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

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I. INTRODUCTION

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

While the American "right to bear arms" developed at the time of the Revolution, it grew out of the duty imposed on the early colonists to keep arms for the defense of their isolated and endangered communities. The definition of "bearing arms" as the phrase was used in legal instruments up to revolutionary times was "serving in an organized armed force."¹ It did not imply any personal right to possess weapons. For example, when Parliament in drafting the English Bill of Rights² or Blackstone in his *Commentaries on the Laws of England*³ intended to convey the meaning of a personal right to possess arms, they spoke of the right to *have* arms, not of the right to *bear* arms.

II. EARLY HISTORY

A. *The Colonial Period*

The earliest colonial statutes requiring that the colonists arm themselves were Virginia statutes of 1623 stating that "no man go or send abroad without a sufficient party will [sic] armed," and that "men go not to worke in the ground without their arms (and a centinell (pg.149) (pg.111) upon them)."⁴ In 1658 Virginia required that "every man able to beare armes have in his house a fixt gunn."⁵ The colony, being unable to afford to arm its militia or troops, required them to arm

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¹ See the materials on the colonial statutes and on the United States Constitution discussed below.

² 1 W & M. I, St. 2, ch. 2 (1689).

³ W. Blackstone, *Commentaries on the Law of England* 143-44 (1766).

⁴ Acts of the Grand Assembly 1623-1624, Nos. 24 and 25.

⁵ Acts of the Grand Assembly 1658-1659, Act 25.

themselves.⁶ If the militia, however, found itself under-armed, the county courts could levy on the population for the provision of arms and distribute them to those not provided—the distributees then paying for the arms at a reasonable rate.⁷

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

This duty to keep and bear arms was limited by the interest of colonial governments in preventing the use of firearms for harmful ends. In order to prevent civil disturbances the colonial governments strove to keep arms from falling into the "wrong hands." To provide against Negro insurrections, Virginia forbade Negroes from carrying arms without their masters' certificate.¹² Pennsylvania had a similar provision by 1700,¹³ and South Carolina even required that the master keep all arms not in use safely locked up in his house.¹⁴ Virginia forbade the sale of arms or ammunition to Indians,¹⁵ and Massachusetts (pg.150) (pg.112) required that Indians possess a license to carry a gun within certain areas of the colony.¹⁶

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

In addition to those laws preventing arms from falling into the hands of those groups openly hostile to colonial society, statutes regulated the conditions under which arms could be used. As the settlements grew crowded, shooting was restricted in order to protect people and livestock. By 1678 Massachusetts forbade shooting "so near or into any House, Barn, Garden, Orchards or High-Wayes

⁶ Acts of the Grand Assembly 1684, Act 4.

⁷ Acts of the Grand Assembly 1673, Act 2.

⁸ The Compact with the Charter and General Laws of the Colony of New Plymouth 44-45 (1836).

⁹ Duke of York's Laws (1665-1675).

¹⁰ First Gen. Assembly, 2d Sess., ch. 20 (October 1684).

¹¹ S.C. Stat., No. 206 (1703).

¹² Acts of the Grand Assembly 1680, Act 10.

¹³ Penn Stat., ch. 61 § 5 (1700).

¹⁴ S.C. Stat., No. 314 (1712).

¹⁵ Acts of the Grand Assembly 1633, Act 10.

¹⁶ Gen. Ct., Sess. of May 23, 1677.

¹⁷ Province Laws 1692-1693, ch. 18, § 6.

in any town or towns of this Jurisdiction, whereby any person or persons shall be or may be killed, wounded or otherwise damaged."¹⁸ In order to prevent fires caused by gunfire, Pennsylvania in 1721 forbade firing a gun within the city of Philadelphia without a special license from the governor.¹⁹ Pennsylvania also forbade hunting by anyone on improved lands without the permission of the owner, and forbade those not qualified to vote from hunting on unimproved lands without the permission of the owner.²⁰

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

B. The Revolutionary Period

During the revolutionary period the issue of arms and the bearing of arms developed along two distinct lines. One line of development related to the balance of military power between the people and their respective governments. The people feared that if the state or federal (pg.151) (pg.113) government became too powerful, that government would abridge the liberties of the people and impose its will by force. The other line of development related to the balance of military power between the governmental bodies of the union. The state governments feared that if they entrusted too much power in the hands of the central government, that government would destroy the political and military independence of the states. Both lines of development concerned the creation of a military balance within the political structure which would result in the maintenance of liberty of the constituent parts—whether personal liberty under a government or state liberty in a union; and both lines of development resulted in the creation of a "right to bear arms" in order to insure the liberty of those constituent parts.

