

**The Right to Have Arms
and Use Deadly Force
Under the Second and
Third Amendments
by David I. Caplan**

SUMMARY

The constitutional right of the people to keep arms has deep roots in common law and constitutional history, and it remains of fundamental importance to this day. This right is explicitly guaranteed in the Second Amendment in the Bill of Rights and includes the keeping by private citizens of any hand-carried arms commonly used by private individuals and police for personal defense.

Because "A man's house is his castle and his defense," and because the Third Amendment in the Bill of Rights prohibits government from quartering soldiers in a person's house during times of peace without his consent, the constitutional right of the people to keep arms must guarantee at its core the legally unfettered ability of the householder to acquire speedily and to keep permanently and anonymously in his house such arms as are commonly used for home defense, not only as a means for resistance against violent burglars but also as a strong moral check and deterrent against illegal quartering of troops in his house.

A key purpose of the constitutional right of the people to keep arms was enunciated in **Presser v. Illinois** decided by the U.S. Supreme Court in 1886, to wit, "for maintaining the public security" -- that is, for citizen participation in preventing and suppressing violent felonies and capturing violent felons on the spot, a public purpose of great current importance and necessity, as at the common law.

STATEMENT

According to a 1977 Library of Congress, Congressional Research Service, legal analysis entitled "The Second Amendment: A Legal Analysis," the constitutional right of the individual citizen to keep arms has been "forcefully"¹ presented as follows:

The Second Amendment in the Federal Bill of Rights guarantees 'the right of the people to keep and bear arms.' This little understood and hence most under valued Article in our Bill of Rights was intended by its Framers to preserve our democratic-republican form of government and to prevent it from destroying the ballot box and from slipping into tyrannical totalitarianism. Especially when combined with the Ninth Amendment's bundle of rights which was retained by the people and with the Fifth Amendment's right to life, liberty, and property, the Second Amendment also plainly guarantees the private individual right to keep and carry Arms for the added purpose of self- preservation and defense of the individual...

The history and debates surrounding this 2d Amendment show that its Framers intended that a well regulated militia was only one of the purpose for the right of the people to keep and bear Arms. Viewed in another aspect, the 2d Amendment was adopted to obtain a militia which would be "well regulated" by the right of the people to keep and bear arms."²

The constitutional right of the people to keep and bear arms is further guaranteed today by the constitutions of thirty-seven States.³ This constitutional right inherently includes the right to use those arms for self-protection against attacks by burglars, robbers, arsonists, rapists, and other marauders--according to a judicial decision decided in 1964⁴ in Louisiana, a State noted for pioneering the modern rules in America for the justifiable use of deadly force.⁵ This constitutional right to keep arms is further confirmed by the Third Amendment in the Federal Bill of Rights (prohibiting quartering of soldiers in any house during times of peace without the consent of the owner) and the Fourth Amendment (prohibiting unreasonable searches and seizures), especially because of the close historical association -- well-known to the Framers of the Bill of Rights -- between governmental disarming of the populace and quartering of troops, as well as mass searches and seizures.⁶

"A man's house is his castle and his defense, and where he has a peculiar right to stay..." declared an English court⁷ in 1506, in the context of the right to protect oneself from bodily harm. As explained by Lord Coke:⁸

And yet in some cases a man may not only use force and arms, but assemble company also. As any man may assemble his friends and neighbors to keep his house against those that come to rob him, or kill him, or to offer him violence in it,...for a man's house is his castle, &c domus sua cuique est tutissimum refugium [a house is for everyone his safest refuge]; for where shall a man be safe, if it be not in his house? And in this sense it is truly said

Armaque in armatos sumere jura sinunt.

[The laws permit taking up arms against armed persons.]

The importance of the foregoing quote, from Coke's **Institutes of the Laws of England**, resides in the fact that of all the books on either law or politics in colonial libraries "the most common was Coke's *Institutes*"⁹ and that the U.S. Supreme Court has recently expressed the opinion that Lord Coke was "widely recognized by the American colonist as the greatest authority of his time on the laws of England."¹⁰ Thus Coke's **Institutes** formed the basis upon which the Framers of the Bill of rights drafted "in a compact draft,...express in terms of the common law,"¹¹ such Articles in the Bill of Rights as the right to keep and bear arms, and the right to be free in one's own house from quartering of soldiers during times of peace without his consent even **when all else fails**.

