HANDGUN PROHIBITION AND THE ORIGINAL MEANING OF THE SECOND AMENDMENT

Don B. Kates, Jr.[*]

INTRODUCTION

Federal or state handgun prohibition legislation[1] is often suggested as one way to reduce the incidence of homicide and other violent crime in the United States.[2] Whatever the criminological

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[*] LL.B. 1966, Yale Law School. Member of the California, District of Columbia, Missouri and United States Supreme Court Bars. Partner, Benenson, Kates and Hardy (San Francisco office). Of counsel, O'Brien & Hallisey, San Francisco, California. Mr. Kates authored one of the petitions for certiorari in *Quilici v. City of Morton Grove.* — Ed.

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[1] Such legislation could, for example, take the form of a restrictive permit requirement designed and administered to exclude more than 99% of the civilian population from handgun ownership. On the constitutionality of restrictive permit systems, see notes 253-54 *infra* and accompanying text.

[2] *See* J. ALVIANI & W. DRAKE, HANDGUN CONTROL: ISSUES AND ALTERNATIVES 48-54 (U.S. Conference of Mayors, 1975) (quoting resolutions to that effect from: The Board of Church and Society, United Methodist Church, Common Cause, National Alliance for Safer Cities, Union of America Hebrew Congregations and Unitarian Universalist Association).

merits of this suggestion,[3] constitutionally speaking it raises a diverse set of issues. Among those which this Article will not cover in any depth are:(pg.205)

(1) whether Congress has jurisdiction under the commerce clause or otherwise to enact a federal handgun prohibition;[4]
(2) whether such a prohibition would violate the "castle doctrine" embodied in the third and fourth amendments;[5]
(3) whether the constitutional privacy protections of the fourth and fifth amendments would inhibit enforcement of such a ban;[6] and

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[3] The criminological literature is as bitterly divided as anything else in this emotion-laden area. Studies that minimize the extent or importance of firearms crime receive severe censure in Zimring, *Games with Guns and Statistics*, 1968 WIS. L. REV. 1113. On the other hand, various statistical arguments purporting to show that widespread gun ownership causes violence or that severe anti-gun laws reduce it are convincingly mauled in Benenson, *A Controlled Look at Gun Controls*, 14 N.Y.L.F. 718 (1968), and in Hardy & Stompoly, *Of Arms and the Law*, 51 CHI.-KENT L. REV. 62, 79-114 (1974).

The most complete and authoritative study to date, done by Professors J. Wright and P. Rossi of the Social and Demographic Research Institute of the University of Massachusetts under a three-year grant from the U.S. Dept. of Justice, involved a comprehensive review and analysis of all the various studies and relevant criminological data developed as of 1980. NATIONAL INSTITUTE OF JUSTICE, U.S. DEPARTMENT OF JUSTICE, WEAPONS, CRIME AND VIOLENCE IN AMERICA (1981) (hereinafter cited as WEAPONS, CRIME AND VIOLENCE IN AMERICA]. Scrupulously neutral despite its authors' admitted anti-gun sentiments, this study evenhandedly rebukes champions of both sides for having been so result-oriented that most of the pre-1975 work in the area is simply not credible. Its abstract provides the following "bottom-line" conclusions:

> There appear to be no strong causal connections between private gun ownership and the crime rate.... There is no compelling evidence that private weaponry is an important cause of, or a deterrent to, violent criminality.
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> ....
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> It is commonly hypothesized that much criminal violence, especially homicide, occurs simply because the means of lethal violence (firearms) are readily at hand, and thus, that much homicide would not occur were firearms generally less available. There is no persuasive evidence that supports this view.

Id. at 1-2.

[4] Clearly, the commerce power provides Congress jurisdiction to prohibit the continued importation of firearms, their domestic manufacture for interstate sale or their sale after travel in interstate commerce. In theory, the extension of commerce clause jurisdiction to the confiscation of handguns which might have been purchased by the present owner or his family 25 or more years ago would be questionable. *But see* Scarborough v. United States, 431 U.S. 563 (1977) (indicating that the commerce power extends to prohibiting possession of any firearm which has at any time traveled in interstate or foreign commerce). Since a substantial minority of firearms are foreign imports, and the rest are manufactured by a few firms located in the New England states, most, if not all, firearms would have the required "minimal nexus" of having crossed a state or federal border at some time. Moreover, existing precedents at least arguably extend the commerce power to confiscation of even those firearms which have never crossed a state or federal border on the ground that the metals and other materials out of which they are fabricated have so moved. *See, e.g.,* Katzenbach v. McClung, 379 U.S. 294 (1964).

[5] In Stanley v. Georgia, 394 U.S. 557 (1969), the Supreme Court barred legislation prohibiting the home possession of pornography. The implications of that holding have become increasingly ambiguous, as it has been honored more in the breach than in the observance. *Cf.* Leary v. United States, 544 F.2d 1266, 1270 (5th Cir. 1977) (no federal right of privacy preempts legislative prohibition of home possession of marijuana). *Stanley* has been described as no more than "a reaffirmation that 'a man's home is his castle.'" Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 (1973). Yet if *Stanley* has any vitality at all it surely encompasses the right to equip one's "castle" with firearms, locks, metal grilles and other devices specifically designed to protect its privacy. However the *Stanley* castle doctrine may be narrowed, it would be difficult logically to exclude from it the home possession of firearms since the doctrine that "a man's home is his castle" originated in cases upholding the right to possess and use arms for home defense. Semayne's Case, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B. 1603) (quoted with approval in Payton v. New York, 445 U.S. 573, 596 n.44 (1980)); Dhutti's Case, Northumberland Assize Rolls (1255) (88 Publications of Surtees Society 94 (1891)) (household servant privileged to kill nocturnal intruder); Rex v. Compton, 22 *Liber Assisarum* pl. 55 (1347) (homicide of burglar is no less justifiable than that of criminal who resists arrest under warrant); Anonymous 1353, 26 *Liber Assisarum* (Edw. III), pl. 23 (householder privileged to kill arsonist).

[6] *See* Hardy & Chotiner, *The Potentiality for Civil Liberties Violations in the Enforcement of Handgun Prohibition*, in RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT (D. Kates ed. 1979) [hereinafter cited as RESTRICTING HANDGUNS]; Kessler, *Enforcement Problems of Gun Control: A Victimless Crimes Analysis*, 16 CRIM. L. BULL. 131 (1980).

(4) whether handgun confiscation would trigger the fifth amendment's just compensation requirement.[7]

The constitutional issue that comes most immediately to mind in (pg.206) connection with handgun prohibition-confiscation, however, is the second amendment's injunction:

> 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.[8]

The meaning of this language has been extensively debated in light of what has aptly been termed "The Great American Gun War."[9] Predictably, but unfortunately, the discussion has mirrored the terms, conditions and bitterness of that "war." Debate has been sharply polarized between those who claim that the amendment guarantees nothing to individuals, protects only the state's right to maintain organized military units, and thus poses no obstacle to gun control (the "exclusively state's right" view), and those who claim that the amendment guarantees some sort of individual right to arms (the "individual right" view).

The individual right view is endorsed by only a minority of legal scholars,[10] but accepted by a majority of the general populace who, though supporting the idea of controlling guns, increasingly oppose their prohibition, believing that law-abiding citizens may properly have them for self-defense.[11] Though the individual right view reigns (pg.207) among nonlegal scholars,[12] the

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[7] *See* Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897). *But cf.* Miller v. Schoene, 276 U.S. 272 (1928) (no duty to compensate if one class of property is destroyed rather than taken for public use).

[8] U.S. CONST. amend. II.

[9] *See* Bruce-Briggs' article with that title in PUBLIC INTEREST 37 (1976).

[10] *See, e.g.*, Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31 (1976); Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65 (1983); Gardiner, *To Preserve Liberty—A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63 (1982); Hardy & Stompoly, *supra* note 3; Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381 (1960); Sprecher, *The Lost Amendment*, 51 A.B.A. J. 554 (1965). Based upon special research by its staff in the archives of the Library of Congress, the Subcommittee on the Constitution of the U.S. Senate Judiciary Committee has also endorsed the individual right view. SENATE SUBCOMM. ON THE CONSTITUTION OF THE COMM. ON THE JUDICIARY, 97TH CONG., 2D SESS., THE RIGHT TO KEEP AND BEAR ARMS (Comm. Print 1982) [hereinafter cited as REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION]. Dr. Joyce Malcolm, an historian whose study in England of the antecedent English legal principles was funded by the American Bar Foundation, Harvard Law School and the National Endowment for the Humanities, has also accepted the individual right view. Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983) (in press), *reprinted in* Firearms & Violence: Issues of Public Policy (D. Kates ed., forthcoming 1984) [hereinafter cited as FIREARMS & VIOLENCE]

Though not necessarily agreeing with all of their conclusions, this Article relies heavily upon the research and insights that appear in Malcolm, Caplan and the REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION, *supra*, and Halbrook, *The Second Amendment as a Phenomenon of Classical Political Philosophy*, in FIREARMS & VIOLENCE, *supra*. The following unpublished materials have also been extremely useful: C. Asbury, The Right to Keep and Bear Arms in America: The Origins and Application of the Second Amendment to the Constitution (1974) (unpublished doctoral thesis in history, U. of Michigan) (available at U. of Michigan Graduate Library); A. Lugo Janer, The System of Defense in the Massachusetts Bay Colonies from 1630 to 1650 (1982) (graduate paper, U. of Pa. Law School); A. Lugo Janer, A Thesis on the Second Amendment (1982) (masters thesis, U. of Pa. Law School); J. Smith, The Constitutional Right to Keep and Bear Arms (1959) (thesis, Harvard Law School).

[11] In answer to a 1975 national poll asking whether the second amendment "applies to each individual citizen or only to the National Guard," 70% of the respondents endorsed the individual right alternative, with another 3% saying it applied to both. 121 Cong. Rec. 42, 112 (1975). A 1978 national poll which asked, "Do you believe the Constitution of the United States gives you the right to keep and bear arms?" received an 87% affirmative response. Decision Making Information, Attitudes of the American Electorate Toward Gun Control (1978) (Mimeo).

exclusively state's right position is dominant among lawyers and law professors[13] and enjoys the support of the American Bar Association.[14] That bastion of individual rights, the American Civil Liberties Union—a member organization of the National Coalition to Ban Handguns—emphatically denies that the second amendment has anything to do with individuals.[15] (pg.208)

Indeed, "The Great American Gun War" bristles with ironies that turn our stereotypes of liberalism and conservatism topsy-turvy: While the *New York Times* editorializes that "[t]he urban

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At the same time, national polls generally show widespread public support for the concept of "gun control." But since there are presently more than 20,000 federal, state and local "gun control" laws, the relevant inquiry is: what specific kinds of present or proposed "gun controls" does the public endorse? Polls seeking opinion on specific proposals suggest that the public approves replacement of the present hodgepodge of diverse federal, state and local controls by a national system. This system would be at once substantially less onerous than those presently in effect in the most restrictive jurisdictions and yet substantially more onerous than those of the least restrictive jurisdictions. Registration would be required for all guns (not just handguns) and lawful ownership would be dependent upon qualification for a permit. On the other hand, permits would be automatically available as a matter of right to every responsible law-abiding adult. *See* Bordua, *Gun Control and Opinion Measurement: Adversary Polling and the Construction of Social Meaning* , in FIREARMS & VIOLENCE, *supra* note 10; Kates, *Toward a History of Handgun Prohibition in the United States*, in RESTRICTING HANDGUNS, *supra* note 6, at 27-30; Tonso, *Social Problems and Sagecraft in the Debate over Gun Control*, 5 LAW & POLY. Q. 325 (1983); Wright, *Public Opinion and Gun Control: A Comparison of Results From Two Recent National Surveys*, 455 ANNALS 24 (1981); *cf.* Part IV-C *infra* (on the constitutionality of such a system).

[12] *See, e.g.*, REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION, *supra* note 10; J. MALCOLM, DISARMED: THE LOSS OF THE RIGHT TO BEAR ARMS IN RESTORATION ENGLAND (1980); Halbrook, *supra* note 10; Marina, *Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective*, in FIREARMS & VIOLENCE, *supra* note 10; Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST 599 (1982); Whisker, *Historical Development and Subsequent Erosion of the Right to Keep and Bear Arms*, 78 W. VA. L. REV. 171 (1975); C. Asbury, *supra* note 10. *But see* Shalhope, *supra* , at 599-600 (citations to several historians who embrace the exclusively state's right view).

[13] "For some years, the second amendment has been regarded by the great majority of constitutional scholars as irrelevant to the issue of gun control." Kaplan, *Foreword*, in FIREARMS & VIOLENCE, *supra* note 10; *see, e.g.*, G. NEWTON & F. ZIMRING, FIREARMS AND VIOLENCE IN AMERICAN LIFE 113 (1970) [hereinafter cited as G. NEWTON & F. ZIMRING]; Feller & Gotting, *The Second Amendment, A Second Look*, 61 NW. U. L. REV. 46 (1966); Jackson, *Handgun Control: Constitutional and Critically Needed*, 8 N.C. CENTRAL L.J. 867 (1977); Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI.-KENT L. REV. 148 (1971); Rohner, *The Right to Bear Arms*, 16 CATH. U. L. REV. 53 (1966); Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961 (1972); Note, *Right to Keep and Bear Arms*, 26 DRAKE L. REV. 423 (1977).

L. TRIBE, AMERICAN CONSTITUTIONAL LAW 266 n.6 (1978), considers these views so clearly established that he echoes them without admitting even the possibility of any alternative interpretation.

[14] AMERICAN BAR ASSOCIATION, POLICY BOOK (August 1975).

[15] The ACLU's Summary of its national board's action at the June 14-15, 1980 meeting sets out the following policy declaration:

> The setting in which the Second Amendment was proposed and adopted demonstrates that the right to bear arms is a collective one existing only in the collective population of each state for the purpose of maintaining an effective state militia.
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> The ACLU agrees with the Supreme Court's long-standing interpretation of the Second Amendment that the individual's right to bear arms applies only to the preservation of efficiency of a well regulated militia. Except for lawful police and military purposes, the possession of weapons by individuals is not constitutionally protected. Therefore there is no constitutional impediment to the regulation of firearms.
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> Nor does the ACLU believe that there is a significant civil liberties value, apart from the Second Amendment, in an individual right to own or use firearms. Interests of privacy and self expression may be involved in any individual's choice of activities or possessions, but these interests are attenuated when the activity, or the object sought to be possessed, is inherently dangerous to others. With respect to firearms, the ACLU believes that this quality of dangerousness justifies legal regulation which substantially restricts the individual's interest in freedom of choice.

