THE RIGHT TO KEEP AND BEAR ARMS

I. INTRODUCTION

In recent years, there has appeared mounting sentiment for governmental regulation of the purchase, sale, possession, ownership and use of firearms. This rising clamor has been precipitated and fueled again and again by assassinations and attempted assassinations of national and local leaders, by seemingly uncontrollable increases in the rate of crime, particularly crimes of violence, and by attacks by terrorists and other extremist groups. A frequent comment made in the national debate by opponents of gun control legislation is that governmental regulation of the types envisioned would infringe upon the individual's "right to keep and bear arms," which is said to be protected by the second amendment to the Federal Constitution. The second amendment 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."

The number of judicial decisions interpreting the right to bear arms has been relatively small. However, those few decisions which have been rendered, as well as the interpretations suggested by the commentators, have unanimously stressed the importance of the historical development of the second amendment and the purposes behind its enactment as keys to its meaning.[1] These historical considerations have led the courts and commentators to conclude that the sole purpose of the second amendment was to ensure the right of the states to maintain militias in a state of preparedness so as to provide protection against the possibility of an oppressive national government and to avoid the need for standing armies. They have determined that the amendment was not meant to protect an individual right to own and possess firearms except as such ownership and possession relates to the preservation of the state militias.[2] Finally, it is now clear that the second amendment operates solely as a restriction on the federal government and that state firearm regulations are therefore restricted only by similar state constitutional provisions.[3] This Note will evaluate the conclusions which have been reached pertaining to the scope and meaning of the second amendment, as well as examine various state constitutional provisions which affect the right to keep and bear arms.

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1. *See, e.g.*, United States v. Miller, 307 U.S. 174 (1939); Feller & Gotting, *The Second Amendment: A Second Look*, 61 NW. U.L. REV. 46 (1966) [hereinafter cited as Feller & Gotting].

2. *See, e.g.*, United States v. Tot, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943); Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U.L. REV. 53, 60 (1966) [hereinafter cited as Rohner].

3. United States v. Cruikshank, 92 U.S. 542 (1876).

II. ENGLISH BACKGROUND

It is well established that many of the American political traditions and institutions trace their origins back into English history. One particular segment of English history, the experience of the English people with standing armies and militias which led to the promulgation of the English Bill of Rights of 1689, is generally considered to be the conscious and direct antecedent of the second amendment.[4]

The history of that part of the seventeenth century which preceded the enactment of the English Bill of Rights was one of an unending struggle between the crown and its subjects, which finally culminated in civil war in 1642.[5] This period was marked by the assertion of boundless royal powers by the king and the use of large standing armies in enforcing the dictates of the crown.[6] When the monarchy was abolished at the end of the civil war, its arbitrary rule was merely replaced by a military dictatorship, created and maintained largely by force of arms and the support of a disciplined standing army.[7]

This military rule intensified the English people's hatred and distrust of standing armies.[8] Therefore, when the monarchy was finally restored under Charles II, the militia system was revived and again relied upon for the country's defense.[9] A militia comprised of the able-bodied members of the community had long been viewed as preferable to professional standing armies in protecting the security and freedom of the state and its inhabitants.[10] From early times, the English landed proprietors had been required to equip and maintain their tenants and retainers as men-at-arms for military service when needed by the government.[11] This had constituted the militia, which had long been the sole military force of the kingdom.

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4. A. SUTHERLAND, CONSTITUTIONALISM IN AMERICA 97-98 (1st ed. 1965); R. POUND, THE DEVELOPMENT OF THE CONSTITUTIONAL GUARANTEES OF LIBERTY 83-84 (1957); SOURCES OF OUR LIBERTIES 303 (Perry & Cooper ed. 1959) [hereinafter cited as SOURCES]; Feller & Gotting, *supra* note 1, at 47. As an indication of American thought at the time of the enactment of the state and federal constitutional provisions, it is interesting to note that during the Virginia convention called for ratifying the federal constitution in 1788, Patrick Henry referred to the English experience as a reason for including a bill of rights in the federal constitution. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 316-17 (2d ed. J. Elliot ed. 1836) [hereinafter cited as ELLIOT'S DEBATES].

5. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HAST. CONST. L.Q. 961, 966 (1975) [hereinafter cited as Weatherup].

6. *Id.* at 966-68; *see* D. WILLSON, A HISTORY OF ENGLAND 385-95 (1967) [hereinafter cited as D. WILLSON].

7. Weatherup, *supra* note 5, at 969. For example, one historian describes how Cromwell forcibly dissolved Parliament by sending his musketeers to the House of Commons, compelling its members to file out of the chamber and locking the door behind them. D. WILLSON, *supra* note 6, at 415.

8. D. WILLSON, *supra* note 6, at 418; Weatherup, *supra* note 5, at 969.

9. Weatherup, *supra* note 5, at 970.

10. Note, *Constitutional Limitations on Firearms Regulation*, 1969 DUKE L.J. 773, 794.

11. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 474 (1915) [hereinafter cited as Emery].

During Charles II's reign, politics was dominated by religious controversy, and especially by the prospect that the King's Catholic brother, the Duke of York, would succeed to the throne.[12] In reaction to the fear of Catholic domination of the government, the Protestant Parliament passed two Test Acts which barred Catholics from all civil and military offices and from both houses of Parliament.[13]

In 1685, Charles II died and the Catholic Duke of York ascended to the throne as James II. He was determined to force Catholicism on England and was willing to use any means to do so, including openly violating the law.[14] Toward this end, James II increased the size of the standing army to 30,000 and asked Parliament to completely abandon the militia in favor of standing armies, asserting that the militia system was too inefficient to rely upon for protection from domestic and foreign enemies. This Parliament refused to do.[15] In addition, James II replaced Protestant army officers and soldiers with Catholics, in clear contravention of the Test Act;[16] replaced Protestants with Catholics throughout the government, particularly at important military posts; quartered the troops in private homes, in clear violation of existing laws; and stationed 13,000 men just outside London in case it became necessary to hold the city in subjugation.[17] These actions greatly alarmed all Protestants and frightened even those persons normally sympathetic to the prerogatives of the Crown who, nevertheless, loathed rule by the military and strongly believed in the need for the Test Act.[18] When James II's wife gave birth to a son, thereby creating the possibility of a long line of Catholic rulers, revolution resulted. Protestant William of Orange and his wife Mary, daughter of James II, were offered the Crown, and James II was forced to flee the country.[19]

After William and Mary arrived in England, Parliament drafted a declaration, called the Declaration of Rights, which was meant to represent its understanding of the proper relationship between Parliament, the Crown, and the people. Parliament required William and Mary to accept the provisions of the declaration before it would recognize them as England's rightful rulers.[20] Parliament then enacted the Declaration in the form of a statute, known as the English Bill of Rights of 1689,[21] which consisted of two parts: (1) an enumeration of particular abuses said to have been engaged in by James II; and (2) a declaration of certain "ancient rights and liberties."[22]

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12. Weatherup, *supra* note 5, at 970.
13. Test Act, 1673, 25 Car. 2, c. 2; Parliamentary Test Act, 1678, 30 Car. 2, Stat. 2; Weatherup, *supra* note 5, at 970-71.
14. D. WILLSON, *supra* note 6, at 440.
15. Weatherup, *supra* note 5, at 971-72.
16. *Id.* at 971.
17. *Id.* at 971-72.
18. *Id.* at 972; D. WILLSON, *supra* note 6, at 441.
19. Weatherup, *supra* note 5, at 972-73.
20. Rohner, *supra* note 2, at 58.
21. Bill of Rights of 1689, I W. & M., sess. 2, c.2.
22. Weatherup, *supra* note 5, at 973.

