of firearms in England.<sup>49</sup> It might also be noted that, despite the mandate of

<sup>41</sup> Sir John Knight's Case, 3 Mod. Rep. 117, 87 Eng. Rep. 75 (K.B. 1686); R. v. Dewhurst, 1 State Tr. N.S. 529 (1820); R. v. Meade, 19 T.L.R. 540 (1903).

<sup>42</sup> 1 BLACKSTONE, COMMENTARIES \*144 n.23 (Tucker) (Sharswood ed. 1859).

<sup>43</sup> 2 BLACKSTONE, COMMENTARIES \*412.

<sup>44</sup> 22 Car. II, ch. 25, sec. 3 (1670).

<sup>45</sup> Emery, *supra* note 40, at 474.

<sup>46</sup> 2 STORY, COMMENTARIES ON THE CONSTITUTION 678 (3d ed. 1858).

<sup>47</sup> Cf. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 176-77 (1930).

<sup>48</sup> State v. Huntly, 3 Ired. 418 (N.C. 1843); State v. Roten, 86 N.C. 701 (1882); State v. Hogan, 63 Ohio St. 202, 58 N.E. 572 (1900) (dictum). *But see* Simpson v. State, 13 Tenn. (15 Yerg.) 356 (1833), denying that the Statute of Northampton was adopted as part of the state's common law since it was particularly aimed at the gentry of 1328.

<sup>49</sup> Consider this dictum of the Supreme Court:

The law is perfectly well-settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. *In incorporating these principles into the fundamental law there was no intention of dis-*

the English Bill of Rights, that country has enacted, through the Gun License Act of 1870,<sup>50</sup> the Pistols Act of 1903,<sup>51</sup> and the Firearms Act of 1937,<sup>52</sup> much more stringent regulations on firearms than any in existence here.

Thus, to whatever extent we look to the English experience for the source of our "right to keep and bear arms" as a constitutional principle, we must also see that that same people had long established a measure of control on the "right" to weapons. Nor, on reflection, does this seem more than ordinary, for the very nature of ordered government includes something of a "police power" to regulate and prohibit activities inconsistent with public peace.

From all this, a conclusion may be suggested, which, even if it is eroded below, may nonetheless serve as a valuable point of reference: *i.e.*, the first "right to bear arms" to achieve constitutional recognition<sup>53</sup> was penned in an age, and by men, well-knowing that there were inherent limitations on such a right—limitations properly derived from the essential police power of their government, and limitations which had, and could have, no relation to the political oppressions which engendered the declaration of the right. The right to bear arms, therefore, was established as a "fundamental principle" by nations well aware of the parallel principle of police power—*i.e.*, the protection of the public health, safety, and welfare.

### III. DEVELOPMENTS SINCE 1791

As of the date of the adoption of the second amendment, its language tied the "right to keep and bear arms" to the necessity for maintaining a "well-regulated militia." The "right" was vested in the "people." The right related to "arms." Each of these aspects has been the subject of judicial scrutiny since 1791, either by direct challenges to legislation as violative of the second amendment, or by challenges under parallel state constitutional provisions, or infrequently on "due process" or "privileges and immunities" grounds under the fourteenth amendment.

#### A. *Limitations on Federal Action:*

The second amendment to the federal constitution applies ipso facto to federal action, particularly legislation. Until the 1930's, there was no federal legisla-

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*regarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, . . . the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons; . . .*

Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897) (Emphasis added).

<sup>50</sup> 33 & 34 Vict., c. 57 (1870).

<sup>51</sup> 3 Edw. VII, c. 18 (1903).

<sup>52</sup> 1 Edw. VIII & 1 Geo. VI, c. 12 (1937).

<sup>53</sup> The word "recognition" is used out of deference to the view that the right to keep and bear arms, whatever its essential limitations, antedates both the English and American Bills of Rights, and hence was "recognized" by their draftsmen.

tion dealing with firearms controls,<sup>54</sup> but during that "gangster" era, two statutes were enacted which provided the first opportunity to raise a direct second amendment challenge.

The Federal Firearms Act,<sup>55</sup> enacted in 1938 as an exercise of Congress' power to regulate interstate commerce, prohibits the interstate shipment or receipt of firearms to or by felons or fugitives from justice, prohibits the shipment of stolen firearms, and requires manufacturers and dealers to procure licenses for the regular shipment of firearms. The 1934 *National Firearms Act*,<sup>56</sup> on the other hand, is actually part of the Internal Revenue Code, and imposes a tax on importers, manufacturers, and dealers, and on "transferors," of sawed-off shotguns, machine guns, and similar weapons, requires the registration of such weapons, and prohibits generally the obliteration of identification marks, and unauthorized importation of such firearms.

The constitutionality of the latter statute under the second amendment was affirmed in *United States v. Adams*,<sup>57</sup> by a federal district court which noted simply that

The second amendment . . . has no application to this act. The Constitution does not grant the privilege to racketeers and desperadoes to carry weapons of the character dealt with in the act. It refers to the militia, a protective force of government; to the collective body and not individual rights.<sup>58</sup>

Not until 1939 did a direct second amendment case reach the Supreme Court. In *United States v. Miller*,<sup>59</sup> defendant was charged with shipping an unregistered "double-barrel 12-gauge Stevens shotgun having a barrel less than 18 inches in length." A judgment sustaining a demurrer to the indictment was reversed in an opinion by Justice McReynolds which held that the second amendment must be interpreted in light of its "obvious purpose" of assuring the continued effectiveness of the militia. Thus, said the Court

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

<sup>54</sup> The delay in federal action may at least partially be attributed to uncertainty as to the authority for congressional action. The federal legislature, being one of enumerated powers, enjoys no general "police power"—the authority to legislate *solely* out of concern for public safety or welfare. This power is vested in the states. Congress, then, must justify its acts on one or more of its "enumerated powers," which of course include the taxing power and plenary authority over interstate commerce. Cf. Brabner-Smith, *Firearm Regulation*, 1 *LAW & CONTEMP. PROB.* 400 (1934).

<sup>55</sup> 15 U.S.C. §§ 901-09, 52 Stat. 1252 (1938).

<sup>56</sup> INT. REV. CODE OF 1954, §§ 5801-62.

<sup>57</sup> 11 F. Supp. 216 (S.D. Fla. 1935).

<sup>58</sup> *Id.* at 218-19.

<sup>59</sup> 307 U.S. 174 (1939).

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.<sup>60</sup>

This of course was decision on the narrowest grounds—a failure of proof. It is significant, however, that the “burden” of proof of such a “reasonable relationship” between the regulated weapon and the militia was cast upon the accused. This seems to accord with generally accepted principles of statutory construction in which legislation is presumptively valid until its infirmity can be clearly demonstrated.