In **Stanley v. Georgia**,¹² the U.S. Supreme Court in 1969 held unconstitutional a State statute prohibiting the possession of obscene materials even in one's own home. The Court extended constitutional protection to the mere possession of such pornographic materials, however unprotected such possession might be under the First Amendment, upon the sole legal basis of "privacy of the home, ... a reaffirmation that 'a man's house is his castle.'"¹³ Thus even if it were to be assumed that handguns are the hard-core pornography of the Second Amendment, or that handguns are not constitutionally protected "arms" within any guarantee of the Constitution or common law, nevertheless the "mere possession...in the privacy of a person's own house"¹⁴ of handguns would still be constitutionally protected, both from

State and from Federal regulation, because "a man's house is his castle and his defense."

Of particular importance thus is the Second and Third Amendment protection of the right to keep arms in the house permanently and anonymously--that is, arms immune from registration or licensing; and the right to acquire those arms quickly and with no legal impediments or burdens is thus also guaranteed. Moreover, the procedural and substantive due process concern for the individual's "life, liberty, [and] property" contained in the Fifth and Fourteenth Amendments, as well as the right to privacy and other non-enumerated personal rights protected by the Ninth Amendment,¹⁵ further confirm and guarantee the individual constitutional right to keep and use arms for "self preservation and defence."¹⁶

The constitutional test of "balancing of interests"¹⁷ cannot be applied in cases of core constitutional rights. Thus, for example, the U.S. Supreme Court in a 1979 case¹⁸ refused to consider any balancing of conflicting interests when dealing with "the constitutional privilege against compulsory self-incrimination in its most pristine form."¹⁹ Similarly, by the same token, there can be no balancing -of-interest test when dealing with the "unqualified"²⁰ right to **keep** arms as opposed to the qualified right to **bear** arms. The keeping of handguns in the home for self preservation and defense thus lies at the core of the constitutional right to keep arms for the purpose of defending one's own house--one's castle--and may thus not be cut down by any balancing test if we are going to be at all faithful to fundamental constitutional principles.

Courts have dealt with the utility of handguns in another context. In order for an invention to be patentable, it must have utility.²¹ In a 1969 case,²² the United States Court of Customs and Patent Appeals put its hearty stamp of approval on its updated quotation from a 1903 decision²³ of the U.S. Court of Appeals, 7th Circuit, in turn quoting from the 1880 textbook **Walker on Patents:**

An important question, relevant to utility in this aspect, may hereafter arise and call for judicial decision. It is perhaps true, for example, that the invention of Colt's revolver was injurious to the good order of society. That instrument of death may have been injurious to morals, in tending to tempt and to promote the gratification of

private revenge. It may have been injurious to health, in that it is very liable to accidental discharge, and thereby to cause wounds, and even homicide. It may also have been injurious to good order, especially in the newer parts of the country, because it facilitates and increases private warfare among frontiersmen. On the other hand, the revolver, by furnishing a ready means of self-defense, may sometimes have promoted morals and health and good order. By what test, therefore is utility to be determined in such cases? Is it to be done by balancing the good functions with the evil functions? Or is everything useful within the meaning of the law, if it is used (or is designed and adapted to be used) to accomplish a bad one? Or is utility negated by the mere fact that the thing in question is sometimes injurious to morals, or to health, or to good order? The third hypotheses cannot stand, because if it could, it would be fatal to patents for steam engines, dynamos, electric railroads, and indeed many of the noblest inventions of the nineteenth century. [And what of such things as automobiles, airplanes, tires, power tools, explosives, lawn mowers, and drugs in the twentieth century?] The first hypothesis cannot stand, because if it could, it would make the validity of patents to depend on a question of fact to which it would often be impossible to give a reliable answer. **The second hypothesis is the only one which is consistent with the reason of the case, and with the practical construction which the courts have given to the statutory requirements of utility.**²⁴

Just as the revolver's fundamental socially redeeming importance for self-defense thus renders its invention patentable from the standpoint of utility, likewise this same self-defense feature renders the possession of a revolver by the law-abiding citizen worthy of constitutional protection under the Second Amendment of the Bill of Rights.