At the same meeting the board approved the following clarification: "It is the sense of this body that the word 'justifies' in the policy means we will affirmatively support gun control legislation."

handgun offers no benefits,"[16] its publisher is among the few privileged to possess a New York City permit to carry one at all times.[17] Arch-conservatives who passionately denounce marijuana and homosexuality wax eloquent against the "victimless criminalization" of gun owners.[18] (pg.209) The National Rifle Association (NRA) has its own gun control program, involving mandatory minimum prison sentences for the use of a gun in the commission of a crime—a scheme which the NRA's opponents decry.[19] But these same opponents endorse mandatory minimum prison sentences for people who (without misuse) simply carry a handgun illegally—people who turn out overwhelmingly to be not criminals but frightened shopkeepers, secretaries and the elderly—respectable citizens who must live or work in high-crime areas but lack the political influence necessary to get a permit.[20] Normally antipathetic political extremists of virtually every persuasion join with apolitical gun collectors in paranoid visions of gun bans as persecutions directed especially against them.[21] Usually liberal jurists and newspaper columnists frankly call for

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[16] *The Real Politics of Guns*, N.Y. Times, May 6, 1983, at A30, col. 1; *see also Taming the White Panthers*, N.Y. Times, Feb. 16, 1983, at A30, col. 1 (in response to the assertion that handgun prohibition would discriminate against the poor who have less access to police protection, the editorial claims that "most civilians, *whatever their income level*, are likely to lack the training and alertness" required to "us[e] a gun to stop an armed criminal") (emphasis added); *see* n.17 *infra* and accompanying text.

[17] Although such permits are officially available only on a showing of "unique need" to carry a defensive weapon, the list of permit holders is composed of people noted more for their political influence, wealth and social prominence than for their residence in high-crime areas. Along with Arthur Ochs Sulzberger, the list has included such other well-known gun prohibition advocates as Nelson Rockefeller and John Lindsay. Psychologist Joyce Brothers, whose public position is that men possess handguns in order to compensate for sexual dysfunction, was not on the list. Her husband was. Kates, Some Comparisons Between The Prohibition of Alcohol and the Banning of Handguns, at n.21 & accompanying text (paper delivered to the 1981 annual meeting of the American Society of Criminology), revised & *reprinted as Handgun Banning in Light of the Prohibition Experience*, in FIREARMS & VIOLENCE, *supra* note 10.

Of course, contrary to the suggestions of the gun organizations which ferreted it out, this information does not *per se* demonstrate the invalidity of handgun prohibition-confiscation legislation—any more than the fact that the children of the influencial parents often manage to avoid the consequences of their peccadilloes demonstrates the undesirability of having criminal laws, or the fact that the rich are best able to take advantage of tax breaks demonstrates the invalidity thereof. If we were to repeal every law or governmental program—however beneficial to society generally—from which the rich and the influential are in a position to obtain special benefits, or to avoid the most onerous effects, there would be neither government nor laws.

But such anomalies are particularly detrimental to the *enforceability* of handgun prohibition-confiscation. How can the resident of a high-crime area be convinced to give up what he believes to be his family's only real security when people who live and work in high-security buildings in the best-policed areas of the city are privileged not to do so? How can he be dissuaded from thinking that guns give security when many of those who have so derisively assailed that idea turn out to mean only that handguns are useless to those who lack the special influence necessary to secure a permit?

[18] Examples could be multiplied almost endlessly, but among the more prominent are Rep. John Ashbrook (R-Ohio), who was, until his death in 1982, a member of the NRA national board, and California State Sen. H.L. Richardson, who is both an NRA board member and the founder and head of Gun Owners of America.

[19] *See, e.g.*, M. YEAGER, DO MANDATORY PRISON SENTENCES FOR HANDGUN OFFENDERS CURB VIOLENT CRIME (U.S. Conference of Mayors, 1976). Criticism of this NRA gun control alternative is not, however, limited to professional anti-gun analysts. *See* Kates, *Why Gun Control Won't Work*, COMMONWEAL, Mar. 13, 1981, at 136; Loftin & McDowall, *One with a Gun Gets You Two*, 455 ANNALS 150 (1981).

[20] *See* Kates, *supra* note 19, at 136; *see also* Kates, *supra* note 17, at n.16 & accompanying text (unpaginated manuscript).

[21] *See, e.g.*, G. NEWTON & F. ZIMRING, *supra* note 13, at 195 app. F (statements of various extremist political groups); Marwick, *What Gun Collectors and Political Activists Have in Common*, FIRST PRINCIPLES, June 1979. For historical examples of the use of gun confiscations to persecute political enemies, see notes 136-40 *infra* and accompanying text. Others are collected in Kessler, *Gun Control and Political Power*, 5 LAW & POLY. Q. 381 (1983).

abrogation of the fourth amendment insofar as it would hinder police confiscation of guns—"unlimited search and seizure" against anyone suspected of being a handgun owner.[22]

Equally ironic, the legal community's endorsement of the exclusively state's right interpretation has actually aided the gun organizations in one way. By concentrating attention on the state's right position, the gun-owner organizations have been able to avoid the details of their own individual right position, which seems inconsistent with the kinds of gun controls the organizations have themselves endorsed.[23] In almost every state, the basic handgun legislation, including (pg.210) both the prohibition on the carrying of concealed weapons and the restrictions on gun ownership by felons, minors, and incompetents,[24] stems from the Uniform Revolver Act,[25] drafted and promoted by the NRA and the now defunct United States Revolver Association in the first three decades of this century.[26] However socially desirable these and other controls may be, they raise problems for the individual right interpretation which its proponents have rarely, if ever, attempted to address. For example:

> (1) Since the amendment contains no express limitation on the kind of "arms" guaranteed, why does it only protect possession of ordinary small arms (rifles, shotguns, handguns)? Why not of artillery, flame-throwers, machine guns, and so on, to the prohibition of which gun-owner groups have readily acceded?
> (2) Likewise, since the amendment's guarantee does not explicitly limit gun ownership to responsible adults, why does it not proscribe the laws restricting handgun ownership by lunatics, criminals and juveniles?
> (3) Since the amendment guarantees an (apparently unqualified) right to "bear" as well as to "keep" arms, how can individual right proponents endorse concealed-carry proscriptions?
> (4) Conversely, if all these controls are consistent with the gun-owner groups' position, how can they contend that registration and licensing requirements are not?[27]

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[22] *See* Wilkey, Wall St. J., Oct. 7, 1977, at 12, col. 4; Keegan, *U.S.A., "Nation of Hypocrites" on Enforcement of Gun Laws*, Chicago Tribune, Apr. 1, 1981, at 1, col. 2. *See generally* Hardy & Chotiner, *supra* note 6.

[23] Notwithstanding their portrayal in the news media (and indeed, their own self-portraits), gun-owner organizations are not necessarily against gun *control*, as opposed to gun prohibition-confiscation. While they frequently cite the failure of our present 20,000 gun control measures as evidence of the uselessness of a gun ban, they fail to point out that they and their predecessors are responsible for many of those controls. In addition to the controls derived from the Uniform Revolver Act, *see* notes 24-26 *infra* and accompanying text, the NRA also cooperated in enacting the Federal Firearms Act of 1938, Act of June 30, 1938, ch. 850, 52 Stat. 1250 (1938) (repealed 1968). L. KENNETT & J. ANDERSON, THE GUN IN AMERICA 211 (1975). Although the NRA did not affirmatively support the Gun Control Act of 1968, 18 U.S.C. §§ 921-28 (1976), the American firearms industry supported it for economic reasons. Kates, *Towards a History of Handgun Prohibition in the United States*, in RESTRICTING HANDGUNS, *supra* note 6, at 25. Nevertheless, the NRA has sought only certain civil liberty modifications to the Act. For example, the Firearm Owners Protection Act, S. 1914, 98th Cong., 1st Sess., 129 CONG. REC. 3872-74 (1983), introduced by Senator McClure (R-Idaho), seeks to amend the Act by prohibiting warrantless searches and other alleged abuses without repealing the provisions designed to forbid firearms to violent felons, juveniles and the mentally unstable.

[24] *See* note 265 & 268 *infra* and accompanying text.

[25] *A Bill To Provide For Uniform Regulation of Revolver Sales* (The United States Revolver Association), *reprinted in* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING 728 (1924) [hereinafter cited as HANDBOOK].

[26] *See* L. KENNETT & J. ANDERSON, *supra* note 23, at ch. 8; United States Revolver Association, *The Argument for a Uniform Revolver Act*, in HANDBOOK, *supra* note 25, at 716; *Report of the Committee on a Uniform Act to Regulate the Sale and Possession of Firearms*, in HANDBOOK, *supra* note 25, at 711.

[27] These and other issues relating to the constitutionality of specific gun control options are treated in detail in Part IV. *See* notes 235-71 *infra* and accompanying text.

In short, even if the historical evidence does establish an individual right to arms, it remains to define its parameters, particularly with regard to gun control rather than gun prohibition-confiscation.[28] One of the purposes of this Article will be to sketch out at (pg.211) least some of the very substantial limitations on the right of individuals to keep and bear arms suggested by the historical evidence.[29] First, however, the controversy between the individual right and the exclusively state's right views must be resolved. The evidence to be examined must include: the literal language of the second amendment; the history of its proposal and ratification; the philosophical and historical background that gave rise to the Founders' belief in "the necessity of an armed populace to effect popular sovereignty";[30] and the contemporary understanding of the second amendment. This Article will then consider the amendment's subsequent judicial interpretation, and the question of its incorporation against the states, before returning to constitutional limitations on the right to keep and bear arms.

I. THE ORIGINAL UNDERSTANDING OF THE SECOND AMENDMENT

The two opposing camps naturally rely on different interpretations of the origins of the second amendment. Proponents of the exclusively state's right view[31] see the amendment as responding to (pg.212) article I, section 8, clauses 15 and 16, of the original Constitution. Those clauses give Congress the power to call out the militia and "to provide for organizing, arming and disciplining" it. According to the state's right interpretation, the amendment was motivated by fear that Congress might order the states' organized militias disarmed, thereby leaving the states

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[28] This Article does not purport to resolve, or even to address, the current debate among constitutional scholars over the proper role of original intent in constitutional adjudication. As to that debate, see, *e.g.* , J. ELY, DEMOCRACY AND DISTRUST (1980) (evaluating interpretive and fundamental value approaches and arguing for his own form of "ultimate interpretivism"; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (arguing that neutral derivation of principle requires adherence to original intent); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) (arguing that interpretivism is impossible and does not serve the ends of constitutionalism); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981) (original intent is proper interpretive mode for ascertaining constitutional meaning). For the purposes of this Article, it is sufficient to note that courts and commentators continue to refer to the text and the intent behind it, taking as their guides the writings of Madison, Jefferson and the other Framers, and the historical background in colonial and English law of the provision under consideration. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 547 (1969); Everson v. Board of Educ., 330 U.S. 1 (1947). Even Thomas Grey, who would read the Constitution in light of modern values, justifies his interpretation on the ground that this was the Framers' intent. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 715-17 (1975).

[29] *See* notes 235-71 *infra* and accompanying text.

[30] Halbrook, *supra* note 10, at n. 79 & accompanying text (unpaginated manuscript).

[31] What is here denominated the "exclusively state's right" position is sometimes also described as the "collective right" theory. That phrase is not used here because of the potential for confusion with a related, but occasionally discretely stated, "collective right" theory. This second "collective right" theory was first enunciated by the Kansas Supreme Court in a decision which eviscerated the right to arms provision of that state's constitution. Salina v. Blaksely, 72 Kan. 230, 83 P. 61 (1905). Under this theory constitutional right to arms guarantees, whether federal or state, involve only a "collective right" of the entire people, by which is apparently meant a right that cannot be invoked by anyone either in his own behalf or on behalf of the people as a whole.

It will be unnecessary to consider at length this discrete "collective right" theory because it is patently wrong. If the amendment was intended to guarantee a right to the people (and not the states), it is self-contradictory to say that because that right was conferred on everyone, no single person may assert it, or indeed, to describe something that guarantees nothing to any specific person or entity as a "right" at all. Thus, the discrete "collective right" theory fails to meet Chief Justice Marshall's elementary test for constitutional construction: "It cannot be presumed that any clause in the Constitution is intended to be without effect...." Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); *cf.* Hardy & Stompoly, *supra* note 3, at 74-75 (state provisions meaningless if right to keep and bear arms refers only to right of state to form a militia); REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION, *supra* note 10, at 11 (individual rights interpretation gives full meaning to the words chosen by the First Congress to reflect the right to keep and bear arms).

powerless against federal tyranny. Thus, this view sees the amendment as a response to concerns that time and the course of American history have rendered anachronistic. During the Revolution, and the subsequent period of the Articles of Confederation, the states loomed larger than the federal government and jealously guarded their prerogatives against it. While the Constitution itself heralded a decisive (though limited) repudiation of those attitudes, they remained strong enough to assure two precatory admonitions a place in the Bill of Rights. These became the second and tenth amendments. The purpose of the second amendment was simply to place the states' organized military forces beyond the federal government's power to disarm, guaranteeing that the states would always have sufficient force at their command to nullify federal impositions on their rights and to resist by arms if necessary.[32] State's right proponents also link the amendment to the traditional Whig fear of standing armies. Though the federal government could not be denied authority to maintain a small army, the basic military defense of the country would rest in the states' reserved power to maintain their own organized military forces. These could be joined together to resist foreign invasion in time of need. Thus, the philosophy underlying the second amendment not only guaranteed the states' right to keep armed forces, but obviated any need for a massive federal military which might defeat them if they found it necessary to revolt.[33]

This state's right analysis renders the amendment little more than a holdover from an era of constitutional philosophy that received its death knell in the decision rendered at Appomattox Courthouse. Though it yet lingers in the Constitution, it does not (for it was never (pg.213) so intended) guarantee the right of any *individual* against confiscation of arms. Rather, it guarantees an exclusive right of the states, which only the states have standing to invoke. This they need not do today when any value the amendment might presently have for them is satisfied by their federally-provided National Guard structure.

Advocates of the individual right position, on the other hand, rely on the fact that the natural reading of the amendment's phrase "right of the people" is that it creates not a state right, but one which individuals can assert. This is how the identically phrased[34] first and fourth amendments are interpreted.[35] Furthermore, the individual right advocate may accept the state's right theory and simply assert that, even though one of the amendment's purposes may have been to protect the states' militias,[36] another was to protect the individual right to arms. Indeed, the evidence suggests it was precisely by protecting the individual that the Framers intended to protect the militia.[37] In thus yielding to the primary strength of the opposing argument, individual right advocates define the burden that the exclusively state's right theorist must bear. To demonstrate that no individual right was intended, he must show not just that there was a desire to protect the states, but that there was

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[32] *See generally* the sources cited at notes 13-15 *supra*. The historical accuracy of this view of the amendment is analyzed at notes 86-89 *infra* and accompanying text.

[33] *See* notes 86-89 & 113 *infra* and accompanying text.

[34] U.S. CONST. amend. I ("Congress shall make no law ... abridging ... the right of the people peaceably to assemble...."); U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers and effects....").

[35] *See, e.g.*, Richmond Newspapers, Inc., v. Virginia, 488 U.S. 555, 577-78 (1980) (right to assemble peacefully is as fundamental as free press and speech and exists as an independent right as well as a catalyst for the exercise of other first amendment rights); United States v. Salvucci, 448 U.S. 83, 85 (1980) (defendants charged with crimes of possession may claim benefits of the exclusionary rule to vindicate their fourth amendment rights).

[36] For the specialized 18th century usage of "militia" to encompass the entire military-age male population, see notes 39-55 *infra* and accompanying text.