Three years later, the First Circuit Court of Appeals found fault with the test applied in *Miller* and restricted that holding to its facts. *Cases v. United States*<sup>61</sup> involved a prosecution under the Federal Firearms Act; in it the court noted that “Commando Units” in the second World War had demonstrated the utility of almost any kind of weapon, and therefore a test of “reasonable relationship” was inadequate. The *Cases* court preferred that each second amendment challenge “be decided on its own facts and the line between what is and what is not a valid federal restriction pricked out by decided cases falling on one side or the other of the line.”<sup>62</sup> Then, finding that the defendant had obtained the gun and “shot up” a nightclub and an acquaintance of his, the court found “no possible inference” that defendant was advancing his military training or that his weapon was used for military purposes!<sup>63</sup>

As a result of these few federal cases,<sup>64</sup> we have only a clear manifestation that the second amendment guaranty of a right to bear arms relates intimately and essentially to military preparedness. The federal courts have not discussed the nature of the right guaranteed, nor have they suggested that such a right is obsolete or even obsolescent. Yet the federal courts *have* sustained the validity of firearms legislation under both the commerce and tax powers; it may therefore be supposed that in any future challenge to federal legislation, the courts will at least seek an accommodation between constitutionally-sanctioned legislative purposes and the constitutionally-protected “right to keep and bear arms.”

<sup>60</sup> *Id.* at 178.

<sup>61</sup> 131 F.2d 916 (1st Cir. 1942), *cert. denied sub nom.*, *Velazquez v. United States*, 319 U.S. 770 (1943).

<sup>62</sup> *Id.* at 922.

<sup>63</sup> The *Cases* court has been criticized as falling into the same error as the Supreme Court in *Miller*, by adopting too shallow a rationale. Feller & Gotting, *The Second Amendment: A Second Look*, 61 Nw. U.L. REV. 46, 66 (1966).

<sup>64</sup> Mention could also be made of *United States v. Fleish*, 90 F. Supp. 273 (E.D. Mich. 1949), which again upheld the National Firearms Act against a contention that it invaded the domain of state legislation, citing and quoting *United States v. Miller*, *supra* note 59.

### B. *Limitations on State Action:*

Implicit in the last section lurks the question whether the second amendment to the Federal constitution acts as a restriction on state legislation by application through the fourteenth amendment. (This question might have special pertinence in those states which have no constitutional guaranties in their own constitutions, and in those states whose constitutional guaranties contain different language from that in the federal Bill of Rights). A simple answer is "NO," for the equally simple reason that the Supreme Court has said that the fourteenth amendment does not incorporate the second. Whether the Court would so hold today is questionable, however.

The landmark case is *United States v. Cruikshank*,<sup>65</sup> which was a prosecution under the Enforcement Act of 1870<sup>66</sup> on an indictment containing 32 counts of conspiracy to deprive certain Negroes of their civil rights. Two of the counts alleged an intent to hinder and prevent the exercise of the Negroes' "right to bear arms." The Court stated, as to those counts:

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 right it recognizes, to what is called . . . [the police power].<sup>67</sup>

This of course was written under the influence of Chief Justice Marshall's opinion in *Barron v. Mayor & City Council of Baltimore*,<sup>68</sup> holding generally that the Bill of Rights does not apply to the states. Despite the modification of the rule of *Barron* in recent years, the *Cruikshank* holding has not specifically been challenged. Indeed, though, it has frequently been re-affirmed in the state courts,<sup>69</sup> the Supreme Court has not had a state-law case before it since *Miller v. Texas*<sup>70</sup> in 1894.

<sup>65</sup> 92 U.S. 542 (1875). The case was cited and followed in *Presser v. Illinois*, 116 U.S. 252, 265 (1885).

<sup>66</sup> 16 Stat. 140 (1870).

<sup>67</sup> 92 U.S. at 553.

<sup>68</sup> 32 U.S. (7 Pet.) 464.

<sup>69</sup> *Fife v. State*, 31 Ark. 455 (1876); *Ex parte Ramirez*, 193 Cal. 262, 62 P.2d 246 (1924); *State v. Shelby*, 90 Mo. 302, 2 S.W. 468 (1886); *State v. Keet*, 269 Mo. 206, 190 S.W. 573 (1916); *People v. Persce*, 204 N.Y. 397, 97 N.E. 877 (1912); *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921); *McCollum v. City of Cincinnati*, 51 Ohio App. 67, 199 N.E. 603 (1935); *Ex parte Thomas*, 21 Okl. 770, 97 Pac. 260 (1908); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 8 Am. Rep. 8 (1871); *Caswell & Smith v. State*, 148 S.W. 1159 (Tex. Civ. App. 1912).

<sup>70</sup> 153 U.S. 535 (1894), dismissing a second amendment challenge to state regulation on the authority of *Cruikshank* and *Barron*.

There was, however, speculation and commentary prior to the decision in *Cruikshank* to the effect that the second amendment "right to keep and bear arms" was so basic an institution that it should not be subject to state legislative action either. Said the Supreme Court of Georgia in 1846:

I am aware that it has been decided, that this, like other amendments adopted at the same time, is a restriction upon the government of the United States, and does not extend to the individual states.

\* \* \* \*

The language of the second amendment is broad enough to embrace both Federal and State governments—nor is there anything in its terms which restricts its meaning. The preamble which was prefixed to these amendments shows, that they originated in the fear that the powers of the general government were not sufficiently limited. Several of the states, in their act of ratification, recommended that further restrictive clauses should be added. And in the first session of Congress, ten of these amendments having been agreed to by that body, and afterwards sanctioned by three-fourths of the States, became a part of the Constitution. But admitting all this, does it follow that because the people refused to delegate to the general government the power to take from them the right to keep and bear arms, that they designed to rest it in the State governments? Is this a right reserved to the *States* or to *themselves*? Is it not an unalienable right, which lies at the bottom of every free government? We do not believe that, because the people withheld this arbitrary power of disfranchisement from Congress, they ever intended to confer it on the local legislatures. This right is too dear to be confided to a republican legislature.

\* \* \* \*

... If a well-regulated militia is *necessary* to the *security* of the State of Georgia and of the United States, is it competent for the General Assembly to take away this security by disarming the people? What advantage would it be to tie up the hands of the national legislature, if it were in the power of the *States* to destroy this bulwark of defense.<sup>71</sup>

This view seems to coincide closely with the analytical framework currently used by the Supreme Court in deciding whether specific portions of the Bill of Rights are applicable to the states through the fourteenth amendment.<sup>72</sup> This process of "selective incorporation" would seem to dictate that the "fundamental-ness" of a right determines its applicability to the States, and under this test there is much to suggest that the second amendment should be so construed.<sup>73</sup>

<sup>71</sup> *Nunn v. State*, 1 Ga. 243, 250-51 (1846).

