Self-Government and the Unalienable Right of Self-Defense: Restoring the Second Amendment

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I. INTRODUCTION

Embodied in the Second Amendment to the Constitution is the truth that self-governing individuals should bear the responsibility for defending themselves. The Amendment states,

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

This Amendment has generated a considerable amount of controversy among legal scholars.[1] Some argue that the Amendment grants an "individual right" to keep and bear arms, while others believe that this right only applies collectively to those in the militia.

Without fail, however, most scholars ignore the foundational principles which are embodied in the Second Amendment. The law of self-government is almost entirely absent from the writings of Second Amendment scholars, and the right of self-defense, if mentioned, is only treated as a constitutional or historical by-product. Rarely does anyone ever treat self-defense as a natural right, or as one founding father said, "a primary law of nature, which . . . (is] the immediate gift of the Creator."[2] As a God-given right, self-defense is an unalienable right which is incapable of being surrendered or transferred. But to understand these principles and how they interrelate, one must first examine the "Laws of Nature and of Nature's God."

A. Laws and Rights are Given by God

In 1776 the framers of the Declaration of Independence appealed to the "Laws of Nature and of Nature's God."[3] They unanimously affirmed that these laws would define the legal rights and principles which would both justify their separation from England and help them establish any future government.

The framers understood the laws of nature and of nature's God to refer to those laws which the Creator had revealed to man. Law was seen as God-given, not man-invented; fixed and permanent; binding everyone in every nation. Furthermore, the framers also believed that the laws of nature and of nature's God explained the nature of man's rights. Rights were God-given, not government-created. And the Declaration of Independence affirmed this truth by asserting that "all Men . . . are endowed by their Creator with certain unalienable Rights." In short, the laws of nature and of nature's God are crucial to understanding the essence of self-government and self-defense. The founders considered both principles to be divinely instituted and far-reaching in their application.

B. The Declaration as Charter

Three ideas which are reflected in the Declaration are the laws of nature, unalienable rights and self-government. What the Declaration has to say is important because it is the Charter of the United States.[4] Any form of government established after the Charter must be consistent with its principles, Just as any corporate form of government must be consistent with its corporate charter.[5] The

founding fathers realized this indisputable legal maxim. In 1787, they drafted a Constitutional form of government upon which John Quincy Adams later observed, "was the complement to the Declaration of Independence; founded upon the same principles, carrying them out into practical execution, and forming with it, one entire system of national government."[6] In other words, the Declaration gives meaning to the Constitution. If the Declaration's principles are separated from the Constitution, then the Constitution's meaning is likely to reflect the transient whims of the majority, the highly vocal or a powerful elite. Both the Declaration and the Constitution are significant legal documents because both, by nature, comprise the covenantal foundation of the United States. Just as a corporate charter and constitution govern the corporation's exercise of authority, so too the Declaration and Constitution set forth the legal and political principles that govern the national objects of the nation.

As an appendage to the Constitution, the Second Amendment must therefore be interpreted according to the principles found in the Declaration and Constitution respectively. Both documents, however, are only lawful to the extent they conform to the laws of nature and of nature's God. For example, no science text book is accurate if it denies or ignores the existence of the law of gravity. Neither is a charter or a constitution lawful if its principles are contrary to the laws of nature.

Consequently, the laws of nature and of nature's God are the foundation for any discussion of law and rights. This higher law declares that all human beings are self-governing individuals. And while the Declaration articulates the law of self-government, the Constitution in turn reflects the application of this law in a variety of contexts, one of which is found in the Second Amendment. The law of self-government is thus vitally important to any discussion of self-defense. To these matters, attention is now focused.

II. SELF-GOVERNMENT AND SELF-DEFENSE

A. The Law of Self-Government

One principle derived from the laws of nature and of nature's God is the law of self-government. Self-government, properly understood, involves those duties man owes to the Creator, such as the duties toward God, neighbor and himself. The key idea, however, is that men are capable of directing and controlling themselves.

The Declaration acknowledges the law of self-government by asserting "that all Men are created equal" -- a statement which presupposes that all men are equally made in the image of God.[7] As God's image-bearer, man is accountable to the Creator for his actions.[8] This accountability requires man to govern himself properly and to ensure that the exercise of rights conforms to the Creator's law. This conformity to the law must come from the inside-out -- man's internal will must control his external actions.

Since man is responsible for governing himself, no man has an inherent right to govern another man. One exception to this rule occurs when a person voluntarily consents to be governed by another. Self-governing individuals may therefore choose those whom they desire to rule over them.

The Declaration affirms this principle in two contexts. It first asserts that civil governments derive "their dust powers from the consent of the governed." Second, it observes that the people can change their form of government whenever it becomes destructive of the people's freedoms.

The Declaration states,

> [I]t is the Right of the People to alter or to abolish it [the existing government], and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

In other words, the people have the unalienable right to govern themselves, whether they "institute" a government, "organize" its powers, or "alter" or "abolish" it when it becomes tyrannical. Governments are likewise established from the inside-out -- the original authority residing in the hands of the people, not in the hands of a few civil rulers.[9]

B. The Right of Self-Defense

One aspect of self-government is the duty of self-defense, which the founders also considered to be an unalienable right.[10] This right, similar to the law of self-government, also works from the inside-out, meaning that, self-governing individuals should bear the primary responsibility for defending themselves. The Declaration affirms this maxim by stating that, "it is their [the people's] Right, it is their Duty, to throw off such Government [i.e., a tyrannical one], and to provide new Guards for their future Security." This statement presupposes a people's right of self-defense.

King George III, however, had assumed the opposite. He believed that the right of self-defense originated in government, not in the people. In the Declaration, the founders stated that the king had kept "among us, in Times of Peace, Standing Armies, without the consent of our Legislatures." Without the consent of the people through their legislatures, the standing armies were seen to be one of the king's many attempts to establish "an absolute Tyranny over these States." Consent was important because the ultimate authority for self-defense originated in the people.

The founders believed that the right of self-defense stemmed from the "Laws of Nature and of Nature's God."[11] As mentioned earlier, these laws are important for they are the legal framework in which one must interpret the Constitution and the Bill of Rights -- particularly the Second Amendment. Moreover, these laws of nature and of nature's God are important because they influenced the thinking of the founding fathers more than anything else -- more than the common law or the classical writers did.

To understand the actions of the founders, one must first understand their thinking. And by examining the National Charter (that is, the Declaration of Independence), one can find what affected their thinking the most. Although the founders were well versed in the classics and the con law, they did not appeal to Aristotle, Cicero, Locke or Blackstone to justify their break with England. Instead, they appealed to "the Laws of Nature and of Nature's God."

From these laws, the founders formulated an entire political philosophy, the basics of which are stated in the Declaration. The founders stated,

> That all Men are created equal, that they are endowed by their Creator with certain unalienable Rights . . . That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it.

But what are the "Laws of Nature and of Nature's God"? John Quincy Adams said that this phrase,

> Presupposes the existence of a God, the moral ruler of the universe, and a rule of right and wrong, of just and unjust, binding upon man , preceding all institutions of human society and of government.[12]

Adams' statement recognizes that God has revealed his law to men and that this law is binding upon everyone. The phrase "Laws of Nature and of Nature's God" was a common way to assert that God had revealed his law through two outlets: nature and the Bible.[13] In fact, the laws of God, the laws of nature, and the laws of the Bible were all considered synonymous. For example, James Wilson, one of the few men to sign both the Declaration and the Constitution, declared that, "It should always be remembered, that this law, natural or revealed (in the Bible] . . . flows from the same divine source: it is the law of God."[14] Similarly, Samuel Adams, another signer of the Declaration, stated that,

> All men are equally bound by the laws of nature, or, to speak more properly, the laws of the Creator. They are imprinted by the finger of God on the heart of man. . . . [T]he voice of Nature . . . is confirmed by written Revelation.[15] (Emphasis added.)

God's written revelation was very important to the founders. In fact, by appealing to the "Laws of Nature and of Nature's God," they were affirming their submission to the laws of the Bible. (See Appendix A.) John Q. Adams stated, for instance, that

> From the day of the Declaration . . . [t]hey [the American people] were bound by the laws of God, which they all, and by the laws of the Gospel, which they nearly all, acknowledged as the rules of their conduct.[16]

This is significant for it indicates that one must examine the Scriptures to understand the political thinking of the founding fathers. The framers, however, did not use explicit Biblical examples to support their arguments because they considered sectarian terminology to be inappropriate in the legal sector.[17] Instead, they illustrated their principled arguments with examples from "secular" history and "secular" writers, which reflected the laws of God in non-religious terms.

By using non-sectarian terminology, the founders were able to express their Biblical world-view in the legal sphere. It is evident from the sermons preached during the eighteenth century that both

clergy and laymen alike had a good grasp of the Biblical principles of government. Moreover, the clergy had much to say about the Scriptural arguments for self-defense, for they drew upon the theological insights of the Protestant theologians of the Reformation and the Catholic theologians of the Middle Ages.

C. Theological Perspectives

Catholic theologians such as St. Augustine (? -604) and Thomas Aquinas (1225-1274) asserted that a defensive war was justifiable.[18] The Spanish theologian, Francisco Suarez (1548-1617), stated that private wars of self-defense could, under certain conditions, be justifiable.[19] Protestant Reformers such as Stephen Junius Brutus (? -1689), Samuel Rutherford (1600-1661) and John Calvin (1509-1564) asserted that tyrannical kings can be deposed by lower-level government rulers.[20] Rutherford, for example, stated that,

> We hold, that the king using, contrary to the oath of God and his royal office, violence in killing . . . his subjects, by bloody emissaries, may be resisted by defensive wars, at the commandment of the estates of the kingdom. . . . Now, that they [the estates] may take away this power, is clear in Athaliah's case [II Kings 11:1-21].[21]

Brutus and Rutherford also spoke of an individual right of self-defense.[22] With this theological background, it is not surprising that eighteenth century pastors had much to say on the subject of self-defense. Many of the preachers in the 1700's believed that self-defense was a right given by God. A Biblical example is found in the life of David, who took Goliath's sword to protect himself from King Saul who was seeking to kill him.[23] David's actions show that fleeing can often be better than fighting -and this he did frequently. But the mere fact that he armed himself with both men and weapons shows that he was prepared to fight if he was forced to defend himself.[24] As Rutherford states,

> If Saul had actually invaded David for his life, David might, in that case, make use of Goliath's sword, (for he took not that weapon with him as a cypher to boast Saul -- it is not less unlawful to threaten a king than to put hands on him.)[25] (Emphasis added.)

Also, David's actions reveal the boundaries of self-defense. One can only defend oneself against an attack; if one is not in danger of any harm, then there is nothing to resist. That is why David did not attack Saul in his sleep.[26] A sleeping enemy could hardly be considered a deadly threat, and thus, for David to kill in that situation would have been an assault, not self-defense. Rutherford states that,

> [For] David to kill Saul sleeping . . . had not been wisdom nor justice; because to kill the enemy in a just self-defence, must be, when the enemy actually doth invade, and the life of defendant cannot be otherwise saved. A sleeping enemy is not in the act of unjust pursuit of the innocent.[27]

One might argue, however, that David refrained from attacking Saul for a different reason. After all, David said, "The Lord forbid that I should do such a thing to my master, the Lord's anointed, or lift my hand against him; for he is the anointed of the Lord."[28] Is David saying that kings are immune from punishment? No, for Athaliah's case shows that tyrants can be punished by the lower-level government officials.[29] By affirming that Saul was the "Lord's anointed," David not only indicates that Saul was not a tyrant but also that he was still the lawful ruler of Israel. This is a reasonable conclusion since Saul's attack was not against the kingdom, but against David only. Rutherford concludes that an assault against a single individual does not make a king a tyrant:

> Saul intended no arbitrary government, nor to make Israel a conquered people, nor yet to cut off all that professed the true worship of God; nor came Saul against these princes, elders and people, who made him king, only David's head would have made Saul lay down arms.[30]

Thus, David could only use the sword of self-defense.

But when an attack is levied against the entire kingdom by either a tyrant or a foreign nation, the situation is entirely different. An attack made against the entire nation is an act of war. While the people in the kingdom certainly have the authority to defend themselves, only the civil authorities can bear the sword of vengeance.[31] Rutherford states that,

> One man sleeping cannot be in actual pursuit of another man; so that the self-defender may lawfully kill him in his sleep; but the case is far otherwise in lawful wars; the Israelites might lawfully kill the Philistines encamping about Jerusalem to destroy it, and religion, and the church of God, though they were all sleeping; even though we suppose king Saul had brought them in by his authority, and though he were sleeping in the midst of the uncircumcised armies.[32]

By stating that "the Israelites might lawfully kill the Philistines," Rutherford is referring to the Israelite citizens under the authority of the civil leaders. Rutherford qualifies this statement elsewhere by asserting that "If the king should sell his country, and bring in a foreign army, the estates (emphasis added) are to convene, to take course for the safety of the kingdom."[33]

Thus, while an individual can bear the sword in self-defense, only the civil magistrates can bear the sword of vengeance in an "offensive" manner. (Bearing the sword "offensively" would include imposing a civil punishment, levying an attack against a retreating enemy in battle or launching a preemptive strike, assuming there is a just cause.)

In short, many eighteenth century preachers viewed Abraham, Joshua and David as examples of men who had exercised the duty of self-defense.[34] Not only did these preachers assume that self-defense was a God-given right, but they also believed that self-defense was consistent with being a Christian. For example, one preacher asserted that, "Self-defense is an established law of our nature . . . which has never been superseded by any written law of God, or by the religion of Jesus."[35]

1. The Right and Duty to Bear Arms

The preachers during this era also taught Biblical methods of self-defense -- all of which adhered to the inside-out principle. The first method was the duty of the people to bear arms for their defense. In the Old Testament, the Israelites were frequently required to bear arms. Moses commanded the Gadites and the Reubenites to arm themselves and go into battle.[36] This duty was also enforced by Nehemiah who required the people to carry weapons while they worked.[37] In fact, some of the citizens worked with one hand and held a sword in the other.

The New Testament also upholds this duty to bear arms. Jesus never repealed this duty, rather, he upheld it. On one occasion, Jesus commanded the disciples to acquire swords; if they did not have one, they were to sell their cloaks and buy one.[38]

This duty to bear arms was the Biblical precedent. Conversely, "weapon control" was equivalent with slavery. On two occasions, foreign nations kept the Israelites from bearing arms. As a result, these enemies were able to keep Israel in bondage.[39] The right and duty to have arms was essential to preserving liberty.