[37] *See* notes 53-55 and accompanying text.

no desire to protect individuals—despite the most natural reading of the amendment's phraseology. As we shall see, this is a particularly difficult burden to bear. Such debate as the amendment received is sparse and inconclusive, while other legislative history strongly supports the proposition that protection of an individual right was at least one of the amendment's purposes.[38] (pg.214)

A. *Parsing the Language of the Second Amendment and the Bill of Rights*

In general, the text of the second amendment, and of the Bill of Rights as a whole, provides a series of insuperable obstacles to an exclusively state's right interpretation. State's right analyses have tended not to come to grips with these obstacles; if they focus on the amendment's wording at all, it is only on the word "militia," assuming that the Framers meant "militia" to refer to "a particular military force," *i.e.*, the states' home reserve, now federalized as the National Guard.[39] In fact, though not unknown in the 18th Century,[40] that usage was wholly secondary to the one Webster classifies as now least used. "The whole body of able-bodied male citizens declared by law as being subject to call to military service."[41] As the paragraphs below demonstrate, the Framers' understanding of the meaning of "militia" and the other phrases of the second amendment seriously embarrasses the state's right argument.

1. *The Militia*

Throughout their existence, the American colonies had endured the constant threat of sudden attack by Indians or any of Britain's Dutch, French and Spanish colonial rivals.[42] Even if they had wanted a standing army, the colonists were unable either to afford the cost or to free up the necessary manpower. Instead, they adopted the ancient practice that was still in vogue in England, the militia system. The "militia" was the entire adult male citizenry, who were not simply *allowed* to keep their own arms, but affirmatively *required* to do so. In the pre-colonial English tradition there had been no police and no standing army in peacetime.[43] From time immemorial every free Englishman had been both permitted and required to keep such arms as a person of his class could afford both for law enforcement and for military service.[44] With arms readily available

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[38] The recorded debate, which centered on a tangential issue, is discussed at note 90 *infra*. Other direct legislative history is set out at notes 75-89 *infra* and accompanying text. The philosophical underpinning of the amendment is set out at notes 90-134 *infra* and accompanying text. Much of this material derives from unpublished background studies by Professor Halbrook which, along with some additional material, are embodied in his article *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1797*, 10 N. KY. L. REV. 13 (1982).

[39] *See, e.g.*, sources cited in note 13 *supra*.

[40] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971).

[41] *Id.*

[42] *See* Dowlut, *supra* note 10, at 69. (Dowlut also mentions that the colonists were exposed to general crime against which they both armed themselves individually and acted jointly in the *posse comitatus*.).

[43] When a large scale threat, such as invasion, presented itself, the civilian militia was mobilized for military duty. In addition, civilian subjects participated in ordinary police work, both individually and as members of posses. *Id.* at 93.

[44] C. GREENWOOD, FIREARMS CONTROL: A STUDY OF ARMED CRIME AND FIREARMS CONTROL IN ENGLAND AND WALES 7 (1972); C. HOLLISTER, ANGLO-SAXON MILITARY INSTITUTIONS ch. 2 (1962). As weapons improved or new technologies, including firearms, took their place, successive monarchs and parliaments constantly found it necessary to redefine and reemphasize citizens' continuing obligation to arm themselves with the most effectual weapons they could afford. For the legislation of Mary Tudor and Elizabeth I, see A. Lugo Janer, *supra* note 10, at 6-13. Legislation enacted by their father, Henry VIII, is discussed at note 235 *infra* and accompanying text. For the tergiversatous course followed by their Stuart successors, see notes 136-39 *infra* and accompanying

(pg.215) in their homes, Englishmen were theoretically prepared at all times to chase down felons in response to the hue and cry, or to assemble together as an impromptu army in case of foreign invasion of their shire.[45]

When the American colonies were founded the militia system was in full flower in England. It was adopted perforce in the colonies, which were thousands of miles by sail from any succor the Mother Country might provide. With slight variations, the different colonies imposed a duty to keep arms and to muster occasionally for drill upon virtually every able-bodied white man between the age of majority and a designated cut-off age. Moreover, the duty to keep arms applied to *every* household, not just to those containing persons subject to militia service.[46] Thus, the over-aged and seamen, who were exempt from militia service, were required to keep arms for law enforcement and for the defense of their homes from criminals or foreign enemies.[47] In at least one colony a 1770 law actually required (pg.216) men to carry a rifle or pistol every time they attended church; church officials were empowered to search each parishioner no less than fourteen times per year to assure compliance.[48] In 1792 Congress, meeting immediately after the enactment of the second amendment, defined the militia to include the entire able-bodied military-age male citizenry of the United States and required each of them to own his own firearm.[49]

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text.

[45] F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 276 (Fisher ed. 1961), particularly stresses the joinder of military and law enforcement purposes served by the requirement that every free man possess weapons. *See also* Malcolm, *supra* note 10; J. Smith, *supra* note 10, at 6; note 44 *supra*.

[46] From the earliest times the duty to possess arms was imposed on the entire colonial populace, with actual militia service contemplated for every male of 15, 16, or 18 through 45, 50, or 60 (depending on the colony). As noted in the REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION, *supra* note 10, at 3 (footnotes omitted):

> In the colonies, availability of hunting and need for defense led to armament statutes comparable to those of the early Saxon times. 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 [*sic*] 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 free men, but also indentured servants own firearms and in 1644 it imposed a stern 6 shilling fine upon any citizen who was not armed.

For examples of subsequent legislation to the same effect, see An Act for Regulating the Militia, 1741, *reprinted in* 8 COLONIAL RECORDS OF CONNECTICUT 379 (1874); Act for Regulating the Militia, 1693-1694, 1st sess., ch. 3, *reprinted in* 1 ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY 128 (1869); An Act for Settling the Militia, 1691, 1st sess., ch.5, *reprinted in* 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 231(1894). Colonial practice is extensively summarized in United States v. Miller, 307 U.S. 174, 179 (1939) ("[T]he term Militia [in the amendment] ... comprised all males physically capable of acting in concert for the common defense ... [who] were expected to appear bearing arms supplied by themselves....").

[47] *See, e.g.*, THE LAWS AND LIBERTIES OF MASSACHUSETTS 42 (M. Farrard ed. 1929, reprinted from the 1648 ed.) ("But all persons exempted whatsoever as foresaid, except Magistrates and Teaching Elders shall be provided of Arms and Ammunition, as other men are."); *see also* Dowlut, *supra* note 10, at 74 n.37 (quoting similar provisions of various New York and Virginia statutes). As in England, the requirement of keeping arms was as much directed toward prevention of crime and apprehension of criminals as the repelling of foreign enemies. Militiamen (apparently selected by rotation) staffed the night watch which both patrolled the city and watched out over it from stationary positions to raise the hue and cry in case of felony and the alarm in case of foreign attack. A. Lugo Janer, *supra* note 10, at 33-34.

[48] An Act for the Better Security of the Inhabitants by Obliging the Male White Persons to Carry Fire Arms to Places of Public Worship, 1770, *reprinted in* 1775-1770 GEORGIA COLONIAL LAWS 471 (1932).

[49] First Militia Act, 1 Stat. 271 (1792). Legislation by Congress immediately following adoption of an amendment is entitled to great weight in the construction thereof. *See, e.g.*, Hampton & Co. v. U.S., 276 U.S. 394, 412 (1928), and cases cited therein.

What does this suggest about the word "militia" as used in the amendment? The American Civil Liberties Union's argument against an individual right interpretation states that the amendment uses "militia" in the sense of a formal military force separate from the people.[50] But this is plainly wrong. The Founders stated what they meant by "militia" on various occasions. Invariably they defined it in some phrase like "the whole body of the people,"[51] while their references to the organized-military-unit usage of militia, which they called a "select militia," were strongly pejorative.[52] (pg.217)

In short, one purpose of the Founders having been to guarantee the arms of the militia, they accomplished that purpose by guaranteeing the arms of the individuals who made up the militia. In this respect it would never have occurred to the Founders to differentiate between the arms of the two groups in the context of the amendment's language.[53] The personally owned arms of the

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[50] Over and above the historical inaccuracy of the ACLU's interpretation is that, so interpreted, the amendment conflicts with Art. I § 10, cl. 3 which forbids the states to raise "troops" (i.e. formal military units) without the consent of Congress. There is not one iota of historical evidence suggesting that Madison and his Federalist colleagues who dominated the first Congress intended the amendment to undercut either the military-militia clauses of the original Constitution in general or Art. I § 10, cl. 3 in particular. See notes 86-9 & 113 *infra* and accompanying discussion.

[51] *See, e.g.*, VA. CONST. art. I, §13 (1776) ("[A] well-regulated militia, composed of the body of the people...."); DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF VIRGINIA, *reprinted in* 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 425 (3d ed. 1937) (statement of George Mason, June 14, 1788) ("Who are the Militia? They consist now of the whole people...."); LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 123 (W. Bennett ed. 1978) (ascribed to Richard Henry Lee) [hereinafter cited as LETTERS FROM THE FEDERAL FARMER] ("[a] militia, when properly formed, are in fact the people themselves...."); Letter from Tench Coxe to the Pennsylvania Gazette (Feb. 20, 1778), *reprinted in* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Mfm. Supp.) 1779 (M. Jensen ed. 1976) ("Who are these militia? *are [sic] they not ourselves*.") (emphasis in original); *see also* R. TRENCH, DICTIONARY OF OBSOLETE ENGLISH 159 (1958); Sprecher *supra* note 10, at 556 n.29 (citing several other state constitutions).

[52] Typical expressions of hostility are cited by Halbrook, *supra* note 38, at 18-19, 23-25, and REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION, *supra* note 10, at 4-5. These expressions reflect a traditional Whig attitude, dating back to the reign of Charles II, who was thought to have used the "select militia" to disarm and tyrannize the people. Malcolm, *supra* note 10.

[53] This is not to say that the amendment's only purpose was to guarantee the arms of the militia. The philosophical tradition underlying the amendment involved three separate purposes. Certain of the early English commentators on the right to bear arms:

> subtly blended several distinct, yet related, ideas: opposition to standing armies, dependence upon militias, and support of the armed citizen. Thus, while the concept of the armed citizen was sometimes linked with that of the militia, libertarians just as often stressed this idea as an independent theme or joined it to other issues.
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> ....
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> The observations of Madison, Washington, Dwight, and Story reveal an interesting relationship between the armed citizen and the militia. These men firmly believed that the character and spirit of the republic rested on the freeman's possession of arms as well as his ability and willingness to defend himself and his society. This was the bedrock, the "palladium," of republican liberty. The militia was equally important in their minds. Militia laws insured that freemen would remain armed, and thus vigorous republican citizens.

Shalhope, *supra* note 12, at 604, 612. Thus, by guaranteeing individuals the right to arms the amendment killed three birds with one stone. First, the independence and self reliance necessary to the citizen of a republic was protected by assuring to each individual the right to possess the arms necessary to defending, and securing food for himself and his family. On the possession of arms as a vital component in the theory of virtuous republican citizenship, see notes 117-18 *infra* and accompanying text. Second and third, by guaranteeing the arms of the individual, the amendment was simultaneously guaranteeing arms to the militia and the *posse comitatus* for military and law enforcement purposes. In this connection it is important to remember that, although these can be stated as three separate functions—and it seems natural to the modern mind to so conceptualize them—it would not have seemed so to the Founders. *See* note 93 *infra* and accompanying text.

individual were the arms of the militia.[54] Thus, the amendment's wording, so opaque to us, made perfect sense to the Framers: believing that a militia (composed of the entire people possessed of their individually owned arms) was necessary for the protection of a free state, they (pg.218) guaranteed the people's right to possess those arms.[55] At the very least, the Framers' understanding of "militia" casts doubt on an interpretation that would guarantee only the state's right to arm organized military units.[56]

2. *A "Right of the People"*

The second amendment's literal language creates another, even more embarrassing problem for the exclusively state's right interpretation. To accept such an interpretation requires the anomalous assumption that the Framers ill-advisedly used the phrase "right of the people" to describe what was being guaranteed when what they actually meant was "right of the states."[57] In turn, that assumption leads to a host of further anomalies. The phrase "the people" appears in four other provisions of the Bill of Rights, always denoting rights pertaining to individuals. Thus, to justify an exclusively state's right view, the following set of propositions must be accepted: (1) when the first Congress drafted the Bill of Rights it used "right of the people" in the first amendment to denote a right of individuals (assembly); (2) then, some sixteen words later, it used the same phrase in the second amendment to denote a right belonging exclusively to the states; (3) but then, forty-six words later, the fourth amendment's "right of the people" had reverted to its normal individual right meaning; (4) "right of the people" was again used in the natural sense in the ninth amendment; and (5) finally, in the tenth amendment the first Congress specifically distinguished "the states" from "the people," although it had failed to do so in the second amendment. Any one of these textual

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[54] That one result of guaranteeing the people's privately owned arms was to guarantee the militia's arms should not, however, be understood as suggesting that the only arms protected were those belonging to militiamen. Among other things, the amendment surely was intended at least to protect those non-militia members who were obligated to possess arms, such as the over-aged and seamen, *see* note 47 *supra* and accompanying text. More important, a "right" to possess arms is obviously broader than an obligation to do so. The amendment's use of "right" without further definition suggests that its purpose was to constitutionalize the right to arms which the Founders knew from the common law. This unquestionably included not only militiamen and others obligated to possess arms, but also women, the clergy and those public officials who were exempt from militia service. On the other hand, it is necessary to distinguish those whose right the amendment was intended to protect although they were *exempt* from militia service, from those who were *excluded* because of perceived unfitness, untrustworthiness or alienage. The Founders would not have understood the amendment as extending to felons, children or those so physically or mentally impaired as to preclude militia service. *See* notes 72, 267 and 258 *infra*. The original intention would unquestionably also have been to exclude Indians and blacks on the ground of alienage or untrustworthiness. For evidence that one purpose of the fourteenth amendment was to guarantee blacks the right to arms, see notes 221-30 *infra* and accompanying text.

[55] Smith "translates" the amendment's language into modern terms as follows:

> Because a free state cannot be secure from either internal or external enemies unless every able-bodied [adult] in the state is trained to use weapons; the right of each individual person, in any of the 50 states, to keep in his house weapons sufficient for his own use, and to use them in such military training as is directed by his state government, shall not be interferred with by the United States Government.

J. Smith, *supra* note 10, at 72. Note that Smith's formulation here reflects usage in colonial statutes and related documents which he concludes indicates an intention to broadly guarantee individuals the right to "keep" arms in their homes, but to "bear" them outside the home only in the course of actual militia service. *See* notes 59-61, 271 *infra* and accompanying text.

[56] As we shall see, the joint-purpose interpretation of the second amendment inherent in the Framers' conception of an armed citizenry—that is, self-defense, law enforcement, and defense against invasion—implies certain limitations on any individual right that amendment may guarantee. *See* notes 233-71 *infra* and accompanying text.