The abuses referred to in the first part of the statute relevant to the present discussion are the assertions that James II

> did endeavor to subvert and extirpate the protestant religion and the laws and the liberties of this kingdom
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> . . .
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> 5. By raising and keeping a standing army within this kingdom in time of peace, without consent of parliament, and quartering soldiers contrary to law.
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> 6. By causing several good subjects, being protestants, to be disarmed at the same time when papists were both armed and employed contrary to law.[23]

As one commentator has pointed out, these grievances were not intended to assert that James II disarmed Protestants in any literal sense, but instead referred to his practice of replacing Protestants with Catholics at important military posts, thereby excluding Protestant participation and influence in the affairs of the standing army. This section of the statute also referred to James II's desire to abandon the militia in favor of a standing army, thereby precluding Protestant participation in the one type of organized armed force which could have been called upon to resist impositions by the Catholic James II and his Catholic standing army.[24] The corresponding declaration of rights proclaimed:

> 6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.
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> 7. That the subjects which are protestants, may have arms for their defense suitable to their conditions, and as allowed by law.[25]

When the enumeration of abuses and the declaration of rights are read to gether, in the seventeenth century context of religious strife, arbitrary royal rule, fear of standing armies, and trust in the militia, the conclusion reached by various courts[26] and commentators[27] has been that the English Bill of Rights was not intended to create or reaffirm any personal right of individuals to possess and use weapons. Rather, the Declaration has been interpreted as a reiteration of the preference for militias over standing armies, as a prohibition against future attempts to abolish the militia, and as an assertion of the rights of Protestants to participate in the militia. The grievance addressed in the Bill of Rights was the maintenance by the king of a large standing army, quartered among the people, through which he could force his subjects, and especially the

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23. Bill of Rights of 1689, I W. & M., sess. 2, c. 2, *reprinted in* SOURCES, *supra* note 4, at 245.

24. Weatherup, *supra* note 5, at 973; *see* Rohner, *supra* note 2, at 59; *see* Feller & Gotting, *supra* note 1, a 48-49.

25. Bill of Rights of 1689, 1 W. & M., sess. 2, c. 2, *reprinted in* SOURCES, *supra* note 4, at 246.

26. *See, e.g.*, Burton v. Sills, 53 N.J. 86, 248 A.2d 521 (1968), *appeal dismissed*, 394 U.S. 812 (1969); Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840).

27. *See, e.g.*, Feller & Gotting, *supra* note 1, at 48-49; Haight, *The Right to Keep and Bear Arms*, 2 BILL OF RIGHTS REV. 31, 32-33 (1941) [hereinafter cited as Haight]; Weatherup, *supra* note 5, at 973-74.

Protestants, to submit to his arbitrary rule.[28] The English people's faith in citizen militias convinced them that the maintenance of an efficient militia was necessary so that the populace could force an oppressive government to respect their rights or, if need be, to rise up in resistance as a collective body to force the oppressors to surrender the government.[29] It was in this sense—through the existence of a militia—that the Protestants could "have arms for their defense."

The abuses noted in the Bill of Rights and the remedy which was believed would preclude such future abuses became entrenched in Anglo-Saxon political thought.[30] The framers of the American Bill of Rights were very familiar with English history and deeply impressed by the leading political thought of the day.[31] When the American colonists were presented with a situation comparable to that with which the English had been presented, the conclusions reached about standing armies and militias in England molded American thought and influenced the framers' perceptions of the proper relationship between the government and the governed.

III. American Origins

A. *Colonial America*

When the Federal Constitution was written, the provisions included were the product of both the prevailing political thought of the day and the former colonists' experiences with the mother country. In particular, these experiences influenced the framing of the second amendment and so must be examined in ascertaining its intended meaning.

The most important of these experiences related to England's employment of professional standing armies to carry out its dictates in America. The English immigrants to colonial America brought with them their fear of standing armies.[32] This fear was particularly characteristic of those colonists who had fled England as a result of the military rule pursued by Cromwell and James II.[33]

The Colonial distrust of standing armies was intensified by the conflicts between King George III and the colonists. It was the deeply-held belief of the

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28. Haight, *supra* note 27, at 33.
29. *Id.*
30. *See* Note, *The Right to Bear Arms*, 19 S.C.L. Rev. 402, 404 (1967) [hereinafter cited as S.C. Note].
31. R. Rutland, The Birth of the Bill of Rights 1776-1791, at 4 (1955) [hereinafter cited as R. Rutland]; Emery, *supra* note 11, at 475; Haight, *supra* note 27, at 33; *see* Rohner, *supra* note 2, at 56-57. For example, during the Virginia ratifying convention of 1788, Patrick Henry referred to the English experience as a reason for including a bill of rights in the federal constitution. Elliot's Debates, *supra* note 4, at 316-17.
32. *See* division II, *supra*.
33. *See* Weatherup, *supra* note 5, at 974. Weatherup points out that the New England colonies had been populated by Puritan refugees during the reign of the Stuart kings and that the southern colonies had been settled by royalists who had fled England when Cromwell came to power. *Id.*

colonists that the rights possessed by Englishmen were just as applicable in America as they were in England.[34] They were willing to acknowledge the King's authority, but they insisted that it be exercised in accordance with their colonial charters and with the same limitations that restricted the King's power in England.[35] However, George III and Parliament, at that time under the firm control of the King, did not recognize such restrictions. Both believed that the King's authority over his subjects in America was unfettered and free of any of the restraints which limited his power in England.[36]

In order to compel the colonies to accept his absolute authority, George III maintained a large army in America.[37] The colonists found the presence of these troops during times of peace very objectionable and were outraged by the use of these forces to enforce what they already considered to be arbitrary and oppressive laws.[38]

Most objectionable to the colonists as threats to individual liberty were the measures utilized to maintain military rule in the colonies.[39] One measure particularly complained of was the quartering of troops in private homes in peacetime without the consent of the owners.[40] Another aspect of military rule which was repulsive to the colonists was the eventual imposition of martial law and the trial of civilians by courts-martial.[41] These actions stregthened the colonists' belief that such oppressive measures were the usual consequence of the existence of a standing army.[42] Furthermore, the use of an armed force by George III as an instrumentality of his arbitrary rule deepened the conviction of American colonists that a standing army was excessively susceptible of being utilized for the usurpation of power by a strong central government.[43] As a