This duty was stressed by many of the eighteenth-century pastors. For example, Simeon Howard, preaching on the subject of the liberty that Christ has given man (Galatians 5:1), encouraged his listeners to be armed for their defense: "A people who would stand fast in their liberty, should furnish themselves with weapons proper for their defense, and learn the use of them."[40] Another pastor asserted that man's sinful nature "renders this knowledge [of the use of arms] absolutely requisite, to protect a country against bands of public robbers and murderers."[41]

2. A Well Regulated Militia

A second method of self-defense lies in the collective form of a well-regulated militia. In the first chapter of Numbers, one sees that Israel has no professional, "standing" army. Instead, the defense of the nation rests in the hands of the militia, a citizen-army composed of every male over 20 years of age.[42]

Self-defense, however, is not the only principle embodied in the militia. Equally important to understanding the nature of this citizen-army is the principle of self-government. First, the militia is a collection of individuals who, as a function of self-government, have covenanted together to defend each other. Whenever people enter into society by way of a social compact, they not only become "one People" as stated by the Declaration, they also take on certain obligations, one being the duty to defend one another.[43] Every citizen in society has a covenant duty to defend his neighbor -- a duty which can be adequately fulfilled in the militia.

Second, the principle of self-government is further reflected in the organization of the militia powers. The Declaration asserts that the people can organize the powers of government "in such Form, as to them shall seem most likely to effect their Safety and Happiness." The militia is a particular way of "organizing" the sword of vengeance so that everyone in the nation, as opposed

to a select minority, can bear the sword. There are two advantages to this system. First, the inside-out principle of self-defense is preserved because everyone is required to defend the country. Second, by placing the sword of vengeance into the hands of everyone, the militia becomes an effectual defense against the tyranny of a select few. Of course, a citizen can only bear the sword of vengeance while on official, militia duty. At that point, he is "deputized" and can wage war on the enemy. He is not limited to mere self-defense; he can go on the offensive by either launching a preemptive strike (only for a just cause) or attacking a retreating enemy in battle. In short, the militia combines the sword of self-defense and the sword of vengeance into one body.

In 1790, Jonathan Homer published a sermon on the Israelite militia:

> OF ZEBULUN SUCH AS WENT FORTH TO BATTLE, EXPERT IN WAR, WITH ALL INSTRUMENTS OF WAR, FIFTY THOUSAND, WHICH COULD KEEP RANK: THEY WERE NOT OF DOUBLE HEART. [I Chronicles 12:33].
>
> The zeal of the tribe of Zebulun was conspicuous on the occasion. Fifty thousand of its citizens, with arms in their hands, marched to the capital. These appear to have been the flower of the militia. They were "such as went forth to battle. expert in war." . . . [T]hey were sufficiently trained to contend with the foes of their country. They were accordingly prepared to fight, should events require it. ***
>
> They were not mercenary soldiers. . . . They were the freemen, the citizens of the state, who viewed their religion, their wives, their children, their property, involved in the liberty, the safety, and the regular government of their country.[44]

Having shown the Biblical model, Homer concluded that the militia was the best defense for the country. Quoting George Washington, he stated that,

> "The Militia of this country must be considered as the palladium of our security, and the first effectual resort in case of hostility."[45]

3. Standing Armies

A third method of defense was the standing army in a time of peace. These armies were comprised of professional soldiers who made the military their career. Standing armies were labeled as such because they were not engaged in war -- they were "standing" around, waiting for a future conflict.

The colonial pastors tended to dislike standing armies. I Samuel 8 gives the Biblical reason for such an attitude. In this chapter, the prophet Samuel warns the Israelites that the type of king they are asking for

> will take your sons and make them serve with his chariots and horses, and they will run in front of his chariots. Some he will assign to be commanders of thousands and commanders of fifties . . . and still others to make weapons of war and equipment for

> his chariots. . . . [y]ou yourselves will become his slaves. When that day comes, you will cry out for relief from the king you have chosen.[46]

In other words, a government that centralizes the military strength of a nation will reduce the people to slavery.

This happens because standing armies encourage a spirit of apathy among the citizenry. The people become lackadaisical, and militia duty is neglected. As one pastor asserted in 1770, standing armies tended

> to prevent the militia of the kingdom from ever becoming respectable. . . . [W]hat a defenceless condition should we be, if our fortifications are suffered to crumble to pieces, and the use of arms is neglected?[47]

When the people and the militia lose their vigilance and are no longer trained in self-defense, a standing army can easily subjugate the citizenry. Simeon Howard stated that,

> A standing army may be fatal to the happiness and liberty of a community. They generally propagate corruption and vice where they reside, they frequently insult and abuse the unarmed and defenceless people . . . land] may be the means, in the hands of a wicked and oppressive sovereign, of overturning the constitution of a country, and establishing the most intolerable despotism.[48]

Reverend Howard believed that tyranny would result when the people deferred their duty of defense to a select group of government soldiers. He felt that an outside-in approach to defense was dangerous and that it should be avoided. Thus, he encouraged everyone to remain vigilant and to be prepared to defend his country.

Of course, the church in the 1700's was not without its share of pacifists, which led many preachers to address their objections. (See Appendix B.) But pacifists were in the minority, and as a result, the founding fathers were not influenced in that direction.

The founders believed in the Biblical right of self-defense, although they did not articulate it as a preacher would have explained it. Instead, they embodied the Biblical principle of self-defense in non-sectarian terminology. For example, while Madison affirmed that self-defense was a God-given right, he said it in non-religious language. He stated that "the great principle of self-preservation" was a "transcendent law of nature and of nature's God."[49] Similarly, Hamilton asserted that "if the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense.[50]

D. Historical Perspectives

While the founding fathers drew their primary insights from the laws of nature and the laws of God, they illustrated these ideas with historical examples.[51] And thus, they studied writers such as

Aristotle, Cicero, Machiavelli, Locke, and Sidney.

What the classical writers had to say about self-defense, the "right" to keep and bear arms, the militia and standing armies is explored in Steven Halbrooks', That Every Man Be Armed. A few excerpts from his book will show the thinking that was prevalent among the classical authors.

For example, Cicero stated that the private use of arms was Justifiable, if used in self-defense:

> There exists a law . . . which comes to us . . . from nature itself . . . . I refer to the law which lays it down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. . . . [A] man who has used arms in self-defense is not regarded as having carried them with a homicidal aim.[52]

Also, Machiavelli argued that a militia was the best form of national defense: "A state ought to depend upon only those troops composed of its own subjects; that those subjects cannot be better raised than by a citizen's militia.[53] Elsewhere he stated "that by establishing a good and well-ordered militia, divisions are extinguished, [and] peace restored."[54]

Finally, standing armies were not well liked by the classical writers. Many spoke out against such armies in favor of a militia.[55] These writers argued that individuals may defend themselves and that the military force of a country should be lodged in the hands of the people.

1. The English Approach

The English common law was another tremendous influence upon the founding fathers. As stated by the Supreme Court in Ex Parte Grossman, 267 U. S. , 87 (1924)

> [The founders] were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. . . . [W]hen they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they would be shortly and easily understood.

The common law, therefore, is important to understanding the Second Amendment.

William Blackstone was a respected commentator on the common law at the time of America's revolution. His Commentaries were very influential in England, and in the United States, where they became the cornerstone of American law.[56]

Self-defense was very important in the English common law. Blackstone asserted that "Self-defense . . . is justly called the primary law of nature."[57] Being a law of nature, self-defense was also considered to be a "natural right."[58] Consequently, weapons were very important because they helped preserve this right. "The subjects of England are entitled," Blackstone stated, "to the right of having and using arms for self-preservation and defense."[59]

Self-defense being an important right, the common law took certain precautions to preserve it. The first method has already been mentioned -the right to have arms. Second, the common law provided for the mustering of the militia. Finally, no standing armies existed for centuries.

Because England did not have a standing army until the seventeenth century, the military force consisted of the citizenry.[60] England's army was the militia -- a citizen-army. Furthermore, England did not have a regular police force until the nineteenth century.[61] A justice of the peace, a sheriff or a constable was the only official law enforcement officer needed. Every citizen had a duty to be a "policeman."

In order for the English citizen to carry out his military and police duties, it was necessary for him to remain armed, to be trained with arms, and above all, to remain vigilant. Numerous statutes were passed to further these objectives. In 1181, the Assize of Arms required every freeman between 15 and 40 to possess arms. Under the Assize of Arms of 1253, the requirement was also extended to villeins (or serfs). By the middle of the thirteenth century, then, every male citizen was required to be armed, even those who were considered as the least important in society (such as the serfs).[62]

Beyond the duty to be armed, citizens were also required to be proficient with their arms. In 1369, citizens were commanded to spend their leisure time during holidays practicing with their bows and arrows. Furthermore, they were to give up any games which diverted them from their practice.[63]

Self-defense was an important matter to the English. Even when King Henry VIII limited the shooting (but not the possession) of longbows, there was an exception made for those who "shote owt of a howse for the lawefull defens of the same.[64]

The militia was another important matter to the English for its existence served as a tremendous check upon the kings' power. A British historian, Charles Oman, remarks on this truth:

> More than once he [Henry VIII] had to restrain himself, when he discovered that the general feeling of his subjects was against him. . . . His 'gentlemen pensioners' and his yeomen of the guard were but a handful, and bills or bows were in every farm and cottage.[65]

A drastic change of policy occurred in the seventeenth century when several restrictions were imposed upon the English. The Militia Act of 1662 empowered the government officials to search for and seize the weapons of individual citizens. The civil officials knew where to retrieve the guns because gunsmiths were required to furnish lists of purchasers to the government.[66]

In 1671, the Game Act restricted the poor from using certain weapons which were useful for hunting.[67] Although the stated purpose for this act was to preserve the diminishing game resources, William Blackstone disagreed. He asserted that the covert purpose was the "prevention of popular insurrections and resistance to the government, by disarming the bulk of the people . . . [which] is a reason oftener meant than avowed."[68]

In 1688, William of Orange took the throne of England in what was known as the Glorious Revolution. Before the coronation, however, he had to swear to uphold a Bill of Rights which had been drafted by Parliament. With respect to gun ownership, the Bill of Rights stated "That the subjects which are Protestant may have arms for their defense suitable to their conditions and as allowed by law."[69] This right was a protection of individual self-defense and was not limited to a militia purpose. In fact, an earlier draft had only allowed Protestants to "keep arms for the common defense."[70] Yet this wording was specifically rejected.[71]

Thus, England's history shows that self-defense was an individual duty. It was not to be delegated to a select few.

2. The Colonial Approach

The colonists in America held attitudes similar to the English regarding self-defense. First, the founders were committed to maintaining an armed populace. For instance, Patrick Henry stated during the Virginia Convention that "The great object is, that every man be armed."[72] Richard Henry Lee, a delegate to that convention, wrote that "To preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them."[73] George Mason even equated slavery with the confiscating of weapons: "Forty years ago, when the resolution of enslaving America was formed in Great Britain, the British Parliament was advised by an artful man . . . to disarm the people."[74]

In addition to the right of bearing arms, the colonists also had the duty to be armed, to be trained in the use of those arms, and to be vigilant. A Congressional Subcommittee lists some of the laws in the colonies which reached these objectives:

> In 1623, Virginia forbade its colonists to travel unless they were "well armed"; in 1631 it required colonists to engage in target practice on Sunday and to "bring their peeces to church." In 1658 it required every householder to have a functioning firearm within his house and in 1673 its laws provided that a citizen who claimed he was too poor to purchase a firearm would have one purchased for him by the government, which would then require him to pay a reasonable price when able to do so. In Massachusetts, the first session of the legislature ordered that not only freemen, but also indentured servants own firearms and in 1644 it imposed a stern 6 shilling fine upon any citizen who was not armed.[75]

The colonists jealously guarded their right to bear arms. The Revolutionary War started with the Battle of Lexington in 1775 when the British were marching to seize the colonists' weapons at Concord. The colonists cited this attempt at gun control as one of the causes of the war in the Declaration of the Causes and Necessity of Taking up Arms.[76] Clearly, they considered weapons to be a vital part of preserving the right and duty of self-defense.

Another similarity with the English system was the colonial militia. As members of a body-politic, the colonists realized that they had certain duties to their fellow neighbor. Consequently, military

duty in the colonies was not delegated to a standing army, rather it was a job for every male citizen as a member of the militia.[77] When the King of England violated this individual-outward principle, the colonists petitioned him, listing as one of their grievances that "standing armies [were being] kept in times of peace."[78] It is thus evident that the colonists did not favor an outside-in view of self-defense. That is, they did not think that the defense of a nation should be delegated to a few government soldiers.

In conclusion, the individual right of self-defense has had an illustrious past. From Moses to Jesus, and from Blackstone to Madison, legal experts have affirmed the exercise of this right. The right of self-defense has also been incorporated into the Declaration of Independence, America's National Charter. Most importantly, the right of self-defense is part of the law of nature and of nature's God, which gives it its unalienable status.

III. SELF-DEFENSE: CONSTITUTIONAL PROVISIONS

The preceding chapter discussed the primary means used to secure the unalienable right of self-defense: the right to have arms, the militia, and the absence of standing armies. These principles are woven throughout the United States' legal documents, starting with the Declaration of Independence which set forth the general principle of self-defense.

Similar to the Declaration, the state constitutions drafted before the U.S. Constitution in 1787 recognized that the natural defense of a nation rested in local hands. Of the seven state constitutions which had a Bill of Rights before 1787, all seven said that permanent, standing armies were unsafe and should not be maintained in time of peace.[79] In 1776, for example, Virginia's Bill of Rights said the following: "Standing armies, in time of peace, should be avoided as dangerous to liberty."[80]

The presupposition was that, by nature, the fundamental defense of a state should work from the inside-out. While every state Bill of Rights asserted this in some form, four of them explicitly stated that the militia (a citizen-army) was the natural defense of the state.[81] Virginia's Constitution said 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."[82] The state militias included every male between the ages of 17 and 45;[83] that is, everyone except for a few public officials.[84] Every citizen was required to be armed and prepared to fight.[85]

The three constitutions which did not mention the militia by name stated that every individual had the right to own firearms either for his own defense or for the common defense.[86] Pennsylvania's Constitution, for example, stated both: "The people have a right to bear arms for the defense of themselves and the state."[87] Weapons were considered to be a necessary means for self-defense. If individuals were denied this means, then the very backbone of self-defense would have been crippled.

In addition to the right of bearing arms, the states also affirmed the importance of maintaining a militia instead of a standing army. The state constitutions recognized that self-defense was an individual right and duty, flowing from the inside-out, not vice-versa.

A. Self-Defense in the U.S. Constitution

When reading the Constitution, one must remember that its drafters incorporated the ideas from the National Charter, the Declaration. It had asserted that self-defense was a citizen's right and duty -- a maxim which was embodied in both the state and national constitutions.

But even though defense was seen primarily as an individual duty, the national government was also given power to defend the nation. For example, Congress has the "Power To lay and collect Taxes, Duties, Imposts and Excises" in order to "provide for the common Defense."[88] At face value, this provision seems to give Congress unlimited power in defending the nation. In a time of crisis, this is the case; the framers wanted Congress to have the necessary and proper means to meet any foreign insurgency.