<sup>72</sup> See, e.g., *Malloy v. Hogan*, 378 U.S. 1 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961). Justice Cardozo stated the test in *Palko v. Connecticut*, 302 U.S. 319, 326 (1937): "Does it violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?"

<sup>73</sup> Cf. Sprecher, *The Lost Amendment*, 51 A.B.A.J. 554, 666 (1965).



In addition, the Supreme Court in *Presser v. Illinois*,<sup>74</sup> while otherwise affirming the rule of *Cruikshank*, intimated that because of the broad power of the United States over the militia, and its reliance on the militia as the source of its armies, "the States cannot, even laying the constitutional provision in question [the second amendment] 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 . . ."<sup>75</sup>

This dictum implies that the federal responsibility for military operations is sufficient in and of itself to preclude state interference with militia readiness.

There are therefore two possible channels through which the second amendment could be found applicable to all the states; (1) the process of absorption through the fourteenth amendment, or (2) as a result of the Federal supremacy over, and reliance upon, the state militia. Further, there is nothing in the language of the second amendment which limits its guaranty to infringement by legislation. It is therefore likely that, if the second amendment is incorporated into the fourteenth, its protection will extend to *all* state action, be it judicial, legislative, or executive, under the rationale of *Shelley v. Kraemer*<sup>76</sup> and its progeny.

Several cases have presented other challenges under the fourteenth amendment. In *Presser v. Illinois*,<sup>77</sup> defendant was convicted of organizing a private military association—the "Lehr und Wehr Verein"—and parading through the streets of Chicago contrary to Illinois law. In addition to a second amendment contention (which was dismissed on the authority of *United States v. Cruikshank*<sup>78</sup>), defendant urged that the statute deprived him of the "privileges and immunities" of United States citizenship, and of due process of law. The Supreme Court dismissed the latter argument as "untenable,"<sup>79</sup> and said as to the former:

The right voluntarily to 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.<sup>80</sup>

<sup>74</sup> 116 U.S. 252 (1885).

<sup>75</sup> *Id.* at 265.

<sup>76</sup> 334 U.S. 1, 20 (1948): "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms."

<sup>77</sup> 116 U.S. 252 (1885).

<sup>78</sup> *Supra*, note 65.

<sup>79</sup> 116 U.S. at 268.

<sup>80</sup> *Id.* at 265. The case was one of many raising "privileges and immunities" objections during that period; the lack of success of those challenges stimulated reliance on "due process" grounds instead. Cf. III WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 289 (1923).

Some years later, in *Patson v. Pennsylvania*,<sup>81</sup> Justice Holmes cryptically upheld a state statute which prohibited aliens from hunting and "to that extent" possessing rifles or shotguns, on grounds that it did not violate either the equal protection or due process clauses of the fourteenth amendment.

However, if no case reaches the Supreme Court upon which it could properly modify the rule of *Cruikshank*, or if the Court in a proper case simply declined to apply a federal standard to state action, numerous questions arise as to the extent to which state action might intrude upon the "right to keep and bear arms." At least one jurisdiction (in which there is no state constitutional equivalent of the second amendment) has intimated that local weapons-control legislation need not allow for *any* "right to bear arms."<sup>82</sup> And since there are some fifteen states without explicit constitutional provisions, that view could become more widespread.

As a perusal of the various state constitutions set out in the Appendix will indicate, the "right" guaranteed in many of them is on its face much broader than that protected by the second amendment. Five states extend the right to the "home, person, or property" of the citizen;<sup>83</sup> six others recognize that the right of the citizen is to defend "himself" as well as the state.<sup>84</sup> It is too simple an answer to say that these states have misconstrued the fundamental right they seek to guarantee, or that the "right" is obsolete. Such may be the case, but if legislation is someday to be enacted that would effectively deprive otherwise competent citizens from possessing guns in their home, or for purposes of self-protection, constitutional amendments in those states would almost certainly be prerequisite.

In the meantime any state gun control restrictions would have to be reconcilable with existing state constitutional provisions. Where those provisions encompass (or appear to encompass) purposes broader than militia readiness, any proposed legislation must be evaluated accordingly. For example, while it is not suggested that these cases are generally controlling today, several courts *have* held gun control statutes unconstitutional in the past: in *Nunn v. State*,<sup>85</sup> the Georgia court invalidated that portion of a statute which prohibited carrying weapons *openly*; *In re Brickey*<sup>86</sup> held that the legislature

<sup>81</sup> 232 U.S. 138 (1914). Same holding as to statute prohibiting possession of firearms by felons: *State v. Robinson*, 343 P.2d 886 (Ore. 1959).

<sup>82</sup> *Ex parte Ramirez*, 193 Cal. 633, 226 Pac. 914 (1924); *People v. Camperlingo*, 69 Cal. App. 466, 231 Pac. 601 (1924).

<sup>83</sup> Colorado, Mississippi, Missouri, Montana, Oklahoma.

<sup>84</sup> Alabama, Arizona, Connecticut, Michigan, Texas, Washington. Still others use the plural pronoun "themselves" in conjunction with "State"; Florida, Indiana, Kentucky, Oregon, Pennsylvania, South Dakota, Vermont, Wyoming. An argument can be made that "themselves" is really only a paraphrase for the existing societal system, and not a guaranty for a right to keep and bear arms for personal defense. *Cf. Feller & Gotting, supra* note 63, at 55.

<sup>85</sup> 1 Ga. 243 (1846).

<sup>86</sup> 8 Idaho 597, 70 Pac. 609, 101 Am. St. Rep. 215 (1902).

could not prohibit the mere carrying of weapons by private persons within city limits; in *Andrews v. State*,<sup>87</sup> the Tennessee court struck down that portion of a deadly weapons statute which proscribed the carrying of "pistols," since those weapons could be "arms" in the military sense; and in *Jennings v. State*,<sup>88</sup> where the Texas constitution expressly authorized the legislature to "regulate the wearing of arms," the court held unconstitutional a provision calling for the forfeiture of any weapon illegally carried.

### C. Relation to Militia Readiness:

It was noted in sections I and II above that, historically, the right to keep and bear arms in the minds of constitutional draftsmen in England and in the United States was inextricably bound up in the felt need for a well-regulated militia. The language of the second amendment joins the two ideas, as does the language of most of the state provisions. There is little doubt that the federal courts, in construing federal statutes under the second amendment, will recognize a right to bear arms only when there is some demonstrable tie between militia readiness and the challenged regulation. Yet it has been seen that certain state constitutions on their face purport to extend the right to the protection of self and property, and that there is a continuing "echo" to the effect that the right to bear arms had its origins in the dim recesses of the common law—long prior to its attaining constitutional stature in 1688 and 1791.