[57] In constitutional or statutory construction, language should always be accorded its plain meaning. *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816).

incongruities demanded by an exclusively state's right position dooms it. Cumulatively they present a truly grotesque reading of the Bill of Rights.(pg.219)

3. *Keeping and Bearing Arms*

The casual attention state's right proponents pay to the text is exemplified by a third problem inherent in the amendment's literal language. Professor Levin argues that the amendment's use of the term "to bear" arms supports an exclusively state's right view: contemporary statutory usage shows eighteenth-century writers using "bear" in reference to militiamen carrying their arms when mustered to duty; whereas Blackstone uses the phrase to "have" arms in referring to individual possession of them by right.[58] Remarkably, Professor Levin seems to have overlooked the fact that the word that the amendment uses to guarantee a right to *possess* arms is "keep," "bear" being used only to denote carrying them outside the home. Obviously, even if a negative pregnant as to possession could have been inferred had the amendment used "bear arms" alone, that inference disappears completely when "to keep" is added.

Had Professor Levin explored colonial statutory usage of "to keep," as well as "to bear," he would have found his "to bear" argument confirmed, but only in a way which decisively refutes his exclusively state's right interpretation. Smith's extensive statutory review confirms that "bear" did generally refer to the carrying of arms by militiamen.[59] Since statutes referring to the transportation of arms by individuals outside the militia context (*e.g.*, statutes forbidding blacks and Indians to transport them) invariably used the word "carry" instead of "bear," he concludes that the amendment's use of "bear" is designed to protect the carrying of arms outside the home only in the course of militia service.[60] In contrast, Smith finds that "keep" was commonly used in colonial and early state statutes to describe arms possession by individuals in all contexts, not just in relation to militia service. Colonial statutes did require militiamen to "keep" arms in their homes, but they also required the over-aged, seamen and others exempt from militia service to "keep" arms in their homes. Moreover, what blacks and Indians (who were excluded from the militia) were forbidden to do was "keep" guns in their homes. The one context in which "keep" was *not* used was as a description of arms possession by public agencies (as opposed to individuals): "only occasionally, and then only in the 17th Century, are towns and colony governments said to 'keep' the public arms."[61] (pg.220) Based on colonial statutory usage then, the amendment's phrase "right of the people to keep" imports not a right of the states or one limited to military service, but a personal right to possess arms in the home for any lawful purpose.

Additional textual evidence of the unsoundness of the exclusively state's right position is that it renders the phrase "to keep" in "to keep and bear" superfluous—as Professor Levin's obliviousness to it unconsciously dramatizes. If the Framers' only concern had been to protect the militia's right to have arms when actually mustered, "to bear" would have sufficed. The words "to keep" take on

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58 Levin, *supra* note 13, at 148.

59 *See* J. Smith, *supra* note 10, at 42-55.

60 *Id.* at 42-47. The implications of this conclusion for some types of gun controls are discussed in the text following note 271 *infra*.

61 *Id.* at 49; *see also Id.* at 47-55. In contrast to the "keeping" by individuals of their private arms in their own homes, the statutes described publicly owned arms as being "lodged" in armories at such times as they were not actually being borne.

meaning only if what is being protected is the individual's own arms, rather than those arms of the state that would be dispensed to him from an armory whenever the militia was mustered.[62]

Finally, the organizational structure of the Bill of Rights cuts against the exclusively state's right position. The rights specifically guaranteed to the people are contained in the first nine amendments, with the rights reserved to the states being relegated to the tenth. If the Framers had viewed the second amendment as a right of the states, they would have moved it back to the ninth or tenth amendment instead of placing it second.[63]

B. *The Proposal and Ratification of the Second Amendment*

As we have seen, the language of the second amendment supports the individual interpretation of the right to keep and bear arms. The nature of the controversy over ratification of the Constitution and the various proposals for and debate over the Bill of Rights also buttress the individual right view, for the one thing all (pg.221) the Framers agreed on was the desirability of allowing citizens to arm themselves.

1. *The Debate Over the Constitution*

The Founding Fathers were necessarily influenced by the fact that the entire corpus of republican philosophy known to them took English and classical history as a lesson that popular possession of arms was vital to the preservation of liberty and a republican form of government.[64] The proponents and the opponents of ratification of the Constitution equally buttressed their conflicting arguments on the universal belief in an armed citizenry.[65] The proponents denied that the newly strengthened federal government could ever be strong enough to destroy the liberties of an armed populace: "While the people have property, arms in their hands and only a spark of noble spirit, the most corrupt congress must be mad to form any project of tyranny."[66] As Noah Webster

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[62] By the same token, however, the phrase "keep and bear" implies at least one important limitation. Because what is being guaranteed is an individual right to keep *and* bear arms, the arms could only be such if the ordinary individual could conveniently lift and transport them about with his body. For the gun control implications of this observation see text at note 241 *infra*.

[63] *See* note 77 and accompanying text. Gardiner has suggested that the organization of the Constitution and Bill of Rights was deliberately modeled after Blackstone's organization of the five legal precepts he considered fundamental to the maintenance of English liberty. *See* Gardiner, *supra* note 10, at 65 n.8. The correspondence can be established as follows: parliamentary powers and privileges are comprehended in art. I; the limitations on the powers of the monarch (executive branch) are comprehended in art. II; the institution and powers of the courts of justice are comprehended in art. III; the right to apply to Parliament for redress of grievances is comprehended in the first amendment; and the right to possess arms is covered in the second amendment. If meritorious, this analysis further buttresses the individual right position since Blackstone included the right to arms among the "absolute rights of individuals." *See* note 153 *infra*.

[64] The influence of such philosophers as Harrington, Nedham and Machiavelli is documented at notes 114-27 *infra* and accompanying text. *See also* Granter, *The Machiaveilanism of George Mason*, 17 W. & M. QUARTERLY 239 (2d ser. 1937). *See generally* Halbrook, *supra* note 10; Shalhope, *supra* note 12. For the historical origins of this philosophy, see notes 114-28 *infra*.

[65] *See* Part I-C *infra*.

[66] REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION, *supra* note 10, at 4-5; Halbrook, *supra* note 10, at 17 (quoting a newspaper columnist); *see also id.* at 24, 37.

put it in a pamphlet urging ratification: "Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe."[67]

But this line of argument opened the Federalists up to a telling riposte: Since the Constitution contained no guarantee of the citizenry's right to arms, the new federal government could outlaw and confiscate them, thereby destroying the supposed barrier to federal despotism. George Mason recalled to the Virginia delegates the colonies' experience with Britain, in which the monarch's goal had been "to disarm the people; that ... was the best and most effectual way to enslave them."[68] Together Mason and Richard Henry Lee are generally given preponderant credit for the compromise under which the Constitution was ratified subject to the understanding that it would immediately be augmented by a Bill of Rights. Lee's influential writing on the ratification question extolled the importance of the individual right to arms, opining that "to preserve liberty, it is (pg.222) essential that the whole body of the people always possess arms and be taught alike, especially when young, how to use them."[69]

In line with these sentiments, New Hampshire, the first state to ratify the Constitution, officially recommended that it include a bill of rights providing "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion."[70] New York and Rhode Island also recommended constitutionalizing the right to arms.[71] Although a majority of the Pennsylvania convention ratified the Constitution unconditionally, rejecting suggestions that a bill of rights be recommended or required, a substantial portion of the Pennsylvania delegates broke away on this issue. As a rump they formulated and published a series of proposals, including freedom of speech, press, due process of law and the right to keep and bear arms, which proved particularly influential in spurring the adoption of similar recommendations in the subsequent state conventions. The individual right nature of the Pennsylvania right to arms proposal is unmistakable:

> That the people have a right to bear arms for the defense 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 ....[72]

Similarly, Samuel Adams proposed to the Massachusetts ratification convention an amendment guaranteeing the right to bear arms.[73]

The strength and universality of contemporary sentiment on the issue of the individual's right to arms may be gauged with reference to the number of amendatory proposals which included it. Amending the constitution to assure the right to arms was endorsed by five state ratifying conventions. By comparison, only four states suggested that the rights to assemble, to due process,

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67 REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION, *supra* note 10, at 5. For Madison's similar expressions from *The Federalist*, see note 100 *infra* and accompanying text. For similar expressions pro and con, see the quotations collected by Halbrook, *supra* note 10.

68 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 380 (2d ed. 1836). *See generally* Shalhope, *supra* note 12, at 606-13 (on the Federalist and Anti-Federalist arguments based on the individual right to arms).

69 LETTERS FROM THE FEDERAL FARMER, *supra* note 51, at 124; *see also id.* at 21-22.

70 1 J. ELLIOT, *supra* note 68, at 326.

71 *See id.* at 328, 335.

72 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 665 (1971)(emphasis added).

73 *Id.* at 675; *see also* note 83 *infra*.

and against cruel and unusual punishment be guaranteed; only three states suggested that freedom of speech be guaranteed or that the accused be entitled to know the crime for which he would be tried, to confront his accuser, to present and cross-examine witnesses, to be represented by counsel, and to not be forced to incriminate himself; only two states proposed that double jeopardy be barred.[74] Such unanimity helps (pg.223) demonstrate that both Federalists and Anti-Federalists accepted an individual right to arms; the only debate was over how best to guarantee it.

2. *The Proposal and Ratification of the Second Amendment*

To secure ratification of the Constitution, the Federalists had committed themselves to the addition of "further guards *for private rights*."[75] To this end, the Federalists put forward Madison, the leading and most ardent supporter of the original Constitution in Congress, to draft the proposed amendments. Madison's own notes on his proposal reflect the ultimate organization of the Bill of Rights;[76] his notes on the amendments, in which the right to arms appears very early, state that the amendments "relate first to private rights."[77] Equally corrosive of the exclusively state's right view is the original organizational scheme revealed by Madison's notes. Not conceiving the idea of simply appending the whole set of amendments to the Constitution as a discrete document (today's "Bill of Rights"), Madison intended to attach them to, or after, each section of the original Constitution to which they related. Had he viewed the right to arms as merely a limitation on article I, section 8's provisions concerning congressional control over the militia, he would have inserted it in section 8 immediately after clauses 15 and 16. Instead, he planned to insert it with freedom of religion, of the press and various other personal rights in section 9, immediately following clause 3, which establishes the rights against bills of attainder and ex post facto laws.[78]

Certainly the amendment was understood by Madison's congressional colleagues as guaranteeing an individual right. For instance, in private correspondence Congressman Fisher Ames noted of Madison's proposals that "the rights of conscience, of bearing arms, [*etc.*] ..., are declared to be inherent in the people."[79] In addition, two written interpretations on the proposed amendments were available (pg.224) to the members of the first Congress.[80] The first, and more authoritative—by virtue of having received Madison's imprimatur—was a widely reprinted article by his ally and

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74 *Id.* at 1167.

75 11 PAPERS OF JAMES MADISON 307 (R. Rutland & C. Hobson ed. 1977) (letter of Oct. 20, 1788, from Madison to Edmund Pendelton) (emphasis added). The Anti-Federalists' objections to the Constitution had not been limited to the lack of individual rights guarantees. For discussion of their objections to art. I, sec. I, see notes 86-89 *infra* and accompanying text.

76 *See* text at note 63 *supra*.

77 *See, e.g.*, 12 PAPERS OF JAMES MADISON, *supra* note 75, at 193-94.

78 *Id.*

79 1 WORKS OF FISHER AMES 52-53 (1854) (letter of June 11, 1789 to Thomas Dwight). The next day U.S. Senator William Gray wrote Patrick Henry that Madison had introduced a "string of amendments" which "respected personal liberty." 3 PATRICK HENRY 391 (1951); *see also* Senator Gallatin's letter of Oct. 7, 1789 ("essential and sacred rights" which "each individual reserves to himself"), *quoted in* Halbrook, *supra* note 38, at 36 n.90.

80 Madison, apparently considering the amendment's language and purposes too clear to require comment, did not bother to discuss it in his introductory and subsequent remarks.

correspondent Tench Coxe.[81] Having discussed the first amendment, Coxe moved on to describe the second in unmistakably individual right terms:

> As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens, the people are confirmed by the next article in their right to keep and bear *their private arms*.[82]

A similar interpretation appears from Anti-Federalist editorials. Samuel Adams, who had taken the modified Anti-Federalist position of conditioning ratification upon the addition of a guarantee of personal rights, had proposed in the Massachusetts Convention that "the said constitution be never construed ... to prevent the people of the United States who are peaceable citizens, from keeping their own arms."[83] Anti-Federalist editorials triumphantly quoted this and Adams' other proposals as Madison's Bill of Rights was wending its way through the House of Representatives. The editorials crowed that the Anti-Federalist champion, Adams, had been vindicated because "every one of" his proposals (except the prohibition against a standing army) had been adopted in Madison's bill and "most probably will be adopted by the federal legislature."[84] Calling upon the public to compare Madison's bill to Adams' previous proposals, the editorials demanded that the Federalists "in justice therefor for that long tried republican" formally acknowledge Samuel Adams as the real father of Madison's bill.[85]

The significance of the bipartisan interpretation so partisanly reflected in these editorials and the Tench Coxe article is incontrovertible. The arch-Federalist Coxe described the amendment as guaranteeing to the people "their private arms." The Anti-Federalist editorials agreed totally, seeing the amendment's language as identical (pg.225) to Adams' previous clearly individual right formulation. If any member of the first Congress had any difficulty in understanding that the amendment's intention was to protect the individual possession of private arms by the general citizenry, these newspaper articles would surely have stilled it. Nor is there reason to imagine that they experienced any such difficulty. Absent some substantial reason particular to the context, the phrase "right of the people" clearly indicates that an individual right was intended. The context here—its use throughout the Bill of Rights—consistently supports an individual right intent.

The second amendment, then, was a response to the perceived lack of individual rights guarantees, not, as state's right proponents contend,[86] a reaction to the standing army and militia control provisions of article I, section 8. The latter source of Anti-Federalist wrath was simply not

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81 Originally published under the pseudonym "A Pennsylvanian," these "*Remarks on the First Part of the Amendments to the Federal Constitution*" first appeared in the Philadelphia Federal Gazette, June 18, 1789, at 2, col. 1. They were reprinted by the New York Packet, June 23, 1789, at 2, cols. 1-2, and by the Boston Centenniel, July 4, 1789, at 1, col. 2.

Coxe sent a copy to Madison who replied commending its "explanatory strictures" of his proposal. 12 PAPERS OF JAMES MADISON, *supra* note 75, at 257 (letter of June 24, 1789, to Tench Coxe).

82 Coxe, *supra* note 81, at 2 (emphasis added).

83 B. SCHWARTZ, *supra* note 72, at 675.

84 Editorial in the Boston Independent Chronicle, Aug. 20, 1789, at 2, col. 2.

85 *Id.*

86 *See* sources cited in notes 13-15 *supra*. The comments of Patrick Henry and George Mason typify those cited by the state's right advocates. *See* 3 J. ELLIOT, *supra* note 68, at 43- 47, 379-81.

addressed by the second amendment.[87] Nothing on the face of the amendment deals with the article I, section 8, concerns; certainly Madison did not see it as changing those portions of the Constitution.[88] The Anti-Federalists themselves were not placated by the amendment: when the proposed Bill of Rights reached the Senate, they unsuccessfully attempted to amend or repeal the offending clauses.[89] Thus, the second amendment cannot be read as a response to the Anti-Federalist objections to article I, section 8. Rather, the fear of federal government encroachment on the states was allayed by guaranteeing the individual right to arms, and thereby, the arms of the militia.