During peace-time, however, the founders wanted the national government to have a more limited role in defending the nation. The text and the context of the Constitution reflect this intent.

1. Text of the Constitution

The text of the Constitution uses restrictive language when delineating Congress' power to defend the nation. Congress is to "provide" for the common defense, not to "promote" it (U.S., Constitution, art. I, sec. 8, cl. 1).

The significance of what this provision says, and what it does not say, is based on the distinction between "provide" and "promote" in the Constitution. On the one hand, Congress is given the power "To provide for calling forth the militia,"[89] but on the other hand, it is given the power "To Promote the Progress of Science and useful Arts."[90] What is the difference?

To "provide for" incorporates a limitation whereas "promote" is an enlargement.[91] Webster's 1828 dictionary defines provide in the following way: "to get, collect or make ready for future use; to prepare. . To stipulate previously."[92] Thus, "provide" means to prepare for a future event. Promote on the other hand means "To forward; to advance; to contribute to the growth, enlargement or excellence of any thing valuable."[93] "Promote" connotes a continual, active pursuit of growth. "Provide" is more limited than "promote," which is assertive and expansive. In providing for the common defense, therefore, Congress has a limited role during times of peace. This reflects the founders' commitment to allow self-defense to be, first and foremost, an individual right and duty.

2. Context of the Constitution

The context of Article I, Section 8 shows that Congress should not bear the primary responsibility for defending the country during a time of peace. The provision empowering Congress to "provide for the common Defense" is limited by the statements following in the rest of Article I, Section 8.

The first limitation is found in clauses 12 and 13. The language states that Congress has the power to "raise and support Armies" and to "provide and maintain a navy." The distinction in the wording

between these two phrases is a crucial one.

"Armies" is a plural noun indicating that more than one army will be raised and that Congress will not maintain a permanent army. But "Navy" is a singular noun, indicating that only one navy will exist. This is further supported by the fact that Congress must "maintain" the navy. To "maintain" something is a continual, ongoing process. Therefore, Congress must continually fund a permanent navy.

In contrast, Congress must "support" the armies that are raised. The power to "support" an army is not as expansive as the power to "maintain" that army. "Maintaining" is perpetual; "supporting" is temporary, for the support of an army depends upon its existence. Once the army is disbanded, the support for it ends. And thus, Congress' power to "support an army" is evidence of restrictive language that limits its power to "provide for the common Defense."

It is important to note that while a standing army in time of peace was considered dangerous to liberty, a permanent navy was not. This distinction lies in the difference between the natures of an army and a navy. A navy was not considered capable of keeping a population in subjection since its strength was at sea. An army, on the other hand, was capable of being quartered in people's homes. This made them dangerous.

James Madison acknowledged this distinction. Concerning the navy, he stated that, "The batteries most capable of repelling foreign enterprises on our safety are happily such as can never be turned by a perfidious government against our liberties."[94] But concerning a professional army, he said that "a standing army is one of the greatest mischiefs that can possibly happen."[95] This distinction is further realized in the state constitutions. s already mentioned, all seven of the state constitutions, which had a Bill of Rights before 1787, said that standing armies should be avoided for they were dangerous to liberty.[96] Not one constitution, however, made the same claim about the navy.

A second limitation is found in the second part of clause 12. Congress shall have power "To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years."[97] (Emphasis added.)

Any delegation of money to the army expires in two years and, if not renewed, the army must then disband. Congress is not required to continue funding an army. In fact, Alexander Hamilton writing in the Federalist Papers said,

> The legislature of the United States will be obliged by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter by a formal vote in the face of their constituents. They are not at liberty to vest in th executive department permanent funds for the support of an army.[98]

Therefore, the two-year limit for funding an army was seen as a restriction upon Congress' power to "provide for the common Defense."

Finally, Congress has the power to "provide for organizing, arming, and disciplining, the Militia."[99] Rufus King, a delegate to the Constitutional Convention, explained this provision in the following manner:

> By "organizing," the committee meant proportioning the officers and men -- by "arming," specifying the kind, size and caliber of arms -- and by "disciplining," prescribing the manual exercise, evolutions, etc.[100]

This provision is a limitation on Congress' power to "provide for the common Defense" because it gives Congress the power to unify the state militias, Once united, the militias can more effectually be used by the President, acting as Commander In Chief. An important purpose of this clause is to give the President power over the militias so that he will be less likely to use a standing army for military purposes. Hamilton stated in the Federalist Papers that,

> If standing armies are dangerous to liberty, an efficacious power over the militia in the same body ought, as far as possible, to take away the inducement and the pretext to such unfriendly institutions. If the federal government can command the aid of the militia in those emergencies which call for the military arm in support of the civil magistrate, it can the better dispense with the employment of a different kind of force. If it cannot avail itself of the former, it will be obliged to recur to the latter. To render an army unnecessary will be a more certain method of preventing its existence than a thousand prohibitions on paper.[101]

By preventing the need for a standing army, the militias can limit Congress' role in peace-time defense, which is better left to the states and the people. (See Appendix C.) The assumption was that self-defense should work from the inside-out.

Although the founders thought that a standing army was dangerous, they wanted Congress to have discretion in deciding if an army was needed. They did not want to tie the hands of Congress in case the need arose for a standing army in time of peace. The concern was that Congress, sensing danger from abroad, might need to raise a standing army -- even though war had not been officially declared.

For example, Jonathan Dayton, a delegate to the Constitutional Convention, expressed this very idea. Although he did not think that a peace-time standing army would be necessary, he conceded that, "a standing force of some sort <u>may, for ought we know, become unavoidable</u> (emphasis added)" because "preparations for war are generally made in time of peace.[102]

If the Congress had to wait until an actual war was in progress, then the nation would have been placed in a precarious position. As Hamilton put it, "the United States would then exhibit the most extraordinary spectacle which the world has yet seen -- that of a nation incapacitated by its Constitution to prepare for defense before it was actually invaded."[103]

Furthermore, the founders did not feel it necessary to limit the size of a standing army. During the

Constitutional Convention, Elbridge Gerry moved to limit the size of standing armies in peace-time to two or three thousand men. Another delegate then reminded him that the best guard against a peace-time standing army was the clause which limited the appropriation of funds.[104] Without the funding from Congress, the army could not exist.

Thus, the delegates to the convention resolved not to expressly prohibit or limit the size of standing armies. Instead, they felt that a limitation upon the purse strings would be enough of a safeguard to prevent an unnecessary army. Again, the assumption was that self-defense should work from the inside-out -- a supposition that is woven throughout the context of Article I, Section 8.

B. Self-Defense in a Federal System

The American form of government also reveals that Congress' peace-time role in defense is limited.

The United States of America is federal in form. In such a system, the governmental powers are distributed between national and state governments. The national government has authority over matters of national unity; the states, over matters that are local and allow for diversity. Those matters which are considered to be matters of national concern are enumerated in the Constitution. What is not delegated to the national government is reserved for the several states and the people.

At the heart of a federal system is the law of unity and diversity -a principle derived from the "Laws of Nature and of Nature's God."[105] The law of unity and diversity has two significant implications for the defense of the nation: strength in unity and freedom in diversity.

1. Strength in Unity

The benefit of unity in a federal system is strength. The "one people" who united under the Declaration later established the Constitution "in order to form a more perfect Union." Having achieved this union, they better secured the defense of the nation -- for unity breeds strength, and strength deters foreign invaders.

In addition to deterrence, unity also improves the defense against an actual invasion. The slogan, "United we stand, divided we fall" is certainly true in warfare. And thus, the Constitution allows the national government to unify the defense of the nation. First, Congress has the sole power to declare war; and it may declare war for the entire nation.[106] This power gives the nation, as James Madison said, "the advantage of uniformity in all points which relate to foreign powers."[107]

Second, "[t]he President shall be Commander in Chief . . . of the militia of the several States, when called into the actual Service of the United States."[108] Under this provision, the President can assume the command which the state governors normally have over their militias. The reasoning behind this is evident: one commander will allow for unity in war; fifty commanders will not.

Third, Congress can "provide for organizing, arming, and disciplining, the Militia."[109] This provision is intended to get the militia to think and act as a unified army. The President can then more

effectually command the militia as one unit when they are nationalized.

Fourth, Congress has the power to raise armies and provide a navy by drafting citizens from any state in the union.[110] Under the Articles of Confederation, many states had severely hampered the Continental Army by refusing to supply their citizens for the war effort.[111] The national government's power to raise troops is intended to prevent the states from dividing the nation in this way ever again.

Finally, the national government can apply the manpower of the whole union to any part of the whole. The national leaders have the authority to quell an internal rebellion or defend a state from external invasion.[112] One reason that rebellions and invasions were considered to be national concerns was that either could threaten the nation's integrity.[113]

To maintain a strong defense, therefore, the Constitution provides for a unified defense. But unity does more than protect the citizens from outside forces; unity also protects the people from internal tyranny by reducing the need for a standing army. In Federalist No. 41, James Madison explained that, "The Union itself . . . destroys every pretext for a military establishment which could be dangerous." Therefore, he continued, "the effectual establishment of the Union, (is] the best possible precaution against danger from standing armies."[114] National unity means national strength, which in turn, means that Congress does not need to raise a permanent standing army. Again, the assumption is that the national rulers are not vested with unlimited powers in matters of defense, but rather, it is supposed that their role is limited. As Hamilton said in Federalist No. 29, the national government has "the duties of superintending the common defense."[115] (Emphasis added.)

2. Freedom in Diversity

In addition to the benefits of unity, there are well-founded reasons for remaining diverse. The "Constitution of the United States," as the title suggests, recognizes that the "Free and Independent States" formed under the Declaration will exist in the midst of the Union. These state governments maintain their own individuality and act as a check upon the national government. Thus, the benefit of diversity in a federal system is the maintenance of freedom.

The Constitution allows for diversity in matters of defense. For example, the Constitution respects the people's right to keep and bear arms. Being a document of limited and enumerated powers, the Constitution only allows Congress to exercise the power given to them by the people. I the people did not give Congress any authority to confiscate guns, then Congress cannot pass any "gun control" legislation. In fact, this is the case; Article I, Section 8 of the Constitution gives Congress no such power. This means that the unalienable right of self-defense, which includes the right to own and use a weapon for a lawful purpose (such as self-defense), remains a right and power to be exercised by the people. This is the primary way that the Constitution secures the people's right to keep and bear arms. The Second Amendment of the Bill of Rights was added later, to serve as a further protection.

Another way the Constitution permits diversity in defense is by allowing the militia to normally

remain under the authority of the states: "Congress shall . . . [reserve] to the States respectively, the Appointment of the Officers, and the Authority of training the Militia."[116] While the states have original jurisdiction over their militias, Congress does have the power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[117] Once Congress "calls forth" the militia, the President becomes their Commander in Chief.[118] Until then, each governor retains his authority as commander his state militia.

The militias are important for they are an effective way to check national encroachments upon the states' power. In Federalist 46, James Madison argued this very point:

> Let a regular army . . . be formed; and let it be entirely at the devotion of the federal government: still it would not be going too far to say that the State governments with the people on their side would be able to repel the danger. . . . To these [the standing army troops] would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by [state] governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the late successful resistance of this country against the British arms will be most inclined to deny the possibility of it.[119]

Besides their ability to check the national government, the state militias can reduce the need for a standing army. Madison stated in the Constitutional Convention that since "the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good militia."[120] Neglecting the militia leaves a void which a standing army must fill. But by keeping the militias well-regulated, the people can bear the brunt of the defense burden. (See Appendix C.)

A federal system keeps the peace-time strength dispersed. Furthermore, it allows the people both to provide a valuable check upon the national government and to prevent the necessity of a standing army. Thus, the federal system limits the Congressional role in providing for the common defense. The assumption, once again, is that self-defense should work from the individual-outward.

In conclusion, the right of self-defense is inherent in the nature of a federal system because both the unity and diversity elements contribute to an inside-out system of defense.

C. Self-Defense in the Second Amendment

The prevalent, recurring theme up to this point is that self-defense is a natural right to be exercised by every individual. The common methods of securing this principle are the following: the right to have arms, the militia, and no permanent standing armies. These principles were very important to the founding fathers, as evidenced by the state ratifying conventions.

1. State Proposals for Amendments

Of the 13 states that ratified the Constitution, eight requested that additional amendments be added to the Constitution. A common theme found in six of these state proposals was the importance of self-defense, as well as the three methods for preserving that right.[121] For example, Virginia's proposal read,

> That the doctrine of non-resistance against arbitrary power and oppression is absurd slavish, and destructive of the good and happiness of mankind. . . . 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.[122]

Among the states requesting a right to keep and bear arms amendment, two states made it unmistakably clear that they wanted a protection for every citizen. The Pennsylvania Convention Minority, for instance, stated that

> The people have a right to bear arms for the defence of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals.[123]

Also, the state of New Hampshire requested the following provision: "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion."[124]

James Madison was given the task of incorporating all of these ideas into a Constitutional amendment. A Congressional Subcommittee explains that Madison, when drafting the Bill of Rights,

> did not write upon a blank tablet. Instead, he obtained a pamphlet listing the State proposals for a Bill or Rights and sought to produce a briefer version incorporating all the vital proposals of these. His purpose was to incorporate, not distinguish by technical changes, proposals such as that of the Pennsylvania minority . . . and the New Hampshire delegates.[125]

The state proposals should help interpret the Second Amendment because it was these proposals that gave rise to what is now the Second Amendment. It states that,

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

2. Text and Context

The language of the Second Amendment indicates that self-defense was the foundational principle

implied. The words "Militia," "security of a free State" and "keep and bear Arms" all contribute to this understanding.

Since the right of self-defense is one of the "Laws of Nature and of Nature's God," it will exist with or without the Bill of Rights. But the framers wanted to further secure this right, and therefore, they drafted the Second Amendment. In this Amendment, the framers either explicitly stated or strongly implied the three most common ways to secure the right of self-defense: the right to have arms, the duty to be in the militia, and the danger of standing armies. The text and context of the Amendment, supplemented with the Congressional debates, reveal this intent.

The Right of the People to Keep and Bear Arms

The first important provision in the Second Amendment is that "the right of the people to keep and bear Arms, shall not be infringed." Two differing interpretations have been derived from this phrase.

The first view is the "collective rights" interpretation. Advocates of this position assert that the language of the Second Amendment ties the right to keep and bear arms to the militia clause. This suggests the following construction of the Amendment: because the militia is necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. This interpretation would limit the right to bear arms to those in the militia and, presumably, to those in other military bodies as well.

The second view is the "individual rights" interpretation. The proponents of this view argue that the "right of the people" which is being protected refers to every individual citizen. Important in arriving at this conclusion is the historical evidence prior to the drafting of the Second Amendment -- especially the state proposals, since they directly gave rise to the language of the Amendment. Of the states proposing a right to keep and bear arms, none restricted gun ownership to only the militia, and in fact, some states actually made an explicit request for a guarantee of a universal right.