Generally, in cases which have upheld the constitutionality of firearms controls, a finding of a lack of relationship between the proscribed arms-bearing and the militia has been made in those states whose constitutions suggest that the purpose of the right is only for collective security, while those states whose constitutions seem to extend the "right" to personal protection either have not litigated the question at all or have avoided an outright confrontation with this issue. Only one case—and that a very old one—has held that the right to bear arms is absolute. In *Bliss v. Commonwealth*,<sup>89</sup> the Kentucky court invalidated a concealed weapons statute holding that the right to bear arms must be preserved "entire." The constitution in that state was subsequently modified to permit regulation, and the case itself has been considered something of an outrageous phenomenon.<sup>90</sup>

Sometimes the question posed is whether "individuals" enjoy the right.

<sup>87</sup> 50 Tenn. (3 Heisk.) 165, 8 Am. Rep. 8 (1871).

<sup>88</sup> 5 Tex. App. 298 (1878).

<sup>89</sup> 2 Litt. 90, 13 Am. Dec. 251 (Ky. 1822).

<sup>90</sup> It was criticized in *State v. Buzzard*, 4 Ark. 18 (1842), and in *Aymette v. State*, 21 Tenn. (2 Humph.) 154 (1840). In *State v. Workman*, 35 W. Va. 367 (1891), the court found the holding in *Bliss* not so surprising in a state which could also rule, in *Carico v. Commonwealth*, 70 Ky. (7 Bush) 124 (1870), that a person in honest fear of his life was entitled to bushwack his enemy!

Thus, in *City of Salina v. Blaksley*,<sup>91</sup> the court upheld a statute prohibiting the carrying of pistols, on the grounds that

The provision in section 4 of the Bill of Rights "that the people have the right to bear arms for their defense and security" refers to the people as a collective body. It was the safety and security of society that was being considered when this provision was put into our constitution.<sup>92</sup>

Similarly, a somewhat cynical Florida court sustained the constitutionality of a concealed weapons statute in these words:

This section 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, who is prone to load his stomach with liquor and his pockets with dynamite, and make of himself a dangerous nuisance to society.<sup>93</sup>

At other times the question posed is: "What 'arms' are protected by the constitution?" Answered a frontier Texas court:

... Certainly such as are useful and proper to an armed militia. The deadly weapons spoken of in the statute are pistols, dirks, daggers, slungshots, sword-canes, spears, brass-knuckles and bowie knives. Can it be understood that these were contemplated by the framers of our bill of rights? Most of them are the wicked devices of modern craft.

\* \* \* \*

To refer the deadly devices and instruments called in the statute "deadly weapons" to the proper or necessary arms of a "well-regulated militia," is simply ridiculous. No kind of travesty, however subtle or ingenious, could so misconstrue this provision of the constitution of the United States, as to make it cover and protect that pernicious vice, from which so many murders, assassinations, and deadly assaults have sprung, and which it was doubtless the intention of the legislature to punish and prohibit.<sup>94</sup>

By this rationale, a Tennessee court found a similar statute valid except as to pistols which could be appropriate military weapons.<sup>95</sup> Later the same court struck down a municipal ordinance prohibiting altogether the carrying of a pistol.<sup>96</sup> In the same vein, a Vermont "concealed weapons" ordinance was

<sup>91</sup> 72 Kan. 230, 83 Pac. 619 (1905).

<sup>92</sup> *Id.* at 231, 83 Pac. at 620.

<sup>93</sup> *Carlton v. State*, 63 Fla. 1, 9, 58 So. 486, 488 (1912).

<sup>94</sup> *English v. State*, 35 Tex. 473, 474, 476 (1872). To same effect, see: *Hill v. State*, 53 Ga. 472, 474-75 (1874); *Pierce v. State*, 275 Pac. 393, 395 (Okla. 1929). See also AM. & ENG. ENCYCLOPEDIA OF LAW 718 (Merrill ed. 1887).

<sup>95</sup> *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 8 Am. Rep. 8 (1871). The statute was amended to exclude army pistols and was sustained in that form in *State v. Wilburn*, 66 Tenn. (7 Bax.) 57 (1872).

<sup>96</sup> *Glasscock v. City of Chattanooga*, 157 Tenn. 518, 11 S.W. 2d 678 (1928).

found unconstitutional as it pertained to handguns;<sup>97</sup> but a Texas statute prohibiting machine guns was upheld.<sup>98</sup> Obviously weaponry has changed since the federal, and most state, "right to bear arms" provisions were enacted. Although there has been little recent litigation on the subject, one court, which felt constrained by the language of the state constitution to strike down a pistol-licensing statute, admitted that the right to bear arms did not mean that "the people have the futile right to use submarines and cannon of 100 mile range nor airplanes dropping deadly bombs, nor the use of poisonous gases. . . ."<sup>99</sup>

The whole problem of attempting to ascertain the inter-workings of the right to bear arms and the maintenance of the militia has been considered moot by some writers,<sup>100</sup> for the reason that the "militia" as our forefathers knew it, and relied upon it, has disappeared.<sup>101</sup> Indeed, despite the long-standing dread of standing armies cited as the basic impetus for the enactment of "right to bear arms" provisions in the English and American constitutions, a standing army has become accepted as the only effective and efficient way of assuring our national security. The role of the citizen-soldier, and of his independent state militia outfit, has diminished almost to nothingness—if for no other reason than that the federal government has assumed total responsibility for training and supplying the "militia" (the National Guard).<sup>102</sup> It would clearly be impossible for any individual, or even any state, to hope to maintain an arsenal of the sophisticated weapons in use today.

One hundred and thirty years ago Joseph Story lamented that "among the American people, there is a growing indifference to any system of militia discipline, and a strong disposition from a sense of its burdens, to be rid of all regulations. How it is practicable to keep the people duly armed, without some organization it is difficult to see."<sup>103</sup> Story's fears notwithstanding, the people of the United States have come to accept that their greatest security lies in a prepared standing army, buttressed by a "militia" of federally trained, equipped and disciplined National Guardsmen, none of whom is called upon, or expected to supply his own weapons. The call for an armed citizenry seems confined to reactionary political groups—and to a number of dissenting judges.<sup>104</sup>

<sup>97</sup> *State v. Rosenthal*, 75 Vt. 295, 55 Atl. 610 (1903).

<sup>98</sup> *Morrison v. State*, 339 S.W.2d 529 (Tex. Crim. App. 1960).

<sup>99</sup> *State v. Kerner*, 181 N.C. 574, 577, 107 S.E. 222, 224-25 (1921).

<sup>100</sup> *E.g.*, Feller & Gotting, *supra* note 63, at 67-70.

<sup>101</sup> *Cf.* Rosengren, *The Myth of the Militia*, 60 W. VA. B.A.J. 65 (1944).

<sup>102</sup> See, *inter alia*, 32 U.S.C. §§ 106, 501, 502, 701 (1956).

<sup>103</sup> II STORY, COMMENTARIES ON THE CONSTITUTION 677 (3d ed. 1858).