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34. R. RUTLAND, *supra* note 31, at 4.
35. Weatherup, *supra* note 5, at 975.
36. *See id.* at 975-77. For example, Parliament in 1766 enacted the Declaratory Act, 6 Geo. 3, c. 12 (1766), which chastised the colonial legislative bodies for enacting measures derogatory to the authority of Parliament and the Crown, declared that the American colonies were subordinate to the King and Parliament, and declared that the King and Parliament had "full Power and Authority to make Laws and Statutes of sufficient Force and Validity to bind the Colonies and People of America . . . in all Cases whatsoever." Weatherup, *supra* note 5, at 975-76.
37. Rohner, *supra* note 2, at 56.
38. Emery, *supra* note 11, at 475; Weatherup, *supra* note 5, at 977. Evidence of this outrage is found in the writings of the period. For example, Thomas Jefferson decried the use by the King of "large bodies of armed forces" as a means of enforcing his "arbitrary measures," T. Jefferson, *A Summary View of the Rights of British America* (August, 1774), *reprinted in* THE COMPLETE JEFFERSON 17 (S. Padover 1943), and James Wilson wrote that the use of military force was an element in George III's "Plan of reducing the colonies to slavery", J. Wilson, *An Address to the Inhabitants of the Colonies* (February 13, 1766), *quoted in* Feller & Gotting, *supra* note 1, at 50. Most revealing is that the list of grievances against George III contained in the Preamble to the Declaration of Independence included one which stated that "He has kept among us, in times of peace, Standing Armies without the consent of our Legislatures." Rohner, *supra* note 2, at 56 n.18.
39. *See* Feller & Gotting, *supra* note 1, at 49-50.
40. *Id.* at 50.
41. *Id.* at 51.
42. *See* Weatherup, *supra* note 5, at 977; *see* Feller & Gotting, *supra* note 1, at 49-51.
43. *See* Weatherup, *supra* note 5, at 977-78.

result of these perceptions, the colonists' belief that standing armies constituted a threat to the liberties of the people was greatly intensified.

The militia system was long perceived by Americans as the preferable means of defense in a free nation[44] because it eliminated the need for standing armies except in extraordinary circumstances.[45] The colonists always relied upon the militia system[46] and found it to be an adequate method of protection.[47] To ensure the existence of an adequate number of militiamen when the need arose, every male of military age and capacity was required by law to be enrolled for military service.[48] Furthermore, because colonial treasuries were sparse, every militiaman was also required by law to provide at his own expense specified weapons and related equipment.[49] Therefore, the colonists believed that individual ownership and possession of weapons was of the utmost importance in order to maintain the militia as a strong and viable means of defense.

Weapons were also important in colonial America and in the early days of the nation as vital tools for the frontiersman. In an era of self-sufficiency, weapons were needed for obtaining the food upon which a large part of the populace was forced to rely for survival.[50] Furthermore, firearms were important as a means of personal protection from wild animals, roving gangs of bandits, and Indians.[51] However, it has been asserted that these considerations did not influence the enactment of the second amendment by the Congress or its adoption by the various ratifying conventions.[52] This observation appears to be correct. The Constitution and the Bill of Rights were clearly addressed to the political structure of the new government and its relationship to individual rights. The use of firearms for hunting and self-defense, however, while certainly important to the colonists, was not a matter which related to the concerns addressed in the Constitution and the Bill of Rights and was not so important as to be of constitutional significance.

B. *State Ratifying Conventions*

After the federal Constitution was drafted at the Constitutional Convention in 1787, it was submitted to the states for ratification. The ratification

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44. Feller & Gotting, *supra* note 1, at 51-52.
45. *Id.* The strength of the colonists' belief in the militia is evidenced by their resistance to the attempted seizure of militia arms by British soldiers in April 1775 at Lexington. The result was the first important battle of the American Revolution. *Id.* at 52.
46. Emery, *supra* note 11, at 475.
47. Feller & Gotting, *supra* note 1, at 51.
48. Emery, *supra* note 11, at 475; United States v. Miller, 307 U.S. 174, 179-82 (1939).
49. Emery, *supra* note 11, at 474-75; Haight, *supra* note 27, at 33.
50. Rohner, *supra* note 2, at 57; Note, *Constitutional Limitations on Firearms Regulation*, 1969 DUKE L.J. 773, 796 [hereinafter cited as DUKE Note].
51. Rohner, *supra* note 2, at 57; DUKE Note, *supra* note 50, at 796.
52. Rohner, *supra* note 2, at 57.

process became a battle between the proponents of the Constitution—the "Federalists"—and its opponents—the "Anti-Federalists." The Anti-Federalists soon adopted as their main point of objection to the Constitution the absence of a bill of rights to serve as a restraint on governmental power.[53] This objection eventually resulted in the recommendation of amendments by the ratifying conventions of several key states.

Although the number of states required for ratification had done so,[54] Virginia has not yet assented, and it was believed that a permanent union of government without Virginia, the wealthiest and most populous of the states, was impossible.[55] The Virginia Anti-Federalists were therefore determined to prevent ratification or to exact recommendations for constitutional amendments which they thought were necessary to preserve and protect the liberties of the states and the people under the new system of government.[56] When it eventually became apparent to the Virginia Federalists that they did not have the votes necessary for ratification, they agreed to accept the recommendation of amendments as a concession to the opposition.[57] Upon approval of ratification by a vote of 89 to 79, a committee, headed by the most resolute of the Virginia Anti-Federalists, Patrick Henry and George Mason, was chosen to present proposed amendments.[58] This committee's product consisted of forty proposed amendments, the first twenty of which were in the nature of a bill of rights.[59]

The seventeenth article of the proposed bill of rights read as follows:

> Seventeenth, That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil power.[60]

It is submitted that this recommended amendment has a greater impact on Madison's ultimate proposal than any other provision which could then be found in an existing state bill of rights or in a ratifying convention's proposed constitutional amendments. The reasons for this conclusion are several. First, Madison was a native of Virginia and therefore in all probability felt a duty to

53. R. RUTLAND, *supra* note 31, at 124. Robert Allen Rutland presents an excellent account of the Anti-Federalists' use of this issue in their attempt to block ratification of the Constitution by the states and their eventual victory in several of the states in securing the recommendation of amendments in return for ratification. *Id.* at 126-89.
54. R. RUTLAND, *supra* note 31, at 162.
55. *Id.*
56. *See id.* at 159-66.
57. *Id.* at 171.
58. *Id.* at 174.
59. E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 183-89 (1957) [hereinafter cited as E. DUMBAULD].
60. *Id.* at 185.

especially consider the desires of the people of his state.[61] Second, the impact of all the proposals of the Virginia ratifying convention can be discerned by the fact that, apart from the provisions in the first seven articles and in the tenth and twelfth articles which merely set forth in general terms certain principles believed to be political truths, every specific provision in the proposals was presented by Madison in his proposed amendments and all but one became part of the Bill of Rights.[62] In addition, it has been suggested that Madison may have been partial toward the Virginia proposals because in sponsoring the amendments he was fulfilling a campaign promise made to Virginians which had played an important part in his election to Congress.[63]