The colonists, fearful of oppression by governmental power, and being aware of the events of 17th Century England, believed that liberty was guaranteed by giving the rulers as little power as possible and by balancing governmental power with popular power.²¹ The foremost factor in this balance of power was the existence of a standing army. Standing armies had been used by the English crown and by continental monarchs to impose their will on their subjects,²² and royal forces had been used by the English crown to intimidate and control the colonies.²³ In 1774 the Continental Congress declared that keeping a "standing army in these colonies, in time of peace, without the consent of the legislature of that colony, in which such army is kept, is against law."²⁴ In 1775 the draftsmen of the Declaration of the Causes and Necessity of Taking up Arms²⁵ gave the presence of royal troops a prominent role in that declaration, and several sections of the Declaration of

¹⁸ Council held in Boston, March 28, 1678.

¹⁹ Penn. Stat., ch. 245, § 4 (1721).

²⁰ Penn. Stat., ch. 246, § 3 (1721).

²¹ C.E. Merriam, *A History of American Political Theories* 83 (1926).

²² *See e.g.*, G.M. Trevelyan, *I-III History of England* (1953).

²³ S. Morison, *The Oxford History of the American People* ch. XII, XIII, and XIV (1965).

²⁴ R. Perry and J. Cooper, *Sources of our Liberties* 288 (1959) (hereinafter cited as *Sources*).

²⁵ *Id.* at 295.

Independence were given to the issue.²⁶ Colonial mistrust of standing armies extended even to colonial troops. In 1776 Sam Adams wrote:

[A] standing army, however necessary it be at some times, is always dangerous to the liberties of the people. Soldiers are apt to consider themselves as a body distinct from the rest of the citizens. They have their arms always in their hands. Their rules and their discipline is severe. They soon become attached to their officers and disposed to (pg.152) (pg.114) yield implicit obedience to their commands. Such a power should be watched with a jealous eye.²⁷

III CONSTITUTIONAL PROVISIONS

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

That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a Free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.²⁸

Several others were similar to that of Maryland:

- XXV. That a well-regulated militia is the proper and natural defense of a free government.
- XXVI. That standing armies are dangerous to liberty, and ought not to be raised or kept up, without the consent of the Legislature.
- XXVII. That in all cases, and at all times, the military ought to be under strict subordination to and control of the civil power.
- XXVIII. That no soldier ought to be quartered in any house, in time of peace, without the consent of the owner; and in time of war, in such manner only, as the Legislature directs.
- XXIX. That no person, except regular soldiers, mariners, and Marines in the service of this State, or militia when in actual service, ought in any case to be subject to or punishable by martial law.²⁹

Some specifically mentioned a "right to bear arms," such as Pennsylvania's:

That the people have a right to bear arms for the defense of themselves and the State; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept

²⁶ *Id.* at 319.

²⁷ Letter to James Warren, quoted in M. Jensen, *The New Nation—A History of the United States During the Confederation 1781-1789*. 29 (1962).

²⁸ Sources at 312.

²⁹ *Id.* at 348.

up. And that the military should be kept under strict subordination to, and governed by, the civil power.³⁰

North Carolina included a "right to bear arms" for the "defense of (pg.153) (pg.115) the State,"³¹ and Massachusetts included such a right for "the common defense."³² Widespread copying by the draftsmen of state constitutions created, in part, the similarity between provisions.³³ These provisions were to be the basis of the militia provisions in the federal Constitution and Bill of Rights.

When the draftsmen of the majority of the state bills of rights wrote of replacing the standing army with a popular militia, they believed it would remove a source of arbitrary military power from the hands of the state governments and replace it with a military less likely to oppress the people.³⁴ They attempted to structure the political and military balance in the new states by making the governments less powerful and the citizens more powerful. The "right to bear arms" was a more extreme and revolutionary manifestation of this restructuring. By having a right to "bear arms," *i.e.*, to serve in the armed forces of the state, the people would have far greater military power than if the militia were merely the preferred defense, for the state governments would be unable to maintain a narrowly based standing army against the interests of the people. Rather the people would rely on their "right" to bear arms and demand that the defense force be broadly based.