<sup>104</sup> See, *e.g.*, *Mathews v. State*, 148 N.E.2d 334 (Ind. 1958) (dissent of Emmert, C.J.); *Moore v. Gallup*, 267 App. Div. 64, 45 N.Y.S.2d 63 (1943) (dissent of Hill, P.J.); *State v. Nieto*, 101 Ohio St. 409, 130 N.E. 663 (1920) (dissent of Wanamaker, J.); *Strickland v. State*, 137 Ga. 1, 72 S.E. 260 (1911) (dissent of Atkinson, J.).

It is in this sense that the second amendment can be called obsolete<sup>105</sup>—the militia itself, in the form it took in colonial days, is obsolete. Continued insistence on an interconnection between arms-bearing and militia preparedness can only lead to ridiculous legal dialogues. For example, a federal statute defines the militia of the United States as “all able-bodied males at least 17 years of age and . . . under 45 years of age . . . and . . . female citizens of the United States who are commissioned officers of the National Guard.”<sup>106</sup> Does it therefore follow that most young and old males, and almost all females, have no right to keep and bear arms? Or that every potential draftee is entitled to acquire and carry military-issue carbines, automatic rifles, and side-arms?

The alternative to such semanticism (in those states whose constitutions permit the interpretation) is an acknowledgement that the right to bear arms exists for purposes other than national security, such as the protection of one's person or property.<sup>107</sup> The test of validity of gun-control legislation should then be its reasonableness as a police regulation considering any inhibiting effects on genuine self-protection.

#### D. *Permissible Areas of Regulation:*

As was noted on the first page of this article, firearms control statutes have almost universally been adjudged constitutional when challenged on “right to bear arms” grounds. The few cases which have found such legislation invalid have for the most part been adverted to above. It may, however, be valuable to review briefly the specific forms of gun control which have been litigated.

Two *caveats* are first necessary: (1) each of the cited cases which follows must be evaluated in light of the specific language of the applicable state constitution since some evidence a broader right than others; and (2) each item of legislation which survives the “right to bear arms” test must also pass muster as a reasonable exercise of the police power.

The earliest type of gun legislation was directed at the carrying of concealed weapons. Most of the cases construing such statutes were therefore cases of first impression in the jurisdiction, and so contain the most lucid discussion of the constitutional issues, and also serve as the controlling precedent for challenges to subsequent legislation. With the exception of *Bliss v.*

<sup>105</sup> Cf. Feller & Gotting, *supra* note 63, at 70.

<sup>106</sup> 10 U.S.C. § 311 (1964).

<sup>107</sup> The idyllic suggestion has even been made that the Supreme Court, “in view of the kinds of arms which now exist, [could] convert the Second Amendment into an *absolute* right to bear arms, unhampered by any concept of arms for militia use only.” Sprecher, *The Lost Amendment*, 51 A.B.A.J. 554, 666 (1965).

*Commonwealth*, discussed above,<sup>108</sup> every court which has passed on a concealed weapons statute has found it constitutional.<sup>109</sup>

From these holding it was but a short step to upholding statutes which forbade the carrying of weapons in public places,<sup>110</sup> or on the property of another,<sup>111</sup> or while in prison.<sup>112</sup> Statutes requiring licenses to carry a firearm have also generally been sustained,<sup>113</sup> including the notorious Sullivan Act in New York which requires a permit for the mere possession of handguns.<sup>114</sup> Interestingly, when the Sullivan Act was amended in 1931 to require fingerprinting and photographing of applicants, a lower court<sup>115</sup> found the amendments unconstitutional as an unreasonable exercise of the police power, but, though the result was affirmed on appeal,<sup>116</sup> that constitutional basis for it was quite clearly reversed.

As in Blackstone's day,<sup>117</sup> the hunting and game laws often impose restrictions on arms-bearing. But where such a statute prohibits possession of guns by aliens, at least one state has held the statute unconstitutional on the grounds that the right to bear arms is an "individual" one (thus intimating that it includes personal self-defense within its purview);<sup>118</sup> another state has found such a limitation a valid police regulation.<sup>119</sup> In a Michigan case, however, where the defendant and four other "unnaturalized foreigners" were arrested while sitting in a Marmon touring car in Detroit and all of them were armed, the court cited the specific language of the state constitution—"Every person has a right to keep and bear arms for the defense of himself and the state"—

<sup>108</sup> *Supra*, note 89.

<sup>109</sup> *State v. Reid*, 1 Ala. 612, 35 Am. Dec. 44 (1840); *State v. Buzzard*, 4 Ark. 18 (1842); *Carlton v. State*, 63 Fla. 1, 58 So. 486 (1912); *Nunn v. State*, 1 Ga. 243 (1846); *People v. Liss*, 406 Ill. 419, 94 N.E.2d 320 (1950); *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833); *McIntire v. State*, 170 Ind. 163, 83 N.E. 1005 (1908); *State v. Jumel*, 13 La. An. 399 (1858); *State v. Shelby*, 90 Mo. 302, 2 S.W. 468 (1886); *State v. Keet*, 269 Mo. 206, 190 S.W. 573 (1916); *State v. Angelo*, 130 Atl. 458 (N.J. 1925); *State v. Speller*, 86 N.C. 697 (1882); *Porello v. State*, 121 Ohio St. 280, 168 N.E. 135 (1929); *State v. Nieto*, 101 Ohio St. 409, 130 N.E. 663 (1920); *Mathews v. State*, 33 Okla. Cr. 347, 244 Pac. 56 (1926); *Ex parte Thomas*, 21 Okla. 770, 97 Pac. 260 (1908); *Wright v. Commonwealth*, 77 Pa. St. 470 (1875); *Aymette v. State*, 21 Tenn. (2 Humph.) 154 (1840); *English v. State*, 35 Tex. 473 (1872); *State v. Workman*, 35 W. Va. 367 (1891).

<sup>110</sup> *Hill v. State*, 53 Ga. 472 (1874); *State v. Wilforth*, 74 Mo. 528 (1881).

<sup>111</sup> *Isaiah v. State*, 176 Ala. 27, 58 So. 53 (1911).

<sup>112</sup> *People v. Wells*, 156 P.2d 979 (Calif. 1945).

<sup>113</sup> *Davis v. State*, 146 So. 2d 892 (1962); *Strickland v. State*, 137 Ga. 1, 72 S.E. 260 (1911); *Matthews v. State*, 148 N.E.2d 334 (Ind. 1958).

<sup>114</sup> *People v. Ryan*, 136 N.Y.S. 154 (Munic. Ct. 1911); *People ex rel. Darling v. Warden of City Prison*, 154 App. Div. 413, 139 N.Y.S. 277 (1913); *People v. Persce*, 204 N.Y. 397, 97 N.E. 877 (1912).