While these two interpretations differ superficially, in the end they both arrive at the same answer, that is, if the proper rules of interpretation are followed. Under the "collective rights" view which links arms ownership to militia duty, the Second Amendment only protects the right of militia-members to bear arms. But for one to then conclude this as a matter of policy would effectively divorce the Bill of Rights from the Constitution. Article I, Section 8 does not give Congress the authority to confiscate the weapons of non-militia-members, meaning that Congress can not deny any citizen of his right to keep and bear arms. Thus, the Second Amendment and the Constitution together protect every individual's right to keep and bear arms. (Even standing alone, the Second Amendment would at least make the right to bear arms applicable to the entire male population. Federal laws from 1792 to the present have defined the militia as comprising every male citizen, not just a select few.)[126]

According to the second view, the Anglo-American history (especially the state proposals) should help interpret the Second Amendment. This would link the right to have arms to non-militiamen as well as militiamen, thereby protecting everyone's right. Either way, therefore, both interpretations

ultimately yield the same conclusion since the Constitution and the Second Amendment must be examined together. The result is a constitutional protection of an individual right to keep and bear arms.

The "individual rights" interpretation is further supported by a closer examination of the text and context of the Amendment. First, the "right of the people" means everyone. Most people would agree that the "right of the people" in the First and Fourth Amendments guarantees individual rights. The right of the people to peaceably assemble, to petition, and to be safe from unreasonable searches and seizures are rights that are commonly considered to apply to all individuals.

The same must be said, therefore, for the "right of the people" in the Second Amendment. To argue that this right only guarantees a collective right, while the "right of the people" in the First and Fourth Amendments guarantees individual rights, would suggest that the framers were guilty of equivocating. (But whenever one interprets a text, one must give the benefit of the doubt to the author. This is Aristotle's rule of interpretation. One must not assume an author to be illogical unless there are compelling reasons for such an assumption.)

Second, the words "shall not be infringed" indicate that there is a preexisting right of the people which is being preserved. Even if the right to have arms only related to the militia, the laws of nature and of nature's God would still permit an individual to use a weapon for his personal self-defense.

Finally, the contextual analysis supports an "individual rights" interpretation. Madison, the author of the Bill of Rights, wrote that, "They [the proposed amendments] relate 1st. to private rights."[127] Madison's statement means that the Second Amendment was intended to secure a private right.

The Second Amendment further states that the people shall not be denied their right "to keep and bear arms." The words "keep" and "bear" do not mean the same thing, although they are similar in meaning. Noah Webster defined "keep" as a matter of possession: "to have in custody for security or preservation."[128] Meanwhile, "bear" refers to where one can keep what he possesses; "bear" means "to wear . . . as, to bear a sword . . . to bear arms in a coat."[129]

Therefore, having defined these terms, and remembering that the Second Amendment secures the right of self-defense, one could put the following gloss on the latter half of the Amendment: "the right of each individual to lawfully possess and wear arms for his self-defense, shall not be infringed." This is a guarantee of an individual right, and it assumes that self-defense works from the inside-out.

A few words must be said concerning the nature of this right. Quite simply, a right is not a wrong. As with any right, it must be used for a lawful purpose, not a wrongful one. For example, a person can not claim a right of liberty to drive a car through his neighbor's front yard. The right of liberty must be exercised in a lawful fashion, meaning that there are limits to that right. Similarly, an individual's right to keep and bear arms is not unlimited. While one may use a gun for a lawful purpose (such as in self-defense), one does not have a right to use a weapon to commit a crime.

A Well-Regulated Militia

The second important provision in the Second Amendment is the statement: "a well regulated Militia, being necessary to the security of a free State."

The militia of the 1700's included every free citizen. George Mason stated in the Virginia convention, "I ask, Who are the militia? They consist now of the whole people, except a few public officers."[130] The founders believed that the militia should be well-regulated, that is, that every citizen should be trained and be vigilant, ready to exercise his citizen duty.[131] Defense was seen as a matter of individual self-government and was a duty that everyone shared.

Furthermore, a well regulated Militia was considered to be "necessary to the security of a free State." The Second Amendment emphasized the "Militia" and the "State," not the army and the nation. This emphasis (upon a local defense) reaffirmed the federal nature of the United States, for defense was considered to be primarily a duty for the diverse parts in times of peace.

A Standing Army, the Bane of Liberty

Finally, a third item which is implied in the Second Amendment is the deterrent to having a standing army. This is accomplished by the phrase, "a well regulated Militia," because it is a well-regulated militia that will diminish the need for a standing army. Elbridge Gerry stated during the Congressional debates over the Second Amendment, "What, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty."[132] Thus, the militia preserved the individual right and duty of self-defense by reducing the need for a permanent standing army.

By way of summary, the text and context of the Second Amendment show that the inside-out principle of self-defense lies at the very foundation of the Amendment.

D. Self-Defense in the State Constitutions

The right of self-defense is embodied in many of the current state constitutions as well. While forty-three state constitutions have right to keep and bear arm provisions, several have pro-militia and anti-standing army clauses as well.[133] North Carolina's constitution, for example, states all three:

> A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained.[134]

States such as Pennsylvania, Kentucky, Washington (to name but a few) make it unmistakably clear that the right to keep and bear arms in those states applies to every citizen. For example, Washington's Constitution states that, "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired."[135]

In conclusion, the right of self-defense has been embodied in the constitutional documents of the

United States: the state constitutions, the U.S. Constitution and the U.S. Bill of Rights. All of them affirm that the principle of self-defense should work from the inside-out.

IV. MODERN DEVELOPMENTS SINCE THE BILL OF RIGHTS

Since the adoption of the Bill of Rights, Second Amendment issues have rarely ever reached the steps of the Supreme Court. Nevertheless, there has been much debate both on the right to keep and bear arms and on self-defense in general. Today, the right of self-defense is understood quite differently than when the nation was founded. According to many, self-defense is no longer an unalienable right, an assumption which has led to many wrong interpretations of the Second Amendment. This chapter discusses four common errors which occur in the Second Amendment debates.

A. The Second Amendment as the Source of a Right

In justifying the right to keep and bear arms, many scholars are very dependent upon the language of the Second Amendment. For example, Joyce Malcolm asserts that, "Few would disagree that the crux of the [right to keep and bear arms] controversy is the construction of the Second Amendment."[136] The American Bar Association agrees. They state that the heart of the debate over the right to keep and bear arms is the "construction of the Second Amendment."[137]

The problem with placing the emphasis upon the language of the Amendment, and not the natural right of self-defense, is that the text becomes the primary expositor of the right to bear arms. To make the text the "crux of the controversy" assumes that the Second Amendment is a grant of power; that it gives people the right to keep and bear arms. This presents two problems, the first of which is an overemphasis upon the "framers' intent."[138] After all, if it is the text that gives people the right to bear arms, then one would certainly want to know the intent of those who drafted the text. But while the intent of the framers is important, it should not be the heart of the debate because the right to keep and bear arms is rooted in a firm foundation which precedes the "framers' intent." That foundation is the unalienable right of self-defense, which in the language of the Declaration, is a right "endowed by the Creator."

If the right to keep and bear arms stems solely from the intent of the Congress that enacted the Amendment, then that right will not be secure for long. A government which has the power to grant a right has the power to revoke the same -- including the right of free speech, free assembly, free press, etc. On the other hand, a God-given right will be much more secure. Since the unalienable right of self-defense is given by God, it cannot be revoked or weakened by government. As long as there is evil in the world, and there are evil people using guns, the right to have arms will be necessary to secure one's self-defense.

Therefore, the real crux of the controversy is, who gives man his rights: the Creator or the government? If self-defense is a God-given right, then it cannot be depreciated or annulled by the government. Self-defense must be the starting point for any discussion of the right to keep and bear arms.

A second problem which results from deriving the right to bear arms from the language of the Second Amendment is that the role of history will be overemphasized. One scholar states that "if the crux of the controversy is the construction of the Second Amendment, the key to that construction is the English tradition the colonists inherited, and the English Bill of Rights from which much of the American Bill of Rights was drawn."[139]

Granted, a good historical argument has its place, but it should not be "the key" to unlocking the meaning of the Second Amendment. Otherwise, one might assume that the right to keep and bear arms simply evolved out of the Anglo-American past. On such an assumption, one may completely overlook the important right of self-defense, which is at the heart of the right to bear arms.

For example, the National Coalition to Ban Handguns stated in 1982 that "the American 'right to bear arms' developed at the time of the revolution." Furthermore, they claimed that the right "grew out of the duty imposed on the early colonists to keep arms for the defense of their isolated and endangered communities."[140] The assumption here was that the right to bear arms only existed because the colonists were living in "isolated and endangered communities," and the government had "imposed" the duty of self-defense upon them. In other words, the right to bear arms was completely dependent upon the circumstances.

John Levin has also advanced this very position: "After over three centuries, the right to bear arms is becoming anachronistic. As the policing of society becomes more efficient, the need for arms for personal self-defense becomes more irrelevant."[141] Levin's statement was based on the same assumption as the one by the N.C.B.H. They both assume that the right of personal self-defense can evolve as the times change. Individuals may have the right of self-defense in one century, but may loose that right in the next.

If rights change with the times, however, then all our rights are in danger -- including the right of a free press, assembly, speech, etc. Arguing that an efficient police force makes the right to have arms "anachronistic" is like arguing that a government's efficient use of print and electronic media makes the right of free press "more irrelevant."

But natural rights do not change with time; nor are they dependent upon the circumstances. They are gifts from God; unchanging and irrevocable. Self-defense is an unalienable right, and the right to bear arms is necessary to secure this right.

Again, self-defense is the crux of the issue. But this time the question is, who gives man his rights: God or history?

B. A Collective Right

Since the drafting of the Bill of Rights, there have been three predominant views concerning the Second Amendment. The first view said that the right to keep and bear arms was an individual right. This was first expressed in James Madison's notes, which stated that the amendments "relate 1st. to private rights."[142]

This theme was also expressed in the Dred Scott decision, where the court enumerated some of the rights which belong to every American citizen. The Court in this decision projected that if blacks were to become citizens of the United States, they would be entitled to the same rights as everyone else. The Court stated that to recognize blacks as citizens,

> would give to persons of the negro race, who are recognized as citizens in any one state of the Union, the right to enter every other state, whenever they pleased. . . . [A]nd it would give them full liberty of speech in public and in private . . . to hold public meetings upon political affairs, and to keep and carry arms wherever they went.[143] (Emphasis added.)

The second view of the Second Amendment arose after the Civil War. This view recognizes that every citizen can keep and bear arms, but the weapons possessed must be able to be used for militia purposes. This view was expressed in U. S. v. Miller, 307 U. S. 174 (1939).

In this decision, the Court recognized that every citizen had a right and duty to have arms. The Court stated,

> The signification attributed to the term Militia appears from the debates in the [Constitutional] Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense . . . [a]nd further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time. (Emphasis added.)

The Court, however, said that the weapons protected by the Second Amendment must fit a militia purpose:

> In the absence of any evidence tending to show that possession or use of any "shotgun having a barrel of less then 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.

The third view of the Second Amendment limits the person and the weapon to militia duty. That is, the right to keep and bear arms applies only to members of the militia. Or to put it more broadly, this right applies to only the police, the militia on duty and the army.

While this view has not been espoused by the Supreme Court, it is very popular at the state level, as well as in the law journals. For example, in 1976 the Supreme Court of Massachusetts stated that the Second Amendment "is not directed to guaranteeing the rights of individuals." Rather, the "Second Amendment to the Constitution is to be read as an assurance that the national government will give the state militias some freedom from national interference."[144] In other words, the Second

Amendment only gives members of the militia the right to keep and bear arms.

Similar to the Massachusetts Supreme Court, the National Coalition to Ban Handguns states that the Second Amendment only refers "to the people's collective right to bear arms as members of a well-regulated and authorized militia. . . . [T]he Second Amendment does not guarantee an individual right to bear arms."[145] (Emphasis added.)

This is the controversy today: is the right to keep and bear arms a collective or an individual right? In reality, the collective rights view is better labeled a "state rights" view because the proponents of this view apply the right to keep and bear arms to the state. For example, Roy Weatherup, a collective rights proponent, asserts that the Second Amendment "was designed solely to protect the states against the general government, not to create a personal right which either state or federal authorities are bound to respect."[146]

There are two problems if one chooses to side with the collectivist camp. First, the collective view is guilty of equivocation. If the right of the people only refers to the people as a collective whole, or to the states in exclusion of the people as individuals, then the same must be said of the rights of the people in the First, Fourth, Ninth and Tenth Amendments. But because no one is willing to argue that individuals do not have a personal right to peaceably assemble or to petition their government, then one cannot dismiss the guarantee of individual protection in the Second Amendment.

More importantly, the collective view prohibits individuals from keeping and bearing arms, which in effect, denies citizens the best means of personal self-defense. "Collective right" advocates wish to transfer the duty of self-defense from the individual to the collective whole; this is an outside-in approach to self-defense, and it is contrary to the laws of nature and of nature's God. The authority of self-defense, as well as the means to secure it, originates in the people, not in the government.

C. The National Guard as the Militia

"A 'well-regulated militia, " says the National Coalition to Ban Handguns, "is [today] represented by the National Guard."[147] This statement reveals the current majority view concerning the militia. Most people would argue that the militia of the Second Amendment is the National Guard.

This is not the case, however. One year after the Second Amendment was added to the Constitution in 1791, Congress provided for the national defense by regulating the militia. The Militia Act of 1792 declared that every white, male citizen between the ages of 17 and 45 was to be a member of the militia. Furthermore, every citizen was to be armed. The Act stated that "every citizen so enrolled . . . [shall] provide himself with a good musket, or firelock, a sufficient bayonet and belt, two spare flints..."[148]

Every citizen, as a matter of self-government, was seen to have a duty to defend his state and his country. There was no National Guard at this point. Everyone was to be armed and ready to fight. In 1824, the Seventh Regiment of the New York State Militia assumed the title of "National Guards." This title became popular after 1878 with the founding of the National Guard Association

of the United States. At this time, the organized militias of the several states became known as the National Guard.[149]

The Dick Act of 1903 officially recognized the National Guard and separated the militia into two classes: the organized militia and the unorganized militia. The organized militias were the National Guard militias in every state. The unorganized militias were made up of everyone else, that is, everyone of age between 17 and 45.[150]

The National Guard Act of 1933 made the organized militia a part of the United States Army. The Act declares that, "the federally recognized National Guard shall at all times, whether in peace or war, be a component of the Army of the United States."[151] The National Guard, however, did maintain its militia status. The Act states that "the National Guard as created and existing under the present National Defense Act is the Organized Militia of the States. . ."[152]

Clearly, the National Guard was never intended to fully comprise the militia -- neither in the 1700's, nor at the present time. This is affirmed in the United States Code. It states unequivocably that, "The militia of the United States consists of all able-bodied males at least 17 years of age and . . , under 45 years of age."[153] The U.S.C. then reaffirms the previous Congressional acts by dividing the militia into the unorganized and the organized militia.