C. *The Philosophical and Historical Origins of the Second Amendment*

The unanimity with which Federalists and Anti-Federalists supported (pg.226) an individual right to arms is a reflection of their shared philosophical and historical heritage.[90] Examination of contemporary materials reveals that the Founders ardently endorsed firearms possession as a personal right[91] and that the concept of an exclusively state's right was wholly unknown to them. The most that such an examination does to dispel the amendment's individual right phraseology is to suggest that the amendment had multiple purposes: the people were guaranteed "arms for their own personal defense, for the defense of their states and their nation, and for the purpose of keeping their rulers sensitive to the right of the people."[92] In short, detailed exploration of the Founding Fathers'

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[87] The Anti-Federalists objected to the militia and standing army provisions on the ground that the federal government might so abuse its control of the militia—either by making militia service intolerable or by failing to organize the militia at all—that a standing army would be necessary. Standing armies were considered a threat to the development of the virtuous, self-reliant citizen on whom the vitality of the republic rested. *See* Shalhope, *supra* note 12, at 604-07; notes 117-18 *infra* and accompanying text. The unwillingness of Madison and the other Federalists who dominated the first Congress to deprive the federal government of the military and militia powers conferred by the original Constitution will be discussed in detail by Dr. Joyce Malcolm (to whom I am indebted on this point) in her forthcoming book.

[88] *See* text at notes 76-78 *supra*. Madison modeled his draft of the amendments on the recommendations made by the state ratifying conventions, but deleted any language dealing with the art. I, sec. 8 concerns. *See generally* B. SCHWARTZ, *supra* note 72.

[89] *See generally* B. SCHWARTZ, *supra* note 72.

[90] The unanimity in the contemporary understanding of the second amendment helps explain the relative absence of recorded debate over it. What little debate there is appears at 1 ANNALS OF CONG. 778-80 (J. Gales ed. 1834) and relates to Madison's proposal that the amendment provide that "no person religiously scrupulous shall be compelled to bear arms." Elbridge Gerry assailed this provision, expressing the peculiar fear that it would give "an opportunity to the people in power to ... declare who are those religiously scrupulous and prevent them from bearing arms." Gerry apparently feared that a particular faction in control of the federal government could mendaciously classify its opponents as conscientious objectors "and prevent them from bearing arms" in the militia. Moreover, the government might exclude so vast a portion of the populace from service as to turn the militia into a "select militia" of their own faction, *see* note 52 *supra* and accompanying text, or as to require raising a standing army because of the militia's insufficiency.

Gerry's statement remains both ambiguous and tangential to the modern debate. The most that can be said is that his usage is consistent with Levin's and Smith's view that "bear arms" is used purely in the sense of carrying them in the course of militia service. But this only emphasizes the irrelevance of Gerry's remarks to the amendment's guarantee that arms might be kept.

[91] James Monroe included "the right to keep and bear arms" in a list of basic "human rights" that he would propose be amended into the Constitution. *See* James Monroe Papers, N.Y. Public Library (miscellaneous papers in his own handwriting). *See also* 3 J. ELLIOT, *supra* note 68, at 386 (quoting Patrick Henry) ("The great object is, that every man be armed . . . . Everyone who is able may have a gun."); *see also* notes 79-81 *supra* and accompanying text.

[92] Shalhope, *supra* note 12, at 614.

attitudes as expressed in their utterances powerfully supports an individual right interpretation, though one which recognizes that the right was viewed as beneficial to society as a whole.[93]

Though such attitudes are apparent in the Founders' utterances, such contemporary materials have been so completely ignored in (pg.227) much of the modern legal literature on the amendment that they require extended consideration here.[94] Perhaps the difficulty experienced by many modern scholars in dealing with the Framers' positive attitudes toward gun ownership can be explained in terms of Bruce-Briggs' "culture conflict" theory of the gun control controversy:

> But underlying the gun control struggle is a fundamental division in our nation. The intensity of passion on this issue suggests to me that we are experiencing a sort of low-grade war going on between two alternative views of what America is and ought to be. On the one side are those who take bourgeois Europe as a model of a civilized society: a society just, equitable, and democratic; but well ordered, with the lines of responsibility and authority clearly drawn, and with decisions made rationally and correctly by intelligent men for the entire nation. To such people, hunting is atavistic, personal violence is shameful, and uncontrolled gun ownership is a blot upon civilization.
>
> On the other side is a group of people who do not tend to be especially articulate or literate, and whose world view is rarely expressed in print. Their model is that of the independent frontiersman who takes care of himself and his family with no interference from the state. They are "conservative" in the sense that they cling to America's unique pre-modern tradition—a non-feudal society with a sort of medieval liberty at large for everyman. To these people, "sociological" is an epithet. Life is tough and competitive. Manhood means responsibility and caring for your own.[95]

If we assume that most modern scholars fall into the first of the modern value categories described, it becomes understandable why they might find the views of the Founders so foreign, indeed repugnant, as to eschew exploring them—instead reflexively projecting their own values onto the amendment. For the second of the value categories described accords perfectly with the views of the Founders, except that, as intellectuals themselves, its aura of anti-intellectualism would have struck no responsive chord in them.(pg.228)

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[93] There is, of course, nothing untoward in the idea of a constitutional right bestowed upon private individuals for purposes that are largely (or even exclusively) public in nature. That is, after all, the earliest and best established explanation of freedom of expression. *See, e.g.*, De Jonge v. Oregon, 299 U.S. 353, 364-65 (1937) (freedom of expression promotes peaceful change in government pursuant to the public will, thereby obviating any need for violent change); Whitney v. California, 274 U.S. 357, 375-76 (1927) (Holmes and Brandeis, JJ., concurring) (first amendment expresses Founders' faith that free competition in the marketplace of ideas is the only sure means of consistently achieving public policies best suited to the public welfare); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes and Brandeis, JJ., dissenting) (same); Meiklejohn, *What Does the First Amendment Mean?*, 20 U. CHI. L. REV. 461 (1953) (freedom of expression is necessary to the American political process).

[94] Whatever the explanation for it, the fact that proponents of the exclusively state's right view have shunned exploration of the Founding Fathers' attitudes toward firearms cannot be gainsaid. None of the quotations referenced at notes 66-69 *supra* and 96-107 *infra* are mentioned (much less discussed) in any of the state's right interpretation articles listed at note 13 *supra*. The sole exception is Levin, who quotes Sam Adams' clearly individual right proposal, characterizing it as *atypical*. Levin, *supra* note 13, at 159. As will become evident, that characterization is made viable only by a failure to discuss, or even acknowledge, the copious expressions of similar sentiment set out in this Article.

[95] Bruce-Briggs, *supra* note 9, at 61. Various implications of this cultural conflict explanation are explored in detail in W. R. TONSO, GUN AND SOCIETY: THE SOCIAL AND EXISTENTIAL ROOTS OF THE AMERICAN ATTACHMENT TO FIREARMS, chs. 1, 2, 8 & 9 (1982) and in Tonso, *supra* note 11, at 330ff. *See also* Kessler, Gun Control: A Symbolic Crusade? (Mimeo, Rockhurst Coll., 1981).

1. *Personal Attitudes of the Founders*

"One loves to possess arms," Thomas Jefferson, the doyen of American intellectuals, wrote to George Washington on June 19, 1796.[96] We may presume that Washington agreed, for his collection contained fifty guns, and his own writings are full of laudatory references to various firearms he owned or examined.[97] John Adams also agreed. In a book on American constitutional principles he suggested that "arms in the hands of citizens" might appropriately be used in "private self-defense" or "under partial order of towns."[98] Likewise, writing after the ratification of the Constitution, but before the election of the First Congress, James Monroe included "the right to keep and bear arms" in a list of basic "human rights" that he would propose be added to the Constitution.[99]

While Monroe and Adams both supported ratification of the Constitution, its most influential advocate was James Madison. In *The Federalist No. 46* he confidently contrasted the federal government it would create to the European despotisms he contemptuously described as "afraid to trust the people with arms." He assured his fellow countrymen that they need never fear their government because of "the advantage of being armed, which the Americans possess over the people of almost every other nation ...."[100] Madison, who had, during the Revolution, exulted at his own and his militia comrades' ability to hit a target the size of a man's head at one hundred paces, many years later restated the sentiments of *The Federalist No. 46* thusly:

> A government resting on a minority is an aristocracy, not a Republic, and could not be safe with a numerical and physical force against it, without a standing army, an enslaved press, and a disarmed populace.[101]

On the other side of the ratification debate, Anti-Federalist Patrick Henry left no doubt as to his feelings regarding the right to possess arms. During the Virginia ratification convention he objected equally to the Constitution's inclusion of clauses specifically authorizing (pg.229) a standing army and giving the federal government control of the militia, and to its omission of a clause forbidding disarmament of the individual citizen: "The great object is that every man be armed.... Everyone who is able may have a gun."[102] The Virginia delegates, remembering that the Revolutionary War had been sparked by the British attempt to confiscate the patriots' privately owned arms at Lexington and Concord, apparently agreed. Henry was appointed co-chairman of a committee to draft a Bill of Rights to be added to the Constitution.[103] The other co-chairman was

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96 9 WRITINGS OF THOMAS JEFFERSON 341 (A.A. Lipscomb ed. 1903).

97 Halsey, *George Washington's Favorite Guns*, AM. RIFLEMAN, Feb. 1968, at 23. In urging Congress to pass an act enrolling the entire adult male citizenry in a general militia, President Washington opined that "a free people ought not only to be armed but disciplined...." 1 PAPERS OF THE PRESIDENT 65 (Richardson ed.) Congress responded with the First Militia Act. *See* note 49 *supra*.

98 3 J. ADAMS, A DEFENSE OF THE CONSTITUTIONS OF THE GOVERNMENT OF UNITED STATES OF AMERICA 475 (1787-88).

99 James Monroe Papers, *supra* note 91.

100 THE FEDERALIST No. 46, at 371 (J. Madison) (J.C. Hamilton ed. 1864).

101 R. KETCHAM, JAMES MADISON: A BIOGRAPHY, 64, 640 (1971).

102 3 J. ELLIOT, *supra* note 68, at 45.

103 Note, *supra* note 13, at 43.

George Mason, whose warning against a federal constitution that failed to guarantee a right to arms has already been quoted.[104]

Thomas Jefferson played little part in this debate from the remote vantage of his position as ambassador to France, but his views on arms possession as a right may be deduced from the model state constitution he wrote for Virginia in 1776. That document included the explicit guarantee that "[n]o free man shall be debarred the use of arms in his own lands."[105] All the evidence suggests that Jefferson was strongly in favor of gun ownership. A talented inventor and amateur gunsmith himself, Jefferson maintained a substantial armory of pistols and long guns at Monticello and introduced the concept of interchangeable parts into American firearms manufacture.[106] In a letter to a nephew (then fifteen) Jefferson offered the following advice:

> A strong body makes the mind strong. As to the species of exercises, I advise the gun. While this gives a moderate exercise to the Body, it gives boldness, enterprise and independence to the mind. Games played with the ball, and others of that nature, are too violent for the body and stamp no character on the mind. Let your gun therefore be the constant companion of your walks.[107]

One intellectual historian has summarized the utterances of the Founding Fathers as expressing "an almost religious quality about the relationship between men and arms."[108] When viewed in the light of this attitude and their English militia tradition, as buttressed (pg.230) by the republican philosophical school with which the Founders were familiar, the language of the second amendment becomes perfectly intelligible: believing self-defense an inalienable natural right,[109] and deriving from it the right to resist tyranny,[110] they guaranteed the right (derived from the foregoing)

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104 *See* note 68 *supra* and accompanying text.

105 THE JEFFERSON CYCLOPEDIA 51 (Foley ed., reissued 1967).

106 Tarassuk & Wilson, *Gun Collecting's Stately Pedigree*, AM. RIFLEMAN, July 1981, at 24.

107 THE JEFFERSON CYCLOPEDIA, *supra* note 105, at 318. Another nephew tells us that Jefferson believed every boy should be given a gun at the age of ten, as Jefferson himself had been. T. JEFFERSON RANDOLPH, NOTES ON THE LIFE OF THOMAS JEFFERSON (Edgehill Randolph Collection) (1879).

108 C. Asbury, *supra* note 10, at 88.

109 *See, e.g.*, 3 W. BLACKSTONE, COMMENTARIES *4 ("Self-Defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be, in fact, taken away by the law of society."); T. HOBBES, LEVIATHAN 88, 95 (1964) ("a covenant not to defend myselfe from force by force is always voyd"); Halbrook, *supra* note 10, discussion at text accompanying notes 56-78 *supra* (unpaginated manuscript) (analyzing views of Sidney and Locke). English and American divines went further still, declaring self-defense not simply a right but an obligation as well:

> He that suffers his life to be taken from him by one that hath no authority for that purpose, when he might preserve it by defense, incurs the Guilt of self murder since God hath enjoined him to seek the continuance of his life, and Nature itself teaches every creature to defend himself ....

C. Asbury, *supra* note 10, at 39-40 (quoting a 1747 Philadelphia sermon); *see also id.* at 28 (English writers making the same point at the time of the Glorious Revolution).

110 Eighteenth-century liberals derived the right to revolution against tyrants from Sidney and Locke, who believed that all persons possessed a universally acknowledged personal right to defend themselves against robbery or enslavement. Throughout the writings of the Founders, and particularly in the debates over the Constitution, the equation between personal self-protection and resistance to tyranny occurs again and again:

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

THE FEDERALIST No. 28, at 227 (J. Hamilton ed. 1864); *see also* Halbrook, *supra* note 38, at 22-24 (similar statements from lesser known figures).

of individuals to possess arms.[111] Further, this also protected the possession of privately owned arms of the militia (which they understood to include most of the adult male population),[112] an institution they regarded as "necessary to the security of a free state."[113]

2. *The Philosophical Environment of the Founding Fathers*

Fully as great an obstacle to modern understanding as Bruce-Briggs' (pg.231) culture conflict is the inattention of modern political philosophy to "the dynamic relationship" that the Founders' philosophy saw "between arms, the individual, and society."[114] Our world is the product of its history: our view of that world is the product of the lessons drawn from that history by the thinkers our society embraces. A conscious effort of will and imagination is necessary to assume the mind-set of eighteenth-century men whose education began with the classics, particularly the works of Plato, Aristotle and Cicero, and ended with the works of Sidney, Rousseau and Montesquieu. Thus were the Framers steeped in an understanding of liberty grounded in the role of arms in society. Thus,

> the very character of the people—the cornerstone and strength of a republican society—was related to the individual's ability and desire to arm himself against threats to his person, his property and his state.[115]

This viewpoint devolved upon eighteenth-century liberals through historical exegesis which was then viewed as the key to philosophical truth. To them classical Greece and Rome represented the highest point that civilization had yet achieved—followed by a long dark age of brutal authoritarianism from which humanity in their time was still recovering. The history of the Greek city-states and "the Roman Republic provided at once an ideal and a condign warning of the frailty of republican institutions."[116] Both that ideal and that warning were inextricably connected in the Founders' minds with the individual possession of arms. English and classical law recognized in arms possession the hallmark of citizenship and personal freedom. Thus the Greeks and Romans distinguished the mere *helot* or *metic* who was deemed to have no right to arms from the free citizen whose privilege and obligation it was to keep arms in his home so as always to be ready to defend

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[111] For instance, Blackstone's classification of "arms for their defense" as being among the absolute rights of individuals was derived from "the natural right of resistance and self-preservation when the sanctions of society and law are found insufficient to restrain the violence of oppression." 1 W. BLACKSTONE, COMMENTARIES *121, *143-44.