If it is true that Virginia's proposal had a great impact on Madison's proposed amendment, much can be learned about the intended meaning of the second amendment by examining the Anti-Federalists' concerns to which the Virginia proposal was addressed. The major object of Anti-Federalist concern in this respect was article I, section 8, clause 16 of the Constitution, the so-called militia clause. This clause stated that Congress shall have the power:

> To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.[64]

It was the view of the Anti-Federalists that this clause gave Congress the exclusive power to provide for arming the militia and prevented the states from doing so themselves..[65] This, feared the Anti-Federalists, would permit the Congress to disarm the state militias by neglecting to provide for their arms and thereby render them useless.[66] The Anti-Federalists feared that this would be done in order to abandon reliance upon the militia for defense and to establish a permanent standing army in their place.[67] The Anti-Federalists argued that the elimination of the militias and the establishment of a standing army would allow the national government to strip the people of their liberties, as had occurred throughout history whenever a standing army had been established.[68]

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61. *Id.* at 21.
62. *Id.* at 23. The one proposal which was deleted during Congress' consideration of the amendments would have allowed conscientious objectors to avoid bearing arms by hiring a substitute. *Id.*
63. *Id.* at n.42; R. RUTLAND, *supra* note 31, at 206.
64. U.S. CONST. art. I, § 8, cl. 16.
65. ELLIOT'S DEBATES, *supra* note 4, at 385-86.
66. *Id.* at 379.
67. *Id.*
68. *Id.* at 380. These concerns can be discerned from the remarks made by George Mason, an Anti-Federalist leader, at the Virginia convention:

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

The Federalists contended that the power of Congress to arm the militia was not exclusive, but rather, concurrent with the states; hence, the states could arm the militia if Congress failed to do so.[69] However, the Anti-Federalists believed that if the militia clause granted such power to the states, it did so at best by implication.[70] Already apprehensive about the powers of the federal government, the Anti-Federalists were not content to set forth such an important right by implication.[71] Therefore, the Anti-Federalists insisted upon an express statement in the Constitution that the states would also have the power to arm the militia.

This, therefore, was the concern of the Anti-Federalists and the basis for the amendment which was proposed by the Virginia ratifying convention and by Madison. It is true that until this time, each individual militiaman was required to supply his own weapons,[72] which has been said to indicate that the possession of arms for this purpose was to be constitutionally protected.[73] However, no mention was ever made during the Virginia debates as to the *means* the states could employ to arm the militia; the only constitutional protection which was desired by the Anti-Federalists was of the *right* of the states to arm the militias. Furthermore, at no point during the Virginia debates was an allusion made to the absence of a provision guaranteeing an individual right to own and possess weapons for other than militia purposes.[74]

D. *Madison's Proposed Amendment*

On June 8, 1789, James Madison introduced his proposed amendments in the House of Representatives. The fourth paragraph of the fourth proposal 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.[75]

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lect them, and let them perish, in order to have a pretense of establishing a standing army.

. . . [W]hen once a standing army is established in any country, the people lose their liberty. When, against a regular and disciplined army, yeomanry are the only defence,—yeomanry, unskilled and unarmed,—what chance is there for preserving freedom? . . . Recollect the history of most nations of the world. What havoc, desolation, and destruction, have been perpetrated by standing armies.

Id. at 379-80.

69. *Id.* at 382.
70. *Id.* at 386-87.
71. *Id.* at 384-88.
72. *See* text accompanying notes 48-49 *supra.*
73. United States v. Miller, 307 U.S. 174, 178-79 (1939).
74. *See* ELLIOT'S DEBATES, *supra* note 4, at 171.
75. E. DUMBAULD, *supra* note 59, at 207. The amendment passed by the House of Representatives on August 24, 1789 read:

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 one religiously scrupulous of bearing arms, shall be compelled to render military service in person.

Id. at 214. The Senate on September 9, 1789, enacted a provision which stated:

The intended purpose of this proposed amendment was clearly to ensure that the states retained the power to arm the militia so as to preserve their effectiveness as an instrument of defense. The provision declares, in effect, that because a well-armed militia is necessary, any action which would cause the militia to become less than well-armed shall be prohibited.[76] The proposal was not intended to protect an individual right, but rather the collective right of the people to keep and bear arms in the form of a well-armed militia.[77] In short, "the right to keep and bear arms is the right to maintain an effective militia."[78]

IV. Judicial Interpretation

A. *Federal Court Decisions*

The number of cases in which the second amendment has been subjected to judicial interpretation is very small. One important reason for this is that the United States Supreme Court has held that the second amendment is a limitation on the federal government only and does not restrict state legislation.[79] Therefore, most of the cases which examine the second amendment are federal court decisions.

The Supreme Court decision restricting the application of the second amendment to federal legislation was *United States v. Cruikshank*.[80] In *Cruikshank*, the defendants had been convicted of violating the Civil Rights Enforcement Act of 1870[81] by conspiring to deprive two black citizens of the free exercise and enjoyment of rights and privileges granted and secured to them by the Constitution and laws of the United States.[82] One such right, the

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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.

Id. at 217. It was the Senate's version which was accepted in the conference committee and presented to the states for ratification. The rephrasing of the proposal by the House and the Senate, except for the Senate's deletion of the clause exempting conscientious objectors from bearing arms in military service, does not appear to have been intended as a change in the substance of the proposed amendment, but instead seems to have been merely the result of stylistic considerations. Feller & Gotting, *supra* note 1, at 62.

76. Feller & Gotting, *supra* note 1, at 61.

77. Mosk, *Gun Control Legislation: Valid and Necessary*, 14 N.Y.L.F. 694, 709 (1968) [hereinafter cited as Mosk]; S.C. Note, *supra* note 30, at 405. This conclusion is further supported by a textual interpretation of Madison's proposal. It is noted that when referring to conscientious objectors, the phrase used by Madison was "no one" and the phrase used in the version adopted by the House of Representatives was "no person." This clearly indicated an intent to apply this provision to individuals. However, when speaking of the right to bear arms, the collective terms "the people" and "the body of the People" were used in the two versions. This contrast in terminology supports the conclusion that while the protection of religious scruples was seen as an individual right, the right to bear arms was intended to be a collective one, possessed by the people as a body in the form of a well-armed militia. Mosk, *supra* note 77, at 709; S.C. Note, *supra* note 30, at 402.

78. Feller & Gotting, *supra* note 1, at 62.

79. United States v. Cruikshank, 92 U.S. 542, 553 (1876).

80. 92 U.S. 542 (1876).