The problem with this classification is that it forms a select militia -- the National Guard. (A select militia is a small core of men who bear the brunt of the militia duty.) Most founding fathers disliked select militias because they denied man's self-governing nature.[154] Defense, by nature, was seen to be the duty of every individual. A select militia, however, delegated this duty to a select few.

Richard Henry Lee, who was a signer of the Declaration of Independence, a delegate to the Virginia state convention, and one of the first U.S. Senators, was very outspoken concerning the evils of a select militia. Lee believed that,

> To preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them . . . . The mind that aims at a select militia, must be influenced by a truly anti-republican principle.[155]

Why anti-republican? Because the issue of equality was at stake. A select militia, established by law, would produce apathy in the general public. By fiat, this would create a special class of citizens who were entitled to bear arms. But Lee argued that to preserve liberty, the general public must be armed. Everyone must be armed and equally prepared.

George Mason stated that the best way to disarm and thus to enslave the citizenry was "by totally disusing and neglecting the militia."[156] And the best way to disuse and neglect the militia, according to Lee, was to maintain a select militia. "Establishing a select corps of militia," he stated, tended "to render this general militia useless and defenseless."[157]

An unprepared and defenseless citizenry is the consequence of denying the law of self-defense. This

law operates from the inside-out, which means that every citizen is responsible for the defense of their state. As self-governed individuals, citizens should not delegate this important duty to someone else. To do so might cause the people to lose their vigilance, and once vigilance deteriorates, liberty will soon follow the same path. As Wendell Phillips once said, "Eternal vigilance is the price of liberty."[158]

D. An Outside-In Mentality

Another problem is that many legal scholars have adopted an outside-in approach toward self-defense, that is, they assume that only the government should defend the people. For example, the American Civil Liberties Union (A.C.L.U.) states that "Except for lawful police and military purposes, the possession of weapons by individuals is not constitutionally protected."[159] But if individuals do not have a right to bear arms, as is suggested by this statement, then they will have to rely on the police and military for their protection. The assumption here is that the the authority for self-defense originates in government, not the people. The A.C.L.U. denies the truth that individual self-defense is both a fixed law of nature and an unalienable right that is "endowed by the Creator."

There are serious repercussions for ignoring the laws of nature. If one ignores the law of gravity and walks off a building, tragic consequences will result. And if a government ignores the natural right of self-defense by denying its citizens this right, tragedies will also result.

Several U.S. cities have passed gun control laws and thus hindered the peoples' ability to defend themselves. One such city, Washington, D.C., has very strict gun control laws. As a result, the District of Columbia has forced its citizens to rely upon the police for their protection. The inside-out principle has been inverted so that now the government exercises the primary duty of self-defense. Consequently, there have been tragic effects.

For example, Warren v. District of Columbia, D.C. App., 444 A. 2d 1, (1981), involved a case where a woman was gang raped for 14 hours. This was done even though she had phoned the police twice before they broke into her apartment. The police never arrived. Ms. Warren sued the District of Columbia for negligence in providing for police protection, but the court ruled in favor of the District, stating that the "Government and its agents are under no general duty to provide . . . police protection, to any particular individual citizen, but, rather, duty to provide public services is owed to public at large."

This case is not mentioned here to point the finger at the police. Human error will always occur. The point to emphasize, however, is that a reliance upon an outside-in approach to self-defense is contradictory to the laws of nature, and it is bound to bring tragic consequences. Warren v. District of Columbia is an example of such a tragedy. A woman is told that the police have no duty to protect her as an individual, and yet the laws of her city prevent her from adequately protecting herself.[160]

V. CONCLUSION

Self-governing individuals are primarily responsible for their own defense. This is a law of nature which in recent years has been ignored by legal scholars who, as a result, have adopted a view similar to that of King George III -- a view which attributes the original authority for defense to the government.

At the heart of this controversy is a view of law. The founding fathers believed that law was both fixed and God-revealed. Furthermore, they believed that it was their duty to codify these pre-existing principles in their legal documents.

On the other hand, today's legal scholars view law as evolving, always changing. Law is not seen as God-given, but is what a majority or the state says is law. The duty of the legislatures today is not to codify pre-existing principles, but to create laws that will reach a desired result.

This evolving view of law has led to the belief that self-defense is a duty for military and police bodies, not for individuals. This view is argued by John Levin who states that,

> As the policing of society becomes more efficient, the need for arms for personal self-defense becomes more irrelevant; and . . . [as] the military power in the hands of the government [becomes] more powerful, and the government itself more responsive, the right to bear arms becomes more futile, meaningless and dangerous.[161]

His assumption is that an outside-in approach to self-defense is a valid alternative to the inside-out principle. This assumption, which is prevalent in many writings, is justified for several reasons. Levin assumes that an outside-in approach is more efficient. Others assume that an outside-in approach will reduce crime. They argue that fewer weapons in the hands of individual citizens will bring about a decrease in the crime rate.[162] Still others say that gun control is necessary to reduce dangerous accidents.

The one theme in common with all of these arguments is that they all are striving for a desired effect in society. One person wants efficiency, while another wants crime control. In effect, each uses the law as an instrument for social control, but in total disregard to the law of self-defense which works from the individual-outward.

The implicit assumption is that man, with his own unaided reason, can devise laws which will improve society, even if those laws run contrary to the laws of nature. This assumption requires faith; a faith unsupported by good and sufficient evidence; a faith that runs contrary to the reasonable faith of the founding fathers. In the Declaration of Independence, the founders did not appeal to pragmatism, or to the desired effect they hoped to achieve in society. They appealed to a higher law, a law given by God which they termed "the Laws of Nature and of Nature's God."

VI. RECOMMENDATIONS

In order to secure the right of self-defense, the state and national governments should pursue the following four policies.

First, the national government should remain faithful to the principle of self-defense. The Constitution assumes that Congress will not perpetually maintain an army because defense was supposed to be the duty of individuals, organized in their state militias. In implementing this principle, however, Congress should proceed with caution. Congress does not have to dismantle the entire army to remain true to the inside-out principle of self-defense. Certainly, a few officers must remain full-time to train the militia. But because a citizen can learn the trade of "soldiering," he may replace the need of the average professional soldier. (See Appendix C.)

While some might argue that standing armies are a necessity in the 20th century, Switzerland has shown that a well regulated militia is an effective alternative. Major General George Patton (Ret) reported that the Swiss were able to dissuade Adolph Hitler from attacking their country.[163] The deterrent, Patton declares, was largely due to the vigilance of the Swiss militia:

> Within 48 hours, the Swiss can field an army of more than 600,000 men, 100,000 more than the present army of West Germany. . . . Yet, there is no standing Army, no bunker mentality, no enormous drain on the Swiss economy, no militaristic threat to Europe's oldest and most fiercely independent democracy. The basis for conscription is the constitution, which mandates military service for every Swiss male from age 20 to 50 (55 in the case of officers). . . . At age 20, recruits report for 17 weeks of training. . . . At the end of the training cycle, the recruit . . . returns home. He carries with him his rifle, an allotment of ammunition, uniforms, military pack, and CBR mask. He is responsible for the maintenance of this equipment and is inspected annually. Once a year he is also required to qualify with his personal weapon on a rifle range or face an additional three days of training. Once a year, he will report for three weeks of military training in a rugged field exercise set up as a problem of the type which his particular unit would face.
>
> The armed population is no bluff. Swiss militiamen are not required to turn in their weapons upon completion of their obligation. It is said that every Swiss home contains at least three weapons, for not only is there the militia system, but there is a long tradition of civilian ownership of firearms and, as pointed out before, rifle and pistol shooting are virtually the national sports of Switzerland. There are few restrictions on the Swiss purchase, ownership or carrying, of firearms. An armed occupation force would indeed be literally faced with the prospect of a Swiss rifleman behind every tree.[164]

The militia can be effective in the 20th century, even in a world inundated with nuclear arms. Switzerland has an extensive civil defense system which helps protect them from "nuclear blackmail:"

> The Swiss have shelter space for 85 percent of the population and by 1990 plan to have 100 percent of the population covered. In many cases, there will be two shelter spaces per person -- one at the place of work and one at home.[165]

The Swiss example shows that even in the 20th century a nation can implement an inside-out approach to self-defense. Switzerland has kept the power of self-defense in the people and has not delegated that power to the national government.

Second, the citizens of every state should be educated about the existence and duties of the militia. The states can do this, for example, through both electronic and print mass media. Every male citizen should understand that upon his eighteenth birthday he becomes a member of the militia. Furthermore, every citizen should know that self-governing individuals are primarily responsible for defending their state. This is vitally important to preserving liberty.

Third, there should be no "organized/unorganized" distinction in the militia. As set forth in the Militia Act of 1792 (which was not repealed until 1903), the entire citizenry was the "organized" militia. The states could return to this policy by training the citizenry to become part of a well-regulated militia. It should be every citizen's duty to be armed, trained, vigilant and active in his state militia, thereby resulting in no "unorganized" militia.

In training the citizen-army, the states could follow the Swiss model. Every male in his twentieth year could serve his militia duty for four months, and then every year following, for three or four weeks. The advantages to having such a militia would be numerous. First, everyone would fulfill his duty to defend his person, family and community. Second, the U.S. would truly have an armed populace -- in the militia alone would be a reserve force of 50 million people bearing arms and trained in the use of those arms.[166] Third, a general militia would also provide an enormous "active" force. There are approximately 50 million males between the ages of 18 and 44 in the United States.[167] If every male were required to spend a month in training every year, then at any one time, there would be over four million "active" militiamen. This is over four times larger than the present size of the U.S. Army.[168] A full-time officer staff (no more than 10,000 would be needed) could both train the militia and provide the core staff to lead the citizen-army in a time of crisis.

In case the states should not wish to abolish the undesirable, "organized/unorganized" militia distinction, they should at least encourage more citizen involvement in the state defense forces which have recently developed. (These defense forces are a back-up to the National Guard troops, and while not the organized militia, they are more established than the unorganized militia.) The defense forces are comprised of citizens who meet regularly to be trained in the following duties: meeting domestic emergencies; providing external physical security of key facilities; maintaining law and order; suppressing riots or insurrections; and assisting, preventing or suppressing terrorism. To increase awareness, the states should spend money to advertise these defense forces and let their citizens know that this option to get involved exists.

The goal for the states should be to achieve 100 percent participation. Like ancient Israel and Rome, medieval England, the early United States and modern-day Switzerland, the states should require

all of their citizens to participate in militia duty.

Finally, every state should require its citizens to be armed. The United States has a long history of such a policy: the early colonies; the Militia Act of 1792; and Kennesaw, Georgia in 1982. In keeping with these policies, the states and localities should repeal their gun control laws -for example, Maryland; Morton Grove, Illinois; and Washington, D.C.

Similarly, Congress should repeal its gun control legislation and instead pursue Constitutional policies that respect the federal nature of the nation. The United States government is one of limited and enumerated powers, and no power was given to Congress to confiscate weapons. Citizens must exercise their right to have arms in order to thwart possible encroachments by the national government upon their liberties. They also must be able to defend themselves and their community.

In conclusion, the state and national civil authorities should pursue policies which will encourage more individuals to exercise their duties as citizens. Self-defense belongs primarily to the people, and a return to the principles embodied in the Second Amendment will both ensure the preservation of this unalienable right and help maintain the liberty of this nation. It is but false security to place the liberty and happiness of a people entirely in the hands of their government, their military or their neighbor.

ENDNOTES

1. A good example of the intense debate over the Second Amendment can be found in the following report: U.S., Congress, Senate, "The Right to Keep and Bear Arms," Report of the Subcommittee on the Constitution of the Committee on the Judiciary, 97th Cong., 2d sess., 1982, Congressional Information Service, 5522.

2. Elbridge Gerry, "Observations on the New Constitution, and on Federal and State Conventions," Pamphlets on the Constitution of the United States, ed. Paul Leicester Ford (Brooklyn: 1888), p. 4.

3. The first paragraph of the Declaration of Independence states,

> When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature's God entitle them, a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation. [Richard L. Perry, ed., Sources Of Our Liberties (Chicago: American Bar Foundation, 1978), p. 319.]

4. Until 1776, the colonists were under the English charters. But in 1776, the colonists broke their ties with England and drafted a new charter -- the Declaration of Independence. John Quincy Adams, reflecting upon this act, stated the following:

> Independence was declared. The colonies were transformed into States. Their inhabitants were proclaimed to be one people, renouncing . . . all claims to chartered rights as Englishmen. Thenceforth their charter was the Declaration of Independence. (Emphasis added.) [John Quincy Adams, The Jubilee of the Constitution, (New York: Samuel Colman, 1839), p. 9.]

5. This analogy was borrowed from a lecture of Dr. Herb Titus, Professor of Constitutional Law, CBN University, Virginia Beach, Virginia, 17 December, 1986; The substance of this argument was set forth by John Quincy Adams in

The Jubilee of the Constitution (cf. endnote number 4).

6. Adams, The Jubilee of the Constitution, pp. 11-12.

7. Genesis 1:26, 27.

8. Romans 14:12.

9. The principle of self-government is also embodied in the U.S. Constitution, and once again, the authority flows from the people to the government. The Preamble of the Constitution states that "WE THE PEOPLE of the United States, in order to form a more perfect Union . . . do ordain and establish this Constitution for the United States of America." It was the people in Convention, and not the civil leaders, who chose the form of government and ratified the Constitution (U.S., Constitution, art. VII, sec. 1.)

10. For example, Elbridge Gerry asserted that "Self-defence is a primary law of nature, which no subsequent law of society can abolish. (Emphasis added.) [Gerry, "Observations on the New Constitution, and on Federal and State Conventions," Pamphlets on the Constitution of the United States, ed. Paul Ford, p. 4.]

Also, Alexander Hamilton stated that, "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." (Emphasis added.) [Alexander Hamilton, The Federalist Papers, No. 28, ed. Clinton Rossiter (New York: New American Library, 1961), p. 180.]

11. James Madison stated, for example, that "the great principle of self-preservation" was a "transcendent law of nature and of nature's God." [James Madison, The Federalist Papers, No. 43, p. 279.]

12. Adams, The Jubilee of the Constitution, pp. 13-14.

13. See Appendix A.

14. James Wilson, The Works of James Wilson, ed. James DeWitt Andrews, 2 vols. (Chicago: Callaghan and Company, 1896), 1:92-93.

15. Samuel Adams, The Life and Public Services of Samuel Adams, ed. William V. Wells, 3 vols. (Boston: Little, Brown, and Company, 1865), 3:325.