The "right to *have* arms" was an adjunct to the right of revolution. The right of revolution is the natural right of a people to overthrow their government when that government no longer serves the purpose for which it was formed. By the middle of the 18th century, Blackstone had recognized that the primary rights of Englishmen—"personal security, personal liberty, and private property"—could not be maintained solely by law, for "in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment."³⁵ There were auxiliary rights in order to enable the subject to preserve the primary rights, and,

The fifth and last auxiliary right of the subject ... is that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law. Which ... is indeed a public allowance, under (pg.154) (pg.116) due restrictions, of the natural right of resistance and self-preservation when the sanctions of society and laws are found insufficient to restrain the violence of oppression.³⁶

The provisions in the state constitutions granting a "right to bear arms" were not intended to permit a public allowance of the right of revolution. In the first place, the phrase "to *bear* arms" only

³⁰ *Id.* at 330.

³¹ *Id.* at 356.

³² *Id.* at 376.

³³ R. Rutland, *The Birth of the Bill of Rights 1776-1791 passim* (1962).

³⁴ See the material on the discussion of the United States Constitution below.

³⁵ *Supra* n.3 at 140.

³⁶ *Supra* n.3 at 143-144.

meant serving in an organized armed force.³⁷ In the second place, the right of revolution, or at least a statement of the principle of that right, was specifically contained in other sections of most state constitutions.³⁸ In the third place, the guaranty of the "right to bear arms" or similar statements of preference for the militia was contained in that section of the constitutions directly concerned with controlling the military power of the state and not in the section recognizing the right of revolution.

When the Constitutional Convention met on May 14, 1787, it was faced with some issues quite dissimilar to those which had troubled the states. In the years during and immediately following the Revolution, the doctrine of the natural right of revolution was an accepted part of colonial political theory.³⁹ After the Revolution, however, the need for stable and orderly government grew, and the philosophy of rebellion withered.⁴⁰ The fundamental problem facing the convention was not to support and nourish a revolutionary situation, but to create a viable federal government out of the jealous and independent states. One of the major aspects of this problem was the creation of a national army. The delegates to the convention feared that if the new federal government could obtain sufficient military power, it could then impose its will on the states and on the people.

The delegates, however, did not consider the new federal standing army to be a danger to the states or the people since Congress would have strict control over the appropriations for troops, and most delegates assumed that the standing army would be small.⁴¹ The Articles of Confederation had left complete control of land forces in the hands (pg.155) (pg.117) of the states which raised them,⁴² and by 1788 the Army of the Confederation consisted of only 679 officers and men.⁴³ The question of the balance of military power between the states and the federal government was raised rather on the issue of federal control over the state militia.

On August 18, 1787, a motion was made in the convention to give Congress the power "to make laws for the regulation and discipline of the Militia of the several States reserving to the States the appointments of Officers."⁴⁴ Here the military power of the states was at stake. John Dickinson exclaimed that "we are come now to a most important matter, that of the sword The states never would or ought to give up all authority over the Militia."⁴⁵ Oliver Ellsworth believed that "the whole authority over the Militia ought by no means to be taken away from the States whose consequence would pine away to nothing after such a sacrifice of power."⁴⁶ Supporters of the motion recalled how

³⁷ See text at n.1, n.2, and n.3.

³⁸ E. Douglas, *Rebels and Democrats passim* (1965).

³⁹ C. Becker, *The Declaration of Independence* 7-8 (1942).

⁴⁰ M. Jensen, *The New Nation—A History of the United States During the Confederation 1781-1789* (1962).

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

⁴² H. Commager, I *Documents of American History* 112-13 (7th ed. 1963).

⁴³ *Supra* n.41 at 365.

⁴⁴ *Id.* at 330.

⁴⁵ *Id.* at 331.