81. Act of May 31, 1870, ch. 114, § 6, 16 Stat. 14 (current version at 18 U.S.C. § 241 (1970)).

82. United States v. Cruikshank, 92 U.S. 542, 548 (1876).

plaintiff's enjoyment of which the defendants were alleged to have prevented, was the right under the second amendment to keep and bear arms for a lawful purpose. The Supreme Court reversed the convictions, finding that no offense indictable under the federal act had occurred since this right is not one granted or secured by the federal Constitution. The Court stated:

> 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 . . . means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called . . . [the police powers].[83]

The principle that the second amendment is a limitation only upon the federal government and not upon the states was reaffirmed by the Supreme Court in two subsequent cases, *Presser v. Illinois*[84] and *Miller v. Texas*.[85] However, it is important to note that the opinions in *Cruikshank*, decided in 1876, *Presser*, decided in 1886, and *Miller v. Texas*, decided in 1894, were all rendered during the era when the prevailing principle was that elucidated by Chief Justice Marshall in *Baron v. Mayor of Baltimore*,[86] which had held that the Bills of Rights does not apply to and restrict the states.[87] Since that time, many other provisions of the Bill of Rights have been held to be applicable to the states through the fourteenth amendment.[88] However, no case raising this issue as to the second amendment has reached the Supreme Court since it decided *Miller v. Texas* in 1894, well before the initiation of the "selective incorporation" process, although this principle has been reaffirmed on a number of occasions by state court decisions.[89]

The question is therefore raised whether the Supreme Court, if faced with the issue, would reaffirm its previous holdings in *Cruikshank*, *Presser*, and *Miller v. Texas* or would instead apply the restrictions of the second amendment to the states. One commentator has suggested that it is possible that the Supreme Court would find the second amendment applicable to the states through the fourteenth amendment.[90] He notes that under the analytical

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83. *Id.* at 553.
84. 116 U.S. 252 (1886).
85. 153 U.S. 535 (1894).
86. 32 U.S. (7 Pet.) 243 (1833).
87. Rohner, *supra* note 2, at 66.
88. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment assistance of counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment).
89. Fife v. State, 31 Ark. 455 (1876); *Ex parte* Ramirez, 193 Cal. 633, 226 P. 914 (1924); 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); *Ex parte* Thomas, 21 Okla. 770, 97 P. 260 (1908); Caswell & Smith v. State, 148 S.W. 1159 (Tex. Civ. App. 1912).
90. Rohner, *supra* note 2, at 67.

framework which the Court appears to use, "the 'fundamental-ness' of a right dictates its applicability to the states" and that, under this test, "there is much to suggest that the second amendment should be so construed."[91] However, the right referred to as "fundamental" by this commentator is an individual right to bear arms,[92] an interpretation of the second amendment which is contrary to that which has been made by the Supreme Court.[93] Therefore, it does not appear likely that the second amendment, under the meaning currently attributed to it, could be held to be a fundamental right which would apply to the states through incorporation in the fourteenth amendment.

A second commentator has suggested that the second amendment restricts the states in a different fashion. He notes that article I, section 8, clauses 15 and 16 of the Constitution give Congress the power to provide for the arming, organizing, disciplining and calling forth of the militia. In light of these constitutitonal provisions, he asserts that it is possible to view the second amendment as protecting "the right of the Federal government to have at its disposal a militia, the right of whose members 'to keep and bear arms' may not be infringed by state governments."[94] The author of this theory claims that his interpretation is supported by dictum found in *Presser v. Illinois*.[95]

In *Presser*, the defendant had been convicted of violating an Illinois statute which required any body of men which sought to form an organized militia or military unit or to drill or parade with arms in any city or town to first obtain a permit from the governor before they could meet or drill within the state. Presser had violated the statute by leading a parade of 400 rifle-bearing members of a German nationalist organization with first procuring the permit. On appeal, Presser admitted that the second amendment was ordinarily a limitation only on the federal government and not on the states. He nevertheless claimed that a state statute would violate the second amendment if it interfered with the right of the people to keep and bear arms for the purpose of forming a militia. Such interference allegedly deprived the federal government of the militia forces it was entitled to call upon by reason of article I, section 8, clause 16 of the Constitution.[96]

The Supreme Court affirmed Presser's conviction on the grounds that the second amendment does not apply to the states. However, the Court also noted in dictum:

> 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 [the second

91. *Id.*
92. *Id.*
93. *See* text accompanying notes 101-08 *infra*.
94. DUKE Note, *supra* note 50, at 789.
95. 116 U.S. 252 (1886).
96. Presser v. Illinois, 116 U.S. 252, 257-58 (1886) (argument of plaintiff-in-error).

> 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, and disable the people from performing their duty to the general government.* But, as already stated, we think it clear that the sections under consideration do not have this effect.[97]

This commentator propounding this theory asserted that the Court thereby "recognized that there were limits beyond which a state could not constitutionally go" in restricting the possession of weapons.[98]

It is submitted, however, that the Court's statement in *Presser* places no restrictions on state legislation at the present time. It seems eminently clear that the Court's concern in *Presser* was the availability of armed state militias for use by the federal government. If the state maintains some militia force which is available for service and which is armed in some manner, it would appear that the state has met any duties it might have and need go no further. Today the state militias are part of the National Guard. It is these units, armed exclusively by the federal government, which provide the federal government with any militia forces it might need.[99] Thus, state restrictions on the ownership and possession of weapons can in no way hinder the availability of an armed militia and may therefore be constitutionally enacted.[100]

Furthermore, in view of the purposes which the second amendment was meant to further, it would seem illogical to apply it to state governments. The second amendment was intended to prohibit any federal action which would prevent a state from arming its militia if the federal government failed to do so. It was thus meant to apply as a prohibition against the disarming of the militias by the federal government, not by the state governments.

The only other case in which the Supreme Court has had occasion to discuss the scope and meaning of the second amendment was *United States v. Miller*,[101] decided in 1939. The National Firearms Act of 1934[102] had imposed a stiff tax on importers, manufacturers, dealers, and transferors of sawed off shotguns, machine guns, and similar weapons and had required the registration of such weapons. The defendants in *Miller* were charged with violating this Act by transporting in interstate commerce an unregistered 12-gauge shotgun with a barrel of less than eighteen inches in length.[103]

The Supreme Court rejected the second amendment challenge to the Act, holding that:

> 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

97. *Id.* at 265-66 (emphasis added).
98. DUKE Note, *supra* note 50, at 791-92.
99. 32 U.S.C. §§ 101-716 (1970 & Supp. V 1975).
100. S.C. Note, *supra* note 77, at 409-10.
101. 307 U.S. 174 (1939).
102. National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (1934) (current version at 26 U.S.C. §§ 5801-5803 (1970 & Supp. V 1975)).
103. United States v. Miller, 307 U.S. 174, 175 (1939).