16. John Quincy Adams, "An Address Delivered at the Request of a Committee of the Citizens of Washington; on the Occasion of Reading the Declaration of Independence, on the Fourth of July, 1821," Washington Gazette, July 10, 1821.

Another similar statement by Adams is cited by John Thornton: "The highest glory of the American Revolution . . . was this: it connected, in one indissoluble bond, the principles of civil government with the principles of Christianity." [John Wingate Thornton, The Pulpit of the American Revolution: or, the Political Sermons of the Period of 1776 (Boston: Gould and Lincoln, 1860), p. xxix.]

17. The founding fathers preferred to use "non-sectarian" terminology in the legal sphere. They did not think that it was appropriate to use church terminology in the civil sphere. Therefore, they expressed their Biblical worldview through the examples of "secular" history and in the terminology of "secular" writers.

For example, George Washington was a devout Christian, as evidenced by his prayer life. He wrote in his prayer diary the following prayer:

> Most Gracious Lord God, from whom proceedeth every good and perfect gift, I offer to thy divine majesty my unfeigned praise and thanksgiving for all thy mercies towards me. . . . [T]hou gav'st thy Son to die for me; and hast given me assurance of salvation. [William J. Johnson, George Washington The Christian (Milford, MI: Mott Media, 1976), p. 28].

In another prayer, Washington wrote,

> Almighty and eternal Lord God, the great creator of heaven & earth, and the God and Father of our Lord Jesus Christ . . . I humbly beseech thee to be merciful to me in the free pardon of my sins, for the sake of thy dear Son, my only saviour, J.C., who came not to call the righteous, but sinners to repentance. [Ibid., p. 31-32.]

However, in the civil sphere, his tone was much more subdued. For instance, in his first inaugural address, he said that,

> It would be peculiarly improper to omit, in this first official act, my fervent supplications to that Almighty Being, who rules over the universe. . . . We ought to be no less persuaded that the propitious smiles of Heaven can never be expected on a nation that disregards the eternal rules of order and right, which Heaven itself has ordained. [Ibid., p. 161-162].

- Why did Washington speak in such overt, theological language in private, yet use more "neutral" language in public? A look at his statements to a group of church people will help to reveal the answer. Some Presbyterians in New England had complained that the Constitution should have had a more explicit acknowledgement that Jesus Christ was the one God had sent. In response, Washington asserted that it was not the duty of the civil magistrate to advance "true religion." This duty was "more properly committed," Washington stated, "to the guidance of the ministers of the gospel." [Paul F. Boller, Jr., George Washington And Religion, (Dallas: Southern Methodist University Press, 1962), p. 181, See also p. 147,148. My thanks to Gary Amos for showing me this book and for his ideas which have formed the framework of my argument in this endnote.]

It appears that Washington's view of church and state led him to speak differently in each sphere. He believed that the duty of the church was to advance "true religion." And since it was not government's duty to do this, he refrained from even using church terminology in the civil sphere. It was not that Washington refrained from speaking in religious language. After all, this was a man who thanked the Father for sending his Son, Jesus Christ, to die for his sins. Washington did not disagree with what the Presbyterians were saying. He just thought that they should say it in another realm -- the church realm.

Like Washington, most founding fathers did not use religious terminology in the civil sphere. Nevertheless, this does not mean that their ideas were devoid of Biblical content. Washington had no qualms about speaking "religiously" when he was not serving as a government official. Bat when he was acting as a civil servant, he preferred to use non-sectarian language. And one will find that many of the founders followed this pattern when proving their arguments in the civil arena. While they spoke in a non-sectarian manner and used historical examples to illustrate their arguments, their ideas stemmed from the Bible. This is evidenced by their appeal to the "Laws of Nature and of Nature's God" in the Declaration. (See Appendix A.)

18. Robert Maynard Hutchins, ed., Great Books of the Western World, 54 vols. (Chicago: The University of Chicago, 1952), vol. 20: Summa Theologica, by Thomas Aquinas, pp. 578-579.

19. Francisco Suarez, Selections From Three Works of Francisco Suarez, trans. Gwladys L. Williams, Classics of International Law Series (Oxford: Clarendon Press, 1944), 2: 858-865.

20. Stephen Junius Brutus, "A Defense of Liberty against Tyrants," (1579; trans. anon., 1648), in Great Political Thinkers: Plato to the Present, ed. William Ebenstein (Hinsdale, Illinois: Dryden Press, 1969), p. 334; Samuel Rutherford, Lex. Rex. or The Law and the Prince (Harrisonbarg, VA: Sprinkle Publications, 1982), pp. 139-143; John Calvin, Calvin: Institutes of the Christian Religion, trans. Ford Lewis Battles, ed. John T. McNeil (Philadelphia: The Westminster Press, 1960), Book 4, Chapter 20, p. 1519.

21. Rutherford, Lex Rex, pp. 141, 143.

22. Brutus, "A Defense of Liberty against Tyrants," in Great Political Thinkers: Plato to the Present, ed. Ebenstein, p. 344; Rutherford, Lex Rex, pp. 143-144, 156-161. Samuel Rutherford, who was one of the Divines who met in the Assembly at Westminster, stated that self-defense was part of God's law:

> If my neighbour come to kill me, and I can by no means save my life by flight, I may defend myself; and all divines say I may rather kill ere I be killed, because I am nearer, by the law of nature, and dearer to myself and my own life than to my brother. (p. 156).
>
> Self-defense is natural to man. (p. 160).
>
> David . . . made his defense by words, by the mediation of Jonathan; when that prevailed not, he took himself to flight, as the next; bat because he knew flight was not safe every way, and nature taught him self-preservation . . . "He took Goliath's sword, and gathered six hundred armed men." (p. 160).
>
> If Saul had actually invaded David for his life, David might, in that case, make use of Goliath's sword . . . and rather kill or be killed by Saul's emissaries; because then he should have been in an immediate and nearest posture of actual self-defense. (p. 161).
>
> By the law of God and nature, we are to use violent re-offending for self-preservation. (p. 161).

23. 1 Samuel 21:9-10.

24. 1 Samuel 21:8-10; 22:1-2.

25. Rutherford, Lex Rex, p. 161.

26. I Samuel 24:1-7.

27. Rutherford, Lex Rex, p. 167.

28. I Samuel 24:6.

29. II Kings 11:1-21.

30. Rutherford, Lex Rex, p. 166.

31. The sword of self-defense is assumed in Exodus 22:2-3. The sword of vengeance is stated in Romans 13:3-4.

32. Rutherford, Lex Rex, p. 168.

33. Ibid., p. 97.

34. See Jonathan Homer, Character and Duties of a Christian Soldier (Boston: Benjamin Russell, 1790); John Lathrop, A Sermon Preached to the Ancient and Honorable Artillery-Company in Boston, New England (Boston: Kneeland and Davis, 1774); David Osgood, A Sermon Preached at the Request of the Ancient and Honourable Artillery Company (Boston: Benjamin Russell, 1788); Nathanael Robbins, Jerusalem's Peace Wished (Boston: J. Boyles, 1772); Samuel Stillman, A Sermon Preached to the Ancient and Honorable Artillery Company in Boston, New England (Boston: Edes and Gill, 1770).

35. Stillman, A Sermon Preached to the Ancient and Honorable Artillery Company in Boston. New England, p. 26.

36. Numbers 32:20-22.

37. Nehemiah 4:13.

38. Luke 22:36-38. After Jesus told the disciples to buy a sword, the following dialogue occurred: The disciples said, "See, Lord, here are two swords." "That is enough," he replied (Luke 22:38). Some have understood this verse to signify

that Jesus' statement about buying a sword was metaphorical. For instance, The NIV Study Bible states, "Sensing that the disciples had taken him too literally, Jesus ironically closes the discussion with a curt 'That's plenty!' [v. 38.] Not long after this, Peter was rebuked for using a sword (v. 50)." [Kenneth Barker, gen. ed., The NIV Study Bible (Grand Rapids: Zondervan Bible Publishers, 1985), p. 1583.] The editors of The NIV Study Bible state that Jesus did not want the disciples to take him literally. But they only believe this because of their assumption that it is wrong for an individual to bear a sword. If such an action were not wrong, then there would be no reason to assume that Jesus was speaking metaphorically.

After all, how does one know that Jesus responded with "a curt 'That's plenty!'" as the editors of the Study Bible have suggested. Perhaps his response was only a thoughtful, "That is enough." If one assumes that individual self-defense is legitimate, then Jesus' statement makes perfect sense without having to read irony into it. But if Jesus had thought that it was sinful for the disciples to be armed, then he most likely would have treated the situation as sin and told them to leave the swords behind. In fact, Jesus' rebuke of Peter in Luke 22:50 is typical of how Jesus handled sin. Peter used the sword to attack when there was no occasion for self-defense. (The Jews had only come to arrest Jesus, not to kill him and the disciples.) Jesus' rebuke was for Peter's improper use of the sword, not for his possession of a sword. In a parallel account Jesus stated, "Put your sword back in its place" (]Matthew 26:52). (Emphasis added.) This indicates that there was a proper place for the sword; Jesus did not tell Peter to throw away the sword. (For an analysis of Jesus' statement, "for all who draw the sword will die by the sword" (Matthew 26:52], see Appendix B.)

39. Judges 5:8; I Samuel 13:19-22.

40. Simeon Howard, "A Sermon Preached to the Ancient and Honorable Artillery Company in Boston," in American Political Writing during the Founding Era: 1760-1805. ed. Charles S. Hyneman and Donald S. Lutz, 2 vols. (Indianapolis: Liberty Press, 1983), 1:197.

41. Homer, Character and Duties of a Christian Soldier, p. 8.

42. Numbers 1:2-3, 20-46.

43. Numbers 32:1-24; Proverbs 24:11.

44. Homer, Character and Duties of a Christian Soldier, pp. 3, 4, 6.

45. Ibid., pp. 19-20.

46. 1 Samuel 8:11-12, 17-18.

47. Stillman, A Sermon Preached to the Ancient and Honorable Artillery Company in Boston, New England, pp. 28-29.

48. Howard, "A Sermon Preached to the Ancient and Honorable Artillery Company in Boston," in American Political Writing during the Founding Era: 1760-1805, ed. Hyneman and Lutz, 1:198-199.

49. Madison, The Federalist Papers, No. 43, p. 279.

It should be noted that "self-preservation" was often used synonymously with "self-defense." Samuel Rutherford, for instance, used both terms as equals:

> They [the people] reserve the power of self-preservation . . . that they may by common counsel defend themselves. Self-preservation in all creatures in which is nature, is in the creatures suitable to their nature. The bull defendeth itself by its horns, the eagle by her claws and bill. . . . Self-defence is natural to man. . . . [B]y the law of God and nature, we are to use violent re-offending for self-preservation. [Rutherford, Lex Rex, pp. 99, 159-161. (Emphasis added.)]

50. Hamilton, The Federalist Papers, No. 28, p. 180.

51. To understand why the founders preferred to use non-sectarian (historical) language in the civil sphere, see endnote

number 17.

52. Steven Halbrook, That Every Man Be Armed (Albuquerque: University of New Mexico Press, 1984), p. 17.

53. Ibid., p. 23.

54. Ibid.

55. Ibid., p. 22.

56. Collier's Encyclopedia, vol. 4, s.v. "Blackstone, William."

57. William Blackstone, Blackstone's Commentaries, ed. St. George Tucker, 5 vols. (Philadelphia: William Young Birch, and Abraham Small, 1803; reprint ed., South Hackensack, NJ: Augustus M. Kelley, 1969), 4:3.

58. Ibid., 2:143.

59. Ibid., 2:144.

60. Joyce Lee Malcolm, "The Right of the People to Keep and Bear Arms: The Common Law Tradition," Hastings Constitutional Law Quarterly 10 (Winter 1983):290.

61. Ibid.

62. U.S., Congress, Senate, "The Right to Keep and Bear Arms," Report of the Subcommittee on the Constitution of the Committee on the Judiciary, p. 1.

63. Ibid.

64. Ibid., p. 2.

65. Charles Oman quoted in U.S., Congress, Senate, "The Right to Keep and Bear Arms," Report of the Subcommittee on the Constitution of the Committee on the Judiciary, p. 2.

66. U.S., Congress, Senate, "The Right to Keep and Bear Arms," Report of the Subcommittee on the Constitution of the Committee on the Judiciary, p. 3.

67. Ibid.

68. Blackstone, Blackstone's Commentaries, ed. St. George Tucker, 5 vols., 3:411.

69. See Richard L. Perry, ed., Sources of Our Liberties, (Chicago: American Bar Foundation, 1978), p. 246.

70. U.S., Congress, Senate, "The Right to Keep and Bear Arms," Report of the Subcommittee on the Constitution of the Committee on the Judiciary, p. 3.

71. Ibid.

72. Jonathan Elliot, ed., The Debates in the Several State Conventions, vol. 3, (New York: Burt Franklin, 1888), p. 386.

73. The Federal Farmer [Richard Henry Lee], Letters from the Federal Farmer to the Republican, ed. Walter Hartwell Bennett (Alabama: The University of Alabama Press, 1978), p. 124.

74. Elliot, ed., The Debates in the Several State Conventions, vol. 3, p. 380.

75. U.S., Congress, Senate, "The Right to Keep and Bear Arms," Report of the Subcommittee on the Constitution of the Committee on the Judiciary, p. 3.

76. Perry, ed., Sources of Our Liberties, pp. 298, (cf. 231-232).

77. Russell F. Weigley, History of the United States Army (Bloomington: Indiana University Press, 1984), p. 4.

78. Perry, ed., Sources of Our Liberties, p. 286.

79. Ibid., pp. 312, 330, 339, 348, 356, 376, 385.,

80. Ibid., p. 312.

81. Ibid., Constitution of Virginia, p. 312; Delaware Declaration of Rights, p. 339; Constitution of Maryland, p. 348; and Constitution of New Hampshire, p. 385.

82. Ibid., p. 312.

83. Militia Act of 1792, printed in John F. Callan, The Military Laws of the United States, (Baltimore: John Murphy & Co., 1858), pp. 64-65.

84. Jonathan Elliot, ed., The Debates in the Several State Conventions, vol. 3, (New York: Burt Franklin, 1888), p. 425.

85. Militia Act of 1792, printed in Callan, The Military Laws of the United States, pp. 65-66.

86. See Perry, Sources of Our Liberties; Constitution of Pennsylvania, p. 330; Constitution of North Carolina, p. 356; and Constitution of Massachusetts, p. 376.

87. Ibid., p. 330.

88. U.S., Constitution, art. I, sec. 8, cl. 1.

89. U.S., Constitution, art. I, sec. 8, cl. 15.

90. U.S., Constitution, art. I, sec. 8, cl. 8

91. My thanks to Dr. Herb Titus for the framework of this argument. I have adopted his "provide/promote" distinction which he presented in his Constitutional Law Class, CBN University, Virginia Beach, Virginia, 17 December, 1987.