The constitutional right to keep and use arms raises two fundamental threshold issues as to what arms, and what uses, are constitutionally protected. As with other provisions²⁵ of the Bill of Rights, the common law furnishes the proper standards and criteria for the right to keep and use arms. In short, the arms protected under the common law, and hence under the Constitution, in the hands of the citizenry are all those arms

which are "hand-carried weapons [i.e., which can be borne by an individual] commonly used by individuals [and police] for personal defense."²⁶ Thus, firearms such as pistols, revolvers, rifles, and shotguns are all clearly within the ambit of constitutional protection, and none can logically be excluded. As to constitutionally protected uses, these include the common-law justifiable (and not merely excusable)²⁷ uses of deadly force against violent felons encountered in the act of felony committed by "violence [and] surprise"²⁸ who "would not surrender peaceably, but stood on their defense, or fled."²⁹ In all such cases of felonious attacks, the life of the victim is **presumed** to be in danger under the common law;³⁰ and hence in all those cases the victim or bystander was justified under common law to use deadly force to prevent or resist the felony and to capture the felon, as an act worthy of "commendation rather than blame."³¹ Accordingly, the justifiable uses of deadly force with firearms commonly used for the purpose, under common law rules of justification, lies at the core of the constitutional right to keep and bear arms; their use to defend the home by preventing or suppressing burglary or arson was "one of the major privileges of the common law."³²

FOOTNOTES

1 **The Second Amendment: A Legal Analysis**, Congressional Research Service, Library of Congress (1977) (77-84-A, 639/90, UC 460 B), pp. 43-44.

2 "Point Blank", Vol. VI, No. 7, July 1976, p.2, as quoted in note 1.

3 D.I. Caplan, **The Right of the Individual to Bear Arms: A Recent Judicial Trend**, Detroit College of Law Review (Fall 1982), 790n.8.

4 **McKellar v. Mason**, 159 So. 2d 700, 702 (4th La. Cir., 1964) ("The Constitutions of the United States and Louisiana give us the right to keep and bear arms. It follow logically, that to keep and bear arms gives us the right to use the arms for the intended purpose for which they were manufactured."). The U.S. Supreme Court in **Presser v. Illinois**, 116 U.S. 252, 265 (1886) declared that the constitutional right of the people to keep and bear arms was so fundamental that even putting the Second Amendment "out of view," the States cannot infringe the right of the people to keep and bear arms for otherwise the people could be deprived of "their rightful resource for maintaining the public security." Id.

5 See, Professor H. Wechsler, Chief Reporter of Model Penal Code, statement in **35th Annual Meeting, The American Law Institute, Proceedings** (1958), p. 285.

6 See, Professor H. Wechsler, Chief Reporter of Model Penal Code, statement in **35th Annual Meeting, The American Law Institute, Proceedings** (1958), p. 285.

7 Anonymous, 21 Henry VII, 39 pl. 50 (K.B., 1506), transl., J.H. Beale, Jr., **A selection of Cases and Other Authorities Upon Criminal Law** (2nd ed., 1907), p. 569.

8 E.Coke, **The Third Part of the Institutes of the Laws of England**, The Mary Ingraham Bunting Institute of Radcliffe College, Bunting Institute Working Paper (1980), p. 15. See also, **State v. Kessler**, 289 Oregon 359, 363-363, 614 P. 2d 94, 96 (19980); and see also, D.I. Caplan **Restoring the Balance: The Second Amendment Revisited**, 5 Fordham Urban Law Journal 31, 35-36 (1976).

9 **Payton v. New York**, 445 U.S. 573, 594 n. 36 (1980).

10 Id., 445 U.S. at 594.

11 **Ex parte Grossman**, 267 U.S. 87, 109 (1925).

12 394 U.S. 557 (1969).

13 **Paris Adult Theatre v. Slayton**, 413 U.S. 49, 66 (1973).

14 **Stanley v. Georgia**, *supra* note 12, 394 U.S. at 564.