> length" *at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia,* we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.[104]

This conclusion appears to have been based upon the Court's determination that the second amendment was enacted "[w]ith [the] obvious purpose to assure the continuation and render possible the effectiveness of . . . [the militia]."[105] The Court observed that the militia forces used in colonial America and at the time of the enactment of the second amendment consisted of citizens who were required by law to be available for militia service if the need arose.[106] The Court also took note of the statutes which required these men to supply their own arms when called for service.[107] The implicit conclusion of the Court was that, because the maintenance of an armed militia at the time of the enactment of the second amendment depended upon the militiaman's supplying of his own weapons, the individual's right to own and possess weapons exists only if the weapon "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia."[108]

The precise meaning of the Supreme Court's opinion in *Miller* has seemed unclear to a number of commentators and courts. One commentator has asserted that the decision rested upon a failure of proof, and that had it been shown that the shotgun could effectively contribute to the common defense, the firearm restrictions might have been found to exceed the regulatory power of Congress.[109] The commentator assails the "pernicious implication" that "[t]he deadlier the weapon, the greater its protection under the second amendment—whether a machine gun, bazooka or ray gun," although he believes that it is very doubtful that the Court intended to establish such a rule.[110]

The First Circuit Court of Appeals was also troubled by this possible interpretation of *Miller* and attempted to clarify its meaning in *Cases v. United States*.[111] *Cases* involved a violation of the Federal Firearms Act[112] which made it unlawful for any person who has been convicted of a crime of violence or who is a fugitive from justice to ship or cause to be shipped firearms or ammunition in interstate or foreign commerce or to receive a firearm or ammunition which has been shipped in interstate or foreign commerce. The defendant was convicted of unlawfully receiving a revolver and ammunition.

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104. *Id.* at 178.
105. *Id.*
106. *Id.* at 179-82.
107. *Id.*
108. *Id.* at 178.
109. Feller & Gotting, *supra* note 1, at 65-66.
110. *Id.*
111. 131 F.2d 916 (1st Cir. 1942), *cert. den. sub nom.*, Velazuez v. United States, 319 U.S. 770 (1943).
112. Federal Firearms Act of 1938, ch. 850, 52 Stat. 1250 (repealed 1968).

The court, in rejecting the argument that the Federal Firearms Act was violative of the second amendment, considered the Supreme Court's holding in *Miller* and decided that it was not meant to be a general rule applicable to all cases but was instead limited to its facts.[113]

The court's reason for narrowly construing *Miller* was that the principle established therein, if intended to be a general, comprehensive rule, would achieve totally unreasonable results. Construed as protecting the possession of any weapon bearing a reasonable relationship to the efficiency of a present-day well-regulated militia unit, the second amendment would permit the federal government to regulate only those weapons which could be classified as antiques or curiosities—such as a flintlock musket or a matchbook harquebus. This would mean, concluded the court, that the limitation of the second amendment is absolute, a result too unreasonable to have been intended by the Supreme Court.[114]

A second unreasonable result which the court believed would flow from a general application of the principle established in *Miller* was that, under such a rule, Congress would be prohibited from regulating the use and possession of distinctly military arms, such as machine guns and anti-tank or anti-aircraft weapons, by private persons who are not present or prospective members of any military unit, even though it would be inconceivable under the circumstances that a private individual could have a legitimate reason for owning or possessing such a weapon. The court felt it was unlikely that the second amendment was intended by its framers to countenance such an unreasonable result.[115]

The court in *Cases* stated that it would be better, in light of the many factors involved in any determination of the permissible extent of firearm regulation, to forego any attempt to formulate a general rule and to instead decide each case on its own facts.[116] It appears to be the court's view that it is not the military usefulness of a particular firearm which will decide whether the weapon may be constitutionally regulated, but rather whether the person possessing the weapon "was or ever had been a member of any military organization" and whether the use of the weapon under the particular circumstances "was in preparation for a military career."[117] Because the defendant in *Cases* did not satisfy either of these criteria, the Federal Firearms Act, as applied to the defendant, did not conflict with the second amendment.[118]

Since the *Cases* decision in 1942, there have been no federal court decisions analyzing either the second amendment or the *Miller* rule in depth. A number of cases have involved second amendment challenges to federal firearm legislation, but in each the court summarily rejected the challenges on

113. Cases v. United States, 131 F.2d 916, 922 (1st Cir. 1942), *cert. den. sub nom.* Velazuez v. United States, 319 U.S. 770 (1943).
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 923.
118. *Id.* Although the court in *Cases* made an independent assessment of the meaning

the basis of *Miller*, by noting that the weapon in question bore no reasonable relationship to the preservation of a well-regulated militia.[119] However, it is submitted that the Supreme Court in *Miller* and other federal courts in subsequent cases have misread the applicability of the second amendment in twentieth century America. The second amendment was intended to go no farther than to guarantee effectively armed militias in order to forestall reliance upon a standing army. It was meant to ensure a state's right to arm its militia as it chose if the federal government failed to do so. The right of an individual to possess a weapon for militia service is protected by the second amendment *only* if the state chooses to supply its militia by requiring each militiaman to provide his own weapons, and not if it does so by another method. Under existing federal law, in effect for over sixty years, the federal government is solely responsible for arming and equipping the present-day state militias, the National Guard.[120] No state still requires its citizens to supply the weapons for its militia and consequently the possession of a weapon by an individual no longer bears *any* reasonable relationship to an effective militia. Therefore, it is submitted that the holding in *Miller* lacks relevance in modern day society and that, as long as the National Guard exists and is armed by the federal government, the guarantee encompassed in the second amendment imposes no restrictions on any federal legislation which would seek to regulate the ownership, possession, and use of weapons by individuals.

B. *State Court Decisions*

Since the second amendment operates as a limitation only on federal firearm regulation, it is the state constitutions which restrict state regulation. State constitutional provisions are very diverse and have been subject to numerous interpretations. Nevertheless, several tentative generalizations will be set forth.

First, it is important to note that thirteen state constitutions contain no provisions relating to a right to keep or bear arms.[121] In the absence of any constitutional provision, the state courts have had little difficulty in rejecting constitutional challenges to firearm legislation, usually on the grounds that such regulation is a proper subject for the state's police power. However, in a state having no restriction in its own constitution on the permissible scope of state

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of the second amendment and attempted to elucidate factors which could be employed in determining whether it was violated by federal legislation, it nevertheless implicitly agreed with the Supreme Court's determination in *Miller* that the second amendment was intended to ensure that the state militias would remain well-armed by prohibiting the regulation of weapons which reasonably related to the preservation of a well regulated militia.

119. *See, e.g.*, United States v. Tomlin, 454 F.2d 177 (9th Cir.), *cert. den.*, 406 U.S. 924 (1972); United States v. Williams, 446 F.2d 486 (5th Cir. 1971); United States v. McCutcheon, 446 F.2d 133 (7th Cir. 1971); United States v. Johnson, 441 F.2d 1134 (5th Cir. 1971); United States v. Synnes, 438 F.2d 764 (8th Cir. 1971), *vacated on other grounds*, 404 U.S. 1009 (1972).

120. 32 U.S.C. §§ 106, 701-710 (1970 & Supp. V 1975).