⁴⁶ *Id.*

ineffectual the militia was during the Revolution. They stressed the need for an effective and centralized military.⁴⁷

When the debate continued on August 23rd, Edmund Randolph felt that the militia could be trusted to look after the liberties of the people. He asked, "What dangers there could be that the Militia could be brought into the field and made to commit suicide on themselves. This is a power that cannot from its nature be abused, unless indeed the whole mass should be corrupted."⁴⁸ Elbridge Gerry stated, when a motion was made to allow the federal government to appoint the general officers, that "as the States are not to be abolished, he wondered at the attempts that were made to give powers inconsistent with their existence."⁴⁹ James Madison replied: "As the greatest danger is that of disunion of the States it is necessary to guard against it by sufficient powers to the Common Government and as the greatest danger to the (pg.156) (pg.118) liberty is from large standing armies, it is best to prevent them by an effectual provision for a good Militia."⁵⁰

A compromise was reached whereby the federal government would maintain a standing army plus have the authority to regulate and call out the militia, and the states would have authority over the militia except when it was called into federal service. The results of the compromise appear in article I, section 8 of the United States Constitution declaring that Congress shall have power:

To make Rules for the Government and Regulation of the land and naval Forces;

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

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Parts of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

Thus, a tentative military balance was achieved between the federal government and the states.

Before the Constitution was ratified, however, its provisions were debated before the state legislatures and in the press. The militia provisions were again argued in terms of the balance of military power between the states and the federal government. Charles Pinckney argued for a federalized militia to give the federal government the power to impose its will on the states:

The exclusive right of establishing regulations for the Government of the Militia of the United States ought certainly to be vested in the Federal Councils. As standing Armies are contrary to the Constitutions of most of the States, and the nature of our Government, the only immediate aid and support that we can look up to, in case of necessity, is the Militia

⁴⁷ *Id.*

⁴⁸ *Id.* at 387. For a discussion of the relation of the militia to popular uprisings in colonial America, see P. Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 28 Wm. & Mary Q. (3rd Ser. 1970).

⁴⁹ *Supra* n.41 at 388.

⁵⁰ *Id.*

... Independent of our being obliged to rely on the Militia as a security against Foreign Invasions or Democratic Convulsions, they are in fact the only adequate force the Union possesses, if any should be requisite to coerce a refractory or negligent Member, and to carry the Ordinances and Decrees of Congress into execution. This, as well as the cases I have alluded to, will sometimes make it proper to order the Militia of one State into another. At present the United States possesses no power of directing the Militia, and must depend upon the States to carry their Recommendations upon this subject (pg.157) (pg.119) into execution ... To place therefore a necessary and Constitutional power of defense and coercion in the hands of the Federal authority, and to render our Militia uniform and national, I am decidedly in opinion they should have exclusive right of establishing regulations for their Government and Discipline, which the States should be bound to comply with, as well as with their Regulations for any number of Militia, whose march into another State, the Public safety or benefit should require.⁵¹

Luther Martin, speaking before the Maryland legislature, argued against the federalized militia as it would give the federal government so great a power that it could destroy the integrity of the states:

[Through] this extraordinary provision, by which the Militia, the only defense and protection which the State can have for the security of their rights against arbitrary encroachments of the general government, is taken entirely out of the power of their respective States, and placed under the power of Congress It was argued at the Constitutional convention that, if after having retained to the general government the great powers already granted, and among those, that of raising and keeping up regular troops, without limitations, the power over the Militia should be taken away from the States, and also given to the general government, it ought to be considered as the last *coup de grace* to the State governments; that it must be the most convincing proof, the advocates of this system design the destruction of the State governments, and that no professions to the contrary ought to be trusted: and that every State in the Union ought to reject such a system with indignation, since, if the general government should attempt to oppress and enslave them, they could not have any possible means of self-defense....⁵²

Superimposed upon this debate over the balance of power between the states and the federal government was the issue of the balance of power between the people themselves and the new government. To assuage fears that the new federal government would infringe upon the rights of the people, the authors of *The Federalist* raised the factors of militia, arms, and the right of revolution in describing how the new government could be controlled. Federalist Number 28 mentioned the right of revolution:

If the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self-defense which is paramount to all positive forms of government.⁵³

⁵¹ *Id.* III at 118-19.

⁵² *Id.* at 208-09.

⁵³ The Federalist, No. 28 (Hamilton).