15 *See, Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("a right of privacy older than the Bill of Rights--older than our political parties, older than our school system.") (The same can be said of the right of self-defense against violent burglars. *See*, 4 W. Blackstone, **Commentaries on the Laws of England** (1769), p. 180 ("...[S]uch homicide, as is committed for the prevention of any forcible and atrocious crime, is justifiable by the law of nature; and also by the law of England, as it stood so early as the time of Bracton [died 1268], and as it is since declared by statute 24 Hen. VIII. c. 5 [1532]...So the Jewish law, which punishes no theft with death; makes homicide only justifiable, in case of **nocturnal** housebreaking...At Athens, if any theft was committed by night, it was lawful to kill the criminal, if taken in the fact.") .) And *see also*, D.I. Caplan, **Restoring the Balance: The Second Amendment Revisited** 5 Fordham Urban Law Journal (1976), at pp. 49-50.

161 W. Blackstone, **Commentaries** (1765), p. 140. Facsimile ed., 1979.

17 **New Jersey v. Portash**, 440 U.S. 450, 459 (1979).

18 *Id.*

19 *Id.*

20 **Aymette v. State**, 21 Tenn. 119, 124, 2 Humph. 154, 159 (1840), a case repeatedly cited with approval in **United States v. Miller**, 307 U.S. 174, 178, 182 n. 3 (1939).

21 35 U.S. Code sect.102.

22 **In re Anthony**, 414 F. 2d 1383 (CCPA, 1969).

23 **Fuller v. Berger**, 120 Fed. 274 (7th Cir., 1903)

24 **In re Anthony**, *supra* note 22, 414 F. 2d n. 12.

25 For example, in **Payton v. New York**, 445 U.S. 573, 591 (1980), regarding the standards for the Fourth Amendment's "reasonableness" of searches and seizures (including body seizures or arrests), the U.S. Supreme Court declared: "An examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment thought to be reasonable." For other examples, *see* D.I. Caplan, **Restoring the Balance; The Second Amendment Revisited**, 5 Fordham Urban Law Journal (1976). p. 33 and n. 16. *See also, supra* note 11 and accompanying text.

26 **State v. Kessler**, 289 Oregon Reports p. 359, at p. 371, 614 Pacific Reporter, 2d Series, p. 94, at p. 100 (1980). Compare the

English common-law standard of "wearing common weapons." 1 W. Hawkins, **Pleas of Crown** (5th ed., 1771), p. 136.

27 For the distinction between justifiable and excusable homicide, see, R.M. Perkins, **Criminal Law** (2nd ed., 1969), pp. 1001 - 1002. Basically, justifiable homicides arose in the killing of violent burglars, robbers, arsonists, and rapists caught in the act or in immediate flight therefrom; excusable homicides arose in sudden brawls, heat of passion or accidents. He who committed a justifiable homicide was fully acquitted and discharged; he who committed a merely excusable homicide required a pardon from the crown in order to be released from jail and at various times in English history, forfeited his worldly goods even if pardoned.

28 **Beard v. United States**, 158 U.S. 550, 562, 563 (1895). quoting from East's **Pleas of the Crown**, Foster's **Crown Cases**, and Wharton on **Criminal Law**. 29 **Rex v. Compton**, 22 Liber Assisarum (Book of Assizes) placitum 55 (1347), transl. in J.H. Beale, Jr., **Retreat from a Murderous Assault**, 16 Harvard Law Review (1903), p. 567, at p. 569. This **Compton's Case** was cited as controlling authority in 3 E. Coke, **Institutes** (5th ed., 1671), p. 221.

30 **United States v. Gilliam**, 25 Fed. Cas. 1319, 1320 (Case No. 15,205a) (D.C., 1882); **People v. Ceballos**, 12 Cal. 3d 470, 478, 526 P. 2d 241, 254 (1974) ("...from their atrocity and violence, human life either is, or is presumed to be, in peril.") (Emphasis added)

31 4 W. Blackstone, **Commentaries on the Laws of England** (1769), p. 182 (Facsimile of the First Edition, 1979.)

32 R.M. Perkins, **Criminal Law** (2nd ed., 1969), p.992 p. 1004.