121. These states are California, Delaware, Illinois, Iowa, Minnesota, Nebraska, Nevada, New Jersey, New York, North Dakota, Virginia, West Virginia and Wisconsin.

firearm legislation, the question as to whether the second amendment applies to the states takes on greater significance and usually receives more judicial attention.

An illustrative example of a state court decision in a state having no constitutional provision for the right to bear arms is *Burton v. Sills*,[122] rendered in 1968 by the New Jersey Supreme Court. *Burton* involved a challenge to a New Jersey statutory scheme which provided for the licensing of firearm manufacturers, wholesalers, and retail dealers and required prospective firearm purchasers to first acquire permits and identification cards from the local chief of police.[123] The statute further provided that no permit and identification card would be issued to certain classes of individuals such as convicted criminals and minors. The challenge to this scheme was rejected by the New Jersey Supreme Court, ultimately on the basis that the state could impose such limitations on the carrying, sale, and possession of weapons as the safety and welfare of the people of the state require. In other words, in the absence of a constitutional provision, the regulation will be upheld if it is a proper exercise of the police power.[124] However, before reaching this result, the court engaged in an extended discussion of the nature and scope of the second amendment, finally concluding that it would follow established authority and hold the prohibitions of the second amendment inapplicable to state firearm legislation.[125]

One state constitutional provision appears in identical or nearly identical form in several states, Connecticut, Michigan, Pennsylvania, South Dakota, Texas, Washington, and Wyoming. The Michigan version reads: "Every person has a right to keep and bear arms for the defense of himself and the state."[126] This provision was construed by the Michigan Supreme Court in *People v. Brown*.[127] The defendant in *Brown* was convicted of possessing a blackjack in violation of a statute which prohibited the possession, manufacture, and sale of certain specified dangerous weapons, such as machine guns, blackjacks, and bombs by all persons except peace officers, certain manufacturers, military personnel, and licensed persons. The court noted that the interpretations made by other courts of the second amendment and state provisions had identified the constitutional protection afforded to the possession of weapons in relation to the state's militia and military purposes. However, the Michigan provision, the court stated, was not by its terms limited to militiamen or military purposes, but instead "extends to 'every person' [the right] to bear arms for the 'defense of himself' as well as of the state."[128] In other words, the Michigan constitutional provision grants to every person an

122. 53 N.J. 86, 248 A.2d 521 (1968), *appeal dismissed*, 394 U.S. 812 (1969).
123. Burton v. Sills, 53 N.J. 86, 90, 248 A.2d 521, 522-23 (1968), *appeal dismissed*, 394 U.S. 812 (1969).
124. *Id.* at 99, 248 A.2d at 528.
125. *Id.* at 92-99, 248 A.2d at 525-28.
126. MICH. CONST. art. I, § 6.
127. 253 Mich. 537, 235 N.W. 245 (1931).
128. People v. Brown, 253 Mich. 537, 540, 235 N.W. 245, 246 (1931).

individual right to own and possess weapons for the private defense of person and property. However, the court further recognized that this right is subject to the state's authority to regulate under the police power. Therefore, to preserve the public safety and peace, the state can prohibit the possession of those weapons which are used as tools of crime and which have no legitimate use as instruments of private defnese.[129] The court declared that the state's exercise of the police power will be upheld if it is reasonable and does not "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."[130] A blackjack was not a weapon which, by common usage, was considered legitimate for the defense of person and property and, therefore, could be constitutionally proscribed.

All state courts, like the court in *Brown*, have recognized the importance of the state's interest in the regulation of crime and, whatever its particular constitutional provision, have held that any constitutional limitation on the state's power to regulate the possession and ownership of firearms must be subject to the state's police power.[131] The constitutional provisions of many states explicitly provide this.[132] The Texas provision, for example, which uses language very similar to the Michigan provision construed in *Brown* and which, according to cases interpreting it, also acknowledges an individual right to possess weapons for the private defense of person and property,[133] states: "Every citizen shall have the right to keep and bear arms in the lawful defense 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."[134]

Most of the state court decisions have therefore focused upon the degree of permissible state firearm regulation. The earliest type of firearm legislation to be examined and upheld as a constitutional regulation of the possession and use of weapons were statutes prohibiting the carrying of concealed weapons. With the exception of one opinion, *Bliss v. Commonwealth*,[135] every state court decision to consider a concealed weapons statute has found it constitutional.[136]

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129. *Id.* at 541, 235 N.W. at 246-47.
130. *Id.* at 541, 235 N.W. at 247.
131. Haight, *supra* note 27, at 41.
132. These states are Colorado, Florida, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Montana, New Mexico, North Carolina, Oklahoma, Tennessee, Texas and Utah.
133. Morrison v. State, 339 S.W.2d 529, 531 (Tex. Crim. App. 1960); Duke v. State, 42 Tex. 455, 458-59 (1875). In the latter case, the court described the right protected by the Texas provision in this manner:

> The arms which every person is secured the right to keep and bear (in the defense of himself or the State, subject to legislative regulation), must be such arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense, as well as such as are proper for the defense of the State.

Id. at 458.
134. TEX. CONST. art. I, § 23.
135. 12 Ky. (2 Litt.) 90 (1822).
136. State v. Reid, 1 Ala. 612 (1840); State v. Buzzard, 4 Ark. 18 (1842); Carlton

In addition, many state constitutional provisions expressly permit the prohibition of carrying of concealed weapons as an exception to any right to bear arms.[137] Kentucky is one of the states to have such a provision, enacted specifically to overrule the decision rendered in *Bliss*.[138] The court in *Bliss* was of the opinion that the right to bear arms was an individual one and was absolute, not abridgeable even by the exercise of the police power.[139] This decision has subsequently been severely criticized by other courts and its declaration that the right to bear arms is absolute has never been accepted by another court.[140]

Also upheld as permissible state regulation against charges of infringement upon a right to bear arms have been statutes prohibiting the carrying of weapons in public places,[141] or on the property of another,[142] or while in prison.[143] The courts have likewise rejected attacks upon state statutes which prohibited the possession or ownership of weapons by felons[144] and which proscribed the discharging of a firearm within city limits.[145] State statutes which prohibit the possession or carrying of a firearm without first obtaining a license have also been generally sustained.[146]

However, regulations which exceed the scope of the types mentioned produce differing results among the state courts. The state's particular constitutional provision then becomes increasingly significant. A comparison of two state court decisions, *Salina v. Blaksley*,[147] decided in 1905 by the Kansas Supreme Court, and *State v. Kerner*,[148] a 1921 opinion by the North Carolina Supreme Court illustrate this generalization.

The defendant in *Salina* was convicted of carrying a pistol within the city while intoxicated. The Kansas constitutional provision read, "The people have the right to bear arms for their defense and security; but standing armies, in

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v. State, 63 Fla. 1, 58 So. 486 (1912); Nunn v. State, 1 Ga. 243 (1846); McIntire v. State, 170 Ind. 163, 83 N.E. 1005 (1908); State v. Keet, 269 Mo. 206, 190 S.W. 573 (1916); Porello v. State, 121 Ohio St. 280, 168 N.E. 135 (1929); *Ex parte* Thomas, 21 Okla. 770, 97 P. 260 (1908); Wright v. Commonwealth, 77 Pa. St. 470 (1875); Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840).