<sup>115</sup> *People ex rel. Ferris v. Horton*, 147 Misc. 506, 264 N.Y.S. 84 (1933).

<sup>116</sup> *Id.* 239 App. Div. 610, 269 N.Y.S. 579 (1934). It may here be noted that though the New State Constitution does not mention a right to bear arms, the New York Civil Rights Law, art. 2, § 4, does include such a provision, in the same language as the second amendment.

<sup>117</sup> See *supra*, notes 42-43.

<sup>118</sup> *People v. Nakamura*, 99 Colo. 262, 62 P.2d 246 (1936).

<sup>119</sup> *State v. Rheume*, 80 N.H. 319, 116 Atl. 758 (1922). Cf. *Patson v. Pennsylvania*, 232 U.S. 138 (1914).

and ruled that the defendant was entitled to carry a weapon for his personal defense.<sup>120</sup>

The organization of private military organizations is prohibited in many states, and several state constitutions expressly allow for their regulation. When such legislation is challenged it has been found constitutional.<sup>121</sup> A poignant example for lawyers may be found in *Application of Cassidy*,<sup>122</sup> where a disciple of Father Coughlin, a member of the Christian Front who advocated the overthrow of the government, was denied admission to the Bar of the State of New York because he had been organizing private armed units during the war. The applicant expressed "jubilation that there is the Second Amendment," but the Court found no justification for the organization of such an armed force.

Statutes prohibiting the ownership or possession of firearms by felons have also been upheld,<sup>123</sup> as was an Ohio "Tramp Law" under which a defendant was charged with threatening others with a gun.<sup>124</sup> And of course such proscriptions as pointing firearms at another,<sup>125</sup> discharging them within city limits,<sup>126</sup> and hunting on Sunday<sup>127</sup> are deemed constitutional. A Texas statute calling for the forfeiture of one's hunting license for hunting on private property was also held not to deny the individual his right to keep and bear arms.<sup>128</sup>

The courts have had equally little difficulty with the constitutionality of legislation affecting the distribution of firearms. A tax on the receipts of pistol sales was upheld in Texas,<sup>129</sup> a requested injunction against the enforcement of a sellers' licensing ordinance was denied in Illinois,<sup>130</sup> and an old Arkansas court sustained a statute which made it a misdemeanor to sell any pistol but those used in the Army or Navy<sup>131</sup>—in all these cases the "right to bear arms" challenge was dismissed in scarcely a sentence.

There is little consistency in the cases which have found gun control statutes (or parts thereof) invalid. Rarely in those cases was the "right to bear arms"

<sup>120</sup> *People v. Zerillo*, 219 Mich. 635, 189 N.W. 927 (1922).

<sup>121</sup> *State v. Gohl*, 46 Wash. 408, 90 Pac. 259 (1907); *Commonwealth v. Murphy*, 166 Mass. 171, 44 N.E. 138 (1896). Cf. *Presser v. Illinois*, 116 U.S. 252 (1885).

<sup>122</sup> 268 App. Div. 282, 51 N.Y.S.2d 202 (1944), *aff'd* 296 N.Y. 926, 73 N.E.2d 41 (1947).

<sup>123</sup> *Jackson v. State*, 68 So. 2d 850 (Ala. 1953); *People v. Garcia*, 218 P.2d 837 (Calif. 1950); *People v. Camperlingo*, 69 Cal. App. 466, 231 Pac. 601 (1924); *City of Akron v. Williams*, 177 N.E.2d 802 (Ohio, 1960); *State v. Robinson*, 343 P.2d 886 (Ore. 1959); *State v. Tully*, 198 Wash. 605, 89 P.2d 517 (1939).

<sup>124</sup> *State v. Hogan*, 63 Ohio St. 202, 58 N.E. 572 (1900).

<sup>125</sup> *Davenport v. State*, 112 Ala. 49, 20 So. 971 (1896).

<sup>126</sup> *State v. Johnson*, 76 S.C. 39, 56 S.E. 544 (1907); *McCullum v. City of Cincinnati*, 51 Ohio App. 67, 199 N.E. 603 (1935).

<sup>127</sup> *Walter v. State*, 35 Ohio C.C.R. 567 (1905).

<sup>128</sup> *Mowels v. State*, 152 Tex. Crim. 135, 211 S.W.2d 213 (1948).

<sup>129</sup> *Caswell & Smith v. State*, 148 S.W. 1159 (Tex. Civ. App. 1912).

<sup>130</sup> *Biffer v. City of Chicago*, 278 Ill. 562, 116 N.E. 182 (1917).

<sup>131</sup> *Dabbs v. State*, 39 Ark. 353, 43 Am. Rep. 275 (1882).



question the central one, and, in keeping with the judicial function, the courts usually adopted the narrowest ground available. For example, in *State v. Kerner*,<sup>132</sup> the court felt that a statute requiring a license and a \$500 bond to carry a weapon was invalid only as it applied to pistols since they had a military use. In *Fife v. State*,<sup>133</sup> the Arkansas court upheld a statute which restricted the carrying of "any pistol of any kind whatever"; two years later, in *Wilson v. State*,<sup>134</sup> the same court found another part of the same statute unconstitutionally narrow because it prevented a person from adequately protecting himself. The statute held valid in *Strickland v. State*<sup>135</sup> was three years later found insufficient, in *Smith v. State*,<sup>136</sup> to support the conviction of defendant for carrying an unlicensed weapon on premises equivalent to his home: the court noted that the statute should be given a reasonable interpretation so as not to interfere with the right to bear arms.

Moreover, those courts which have adopted a sweeping rationale either upholding or invalidating legislation on "right to bear arms" grounds have generally done their own cause a disservice by failing to note adequately the reasons for the legislation or the nature of the right to bear arms. *Bliss v. Commonwealth*,<sup>137</sup> by holding the right to bear arms to be "absolute," failed to take cognizance of the long history of arms regulation, and precipitated a constitutional amendment in the state. Similarly, an early Texas court<sup>138</sup> sustained a statute which established different penalties for assaults with different weapons, but posited this unfortunate dictum:

. . . *The right of a citizen to bear arms, in the lawful defense of himself or the state, is absolute.* He does not derive it from the state government, but directly from the sovereign convention of the people that framed the state government. It is one of the "high powers" delegated directly to the citizens, 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 law-making power.*<sup>139</sup>

It took the Texas courts some years before they recognized any limitation on the right.<sup>140</sup>

<sup>132</sup> 181 N.C. 574, 107 S.E. 222 (1921). To same effect, see *Glasscock v. City of Chattanooga*, 157 Tenn. 518, 11 S.W.2d 678 (1928); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 8 Am. Rep. 8 (1871).

<sup>133</sup> 31 Ark. 455 (1876).

<sup>134</sup> 33 Ark. 557 (1878).

<sup>135</sup> 137 Ga. 1, 72 S.E. 260 (1911).