92. Noah Webster, American Dictionary of the English Language, (1828; reprinted in San Francisco: Foundation For American Christian Education, 1967), s. v. "Provide."

93. Webster, American Dictionary of the English Language, s.v. "Promote."

94. Madison, The Federalist Papers, No. 41, pp. 260-261.

95. Elliot, ed., The Debates in the Several State Conventions, vol. 3, p. 381.

96. Perry, ed., Sources of Our Liberties, pp. 312, 330, 339, 348, 356, 376, 385.

97. U.S., Constitution, art. I, sec. 8, cl. 12.

98. Hamilton, The Federalist Papers, No. 26, p. 171.

99. U.S., Constitution, art. I, sec. 8, cl. 16.

100 . Arthur Taylor Prescott, Drafting the Federal Constitution, (New York: Greenwood Press, 1968), pp. 520-521.

101. Hamilton, The Federalist Papers, No. 29, p. 183.

102. Prescott, Drafting the Federal Constitution, p. 516.

103. Hamilton, The Federalist Papers, No. 25, p. 165.

104. Prescott, Drafting the Federal Constitution, p. 515-516.

105. The principle of unity and diversity is derived from the "Laws of Nature and of Nature's God." This means that nature itself should express this principle. And it does. For example, the atom is composed of numerous, diverse parts which are unified in their function; and the same could be said of proteins, DNA, cells, trees, etc.

106. U.S., Constitution, art. I, sec. 8, cl. 11.

107. Madison, The Federalist Papers, No. 44, p. 281.

108. U.S., Constitution, art. II, sec. 2, cl. 1

109. U.S., Constitution, art. I, sec. 8, cl. 16.

110. U.S., Constitution, art I, sec. 8, cl. 12 & 13,

111. Hamilton, The Federalist Papers, No. 22, p. 145.

112. U. S., Constitution, art. I, sec. 8, cl. 15; U. S., Constitution, art. IV, sec. 4.

113. Whenever a power is delegated to the national government, it is automatically made a matter of national concern. Article I, Section 8, Clause 15 gives Congress the power to protect any state from an invasion or rebellion. Likewise, Article IV, Section 4 grants to the national government the same power. Therefore, any threat to the security of a part was considered to be the concern of the whole.

See The Federalist Papers, No. 43, 4 and 5. In Federalist No. 43, James Madison stated that, "A protection against invasion is due from every society to the parts composing it." In Federalist No. 4, John Jay stated that, "It [the national government] can apply the resources and power of the whole to the defense of any particular part." In Federalist No. 5, Jay explained why this power was important. He stated that, "weakness and divisions at home would invite dangers from abroad; and that nothing would tend more to secure us from them than union, strength, and good government within ourselves."

114. Madison, The Federalist Papers, No. 41, pp. 258-259.

115. Hamilton, The Federalist Papers, No. 29, p. 182.

116. U.S., Constitution, art. I, sec. 8, cl. 16.

117. U.S., Constitution, art. I, sec. 8, cl. 15.

118. U.S., Constitution, art. II, sec. 2, cl. 1.

119. James Madison, The Federalist Papers, No. 46, p. 299.

Madison's quote highlights the need for the people to own the same type of guns used by the military. For example, semi-automatic rifles are commonly used by both civilians and military personnel. ("Semi-automatic" means that for every pull of the trigger, one bullet is fired.) There has been much debate over these rifles. Many people favor banning semiautomatics because they see no reasonable need for them. Far instance, a Los Angeles Times poll found that the respondents agreed by a 2-to-1 margin that "the interests of public safety" outweighed the right to own a semi-automatic gun. ["Poll: ban assault rifles," The Sun, March 19, 1989.]

But as Madison points out, the people need guns to resist a tyrannical government; and the people can not resist tyranny unless they own guns equivalent in firepower to the guns used by their oppressors. To deny citizens the right to own semi-automatic guns is to cheapen their right of self-defense. How can citizens bearing revolvers, resist their tyrannical officials who have Uzi's? That would not be a fair fight, and certainly not Madison's idea of self-defense. In today's society, a ban an semi-automatic guns would only serve to keep the people hostage to their government, and to the criminals who could always obtain these guns illegally -- after all, a criminal by definition does not abide by the law.

But if U.S. citizens own semi-automatic weapons, then (in Madison's words), "It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular (professional] troops."

Furthermore, the thinking behind the Second Amendment was that every male citizen should at least own the same type of guns the military uses. The Militia Act of 1792, which was passed only one year after the Second Amendment was ratified, ordered every male over 17 to own certain types of rifles [Militia Act of 1792, printed in Callan, The Military Laws of the United States, p. 65]. (All of the rifles listed in the Act were commonly used by the Continental Army during the Revolutionary War.) And the Supreme Court confirmed in U.S. v. Miller, 307 U.S. 174 (1939), that "the Militia comprised all males physically capable of acting in concert for the common defense . . . [and that] when called for service, these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." (Emphasis added.) In today's society, semi-automatic guns are a standard weapon "for [the] service" and thus are guns "of the kind in common use."

120. Prescott, Drafting the Federal Constitution, p. 524.

121. Edward Dumbauld, The Bill of Rights and What it Means Today (Oklahoma Press, 1957; reprint ed., Westport, Connecticut: Greenwood Press, Publishers, 1979), pp. 160-165, 173-205.

122. Documents Illustrative of the Formation of the Union of the American States, (Washington: Government Printing Office, 1927), pp. 1028, 1030.

123. Dumbauld, The Bill of Rights and What it Means Today, p. 174.

124. Documents Illustrative of the Formation of the Union of the American States, p. 1026.

125. U.S., Congress, Senate, "The Right to Keep and Bear Arms," Report of the Subcommittee on the Constitution of the Committee on the Judiciary, p. 6.

126. See the Militia Act of 1792, printed in Callan, The Military Laws of the United States, p. 65; and 10 United States Code section 311 (1983).

127. Bernard Schwartz, The Bill of Rights, vol. 5, (Pew York: Chelsea House Publishers, 1980), p. 1042.

128. Webster, American Dictionary of the English Language, s.v. "Keep."

129. Webster, American Dictionary of the English Language, s.v. "Bear."

130. Elliot, ed., The Debates in the Several State Conventions, vol. 3, p. 425.

131. Militia Act of 1792, printed in Callan, The Military Laws of the United States, pp. 65-66.

132. Schwartz, The Bill of Rights, vol. 5, p. 1107.

133. The following state constitutions have right to keep and bear arms provisions: Alabama, art. I, sec. 26; Alaska, art. I, sec. 19; Arizona, art. 2, sec. 26; Arkansas, art. II, sec. 5; Colorado, art. II, sec. 13; Connecticut, art I, sec. 15; Delaware, art. I, sec. 20; Florida, art. I, sec. 8; Georgia, art. I, sec. I, para. VIII; Hawaii,.art. I, sec. 15; Idaho, art. I, sec. 11; Illinois, art. I, sec. 22; Indiana, art. I, sec. 32; Kansas, Kansas Bill of Rights, sec. 4; Kentucky, Kentucky Bill of Rights, sec. I, para. 7; Louisiana, art. I, sec. 11; Maine, art. I, sec. 16; Massachusetts, Massachusetts Declaration of Rights, Part I, Article XVII; Michigan, art. I, sec. 6; Mississippi, art. 3, sec. 12; Missouri, art. I, sec. 23; Montana, art. II, sec. 12; Nevada, art. I, sec. 11, para. 1; New Hampshire, Part First, Art. 2-a; New Mexico, art. II, sec. 6; North Carolina, art. I, sec. 30; North Dakota, art. I, sec. 1; Ohio, art. I, sec. 4; Oklahoma, art. 2, sec. 26; Oregon, art. I, sec. 27; Pennsylvania, art. I, sec. 21; Rhode Island, art. I, sec. 22; South Carolina, art. I, sec. 20; South Dakota, art. VI, sec. 24; Tennessee, art. I, sec. 26; Texas, art. I, sec. 23; Utah, art. I, sec. 6; Vermont, chapter I, art. 16; Virginia, art. I, sec. 13; Washington, art. I, sec. 24; West Virginia, art. III, sec. 22; and Wyoming, art. I, sec. 24. Also, in November, 1988, Nebraska became the 43rd state to adopt a gun rights constitutional amendment. It states that the people have an unalienable right "to keep and bear arms for the security or defense of self, family, home and others, and for lawful common defense, hunting, recreational use and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof." [Larry Pratt, ed., The Gun Owners, (Nov./Dec., 1988), p. 3.]

134. Ibid., p. 792.

135. Ibid., p. 793.

136. Malcolm, "The Right of the People to Keep and Bear Arms: The Common Law Tradition," Hastings Constitutional Law Quarterly, p. 287.

137. American Bar Association, "Background Report on Firearms Control," Report of the Subcommittee on the Constitution of the Committee on the Judiciary, p. 28.

138. See Roy Weatherup, "Standing Armies and Armed Citizens: An Historical Analysis of The Second Amendment," Report of the Subcommittee on the Constitution of the Committee on the Judiciary, p. 169.

139. Malcolm, "The Right of the People to Keep and Bear Arms: The Common Law Tradition," Hastings Constitutional Law Quarterly, p. 287.

140. National Coalition To Ban Handguns, "You do not have a Constitutional Right to Own a Handgun," Report of the Subcommittee on the Constitution of the Committee on the Judiciary, p. 30.

141. See John Levin, "The Right To Bear Arms: The Development of the American Experience," Report of the Subcommittee on the Constitution of the Committee on the Judiciary, pp. 128-129.

142. Schwartz, The Bill of Rights, vol. 5, p. 1042.

143. Dred Scott, 60 U.S. (19 How.) 393 (1857).

144. Commonwealth v. Davis, Mass., 343 N. E. 2d 847.

145. National Coalition To Ban Handguns, "You do not have a Constitutional Right to Own a Handgun," Report of the Subcommittee on the Constitution of the Committee on the Judiciary, p. 31.

146. Weatherup, "Standing Armies and Armed Citizens: An Historical Analysis of The Second Amendment," Report of the Subcommittee on the Constitution of the Committee on the Judiciary, p. 169.

147. National Coalition To Ban Handguns, "20 Questions and Answers," Question No. 5.

148. Militia Act of 1792, printed in Callan, The Military Laws of the United States, p. 65.

149. The Encyclopedia Americana International Edition, vol. 19, s.v. "National Guard."

150. Dick Act, 32 Stat. 775 (1903).

151. U.S., Congress, House. National Guard Bill, H.R. 5645, 73rd Cong., 1st Sess., 1933, p. 2.

152. Ibid.

153. 10 United States Code section 311 (1983).

154. The founders believed that self-governing individuals should always be trained in the use of arms and be organized in a militia. They believed, however, that a select militia could not accomplish this goal. For example, Richard Henry Lee said that states should not establish a select militia because it tended to render "this general militia useless and defenceless." Furthermore, he asserted that a select militia, not much unlike regular troops, will ever produce an inattention to the general militia; and the consequence has ever been, and always must be, that the substantial men, having families and property, will generally be without arms, without knowing the use of them, and defenceless; whereas, to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them. [The Federal Farmer [Richard Henry Lee], Letters from the Federal Farmer to the Republican. ed. Bennett, p. 124.]

Many of the founding fathers agreed with Lee that select militias were similar to standing armies. For example, one delegate to the Pennsylvania Convention believed that Congress should not establish "a select militia which will, in fact, be a standing army." (Merrill Jensen, ed., The Documentary History of the Ratification of the Constitution, 16 vols. (Madison: State Historical Society of Wisconsin, 1976), vol. 2: Ratification of the Constitution by the States: Pennsylvania, p. 509.]

Because it was viewed as a standing army, the select militia was considered to be Just as dangerous. In this respect, everything the founders said about standing armies could also be said about select militias. Most important, however, was the concern that a select militia would produce apathy, the nemesis of a vigilant and self-governing individual. Individual effort was very important. For example, James Madison, during the Virginia Convention, praised the militia because it would "be a strong inducement to individual exertion." (Emphasis added.) Furthermore, it would "exert the whole natural strength of the Union . . . [and.] furnish the people with sure and certain protection, without recurring to this evil [of a standing army]." [Elliot, ed., The Debates in the Several State Conventions, vol. 3, p. 381.]

155. The Federal Farmer [Richard Henry Lee], Letters from the Federal Farmer to the Republican, ed. Bennett, p. 124.

156. Elliot, ed. , The Debates in the Several State Conventions, vol. 3, p. 380..

157. The Federal Farmer [Lee], Letters from the Federal Farmer to the Republican, ed. Bennett, p. 124.

158. Wendell Phillips quoted in Dr. Laurence J. Peter, Peter's Quotation's (Toronto: Bantam Books, 1977), p. 203.

159. American Civil Liberties Union, "Policy #43," Report of the Subcommittee on the Constitution of the Committee on the Judiciary, p. 28.

160. Washington, D.C., vividly shows that gun control does not work. The District has had tough gun control laws since 1976, and yet they were ranked as the nation's murder capital in 1988. The reason? Armed criminals can freely terrorize the D.C. neighborhoods because the citizens have been made defenseless by law. Even with gun control, the criminals still manage to get the illegal guns -- after all, a criminal by definition does what is illegal. Criminals can steal guns, make guns or buy them on the black market. Banning guns only takes them away from the law-abiding citizens, not the criminals. And, the disarmed citizens can not always rely on the police: there are only 150,000 police on duty at any one time in the entire country [Larry Pratt, "Gun control - as 150,000 police try to protect 250 million Americans," The Providence Journal, April 3, 1989]. No wonder the courts have stated that the police do not have the duty to protect

individual citizens, only society as a whole.

Despite the D.C. gun ban, Washington had more shooting deaths than any other city in 1988. Where did the criminals get the guns if they were illegal? Critics claim that the criminals merely got them from the neighboring state, Virginia, where the guns are legal. [Scott Ross, Straight Talk, (Virginia Beach: Christian Broadcasting Network), February 27, 1989.] This, they claim, is the reason why the D.C. gun ban is not working. Perhaps the criminals do get their guns in Virginia; even so, this overlooks one point. If the availability of guns in Virginia is the root of D.C.'s problems, then why does Virginia not have the same murder and crime rate as the District? Virginia is awash in guns and yet the crime rate is much, much lower than Washington's. Why? The reason is that in Virginia, armed citizens can shoot back at the criminals. Guns in the hands of citizens deter crime. The National Institute of Justice (NIJ), which conducted a survey of incarcerate felons, found that about 3/5 of the inmates polled agreed that "a criminal is not going to mess around with a victim he knows is armed with a gun" [U.S. Department of Justice, National Institute of Justice, The Armed Criminal in America: A Survey of Incarcerated Felons, (July 1985), p. 27.] Furthermore, 74% of the inmates agreed that "[o]ne reason burglars avoid houses when people are at home is that they fear being shot during the crime" [Ibid]. Even without these figures, common sense should indicate that criminals would rather meet unarmed victims, not armed ones. Armed victims pose quite a problem for criminals. In this country, about one million people use a gun to defend themselves against criminals every year -- or 2740 people a day. [Gary Kleck, "Crime Control Through the Private Use of Armed Force," Social Problems 35 (February 1988):4]. Furthermore, about 1500 to 2800 criminals are killed every year by gun-wielding civilians in self-defense [Ibid., p. 5].