137. These states are Colorado, Kentucky, Louisiana, Mississippi, Missouri, Montana, New Mexico, North Carolina and Oklahoma.

138. Feller & Gotting, *supra* note 1, at 62 n.73.

139. Bliss v. Commonwealth, 2 Ky. (Litt.) 90, 91-92 (1822).

140. *See, e.g.*, Strickland v. State, 137 Ga. 1, 2, 72 S.E. 260, 261 (1911) ("This ruling [*Bliss*] has not been followed, but severely criticized. The decisions are practically unanimous to the contrary."); Salina v. Blaksley, 72 Kan. 230, 231, 83 P. 619, 620 (1905) ("[T]his decision [*Bliss*] . . . has never been followed.").

141. Hill v. State, 53 Ga. 472 (1874); State v. Wilforth, 74 Mo. 528 (1881).

142. Isaiah v. State, 176 Ala. 27, 58 So. 53 (1911).

143. People v. Wells, 156 P.2d 979 (Cal. 1945).

144. Jackson v. State, 68 So. 2d 850 (Ala. 1953); People v. Garcia, 218 P.2d 837 (Cal. 1950); 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).

145. State v. Johnson, 76 S.C. 39, 56 S.E. 544 (1907); McCollum v. City of Cincinnati, 51 Ohio App. 67, 199 N.E. 603 (1935).

146. Davis v. State, 146 So. 2d 892 (Fla. 1962); Strickland v. State, 137 Ga. 1, 72 S.E. 260 (1911); Matthews v. State, 148 N.E.2d 334 (Ind. 1958); Burton v. Sills, 53 N.J. 86, 248 A.2d 521 (1968), *appeal dismissed*, 394 U.S. 812 (1969).

147. 72 Kan. 230, 83 P. 619 (1905).

148. 181 N.C. 574, 107 S.E. 222 (1921).

time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power."[149] The defendant argued that this provision restricted the legislature's power to prohibit the possession and carrying of weapons by individuals.[150] The court rejected this argument, holding that it was apparent from the terms of the provision that it was intended to refer to the security and defense of the people as a collective body and not as individuals. The court stated: "It deals exclusively with the military. Individual rights are not considered in this section. . . . [T]he 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 law . . . ."[151] Therefore, according to the Kansas Supreme Court, the state constitutional provision is a limitation on the legislature's power to enact laws prohibiting the bearing of arms in the militia or in any other military organization provided for by law, and does not otherwise limit the legislature's power to regulate or prohibit the possession or carrying of weapons.[152]

This expansive view of the legislature's power to enact firearm regulations is in sharp contrast with the view taken by the North Carolina Supreme Court in *State v. Kerner*.[153] In *Kerner*, the defendant had been charged with violating a statute which prohibited the carrying of a weapon off his premises, even if unconcealed and for a lawful purpose, without first obtaining a permit. The North Carolina constitutional provision then in effect stated: "The right of the people to keep and bear arms shall not be infringed; . . . nothing herein contained shall justify the practice of carrying weapons or prevent the Legislature from enacting penal statutes against said practice."[154] The court found that the statute which the defendant was charged with violating contravened this constitutional provision. A distinction was drawn between the "prohibition" and the mere "regulation" of the right to bear arms, the former constituting an abridgment of the constitution while the latter did not.[155] The court noted that the purpose of the constitutional right was to enable "the people to protect themselves against invasions of their liberties"[156] and to defend "person and property against mobs and violence,"[157] by preserving to the people "the right to acquire and retain a practical knowledge of the use of fire arms."[158] Because the statute prohibiting the carrying of an unconcealed weapon without a permit would contravene the purpose of the North Carolina constitutional provision, it is a "prohibition" of the right to bear arms and is therefore void.

149. KAN. CONST. Bill of Rights § 4.
150. Salina v. Blaksley, 72 Kan. 230, 232, 83 P. 619, 620 (1905).
151. *Id.* at 233, 83 P. at 620.
152. *Id.*; *accord*, State v. Bolin, 200 Kan. 369, 436 P.2d 978 (1968). It is also interesting to note that the Kansas Supreme Court in *Salina* was of the opinion that the second amendment to the federal constitution had the same meaning as the Kansas provision.
153. 181 N.C. 574, 107 S.E. 222 (1921).
154. N.C. CONST. art. I, § 30.
155. State v. Kerner, 181 N.C. 574, 580, 107 S.E. 222, 225 (1921).
156. *Id.* at 578, 107 S.E. at 224.
157. *Id.* at 580, 107 S.E. at 225.
158. *Id.* at 580, 107 S.E. at 225.

Furthermore, the court held, even as a regulation it is void because it is an unreasonable regulation.[159]

The distinction drawn between permissible regulations and impermissible prohibitions by the North Carolina Supreme Court is not an uncommon one,[160] but, as in the *Kerner* case, the explanation as to why a particular statute falls within either of the categories is never adequate. The view taken by the Kansas Supreme Court in *Salina* as to its constitutional provision avoids this fragile dichotomy, but in so doing it in effect declares that any state firearm legislation which does not relate to the bearing of arms as a member of an organized state militia or other legal military organization is constitutionally permissible. Although the Kansas court's interpretation goes farther than any other state court in construing its constitutional provision, in practice the provisions of many states have been applied at least as expansively.[161] Nevertheless, the *Kerner* and *Salina* cases serve as a reminder of the variation which exists among state constitutional provisions and their judicial interpretations.

IV. Conclusion

In all likelihood, some type of new federal firearm legislation will be enacted in the foreseeable future. When this occurs, there will be a flurry of challenges in the courts to the legislation on the ground that it violates the second amendment, as occurred after Congress enacted the National Firearms Act of 1934 and the Federal Firearms Act of 1938. It is submitted that on the basis of the few cases which have considered the nature and scope of the second amendment and in light of the purposes which the second amendment was intended to further, it is improbable that any type of federal regulation will or should be held by the courts to infringe upon the second amendment.

Nor do most state constitutional provisions, it is submitted, constitute an obstacle to further state firearm regulation. However, the constitutional provisions in some states have on occasion been held to guarantee a more substantial individual right to bear arms, and therefore, state legislation which is more expansive in scope may in particular states be subjected to successful challenges as violative of a "right to bear arms."

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159. *Id.* at 581, 107 S.E. at 225.

160. *See, e.g.*, Rinzler v. Carson, 262 So. 2d 661 (Fla. 1972); *In re* Brickey, 8 Idaho 597, 70 P. 609 (1902); Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (1971).

161. *See, e.g.*, McCollum v. City of Cincinnati, 51 Ohio App. 67, 199 N.E. 603 (Ct. App. 1935); Mowels v. State, 152 Tex. Crim. 135, 211 S.W.2d 213 (Crim. App. 1948).