And the military power of the states:

When will the time arrive that the federal government can raise and maintain an army capable of erecting a despotism over the great body (pg.158) (pg.120) of the people of an immense empire, who are in a situation, through the medium of their States governments, to take measure for their own defense, with all the celerity, regularity and system of independent nations?⁵⁴

The 46th Federalist by Madison discussed the armed population and its relationship to the militia and the central government:

Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments to which the people are attached, and by which the Militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms.⁵⁵

Though the Constitution was ratified, the issue of the federal militia was not resolved until adoption of the second amendment. Several of the states had suggested during their ratifying conventions that a bill of rights be added to the United States Constitution.⁵⁶ When such a bill of rights was debated in the First Congress, the militia amendment was first reported out of committee of the House of Representatives reading:

A well-regulated Militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.⁵⁷

Several of the representatives objected to the provision excusing those people "religiously scrupulous" from bearing arms. Elbridge Gerry stated that as the purpose of the militia "is to prevent the establishment of a standing army" it was "evident, that under this provision, together with their own powers, Congress could take such measures with respect to a Militia, as to make a standing army necessary." This could be accomplished by Congress using "a discretionary power to exclude those from the Militia who have religious scruples."⁵⁸ In such event, so many citizens would attempt to avoid Militia duty on religious grounds that a standing army would be necessary for national defense.

In any event the religious exemption from the militia was dropped and the amendment in its final form read:(pg.159) (pg.121)

⁵⁴ *Id.*

⁵⁵ The Federalist, No. 46 (Madison).

⁵⁶ For a study of the forces at work to create a bill of rights, *supra* n.33.

⁵⁷ 1 Annals of Congress 778.

⁵⁸ *Id.* at 778-79.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.⁵⁹

From the debates it seems clear that the intent of Congress in passing the second amendment was to prevent the federal government from destroying the state militia. Pinckney would keep a defense force uniform and at the disposal of the federal government. Martin was assured that the federal government would not emasculate the states and leave them at the mercy of federal troops. The "right to bear arms" was a corporate right used to insure that a desired balance between liberty and authority within the union would be maintained.

Attempts were made to include a personal right to have arms in the Bill of Rights. Sam Adams introduced a bill in the Massachusetts legislature that the state support an amendment holding that the "Constitution be never construed to authorize Congress to ... prevent the people of the United States, who are peaceable citizens from keeping their own arms."⁶⁰ New Hampshire supported a provision that "Congress shall never disarm any citizen unless such as are or have been in Actual Rebellion."⁶¹ Though these provisions were never adopted, they indicate that there has never been any absolute "American" philosophy on the right to bear arms. This confusion arises from America's situation of being a frontier nation created out of revolution and espousing a belief in revolution but which also desires and needs to create an orderly social and political structure.

The result has been the use of the concept of the right to bear arms to support several different, and often contradictory, theories of the relation of armed citizens to the government. The judicial opinions of the courts of the various jurisdictions in the United States best exemplify this situation.

IV. RELEVANT COURT DECISIONS

A. State Courts

The first pronouncement on the right to bear arms was by a Kentucky court in *Bliss v. Commonwealth*.⁶² The court held that "the right of (pg.160) (pg.122) the citizens to bear arms in defense of themselves and the State must be preserved entire," and all legislative acts "which diminish or impair it as it existed when the Constitution was framed are void."⁶³ Thus an act pronouncing the wearing of concealed arms was declared void. This point of view which considers the right to bear arms as absolute, unbridgeable, and personal is rare. Most cases follow the reasoning of a Texas court which asked "How far personal liberty may be restrained for the prevention of crime."⁶⁴

⁵⁹ U.S. Const. Amend. II.

⁶⁰ Pierce & Hale, Debates of the Massachusetts Convention of 1788 86-87, quoted in Feller and Gotting, *The Second Amendment: A Second Look*, 61 Nw. U. L. Rev. 47 (1966).

⁶¹ Feller and Gotting, *The Second Amendment: A Second Look*, 61 Nw. U. L. Rev. 59 (1966).

⁶² 2 Ky. 90 (1822).

⁶³ *Id.* at 91.

⁶⁴ English v. State, 35 Tex. 437, 477 (1872).

A few states adopted the thinking of the early Tennessee case of *Aymette v. State*⁶⁵ which held that the right to bear arms was a right of the people to enable them to rise up and defend their rights against an oppressive government. This concept was similar to Blackstone's presentation of the right to bear arms as a public allowance of the right of revolution. Courts holding this theory consider that, as the right is by public allowance, the state can regulate the use of arms to insure the public peace and welfare. This position was well presented by the Arkansas court in *Haile v. State*:⁶⁶

The constitutional provision sprung from the former tyrannical practice, on the part of governments, of disarming the subjects, so as to render them powerless against oppression. It is not intended to afford citizens the means of prosecuting, more successfully, their private broils in a free government. It would be a perversion of its object, to make it a protection to the citizen, in going, with convenience to himself, and after his own fashion, prepared all time to inflict death upon his fellow citizens, upon the occasion of any real or imaginary wrongs.⁶⁷

While most courts have not attempted to counter the assertion of the right of revolution, an earlier Arkansas court had stated in *State v. Buzzard*⁶⁸ that such a right was unnecessary under a free, republican government which could be changed at the will of the people.