<sup>136</sup> 14 Ga. App. 823, 82 S.E. 355 (1914).

<sup>137</sup> 2 Litt. 90, 13 Am. Dec. 251 (Ky. 1822). See discussion, *supra* note 89.

<sup>138</sup> *Cockrum v. State*, 24 Tex. 394 (1859).

<sup>139</sup> *Id.* at 401-02. (Emphasis added).

<sup>140</sup> *Cf. English v. State*, 35 Tex. 473 (1872).

Even the holding in *City of Salina v. Blaksley*<sup>141</sup> (which is the leading exponent of the view that the right to bear arms is a "collective" rather than "individual" right) seems unnecessarily broad. Written in 1905—before either of the World Wars—the opinion suggests that the *only* right is to bear arms *as a member* of the state militia. It thus eliminates the right to bear arms in preparation for such service, or for personal defense, and to this extent disagrees even with those states which allow the regulation of all but military-type sidearms.<sup>142</sup>

From this review we can detect in the state cases a wide divergence of rationales, and, in the later cases, a general paucity of discussion on the "right to bear arms" issues. But it seems impossible to see any definable trend in the opinions of the courts. As is apparent from the dates of the cases, few of them are current; but the views expressed in the most recent cases often seem more dated than the views in the earliest 19th century ones. For example, the view expressed in *Carlton v. State*<sup>143</sup>—that the right to bear arms was not designed as a shield for the individual man, but was a collective right of the populace—had been iterated seventy-two years earlier in *Aymette v. State*.<sup>144</sup> Conversely, an *individual* right to keep and bear arms has been found as late as 1936 in *People v. Nakamura*<sup>145</sup> and in 1922 in *People v. Zerillo*.<sup>146</sup> About all this writer is willing to concede from this review is that the various state courts—if and when called upon to determine the constitutionality of firearms legislation—will react more to the specific language of the state constitution and the data relied on by the legislature in enacting the law, than they will to a marshalling of ancient precedents.

#### IV. CONCLUSION

Comes now the time to draw the thread of synthesis through the fabric of discussion. From a historical viewpoint, the right to keep and bear arms is indeed a phenomenon—and prior to 1688 it appears to have been a phantom as well. That is, prior to the expression of a right to bear arms in the English Declaration of Rights, there is no concrete evidence of its existence or its content. The circumstances of the England of 1688 reveal a major religious and political upheaval, in which one of the items of oppression was the systematic denial of weapons of resistance to Protestants. This "discrimination" engendered in Parliament the declaration of a constitutional principle that Protestants had a right to bear such arms "as [were] allowed by law." There

<sup>141</sup> 72 Kan. 230, 83 Pac. 619 (1905).

<sup>142</sup> See cases cited *supra*, note 132.

<sup>143</sup> 63 Fla. 1, 58 So. 486 (1912).

<sup>144</sup> 21 Tenn. (2 Humph.) 154 (1840).

<sup>145</sup> 99 Colo. 262, 62 P.2d 246 (1936).

<sup>146</sup> 219 Mich. 635, 189 N.W. 927 (1922).

was implicit in the first constitutional statement of the right a recognition of the "overlordship of the police power."<sup>147</sup>

It also seems clear that the second amendment to the United States Constitution was formulated in a similar period of strife and military impositions, grounded four-square on a proven disregard for standing armies—a disregard which had special meaning in colonial America, but which had long been ingrained in the common law tradition. And it further appears that that tradition had long tolerated a measure of regulation of firearms.

The available opinions of the federal courts confirm the view that the second amendment guarantee for a right to bear arms is necessarily related to the maintenance of the militia. Yet it seems obvious that home-spun military preparedness is a myth today and has been for sometime;<sup>148</sup> there is then the possibility that the guarantee contained in the second amendment is of little significance as an inhibiting factor to proposed federal legislation for the control of interstate traffic in firearms.

However, thirty-five states also guarantee the right to bear arms in one form or another. Many of these provisions differ radically from their federal counterpart, and have been so construed. Specifically, it is difficult to ignore language which states that the right to bear arms extends to the protection of "home, person and property." It is in these jurisdictions that legislatures and courts will have to take a long hard look at the content of any gun law, to ascertain whether it oversteps the limits of police power and invades a constitutionally protected domain.

But what are the boundaries of that domain? It is highly unlikely that all states will adopt a single interpretation of the right to bear arms, so that the limits of the "right" may vary with the jurisdiction. Yet a single *approach* to the problem of delineating the right seems possible, and it is this: *the nature of the right to bear arms should be expressed in terms of the purposes for which firearms can conceivably be used.*<sup>149</sup> Once a protected purpose is identified, any legislation which leaves that purpose reasonably intact is valid. The test adopted in the only Supreme Court case directly under the second amendment<sup>150</sup> was whether the arms regulated bore any reasonable relation to the maintenance of the militia. Finding none, the Court ruled the statute valid.

<sup>147</sup> People *ex rel. Ferris v. Horton*, 147 Misc. 506, 509, 264 N.Y.S. 84, 88 (1933).

<sup>148</sup> Almost a hundred years ago, a Tennessee court could say:

We may for a moment, pause to reflect on the fact, that what was once deemed a stable and essential bulwark of freedom, "a well regulated militia," though the clause still remains in our Constitutions, both State and Federal, has, as an organization, passed away in almost every State of the Union, and only remains to us as a memory of the past, probably never to be revived.

*Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 184, 8 Am. Rep. 8, 17 (1871).

<sup>149</sup> See *supra* note 10.

<sup>150</sup> *United States v. Miller*, 307 U.S. 174 (1939).

It may then be said that the "purpose" for which arms-bearing is protected by the second amendment is military preparedness. It is wholly conceivable that this "purposes" rationale will yield different results under the various state constitutions—for example, the Colorado constitution extends the right to "home, person and property": a protected purpose may then be the defense of one's business establishment. Unless the Denver shopkeeper can demonstrate that the challenged legislation deprives him of an effective means of defending his store, the regulation is valid.

The proposed test hopefully achieves two ends (1) it avoids the meaningless debate over whether the right to bear arms is a collective or individual right; and (2) it furnishes a means of evaluating the constitutionality of proposed regulations ahead of time through the legislative (data-gathering) process. Much the same thought has been expressed by a recent student commentator:

No reason exists why a weapon should be available to the public that by reasonable standards has no legitimate sporting, hunting or security utility, and has generally been adopted by criminals and undesirables to enhance their anti-social behavior.<sup>151</sup>

On the presumption that "sporting, hunting or security" are the protected purposes, arms having no utility in those pursuits may be proscribed.<sup>152</sup>

Finally, if there is any discernible trend in the attitude of courts toward the right to bear arms, it is an increasing sympathy for the problems of legislatures in devising effective means to combat rampant crime or to eliminate recurring safety hazards. For example, in 1840 a Tennessee court could say:

To hold that the Legislature could pass no law upon this subject by which to preserve the public peace, and protect our citizens from the terror which a wanton and unusual exhibition of arms might produce, or their lives from being endangered by desperadoes with concealed arms, would be to make it a social evil of infinitely greater extent to society than would result from abandoning the right itself.<sup>153</sup>

And in 1959, the same thought persists:

Must a civilized society continue a tacit acceptance of the pervasive spirit of lawlessness and force in its life?