[112] *See* notes 46-49 *supra* and accompanying text.

[113] The Federalists viewed a small standing army as a necessity for dealing with the Indian threat and as a first line of defense against any foreign invasion. To them the militia and the armed citizenry from which it was raised were the ultimate defense in a military emergency too great to be dealt with by the standing army. The militia and armed citizenry were also the counter-poise to any danger posed by the standing army to personal liberty or the republican form of government. "Before a standing army can rule, the people must be disarmed" argued the Federalists; the inherent danger of a standing army was ameliorated in the American situation where "the whole body of the people are armed and constitute a force superior to any band of regular troops that can be, on any pretense, raised ...." REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION, *supra* note 10, at 4-6 (quoting Noah Webster and various other contemporary arguments in favor of ratification). The conventional pro-militia sentiment expressed in the amendment's language was as far as the Federalists would go to appease the Anti-Federalists. *Id.*

[114] Shalhope, *supra* note 12, at 601.

[115] *Id.* at 604.

[116] Halbrook, *supra* note 10, at text accompanying n.31 (unpaginated manuscript); *see also* J. MALCOLM, *supra* note 12 (on the Framer's philisophical tradition); C. Asbury, *supra* note 10.

his own rights and to rush to defend the walls when the tocsin warned of approaching enemies.[117] The philosophical tradition embraced by the Founders regarded the survival of popular government and republican institutions as wholly dependent upon the existence of a citizenry that was "virtuous" in upholding that ancient privilege and obligation. (pg.232) In this philosophy, the ideal of republican virtue was the armed freeholder, upstanding, scrupulously honest, self-reliant and independent—defender of his family, home and property, and joined with his fellow citizens in the militia for the defense of their polity.[118] The congruence between this ideal of republican virtue and the second of the modern value attitudes described by Bruce-Briggs is evident.

The same thought that held arms ownership vital to republican citizenship also warned the Framers that to be disarmed by government was tantamount to being enslaved by it; the possession of arms was the vital prerequisite to the right to resist tyranny.[119] The Founders learned from Aristotle that a basic characteristic of tyrants was "mistrust of the people; hence they deprive them of arms."[120] Aristotle showed that confiscation of the Athenians' personal arms had been instrumental to the tyrannies of the Peisistratus and the Thirty.[121] Machiavelli taught the Founders that Augustus and Tiberius had similarly destroyed the Roman republic.[122] Only so long as Greek and Roman citizens retained their personal arms did they retain their personal liberties and their republican form of government. That lesson was brought home to the Founders by the entire corpus of political philosophy and historical exegesis they knew: "Among Renaissance theorists as dissimilar as Nicholas Machiavelli and Sir Thomas More, Thomas Hobbes and James Harrington, there was a concensus that only men willing and able to defend themselves could possibly preserve their liberties."[123] The theme of personal (pg.233) arms possession as both the hallmark and the ultimate

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[117] *See* notes 43-44 & 54 *supra* and accompanying text. James Burgh, the late-18th-century English libertarian writer "most attractive to Americans," proclaimed that "the possession of arms is the distinction between a freeman and a slave," it being the ultimate means by which freedom was to be preserved. *See* Shalhope, *supra* note 12, at 604 (quoting Burgh).

[118] In the line of republican political philosophers beginning with Machiavelli and extending through Harrington, Nedham, Sidney, Trenchard, Gordon and Rousseau, "[c]ivic virtue came to be defined as the freeholder bearing arms in defense of his property and his state." Shalhope, *supra* note 12, at 603. For a discussion of classical republican theory, see J. POCOCK, THE POLITICAL WORKS OF JAMES HARRINGTON 54 (1977), which states:

> The rigorous equation of arms-bearing with civic capacity is one of the Machiavelli's most enduring legacies to later political thinkers.... Classical [republican political] theory, especially in its Machiavellian form, had emphasized the notion that the bearing and possession of arms was the individual's passport to citizenship....
>
> [T]he concept of the people active in politics because disciplined arms was a vital component in republican and Machiavellian theory.... [Subsequent philosophers elaborated on it] in the rapturous oratory of ... King People [based] not merely on rotatory balloting but on the union of "arms and counsel", bullets and ballots, in a setting in which the citizens appeared in arms to manifest their citizenship, casting their votes even as they advanced and retired in the evolutions of military exercise.

[119] *See* notes 109-11 *supra* and accompanying text.

[120] ARISTOTLE, POLITICS 218 (J. Sinclair trans. 1962).

[121] ARISTOTLE, THE ATHENIAN CONSTITUTION 47, 105 (H. Rackham trans. 1935); *see generally* Halbrook *supra* note 10.

[122] MACHIAVELLI, THE ART OF WAR 20 (E. Farnsworth trans. 1965). *See generally* J. POCOCK, THE MACHIAVELLIAN MOMENT (1975).

[123] J. MALCOLM, *supra* note 12, at 1. These elements in the thought of Machiavelli and Hobbes were relayed to the Founding Fathers through Sidney, Locke and Rousseau. *See* Halbrook, *supra* note 10.

The works of Harrington provided an equally important conduit for bringing these views to the Founders. "[I]t was [Harrington] who had first stated in English terms, the theses that only the armed freeholder was capable of independence and virtue...." J. POCOCK, *supra* note 118, at 145. "As (the 17th Century] went on its way, Harringtonian and neo-Harringtonian ideas were absorbed into the opposition tradition of Whig political culture, a powerful current of thought whose effects can be traced in Europe and America, as well as in England and Scotland." *id.* at 143.

guarantee of personal liberty appears equally in the writings of Cicero, Sidney, Locke, Trenchard, Rousseau,[124] Sir Walter Raleigh,[125] Blackstone[126] and Nedham.[127] That lesson must have been even more firmly cemented in the Founders' minds by the fact that authoritarian philosophers made the same observation in reverse, recommending arms prohibitions as the surest security for absolutism.[128]

Moreover, although the Founders' antipathy to gun bans arose out of political philosophy, it should not be supposed that eighteenth-century liberals were unaware of the crime control rationale for such legislation and had no answer to it. In the French despotism they abhorred, the single most important duty of the police, "protecting" the public security, was effected through enforcing arms prohibitions.[129] Although actually aimed at continuing the subordination of the peasantry, the ostensible reason for the French arms prohibition was to reduce homicide and other violent crime, and so was it rationalized by the French monarchs and their apologists.[130] The Founders gave such arguments short shrift, believing that if a population were actually unfit to possess arms, it was only because of the degradation induced by subjection to the oppression and exploitation of aristocratic and monarchical authoritarianism.[131] For a (pg.234) free and virtuous people, eighteenth-century liberalism's response, as formulated by Montesquieu and Beccaria, to the crime control argument was simply an expansive rhetorical rendition of today's slogan "when guns are outlawed, only outlaws will have guns."

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[124] *See* Halbrook, *supra* note 10; *see also* Shalhope, *supra* note 12, at 603 (quoting Trenchard and Moyle to the effect that classical republics and commonwealths had maintained popular liberty by "a general Exercise of the best of their People in the use of Arms, ... the People being secured thereby as well against the Domestick Affronts of any of their own Citizens, as against the Foreign Invasions of ambitious and unruly Neighbors.")

[125] *See* Shalhope, *supra* note 12, at 602.

[126] *See* 1 W. BLACKSTONE, COMMENTARIES *143-44; 2 W. BLACKSTONE, COMMENTARIES *411-12 (citation of classical examples).

[127] *See, e.g.*, NEDHAM, THE RIGHT CONSTITUTION OF A COMMONWEALTH (1656) *quoted in* J. ADAMS, *supra* note 98, at 471-72.

[128] *See* Halbrook, *supra* note 10, discussion at notes 3-16 and 48-51 *supra* (discussing Plato and Jean Bodin).

[129] I. CAMERON, CRIME AND REPRESSION IN THE AUVERGNE AND THE GUYENNEA 1720-1790, at 7-8 (1982).

[130] *See* L. KENNETT & J. ANDERSON, *supra* note 23, at 8-16; *see also* Halbrook, *supra* note 10, discussion at notes 48-51 *supra* (discussing Jean Bodin).

[131] If pressed, Madison might have admitted that the European despotisms he contemptuously dismissed as "afraid to trust the people with arms," *see* note 100 *supra* and accompanying text, were nevertheless justified in denying arms to populations so brutalized and demoralized by generations of subjection to the *ancien regime* as to be unfit to possess them. By contrast, the proud, gun-loving Americans were upstanding, responsible, strong, independent, self-reliant—the epitome of virtuous republican citizenship. Expressing this self-satisfied attitude, Joel Barlow wrote of Americans, "[i]t is because the [Americans] are civilized," *i.e.*, not demoralized by oppression or luxury, "that they are with safety armed":

> The danger (where there is any) from armed citizens, is only to the *government*, not to the *society*; and as long as they have nothing to revenge in the government (which they can not have while it is in their own hands) there are many advantages in their being accustomed to the use of arms, and no possible disadvantage.

Shalhope, *supra* note 12, at 607 (quoting Barlow in *Advice to the Privileged Orders in the Several States of Europe: Resulting From the Necessity and Propriety of a General Revolution in the Principle of Government*) (emphasis in original). Similarly, Timothy Dwight stated,

> [I]f proper attention be paid to the education of children in knowledge and religion, few men will be disposed to use arms, unless for their amusement, and for the defense of themselves and their country.

Shalhope, *supra* note 12, at 607 (quoting Timothy Dwight in *Travels in New England and New York*). Nevertheless, the Founders were not so Panglossian about the American character as to blind themselves to the fact that even among the virtuous there would always be a tiny fraction of evilly-disposed people whom it would be desirable to disarm selectively. *See* notes 258 & 267 *infra* and accompanying text.

> False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary ones, which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty—so dear to men, so dear to the enlightened legislator—and subject innocent persons to all the vexations that the guilty alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man. They ought to be designated as laws not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree.[132] (pg.235)

The influence of the republican philosophical tradition of the armed people upon the Founding Fathers is obvious from their own statements.[133] Likewise, the writings of lesser known figures and newspaper editorials of the period abound with favorable references to the citizenry's widespread possession of personal arms as characteristic of the "diffusion of power" necessary to preserve liberty. These writings also express fears that the new federal government might disarm the populace, leading to a "monopoly of power [which] is the most dangerous of all monopolies."[134] In short, the accepted philosophy of the times treated the right to arms as among the most vital of personal rights.

3. *English Gun Prohibition and the English Bill of Rights*

Further evidence of the link between republican government and the possession of arms was given the Founders by their view of the mother country's history. Despite England's lack of a police force, legislation prohibiting possession of firearms by others than the high nobility had been instituted under the aegis of the hated Game Acts.[135] Though the ostensible purpose was to protect England's dwindling game resources, the Acts' covert purpose was confirmed by Blackstone: "prevention of popular insurrections and resistance to the government, by disarming the bulk of the

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[132] C. BECCARIA, ON CRIMES AND PUNISHMENTS 145 (1819). Originally published in 1764, this work was sufficiently familiar to the colonists ten years later for John Adams to have opened the Boston Massacre trial by quoting from it. *See* 3 LEGAL PAPERS OF JOHN ADAMS 28 (1965). Montesquieu's pejorative remarks on gun prohibitions (which may well have influenced Beccaria's) appear at 2 Montesquieu, SPIRIT OF LAWS 79-80 (Nugent trans., Colonial Press 1900).

The English libertarian/republican philosophers were, if anything, even more solicitous than Beccaria and Montesquieu (who lived on the relatively peaceful Continent) of the right to possess arms for the defense of family, home and self from criminal attack as well as the oppression of government. As Shalhope noted, amidst the endemic criminal violence of 16th-18th century England, "[t]he individual's need to protect himself from vicious fellow citizens and corrupt authorities—both banes of any republican society—also became clear." Shalhope, *supra* note 12, at 603; *see also* note 140 *infra* and accompanying text.

[133] *See* notes 96-113 *supra* and accompanying text.

[134] Halbrook, *supra* note 38, at 33 (quoting *Political Maxims*, New York Daily Advertiser, Aug. 15, 1789, at 2, col. 1).

[135] The Game Act of 1671, 22 Cor. II, c. 25 § 3.

people ... is a reason oftener meant than avowed ...."[136] Particularly indicative of the nefarious intent of the 1671 Game Act (at least to the minds of the Founders) was that it was evidently modeled on the French example,[137] and had appeared in the reign of Charles II. Living as we do several centuries removed, in an age in which religious tolerance is so much the norm as to be taken for granted, it is difficult for us to understand the almost hysterical execration the Founders felt for the restored Stuarts. The dissolute and debauched Charles II had martyred Algernon Sidney, the Founders' beloved philosopher of the armed people. Charles and his upright but intolerantly Catholic (pg.236) brother James II were viewed as traitors who had plotted to place England under the yoke of their Catholic ally Louis XIV of France; through the mechanisms of a standing army and the importation of French troops, the free English population was to be disarmed and reduced to the condition of the French peasantry, and the Protestant religion was to be extirpated with fire and sword in England as Louis had done in France.[138]

Arms confiscation was a basic technique of the absolutism that the Stuarts, at least in the Framers' eyes, had determined to impose on England after their return from exile in France. To that end both Charles and James seized upon a series of new and old confiscatory devices, not the least of which was the 1671 Game Act.[139] Conscious of the disaffection of many of his subjects, and of the precariousness of his hold on the rest, the wily Charles never went beyond sporadic and highly selective arms confiscations. But enforcement under the Game Act and other legislation was enormously (though still selectively) increased during James' short reign. In addition to disarming the actively rebellious, this policy deterred the expression of any kind of dissent or opposition. In an age as subject to apolitical crime and violence as seventeenth- to eighteenth-century England, few people were courageous or foolhardy enough to want to live without weapons to defend themselves and their families.[140]

Having rid itself of James through the "Glorious Revolution," Parliament composed a list of grievances against him, turning it into a Bill of Rights to which royal assent was required as part of the compact under which William and Mary were allowed to ascend the English throne. Seventh among the grievances was that James had caused his Protestant subjects "to be disarmed at a time when Papists were both armed and imployed [*sic*] contrary to law."[141] It was concomitantly guaranteed "that the subjects which are Protestant may have arms for their defense suitable to their conditions and as allowed by law." The significance of the phrase "as allowed by law" is (pg.237) unclear. It could have been meant to specify that the right to arms which Protestants (who then

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136 2 W. BLACKSTONE, COMMENTARIES *412.