The *Aymette* line of cases is perhaps truest to the intention of the draftsmen of the state bills of rights. The right to bear arms was a means of preserving the liberty of the people by balancing the military power in the hands of the state by military power in the hands of the (pg.161) (pg.123) people. The desire to maintain such a balance has had a long history dating from feudal times, through the English revolution to the present day. Such thinking, however, is rare in judicial opinions. Similarly rare is the unitary concept of society and government expressed by the Kansas court in *City of Salina v. Blakesly*.⁶⁹

The provision ...that 'the people have the right to bear arms for their defense and security' refers to the people as a collective body. It was the safety and security of society that was being considered when this provision was put into our Constitution The provision in question applies only to the right to bear arms as a member of the State Militia, or some other military organization provided for by the law.⁷⁰

Such thinking indicates belief that there is no need to provide for a military balance within the political and social structure when that structure is responsive to the people.

Most state courts have never spoken of the right to bear arms in the sophisticated terms of political balance, but rather treated the right as synonymous with the right of self-defense. In 1950 an Illinois court warned in the construction of an arms control statute "that it is aimed at persons of

⁶⁵ 2 Tenn. 154 (1840).

⁶⁶ 38 Ark. 564 (1882).

⁶⁷ *Id.* at 566.

⁶⁸ 4 Ark. 18, 24 (1843).

⁶⁹ 70 Kan. 230, 83 P. 619 (1905).

⁷⁰ *Id.* at 231-32, 83 P. at 620.

criminal instincts, and for the prevention of crime, and not against use in the protection of person or property."⁷¹ In *Andrews v. State*,⁷² a dissenting judge found that "the right exists only for the purpose of defense: and this is a right which no constitutional or legislative enactment can destroy." The dissent in the Oklahoma case of *Pierce v. State*⁷³ proclaimed—"From time immemorial, the home, be it ever so humble, has been sacred—the castle of the occupant—with the right to repel [sic] invasion or any trespass."

Answers to such claims vary from the flat declaration in *Buzzard* that individuals have surrendered the right of self-defense to the society as a whole, to the more moderate holding in *Andrews* that "every good citizen is bound to yield his preference as the means to be used, to the demands of the public good."⁷⁴ A Michigan court put forth a novel answer saying that the state's power is "subject to the limitation that its exercise be reasonable [and does not result] in the prohibition of (pg.162) (pg.124) those arms which, by the common opinion and usage of law-abiding people, are [to be kept for] protection of person and property."⁷⁵

These debates over the issue of the right of self-defense, though of primary interest today, have little relation to the intent of the draftsmen of the Bill of Rights. The right of self-defense has had a long history; but its history was parallel to, not connected with, the right to bear arms. The use of the right of self-defense to support a right to bear arms is of modern usage. Nevertheless, its modernity does not affect its relevance. The concept is the supreme law in several states of the union, and is a concept to be considered by any legislature hoping to pass restrictive arms legislation.

The confusion in the state courts over the right to bear arms is partly due to the judicial process itself. A court generally does not base its decision on political theory but considers the facts of the particular case before it. If a court feels a particular restrictive arms statute to be necessary and fair, and if the facts of the case before it are favorable, then the court will uphold the statute using whatever language and doctrine is required to so hold. If the statute appears unfair, if the times are unfavorable, or if the factual situation is difficult, then the court will use the language and doctrine necessary to overturn the statute. For example, a Florida court stated in 1912 that the right to bear arms "was intended to give the people the means of protecting themselves against oppression and public outrage, and was not designed as a shield for the individual man."⁷⁶ Fifty years later the court declared that "doubtless the guarantee was intended to secure to the people the right to carry weapons for their protection."⁷⁷ Similar situations have occurred in several states.⁷⁸ The development of federal doctrine, however, has followed a more constant and evolutionary course.

⁷¹ *People v. Liss*, 406 Ill. 419, 424, 94 N.E. 2d 320, 323 (1950).

⁷² 50 Tenn. 165 (1871).