\* \* \* \*

The right to bear arms is a precious one, guaranteed by the United States Constitution. But while we are a society still pioneering in the realm of space and

<sup>151</sup> Note, 15 DE PAUL L. REV 164, 169 (1965).

<sup>152</sup> The protected purposes would probably be determined historically, in which case they could hardly include anything more than militia preparedness and self-defense. The "purposes" test, however, could be flexibly interpreted to allow for more or fewer purposes as the times demand.

<sup>153</sup> *Aymette v. State*, 21 Tenn. (2 Humph.) 154, 159 (1840).

spirit, we are no longer a frontier community. The great master of the law [Holmes] correctly observed that "Most rights are qualified". . . , and this right, too, is subject to regulation.<sup>154</sup>

The freedom with which firearms are bought and sold and used cannot help but contribute in some measure to these problems.

The first inclination of a court, therefore, will probably be to evaluate the effectiveness of any gun control statute as a police measure.<sup>155</sup> If the court finds it a reasonably effective attempt to abate some social evil, it can turn to a number of theories to overcome a "right to bear arms" objection: (1) it may find that the statute simply "regulates" and does not infringe (as, perhaps, the "concealed weapons" statutes, or a licensing or registration requirement); (2) the statute may be directed at weapons which in light of modern technology could not increase the military proficiency of their owners (snub-nosed pistols, sawed-off shotguns, etc.); (3) the legislation may be directed at persons who could not reasonably be expected to serve in an organized military force; (4) the statute may impose limitations which do not inhibit the ownership of firearms for any constitutionally protected purpose (which could then safely be extended to protection of self and property). And in those fifteen jurisdictions which have adopted no specific "right to bear arms" provision, unless and until the second amendment is found applicable to the states, it is at least conceivable that their courts could simply deny the existence of any such constitutional principle.

In fact, if one may speculate, it is not at all unlikely that a court may one day develop a simpler test, by holding that the police power and the right to bear arms are mutually exclusive constitutional concepts, and that therefore any regulation which is by conventional standards a valid police measure cannot, by that very fact, infringe the right to bear arms.

#### APPENDIX

<i>State</i>	<i>Const. Citation</i>	<i>Text</i>
Alabama	art. I, sec. 26	That every citizen has a right to bear arms in defense of himself and the state.

<sup>154</sup> Application of Grauling, 183 N.Y.S.2d 654, 657 (1959).

<sup>155</sup> Consider the approach of a Michigan court:

. . . . The police power of the State to preserve public safety and peace and to regulate the bearing of arms cannot fairly be restricted to the mere establishment of conditions under which all sorts of weapons may be privately possessed, but it may take account of the character and ordinary use of weapons and interdict those whose customary employment by individuals is to violate the law. The power is, of course, subject to the limitation that its exercise be reasonable, and it cannot constitutionally result in the prohibition of the possession of those arms which, by the common opinion and usage of law-abiding people, are proper and legitimate to be kept upon private premises for the protection of person and property.

People v. Brown, 253 Mich. 537, 541, 235 N.W. 245, 246-47 (1931).

Alaska	art. I, sec. 19	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.
Arizona	art. 2, sec. 26	The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.
Arkansas	art. 2, sec. 5	The citizens of this State shall have the right to keep and bear arms for their common defense.
Colorado	art. II, sec. 13	The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.
Connecticut	art. I, sec. 15	Every citizen has a right to bear arms in defense of himself and the state.
Florida	Decl. of Rts., sec. 20	The right of the people to bear arms in defense of themselves, and the lawful authority of the state, shall not be infringed, but the Legislature may prescribe the manner in which they may be borne.
Georgia	art. I, sec. I, para. XXII	The right of the people to keep and bear arms, shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne.
Hawaii	art. I, sec. 15	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.
Idaho	art. I, sec. 11	The people have the right to bear arms for their security and defense; but the legislature shall regulate the exercise of this right by law.
Indiana	art. I, sec. 32	The people shall have a right to bear arms, for the defense of themselves and the State.
Kansas	Bill of Rts., sec. 4	The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power.
Kentucky	sec. 1, para. 7	The right to bear arms in defense of themselves and of the state, subject to the power of the general assembly to enact laws to prevent persons from carrying concealed weapons.
Louisiana	art. I, sec. 8	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 abridged. This shall not prevent the passage of laws to punish those who carry weapons concealed.
Maine	art. I, sec. 16	Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned.
Massachusetts	Part The First, art. XVII	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.
Michigan	art. I, sec. 6	Every person has a right to keep and bear arms for the defense of himself and the state.
Mississippi	art. 3, sec. 12	The right of every citizen to keep and bear arms in defense of his home, person or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons.
Missouri	art. I, sec. 23	That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons.
Montana	art. III, sec. 13	The right of any person to keep or bear arms in defense of his own home, person and property or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.
New Mexico	art. II, sec. 6	The people have the right to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons.
North Carolina	art. I, sec. 24	A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to, and governed by, the civil power. Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against said practice.
Ohio	art. I, sec. 4	The people have the right to bear arms for their defence and security; but standing armies, in time of peace, are dangerous to

		liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.
Oklahoma	art. II, sec. 26	The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons.
Oregon	art. I, sec. 27	The people have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power.
Pennsylvania	art. I, sec. 21	The right of the citizens to bear arms in defence of themselves and the State shall not be questioned.
Rhode Island	art. I, sec. 22	The right of the people to keep and bear arms shall not be infringed.
South Carolina	art. I, sec. 26	A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As in times of peace armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in the manner to be prescribed by law.
South Dakota	art. VI, sec. 24	The right of citizens to bear arms in defense of themselves and the state shall not be denied.
Tennessee	art. I, sec. 26	That the citizens of the State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime.
Texas	art. I, sec. 23	Every citizen shall have the right to keep and bear arms in the lawful defence of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime.
Utah	art. I, sec. 6	The people have the right to bear arms for their security and defense, but the Legislature may regulate the exercise of this right by law.
Vermont	chap. I, art. 16	That the people have a right to bear arms for the defence of themselves and the State—and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be



		kept under strict subordination to and governed by the civil power.
Washington	art. I, sec. 24	The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporation to organize, maintain or employ an armed body of men.
Wyoming	art. I, sec. 24	The right of citizens to bear arms in defense of themselves and of the state shall not be denied.

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