137 The Game Act of 1671 followed the French pattern in limiting firearms possession to the nobility. The French legislation went even further in that it prohibited commoners from possessing swords as well as guns. *See* M. JOSSERANT & J. STEVENSON, PISTOLS, REVOLVERS AND AMMUNITION 271-72 (1972); L. KENNETT & J. ANDERSON, *supra* note 23.

138 M. DAVIDSON, THE HORIZON CONCISE HISTORY OF FRANCE 96 (1971); J. GARRITY & P. GAY, THE COLUMBIA HISTORY OF THE WORLD 738 (1972).

139 These devices and the uses made of them are detailed in J. MALCOLM, *supra* note 12, at chs. 2-4; Malcolm, *supra* note 10, and the REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION, *supra* note 10, at 2-3, from which this narrative follows. *See also* notes 148-50 *infra* and accompanying text.

140 Throughout the colonial and pre-colonial period, England suffered a remarkable degree of violence surprising in light of its relative peacefulness today. *See, e.g.*, J. OSBORNE, THE SILENT REVOLUTION 9 (1970) ("[T]he English were noted throughout Europe for their turbulence and proclivity to violence."); Gurr, *Historical Trends in Violent Crime: A Critical Review of Evidence*, 3 ANNUAL REVIEW OF CRIME AND JUSTICE (1981).

141 W. & M. Sess. 2, ch. 2 (1689).

composed about ninety-eight percent of the English population)[142] were receiving was no greater than that which had pre-existed at common law. To avoid a lengthy debate which might delay the Bill's enactment, Parliament had strictly agreed that "no new principle of law" was to be included; the Bill was to be "a mere recital of those existing rights of Parliament and of the subject, which James had outraged, and which William must promise to observe."[143]

More likely, Parliament meant the phrase "as allowed by law" to preserve its own power to disarm the subjects, simply clarifying that only the king was prevented from doing so. If this is what the phrase stood for, the qualification it adds to the English Bill of Rights is manifestly unimportant in interpreting the second amendment, which was expressly intended to restrict the legislative as well as the executive branch.[144] Partisans of the exclusively state's right theory have seemed to invest the question of Parliament's power with some significance, commenting that twentieth-century England has adopted one of the world's most stringent anti-gun policies, notwithstanding the 1689 Bill of Rights.[145] If this is intended to suggest that Congress is free to do likewise, it completely misses the distinction between the American system of constitutional rights and the non-constitutional English system in which even the most sacrosanct (pg.238) rights guaranteed by one Parliament may be abrogated by its successors. Parliament's power to disarm no more proves that Congress can violate the second amendment than the fact that twentieth-century Parliaments have abolished various traditional rights of the criminally accused in Northern Ireland[146] proves that Congress is free to legislate in derogation of the fourth, fifth and sixth amendments.

What is significant about the English Bill of Rights is the undeniable support that it provides for the individual right position. There were no states in England to be protected against disarmament. So what Parliament was complaining of could only have been the seizure of arms from *individual* citizens in violation of their common-law rights. Because the Founders knew that the English forerunner to their own Bill of Rights contained an individual right to arms, and because the Founders themselves emphatically endorsed such a right, it seems unlikely that the right to arms which they wrote into their own Constitution was not intended, at least partly, to protect such an individual right.

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142 *Cf.* J. JONES, THE REVOLUTION OF 1688 IN ENGLAND 77 n.2 (1972) (Catholics comprised 2% of the population of England during the 17th century). As Smith points out, Catholicism was illegal and Catholics were banned from public office in England through the mid-19th century. J. Smith, *supra* note 10, at 24.

143 G. TREVELYAN, THE ENGLISH REVOLUTION, 1688-1689, at 150-51 (1954).

144 Madison's notes in formulating the Bill of Rights expressly reflect his dissatisfaction with the English Bill of Rights because it applied only to Protestants and because, being no more than an act of one Parliament, it was subject to repeal by a later one. 12 PAPERS OF JAMES MADISON, *supra* note 75, at 193-94. Indeed, the Founders apparently believed that contemporary English arms policies were highly restrictive and assigned the blame for this to the defective and equivocal language of the English Bill of Rights. Provincial Americans like Madison, who had never been abroad, gained their knowledge of current English institutions and character from the hyperbolic philipics of the alienated English republican/libertarian philosophers. Thus the Continental Congress compared our robust men, "trained to arms from their infancy and animated by the love of liberty," to the "debauched" British population, so corrupted by "luxury and dissipation" that they had allowed themselves to be disarmed and made utterly dependent on a standing army. Shalhope, *supra* note 12, at 606. Similarly, St. George Tucker, a distinguished American jurist and member of Madison's Virginia circle, contemptuously compared the second amendment's unqualified guarantee to the English Bill of Rights, which he believed to be so rotten with exceptions "that not one man in five hundred can keep a gun in house without being subject to a penalty." 1 ST. G. TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAW OF THE FEDERAL GOVERNMENT 143 n.40 (1803).

145 *See, e.g.*, Feller & Gotting, *supra* note 13, at 49 n.10; G. NEWTON & F. ZIMRING, *supra* note 13, at 225.

146 *See generally* Bishop, *Law in the Control of Terrorism and Insurrection: The British Laboratory Experience*, 42 LAW & CONTEMP. PROB. 140 (1978).

To avoid the highly adverse implications of the English Bill of Rights, some state's right exponents have resorted to what can only be described as fudging the facts. They deny that James II was actually confiscating any arms from his Protestant subjects. They assert, instead, that Parliament used the word "disarmed" merely figuratively, referring to the fact that James had replaced various Protestant officials with Catholics, particularly in the English military.[147] This interpretation is demonstrably untrue. Space does not permit full detailing of the later Stuarts' arms confiscation efforts.[148] Sufficient for present purposes are the details noted in the *Report of the Subcommittee on the Constitution*:

> In 1662, the Militia Act was enacted empowering officials "to search for and seize all arms in the custody or possession of any person or persons whom the said lieutenants or any two or more of their deputies shall judge dangerous to the peace of the kingdom." Gunsmiths were ordered to deliver to the government lists of all purchasers. (pg.239) These confiscations were continued under James II, who directed them particularly against the [Protestant] Irish population: "Although the country was infested by predatory bands, a Protestant gentleman could scarcely obtain permission to keep a brace of pistols." [Quoting Macauley's History of England; footnotes deleted.]
>
> In 1688, the government of James was overturned in a peaceful uprising which came to be known as "The Glorious Revolution." Parliament resolved that James had abdicated and promulgated a Declaration of Rights, later enacted as the Bill of Rights. Before coronation, his successor William of Orange, was required to swear to respect these rights. The debates in the House of Commons over this Declaration of Rights focused largely upon disarmament under the 1662 Militia Act. One member complained that "an act of Parliament was made to disarm all Englishmen, who the lieutenant should suspect, by day or night, by force or otherwise—this was done in Ireland for the sake of putting arms into Irish [Catholic] hands." The speech of another is summarized as "militia bill—power to disarm all England—now done in Ireland." A third complained of "Arbitrary power exercised by the ministry ... Militia—imprisoning without reason; disarming—*himself disarmed*." Yet another summarized his complaints "Militia Act—an abominable thing to disarm the nation ...."[149]

These and various other examples establish beyond peradventure that James II aggressively enforced the largely dormant arms proscriptions he had inherited so as to affect not only the common people but some of their elected representatives,[150] that this policy was diametrically contrary to the principles of the common law as they were then understood, and that one purpose of the English Bill

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147 *See, e.g.*, Note, *supra* note 13, at 426:

> As one commentator has pointed out, these grievances were not intended to assert that James II disarmed Protestants in any literal sense, but instead referred to his practice of replacing Protestants with Catholics at important military posts ....

The commentator referred to is Weatherup, *supra* note 13, at 973.

148 These efforts are the subject of a forthcoming book by Dr. Joyce Malcolm. The results of her exhaustive original research in English records (many of which are available only in that country) are summarized in J. MALCOLM, *supra* note 12; Malcolm, *supra* note 10.

149 REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION, *supra* note 10, at 2-3.

150 One of the Members of Parliament was Sir John Knight, former Mayor of Bristol (then England's second city), and the defendant in Rex v. Knight, 87 Eng. Rep. 73 (K.B. 1686). This case's rejection of James II's attempt to prosecute so prominent a Protestant under the arms laws was a *cause célèbre* and one of the events leading to the Glorious Revolution. Personal communication from Dr. Malcolm.

of Rights was to place the possession of arms beyond monarchical interference—at least as far as the Protestant ninety-eight percent of the population was concerned.[151] (pg.240)

D. *Eighteenth- and Nineteenth-Century Interpretation of the Second Amendment*

The final proof that an individual right was guaranteed by the second amendment lies in Madison's formulation of the amendment in terms that he must have known his contemporaries would interpret as protecting an individual right. As we shall see, that is how his contemporaries did read the amendment. Fundamental to understanding the original intention behind the Constitution is the observation that 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*. [For that reason,] the language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted.[152]

Reference to the great common law commentators known to the Founders shows Hawkins, Bracton and Coke all affirming the existence of a common law right to possess arms for home defense, while Blackstone included that right among those he classified as the five "absolute rights of individuals" at common law.[153]

Not only the great common law commentators, but also the English courts affirmed the individual right to arms. When Parliament overthrew the Stuarts, it wrote the common law liberty to possess arms into the English Bill of Rights. Thereafter English court decisions, reports of which were available to the Founders, had recognized that "a man may keep a gun for the defense of his house and family," denying that the Game Acts then current "prohibit a man from keeping a gun for his necessary defense...."[154] Moreover, the English Game Acts that prohibited firearms had never

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[151] Having nullified the 1671 Game Act's gun prohibition by the 1689 Bill of Rights, Parliament went on to delete the prohibition in subsequent Game Acts. *See, e.g.*, 4 & 5 W. & M. 23 (1692); 6 Anne 16 (1706); *see also* Rex v. Gardner, 7 Mod. 279, 280, 87 Eng. Rep. 1240, 1241 (K.B. 1739) (holding that these Game Acts do "not extend to prohibit a man from keeping a gun for his necessary defense"); Mallock v. Eastly, 7 Mod. 482, 87 Eng. Rep. 1370 (K.B. 1744) ("the mere having a gun was no offense within the game laws, for a man may keep a gun for the defense of his house and family"). Writing in 1793, Edward Christian, the English editor of Blackstone's 12th edition, annotated Blackstone's strictures against the gun confiscation provisions of the Game Acts with the comment that these had long since been repealed so that "every one is at liberty to keep or carry a gun, if he does not use it for the destruction of game." 2 W. BLACKSTONE, COMMENTARIES 411 (12th ed. London 1793-95). Even Catholics, though forbidden to stockpile arms, were acknowledged the right to retain such as were necessary to defend their homes by the 1689 "Act for better securing the Government by disarming Papists and reputed Papists." 1 W. & M. sess. 1, ch. 15 (1689).

[152] *Ex parte* Grossman, 267 U.S. 87, 108-09 (1925) (emphasis added).

[153] 1 W. BLACKSTONE, COMMENTARIES *144; *see also* 3 E. COKE, INSTITUTES 161-62 (5th ed. 1671); III HENRICI DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 20-25 (Twiss ed. 1880); 1 W. HAWKINS, PLEAS OF THE CROWN 135-36 (5th ed. 1771).

[154] Mallock v. Eastly, 7 Mod. 482, 489, 87 Eng. Rep. 1370, 1374 (K.B. 1744); Rex v. Gardner, 7 Mod. 279, 280, 87 Eng. Rep. 1240, 1241 (K.B. 1739); *see* note 151 *supra*. These cases were printed in English law reports that were available both in the personal collections of American lawyers and in American law libraries by the mid-18th century. In addition, the *Gardner* opinion is reported almost in full in a volume referred to by Blackstone. R. BURNS, THE JUSTICE OF THE PEACE AND PARISH OFFICER, *Game* § 8, at 442 (1755); *see* 4 W. BLACKSTONE, COMMENTARIES *175, n."j". This legal commentary was available in the colonies. The Adams family donated John Adams' personal copy to the Boston Public Library, which still owns it. *See* J. Smith, *supra* note 10, at 63.

been a part of the colonial law,[155] which the Founders knew from their own (pg.241) experience and to which they presumably referred in determining what the pre-existing "rights" were that the amendment guaranteed. Not only did colonial law allow every trustworthy adult to possess arms, but it deemed this right so vital that every colony or state had exempted firearms from distraint for execution because of debt.[156] Given this background, it is inconceivable that Madison and his colleagues in the first Congress would have chosen the language they did for the amendment unless they intended a personal right. They must necessarily have known that their undefined phrase "right of the people to keep and bear arms" would be understood by their contemporaries in light of to common law formulations like Blackstone's "absolute rights of individuals."

That indeed is precisely how their contemporaries did interpret it. The second amendment was analyzed in at least four legal commentaries, authored by men who were closely acquainted with Madison or other members of the first Congress. The earliest of these commentaries, written by Madison's ally Tench Coxe, has already been quoted.[157] Next came St. George Tucker's 1803 edition of Blackstone's Commentaries, annotated to explain parallel developments in American law.[158] We may assume that Tucker was learned in American law since he was a justice of the most distinguished court of his day, the Virginia Supreme Court. His familiarity with the thought underlying the Bill of Rights may also be assumed. Not only was he an important member of the generation that produced it, but the Virginia circles in which he moved included both Madison and Jefferson.[159] Tucker annotated Blackstone's inclusion (pg.242) of the right to possess firearms as among the "absolute rights of individuals" in England, with the observation that in America this right had been constitutionalized by the enactment of the second amendment.[160] William Rawle, whose general commentary on the Constitution appeared in 1825, seems also to have never considered any but an individual right interpretation of the second amendment. Rawle was both influential and well-known

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[155] Although colonial law was generally derived from English common law, any common law or statutory principle inapplicable to the situation or conditions prevailing in the colonies was excluded. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 9, at 60 (1972); Smith, *The English Criminal Law in Early America* in J. SMITH & T. BARNES, THE ENGLISH LEGAL SYSTEM: CARRY OVER TO THE COLONIES 14-17 (1975). Parliamentary acts designed to provide the nobility a monopoly both of arms and of the shrinking English game resources were plainly inapplicable to the colonies, where there was no nobility and the supply of game seemed inexhaustible. It bears emphasis in this connection that the import of English common law precedent in interpreting the American Bill of Rights "is subject to the qualification that the common law rule invoked shall not be one rejected by our ancestors as unsuited to their civil or political condition." Grosjean v. American Press, 297 U.S. 233, 249 (1936); *see also* note 234 *infra*.

[156] *See* J. Smith, *supra* note 10, at 34. In general, the colonies and early states knew only four kinds of gun laws: (a) those which required/allowed every trustworthy citizen to possess arms, both for militia service and otherwise; (b) those prohibiting gun ownership or carrying for Indians and blacks; (c) those which prohibited hunting or shooting in or near urban areas; and (d) those which prohibited the carrying or brandishing of arms in such a manner as to cause fear.

[157] *See* notes 81-82 *supra* and accompanying text.

[158] ST. GEORGE TUCKER, *supra* note 144.