⁷³ 275 P. 393, 397 (Okla. Crim. Ct. App. 1929).

⁷⁴ 50 Tenn. 165, 193 (1871).

⁷⁵ *People v. Brown*, 253 Mich. 537, 541, 235 N.W. 245, 246 (1931).

⁷⁶ *Carlton v. State*, 63 Fla. 1, 9, 50 So. 486, 488 (1912).

⁷⁷ *Davis v. State*, 146 So. 2d 892, 893 (Fla. 1962).

⁷⁸ *Cf. State v. Buzzard*, 4 Ark. 18 (1843); *Wilson v. State*, 33 Ark. 557 (1878); *Haile v. State*, 38 Ark. 564 (1882); *City of Akron v. Williams*, 172 N.E. 2d 28 (Mun. Ct. Akron, Ohio 1960); *City of Akron v. Williams*, 177 N.E. 2d 802 (Ct. App. Ohio 1960), *aff'd without opinion*, 172 Ohio St. 287, 175 N.E. 2d 174 (1961).

B. Federal Courts

Cases concerning the second amendment arose in the federal courts only after the Civil War. The first of such cases, *U.S. v. Cruickshank*,⁷⁹ (pg.163) (pg.125) implied that there was a *personal* right to bear arms upon which Congress could not infringe. The central point of the opinion, however, was to state that the second amendment did not apply to state governments, and such governments could pass whatever legislation they desired without fear of federal sanction.

Cruickshank was not directly concerned with the right to bear arms or the militia, but with civil rights legislation. The first federal case to be directly concerned with arms was *Presser v. Illinois*.⁸⁰ Presser was convicted for leading a military parade in violation of an Illinois statute which forbade such parades by any group but the state militia. Presser claimed that the Illinois statute was in violation of the second amendment. The court relied on *Cruickshank* in stating that the "amendment is a limitation only upon the power of Congress and the National Government, and not upon that of the States,"⁸¹ but added a restriction upon the State's power:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve Militia of the United States as well as of the States; and, in view of this prerogative of the General Government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government.⁸²

This principle harkens back to the citizen army of Saxon times and had little relevance in 1886. It was understandable, however, that only twenty years after the Civil War, the Supreme Court would be concerned with state attempts to weaken the central government by withholding arms and troops from national service. Nevertheless, the restriction is a complete reversal from the aims of the draftsmen of the Constitution and Bill of Rights which was to restrict the military power of the central government and give the state more leverage.

On one subject *Presser* was quite clear—there was no right to band together in paramilitary organizations:

Military organization and military drill and parade under arms are subjects especially under the control of the government of every (pg.164) (pg.126) country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the State and Federal Governments, acting in due regard to their respective prerogatives and powers.⁸³

⁷⁹ 92 U.S. 542 (1874).

⁸⁰ 116 U.S. 252 (1886).

⁸¹ *Id.* at 264.

⁸² *Id.* at 265.

⁸³ *Id.* at 266-67.

Thus, whatever right to bear arms was recognized, that right was limited to arms and organizations that did not threaten the security of the government. The court did not approve of an armed population as a balance to governmental power.

For many years after *Presser* the issue of the second amendment appeared in federal courts only in reaffirming the *Cruikshank* holding that the second amendment did not apply to the states.⁸⁴ In the 1930's Congress passed two laws, the Federal Firearms Act⁸⁵ and the National Firearms Act,⁸⁶ to control commerce in certain types of dangerous weapons. Both acts were attacked in court for being in violation of the second amendment. In upholding the National Firearms Act, the district court held in *United States v. Adams*⁸⁷ that the second amendment "refers to the Militia, a protective force of government; to the collective body and not individual rights." This language was quoted verbatim by another district court in *United States v. Tot*⁸⁸ in upholding the Federal Firearms Act. Neither court went into the problem of the extent to which the collective right could be regulated, but both made clear that no personal right to own arms existed under the federal Constitution.