It appears that Washington, D.C. is prohibiting the best form of crime control: an armed citizenry. Even most of the inmates who were polled by NIJ (57%) agree that "criminals are more worried about meeting an armed victim than they are about running into the police" [U.S. Department of Justice, National Institute of Justice, The Armed Criminal in America: A Survey of Incarcerated Felons, p. 27.] The NIJ states that this response is considerably accurate because,

> National surveys conducted periodically since 1959 have routinely found that about half of all US households possess at least one gun, which translates into about 40 million gun owning households. There are, in short, very many more potential "armed victims" to run into than there are police. Consistent with the point, [Gary] Kleck (1983) has reported that in any given year, more criminals are shot to death in "Justifiable homicides" by ordinary civilians than are killed by the police [Ibid].

In conclusion, until the District of Columbia relaxes its gun control laws, Washington may continue to find itself listed as the nation's murder capital.

161. Levin, "The Right To Bear Arms: The Development of the American Experience," Report of the Subcommittee on the Constitution of the Committee on the Judiciary, pp. 128-129.

162. See the Editorial, "Veto It, Governor," The Virginian-Pilot, March 11, 1987.

163. Patton states that,

> Switzerland lies landlocked in Western Europe. . . . By modern jet fighter, it is ten minutes from the Warsaw Pact nations of Eastern Europe. Since 1815 Switzerland has remained an inviolate island of peace in the midst of war. Even Adolph Hitler's Wehrmacht, which conquered all of Europe in the early months of World War II, chose not to attack Switzerland despite the fact that the small country was in the crossroads of Western Europe.

The Swiss have no illusions about their ability to defeat a major military power. They could not have defeated the Nazi army which for a time considered invading Switzerland. They mobilized, however, and made it clear beyond a shadow of a doubt that if the Nazi army invaded, it would be fiercely resisted. . . . In a classic example of dissuasion at work, Hitler's general staff recommended against an invasion on the grounds that the costs would be disproportionate to the gains. [George S. Patton and Lewis W. Walt, "The Swiss Report," in The Militia in the 20th Century, ed. Morgan Norval (Falls Church, VA: Gun Owners Foundation, 1985), pp. 153-154, 161.]

164. Ibid., pp. 154, 162-163, 166.

165. Ibid., p. 169.

166. There are 50 million males between the ages 18 and 44. This figure is adapted from the U.S. Bureau of Census, The Statistical Abstract of the U.S.:1986, 106th ed. (Washington, D.C.: U.S. Government Printing Office, 1985), p. 24.

167. Ibid.

168. There were 788,026 people in the army in 1982. This figure is taken from Russell F. Weigley, History of the United States Army (Bloomington: Indiana University Press, 1984), p. 600.

APPENDIX A:
LAWS OF NATURE AND OF NATURE'S GOD[1]

Thomas Jefferson stated that the object of the Declaration of Independence was "not to find out new principles, or new arguments, never before thought of . . . but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent."[2] But what was the common sense of the subject? What were those principles on which everyone could agree?

Those principles were the "Laws of Nature and of Nature's God." To the founders, this phrase meant the following: 1) That law was given by God; 2) That this higher law was binding upon everyone – both ruler and citizen; and 3) That this higher law was revealed in nature and in the Bible.

"The Laws of Nature and of Nature's God" was not an original term for the founders since both John Locke and William Blackstone had used this terminology before them. These commentators had a profound impact upon the thinking of the founders.

Donald Lutz, who has done a ten-year comprehensive reading of American political writings published in the latter half of the eighteenth century, has determined which European authors had the greatest influence upon the founding fathers. His study has revealed that both Locke and Blackstone were among the top three most frequently cited writers during the founding era.[3]

Lutz reports that Locke was cited more often than any other author when the colonists were Justifying their break with England.[4] Interestingly, Locke's terminology bears striking resemblance to the text of the Declaration. Locke believed that God had revealed His laws in the Bible and in nature. This is evidenced by his use of the phrase "the law of God, and the law of nature," which he describes as the higher law.[5] All human laws, he asserted, had to be in conformity with God's higher law:

> The law of nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for men's actions, must . . . be conformable to the law of nature – *i.e.,* to the will of God . . . [and must be] without contradiction to any positive law of scripture.[6]

In this quote, Locke referred to the "law of scripture and the law of nature." Elsewhere, however,

he used the phrase "the law of God, and the law of nature." For Locke, both phrases meant the same thing because he used both interchangeably.[7] And it was the language of the latter expression (that is, the law of God and the law of nature), with minor stylistic changes, that eventually worked its way into the Declaration.

Yet Locke was not the only one to speak of "the law of God, and the law of nature." These ideas were rooted deep in the heart of the common law.[8] What the common law has to say is key because the founders were steeped in its thinking. The Supreme Court in Ex Parte Grossman, 267 U.S., 87 (1924) asserted this very fact:

> (The Founders) were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. . . . [W)hen they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they would be shortly and easily understood.

The most influential commentator of the common law was Sir William Blackstone. His Commentaries were widely read in the colonies and were foundational in the formative stages of American law. Lutz observes that Blackstone was "the second most prominent secular writer [cited) during the founding era" and that "a trenchant reference to Blackstone could quickly end an argument."[9]

Blackstone also spoke of "the laws of nature and the laws of God". He stated that,

> Man, considered as a creature, must necessarily be subject to the laws of his creator. . . . This will of his maker is called the law of nature. . . . [and] is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this.[10]

Thus, Blackstone believed that God had fixed certain laws in the creation. But because man's reason is corrupt, Blackstone felt that man could not fully discern what those laws were.[11] He thought that man needed for God to reveal those laws to him in an understandable form; and he asserted that God did this in the Bible:

The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature. . . . Upon these two foundations, the law of nature and the law of revelation, depend all human laws.[12]

Thus, Blackstone believed that "the law of nature and the law of revelation" is the higher law by which men must live. Blackstone also called this higher law, "the law of nature, and the law of God."[13] This phrase was for Blackstone a shorthand way to say God's revelation in nature and in the Bible. Locke, Blackstone and the founding fathers placed a high primacy on God's revelation. In fact, Lutz's study found that the most frequently quoted book during the founding era was the book of Deuteronomy – a book dealing with God's revealed laws.[14]

In conclusion, the "Laws of Nature and of Nature's God" was a concept that had its roots in the common law. This phrase was also included in the Declaration meaning that it would have been understood by almost everyone. After all, Jefferson was not seeking "to find out new principles, or new arguments, never before thought of;" rather, he was trying "to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent." In part, this "common sense" was that the laws of nature and the laws of God were to be found in the Bible and that they were binding on all peoples and nations.

NOTES

1. I am indebted to Gary Amos for the framework of the argument that is presented in this appendix. Much of the subject matter covered in this appendix can be found in greater depth in Gary T. Amos, ed. "The Laws of Nature and Of Nature's God: Christian or Deistic?," BIBLICAL PRINCIPLES OF GOVERNMENT: America a Case Study, (Virginia Beach: CBN University, 1987).

2. Thomas Jefferson, Writings, (New York: Viking Press, 1984), p. 1501.

3. Donald S. Lutz, "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought," *The American Political Science Review* 78 (March 1984):193.

4. Ibid., p. 192.

5. John Locke, *An Essav Concerning The True Original Extent and End of Civil Government* (reprint, Boston: Edes and Gill, 1773), p. 72.

6. Ibid.

7. Ibid. Here, Locke stated that,

> Human laws are measures in respect of men whose actions they must direct, howbeit such measures they are as have also their higher rules to be measured by, which rules are two, the law of God, and the law of nature; so that laws human must be made according to the general laws of nature, and without contradiction to any positive law of scripture, otherwise they are ill made. (Emphasis added.)

8. Two of the greatest commentators of the common law, Sir Edward Coke and Sir William Blackstone, wrote much about the laws of nature and the laws of God. See Amos, ed. "The Laws of Nature and Of Nature's Gad: Christian or Deistic?," BIBLICAL PRINCIPLES OF GOVERNMENT: America a Case Study, pp. 264-269.

9. Lutz, "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought," *The American Political Science Review*, pp. 193, 196,

10. William Blackstone, Blackstone's Commentaries, ed. St. George Tucker, 5 vols. (Philadelphia: William Young Birch, and Abraham Small, 1803; reprint ed., South Hackensack, NJ: Augustus M. Kelley, 1969), 1:39, 41.

11. Ibid., 1:41.

12. Ibid., 1:41-42.

13. Ibid.

14. Lutz, "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought," *The American Political Science Review*, p. 192.

APPENDIX B:
PACIFISM AND THE FOUNDING FATHERS

Most colonial preachers in the 1700's were not pacifists. In 1770, Samuel Stillman argued that self-defense is a law of nature which was revealed in the Old Testament and reaffirmed in the New:

> SELF-DEFENSE is an established law of our nature, and first dictate of common sense; which has never been superseded by any written law of God, or by the religion of Jesus. . . . During the old testament dispensation . . . some of the best of men were the greatest soldiers, as Abraham, Joshua, David, &c. And even in the New Testament, we learn . . . [that when] the soldiers asked John, what they should do? he did not take the opportunity, which was very favourable, to inform them that their employment was unlawful but rather directs them to do violence to no man . to be content with their wages; which plainly implies a continuance in their employment.
>
> WHEN Peter went to Cornelius . . we do not read that he made any attempt to convince him, that the military character was incompatible with the gospel of Christ. . . . His silence therefore in this matter, implies that a man may be at the same time a real disciple of Christ and a good soldier.
>
> THE same thing is taught us by Christ himself. If my kingdom were of this world, then would my disciples fight . . . . [H]e declares, had it [his kingdom] been temporal, they would have fought in his defence, agreeable to the maxims of earthly Potentates. Therein teaching us, that to defend ourselves is lawful.[1]

Similarly, Nathanael Robbins stated that using arms may be necessary for self-defense. In a 1772 sermon, Robbins argued that,

> Self-defence may require the use of warlike weapons, or taking up arms to prevent an incursion evidently intended, and the effusion of human blood, which would be the probable consequence of it. . . . David, who well knew the safety of making God his trust, and that this was his principal defence; we accordingly find praying to him for all kinds of prosperity in Jerusalem; yet we also find him blessing God, who had taught his hands to war, and his fingers to fight. . . . And we find our Saviour Himself minding his disciples to expect, that their enemies would be more fierce upon them, than they had been: And accordingly he gives warning, that he amongst them, that had no sword, wherewith to defend Himself, might find great want of one, and might therefore be ready to wish, some time or other that he had sold his garment and bought one [See Luke 22:36-38].[2]

John Lathrop agreed with Robbins. In quoting St. Chrysostom, Lanthrop sheds light on a difficult New Testament passage. In the following text, Christ rebukes a disciple for striking with his sword when there was no occasion for self-defense:

> For all they that take the sword shall perish with the sword [Matthew 26:52] . . . . "For a man to take the sword, is to draw it when it is not put into his hands by the laws; therefore he who offers unjust violence, takes the sword: But on the other hand, he who uses a just defence does not take thy sword, but he draws a sword which the laws put into his hands."[3]

Finally, Simeon Howard took some time in a sermon to address some of the objections raised by pacifists:

> It is not, however, to be denied that there are some passages in the new testament which seem to forbid all war: particularly, our Saviour's own words in his sermon on the mount. I say unto you that ye resist not evil – love your enemies, do good to them that hate you, etc. And those of the apostle Paul; Recompence to no man evil for evil. – Avenge not your selves. And from such passages some have supposed that christians are not allowed to defend themselves by force of arms, how violently soever they may be attacked.
>
> Give me leave then, to offer a few remarks to take off the force of this objection.
>
> 1. When our Saviour forbids us to resist evil, he seems to have had in view only small injuries, for such are those which he mentions in the following words, as an illustration of the precept; smiting on the cheek, taking away one's coat, or compelling him to go a mile. And to such injuries it is oftentimes a point of prudence, as well as duty to submit, rather than contend. But it does not follow, that because we are forbidden to resist such slight attacks, we may not defend ourselves when the assault is of a capital kind. But,
>
> 2. Supposing our Lord's words to refer only to small injuries, they ought not to be taken in an absolute sense. Expressions of this nature frequently occur in scripture, which are universally understood with certain restrictions and limitations. For instance; Love not the world, nor the things that are in the world. Lay not un for yourselves treasure on earth. Give to him that asketh thee, and from him that would borrow of thee, turn not thou away. Now, I believe, no body ever supposed, not even the honest Quakers, that these precepts were to be understood so literally, as to forbid all love of the world, and all care to provide the good things of it; or to oblige us "to give to every idle fellow all he may think fit to ask, whether in charity or loan." And we have as good a right to limit the precept which forbids our resisting evil, by the nature and reason of things, as we have to limit these other indefinite expressions.
>
> 3. Defending ourselves by force of arms against injurious attacks, is a quite different thing from rendering evil for evil. The latter implies doing hurt to another, because he has done hurt to us; the former implies doing hurt to another, if he is hurt in the conflict, only because there is no other way of avoiding the mischief he endeavors to do us: the one proceeds from malice and revenge; the other merely from self-love,

> and a just concern for our own happiness, and argues no ill will against any man.
>
> And therefore it is to be observed,
>
> 4. That necessary self-defence, however fatal it may prove to those who unjustly attack us, implies no principle inconsistent with that love to our enemies which Christ enjoins. (Footnotes omitted).[4]

While these selection are only a small sampling, they, nevertheless, are representative of the sentiments among preachers in the eighteenth century.

NOTES

1. Samuel Stillman, A Sermon Preached to the Ancient and Honorable Artillery Company in Boston, New England (Boston: Edes and Gill, 1770), pp. 26-27.

2. Nathanael Robbins, Jerusalem's Peace Wished (Boston: J. Boyles, 1772), pp. 12, 16.

3. John Lathrop, A Sermon Preached to the Ancient and Honorable Artillery-Company in Boston, New England (Boston: Kneeland and Davis, 1774), pp. 23-24.

4. Simeon Howard, "A Sermon Peached to the Ancient and Honorable Artillery Company in Boston," in American Political Writing during the Founding Era: 1760-1805, ed. Charles S. Hyneman and Donald S. Lutz, 2 vols. (Indianapolis: Liberty Press, 1983), 1:193-194.