The issue of regulating the collective right arose in *United States v. Miller*⁸⁹ in which the Supreme Court held that as long as the weapon regulated did not have a direct relationship to the arms used in maintaining a well-regulated militia, they could be controlled:

In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated Militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.⁹⁰

The difficulty with such an interpretation is that were a weapon to have (pg.165) (pg.127) such a "reasonable relationship" it would be a protected weapon under the second amendment. The circuit court in *Cases v. United States*⁹¹ recognized this problem saying: "But to hold that the Second Amendment limits the federal government to regulations concerning only weapons which can be classed as antiques or curiosities,—almost any other might bear some reasonable relationship to the preservation or efficiency of a well-regulated militia unit of the present day,—is in effect to hold that the limitation of the second amendment is absolute."⁹² The court also recognized that such an interpretation would prohibit the federal government from prohibiting private ownership of heavy weapons "even though under the circumstances of such possession or use it would be inconceivable

⁸⁴ *Miller v. Texas*, 153 U.S. 535 (1894).

⁸⁵ 15 U.S.C.A. 901-909.

⁸⁶ 26 U.S.C.A. 5801-5862.

⁸⁷ 11 F. Supp. 216, 219 (S.D. Fla. 1935).

⁸⁸ 28 F. Supp. 900, 903 (D. Conn. 1939); rev'd on other grounds, 319 U.S. 403 (1943).

⁸⁹ 307 U.S. 174 (1939).

⁹⁰ *Id.* at 178.

⁹¹ 131 F. 2d 916, (1st Cir. 1942); *cert. den. sub. nom.* *Cases Velasquez v. United States*, 319 U.S. 770 (1943); rehearing denied, 324 U.S. 889 (1945).

⁹² *Id.* at 922.

that a private person could have any legitimate reason for having such a weapon."⁹³ The court then decided it would be impossible to formulate any general test to determine the limits of the second amendment and each case would have to be decided on its individual merits.

The federal courts have interpreted the right to bear arms contained in the second amendment very narrowly. The right exists only to the extent that the arms are required for a well-regulated militia. Since *Presser*, however, the second amendment has been interpreted as a source of federal power and not as a protection of state power. The need for the old military balance between state and national governments had disappeared, and the federal courts no longer recognized its existence.

Similarly, the federal courts no longer recognized the need for a military balance between the population and its government. Rather, the courts have held that the interests of order and stability must be balanced against the need for revolution, and such interests may outweigh any need for the right of revolution. Thus, there could also be restrictions on other, subsidiary natural rights such as the right to bear arms. As Justice Vinson said in *Dennis v. United States*⁹⁴ in upholding the Smith Act:

That it is within the *power* of the Congress to protect the government (pg.166) (pg.128) of the United States from armed rebellion is a proposition which requires little discussion. Whatever theoretical merit there may be to the argument that there is a "right" to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change. We reject any principle of governmental helplessness in the face of preparations for revolution, which principle, carried to its logical conclusion, must lead to anarchy.⁹⁵

Even though the right of revolution has never been recognized by the courts of the United States, armed rebellion has been—and still is—an important part of the American political tradition. From the early Republic to the present day dissident elements who have not been able to achieve their goals within the political structure have resorted to arms as a final resort.⁹⁶ In many instances, such elements have been punished as rebellious or treasonable, but in others the use or threat of violence has forced the political structure to compromise with the dissidents. Though not protected by the Constitution, this use of arms is the most important and relevant use of arms today.

V. CONCLUSION

Regardless of the long history of violence and assassination in the United States, the right to bear arms has remained closely and jealously guarded. This right appears to provide the individual with the means of protecting himself against other individuals and of protecting himself against his government. The maintenance of a military balance within the political structure was the genesis of this right, and the desire to continue such a balance will promote its continuation. The right to bear arms supports man in his fear of being defenseless in the face of personal danger or oppression.

⁹³ *Id.*

⁹⁴ 341 U.S. 494 (1951).

⁹⁵ *Id.* at 501.

⁹⁶ See R. Ginger, *Age of Excess* (1965), and references cited therein.

The possibility, however, of maintaining a military balance within a political structure has become smaller as society has become more complex and warfare more destructive. In the words of Roscoe Pound:

In the urban industrial society of today a general right to bear efficient arms so as to be enabled to resist oppression by the government would mean that gangs could exercise an extra-legal rule which could defeat the whole Bill of Rights.⁹⁷

Thus, after over three centuries, the right to bear arms is becoming anachronistic. As the policing of society becomes more efficient, the (pg.167) (pg.129) need for arms for personal self-defense becomes more irrelevant; and as the society itself becomes more complex, the military power in the hands of the government more powerful, and the government itself more responsive, the right to bear arms becomes more futile, meaningless and dangerous.

⁹⁷ R. Pound, *The Development of Constitutional Guarantees of Liberty* 91 (1957).