[159] "The Jefferson Papers in the Library of Congress show that both Tucker and Rawle were friends of, and corresponded with, Thomas Jefferson." REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION, *supra* note 10, at 7. The Jefferson papers archived at the Library of Congress contain 22 letters between Jefferson and Tucker spanning the period 1775 to 1809. LIBRARY OF CONGRESS, INDEX TO THOMAS JEFFERSON'S PAPERS 139 (Wash. D.C., Govt. Printing Off. 1976). Their actual correspondence probably exceeded this, since much of Jefferson's pre-1780 correspondence was lost when the British occupied Richmond in that year. *Id.* at viii. Tucker's association with Madison began at least as early as the Annapolis Convention of 1786 to which they were both delegates. *See* M. COLEMAN, ST. GEORGE TUCKER, CITIZEN OF NO MEAN CITY 87, 124, 182. In addition, both Tucker's brother and his best friend were members of the first Congress. *Id.* at 35, 61, 113-14.

[160] 1 ST. G. TUCKER, *supra* note 144, at 143 n.40, 300.

enough to have been offered the attorney generalship several times by Washington.[161] So far was Rawle from the state's right concept that he flatly declared that the second amendment prohibited state, as well as federal, laws disarming individuals.[162] More enduring in its fame than Rawle's work, though not necessarily more influential in its time, is the *Commentaries on the Constitution* of Mr. Justice Story, a younger contemporary of the Founders and a Jefferson appointee to the United States Supreme Court. He, too, eulogized "[t]he right *of the citizens* to keep and bear arms" as "the palladium of the liberties of a republic."[163]

One further point about the contemporaneity of these commentaries suggests itself: as we have seen, Coxe's article received Madison's approval even before the Amendment's enactment.[164] Published almost fifteen years thereafter, St. George Tucker's American edition of Blackstone became a standard reference work on Anglo-American common law for early nineteenth-century Americans. Literally hundreds of those who had served in Congress or state legislatures during the enactment of the Bill of Rights were still alive at that time. Many of them, including Madison himself, were still living (pg.243) twenty-five years later when Rawle's and Story's commentaries were published.[165] Those commentaries remained the standard nineteenth-century reference works on the Constitution at least until Cooley appeared.[166] If these commentaries were erroneously presenting as an individual right of the people what was intended to be only a collective right of the states, surely one or more former legislators would have remonstrated the authors or publishers and, if correction was not forthcoming, publicly clarified the record.

To reiterate, the amendment was written in language which its authors would have adopted only if they intended to secure an individual right, because they knew that that was how their audience would inevitably understand it. Equally dispositive, that audience, composed of people like Coxe, Tucker, Rawle, and Story of the Framers' own generation, and of judges and commentators from the succeeding generations closest in time to the Framers, uniformly did so understand the amendment.[167] The general rule in constitutional construction is one of deference to contemporary interpretations with the greatest weight being accorded those interpretations closest in time to the

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[161] D. BROWN, EULOGIUM UPON WILLIAM RAWLE 15 (1837). As to Rawle's correspondence and friendship with Jefferson, see note 159 *supra*. The Jefferson papers include five letters between them in the 1792-1793 period. LIBRARY OF CONGRESS, *supra* note 159, at 118.

[162] W. RAWLE, A VIEW OF THE CONSTITUTION 125-26 (2d ed. 1829). Rawle shared this view with Hamilton, who saw the people's possession of arms as guaranteeing freedom from state as well as from federal tyranny. The armed populace, "by throwing themselves into either scale, will infallibly make it preponderate" against either a federal or a state invasion of popular rights. THE FEDERALIST No. 28, at 228 (A. Hamilton) (J.C. Hamilton ed. 1864).

[163] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION 746 (1833) (emphasis added).

[164] *See* note 81 *supra*.

[165] Madison lived until 1836, reiterating to the last his belief in an individually armed citizenry. *See* notes 96-113 *supra* and accompanying text. John Adams and Thomas Jefferson both died on July 4, 1826. Without attempting to document the longevity of each legislator who passed on the amendment, thumbing through D. MORRIS & I. MORRIS, WHO WAS WHO IN AMERICAN POLITICS (1974), yields the following dates of death: U.S. Senator Albert Gallatin, 1849; U.S. Representative Jeremiah Smith, 1842; U.S. Senator Paine Wingate, 1838; U.S. Senator Aaron Burr, 1836.

[166] The individual right interpretation seems to have been as self evident to Cooley as it was to his predecessors Rawle and Story. *See, e.g.*, T. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 298-99 (3d ed. 1898); *cf.* T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 498-99 (7th ed. 1903) (federal and state constitutions protect the right to bear arms).

[167] For 19th-century judicial interpretation, see notes 169-84 *infra* and accompanying text.

enactment of the constitutional provision in question.[168] The tone and unanimity of contemporary interpretation of the second amendment discloses what was apparently a perfectly clear understanding to those generations closest in time to the amendment's formulation. Thus, an exclusively state's right theory cannot survive the observation that it is so much a product of the twentieth century that neither the Framers nor any eighteenth- or nineteenth-century commentator or court breathed even the slightest intimation of it.(pg.244)

II. SUBSEQUENT INTERPRETATION OF THE RIGHT TO ARMS

In attempting to identify a pre-twentieth century origin for the exclusively state's right position, several of its proponents have noted that one pre-1789 state constitutional guarantee of a right to arms, and several early post-1789 ones specified a "common defense" purpose, without mentioning any individual self-defense purpose.[169] If such provisions had been interpreted as not guaranteeing an individual right to provide for common defense, they would be persuasive evidence that such a position was known to the Framers. Instead, every one of the twenty-two pre-1906 state cases construing a state constitutional right to arms provision, including some provisions that referred only to a common defense purpose, recognized an individual right to possess at least militia-type arms.[170] A nonindividual right interpretation first appeared in a 1906 Kansas decision which is plainly wrong even as a construction of the Kansas constitution.[171](pg.245)

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[168] *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 547 (1969).

[169] *See, e.g.*, MASS. CONST. of 1780, 1st Part, art. XVII ("The people have a right to keep and to bear arms for the common defence."). Other pre-20th-century state constitutional provisions with a right to arms "for the [or their] common defence" include ARK. CONST. of 1836, art. II, § 21; FLA. CONST. of 1838, art. I, § 21; ME. CONST. of 1819, art. I, § 16; S.C. CONST. of 1868, art. I, § 28; TENN. CONST. of 1796, art. XI, § 26; *see also* GA. CONST. of 1865, art. I, § 4 ("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."); LA. CONST. of 1879, art. III (same as Georgia, plus: "This shall not prevent the passage of laws to punish those who carry weapons concealed."); N.C. CONST. of 1776, Declaration of Rights, art. XVII ("for the defence of the state").

But see, e.g., PA. CONST. of 1776, Declaration of Rights, art. XIII ("The people have a right to bear arms *for the defence of themselves* and the state.") (emphasis added). Other early state constitutional provisions providing for a right to arms "for the defence of themselves [or himself] and the state" include the following: ALA. CONST. of 1819, art. I, § 23; CONN. CONST. of 1818, art. I, § 17; IND. CONST. of 1816, art. I, § 20; KY. CONST. of 1792, art. XII, § 23; MICH. CONST. of 1835, art. I, § 13; MISS. CONST. of 1817, art. I, § 23; MO. CONST. of 1820, art. XIII, § 3; OHIO CONST. of 1802, art. VIII, § 20; PA. CONST. of 1790, art. IX, § 21; VT. CONST. of 1777, ch. I, § 15.

[170] Wilson v. State, 33 Ark. 557, 34 Am. Rep. 52 (1878); Nunn v. State, 1 Ga. 243 (1846); *In re* Brickey, 8 Idaho 597, 70 P. 609 (1902); Bliss v. Commonwealth, 12 Ky. 90, 2 Litt. 80 (1822); Andrews v. State, 50 Tenn. (3 Heisk.) 165 (1871); Smith v. Ishenhour, 43 Tenn. (3 Cold.) 214 (1866); State v. Rosenthal, 75 Vt. 295, 55 A. 610 (1903); *see* State v. Reid, 1 Ala. 612, 619 (1840); Fife v. State, 31 Ark. 455, 459-62 (1876); State v. Buzzard, 4 Ark. 18, 27, 32 (1842); Hill v. State, 53 Ga. 472, 474-75 (1874); State v. Chandler, 5 La. Ann. 489 (1850); Aymette v. State, 21 Tenn. 154, 2 Hum. 119 (1840); Simpson v. State, 13 Tenn. 356, 5 Yer. 292 (1833); Cockrum v. State, 24 Tex. 394, 402 (1859); *cf* State v. Mitchell, 3 Blackf. 229 (Ind. 1833) (statute prohibiting wearing or carrying concealed weapons is constitutional); State v. Jumel, 13 La. Ann. 399 (1858) (same); State v. Newsom, 27 N.C. 250, 5 Ired., 181 (1844) (same); State v. Duke, 42 Tex. 455 (1875) (similar statute); English v. State, 35 Tex. 473 (1872) (statute prohibiting certain unusual weapons is constitutional); State v. Workman, 35 W. Va. 367, 373, 14 S.E. 9 (1891) (concealed weapon statute).

[171] *See* Salina v. Blaksley, 72 Kan. 230, 83 P. 619 (1905); note 31 *supra*. This case, which presents a "collective right" theory, is sometimes viewed as an early example of the exclusively state's right approach. It is difficult to believe, however, that the Kansas Supreme Court meant to suggest that its constitution's right to arms guarantee was intended to protect the state's own right to possess arms. Such an interpretation reduces the state constitutional guarantee to nonsense, construing it as if it read: "the state shall not infringe the state's right to keep arms or have its militia bear them." The REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION, *supra* note 10, at 11, argues that while it is possible to argue that a right to arms provision in the *federal* constitution was intended to protect the states, it is conceptually absurd to suggest that such a provision inserted into a *state* constitution was intended to protect the state rather than individuals. "State bills of rights necessarily protect only against action by the state, and by

Implicit in some of these nineteenth-century individual right cases is the proposition that even if a militia or "common defense" motive is specified for guaranteeing a right, that right is measured by the language of the guarantee given, and is not qualified or limited in the absence of some specific qualifying language.[172] As we shall see, other courts and commentators have construed the statement of a militia or "common defense" purpose as limiting the kinds of arms guaranteed individuals to those commonly used by soldiers.[173] Even where the right specified is to have a gun for one purpose, however, one who lawfully has it for that purpose may properly use it for such other purposes as hunting or the defense of his life or another's.

Some of these nineteenth-century state cases were based upon the second amendment in addition to the state constitutional provision.[174] Many of them upheld specific and limited arms controls on the ground that, while the right was individual in nature, it included only militia-type arms and extended only to carrying them openly, not concealed.[175] The only flat prohibitions of gun ownership that were upheld were laws from the slave states that prohibited guns to slaves or free blacks. The reasoning of these cases makes them the proverbial exception that proves the rule. Beginning from the universally accepted individual right premise, these courts reasoned that (pg.246) blacks could be denied the right to arms because they were excluded by race from *all* privileges of citizenship.[176] Adopting that conclusion in *Dred Scott*,[177] Mr. Chief Justice Taney offered an *argumentum ad horribilis* that exemplified the individual right interpretation expounded by all the courts and commentators relatively close in time to the amendment. Obviously blacks could not be recognized as citizens, Taney declared, because then the (to him) salutary Southern laws requiring their disarmament could not stand in the face of constitutional guarantees of the right to arms.[178]

Dred Scott was apparently the only ante-bellum Supreme Court reference to right-to-arms guarantees. Several years after the Civil War the Court voided a federal prosecution of private persons for attempting to deprive blacks of their newly recognized rights as freedmen to assemble

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definition a state cannot infringe its own rights; to attempt to protect a right belonging to the state by inserting it in a limitation of the state's own powers would create an absurdity."

[172] Hardy & Stompoly, *supra* note 3, at 76-77, make this argument explicit in regard to the second amendment, analogizing to the first amendment's guarantee of a right to assembly. Although the motive of allowing the people to petition for redress of grievances is specified in the first amendment, the right of assembly has not been construed as strictly limited by that statement of motivation. Indeed, it has been extrapolated into a right of association for innumerable purposes, of which petitioning for redress of grievances is but an infrequently encountered one. *See also* Gardiner, *supra* note 10, at 83.

[173] *See, e.g.*, English v. State, 35 Tex. 473, 475 (1872) (quoting 2 J. BISHOP, THE CRIMINAL LAW § 124 (3d ed. 1865)):

> As to its interpretation, if we look to this question in the light of judicial reason, without the aid of specific authority, we shall be led to the conclusion that the provision protects only the right to "keep" such "arms" as are used for purposes of war, in distinction from those which are employed in quarrels and broils, and fights between maddened individuals, since such only are adapted to promote "the security of a free state." In like manner the right to "bear" arms refers merely to the military way of using them, not to their use in bravado and affray.

See also notes 193-94 *infra* and accompanying text.

[174] *E.g.*, State v. Buzzard, 4 Ark. 18 (1842); Nunn v. State, 1 Ga. 243 (1846); State v. Chandler, 5 La. Ann. 489 (1850); Cockrum v. State, 24 Tex. 394 (1859).

[175] *E.g.*, State v. Buzzard, 4 Ark. 18 (1842); Nunn v. State, 1 Ga. 243 (1846); Aymette v. State, 21 Tenn. 154, 2 Hum. 119 (1840).

[176] *E.g.*, State v. Newsom, 27 N.C. 250, 5 Ired. 181 (1844); *cf.* Cooper v. Mayor of Savannah, 4 Ga. 68 (1848) (blacks were not citizens).

[177] Scott v. Sanford, 60 U.S. (19 How.) 690 (1856).

[178] *See* 60 U.S. (19 How.) at 416-17.

and to bear arms.[179] Pointing out that only private action had been alleged, the Court denied federal jurisdiction on the ground that freedom of assembly and the right to arms are guaranteed only against congressional infringement. But it obviously viewed the right to arms as an individual one, stating that the amendment leaves "the people to look [to state law] for their protection against any violation by their fellow citizens" of that right.[180]

Next came *Presser v. Illinois*,[181] in which the petitioner claimed that the amendment invalidated laws which prohibited the unlicensed organization, training and marching of para-military groups. The *Presser* Court responded by stressing the obvious: the subject matter of the second amendment is only the right of *individuals* to possess arms; constitutional provisions relating to *group* arm-bearing appear only in article I, sections 8 and 10. Moreover, those provisions refer only to the militia and formal state or federal military forces, not to private armies. Thus, the challenged state legislation simply did not fall within the amendment's subject matter. The Court also noted that, even if the right to arms had been implicated, the amendment guarantees it against only the federal government, not the states. This was standard nineteenth-century doctrine, based on prior holdings that the provisions of the Bill of Rights, standing alone, did not apply against the states themselves and were not made (pg.247) applicable by the privileges and immunities clause of the fourteenth amendment.[182] That the Court rejected a first amendment claim on the same nonincorporation grounds emphasizes its implicit individual right view of the second amendment. Second and fourth amendment challenges were also rejected on that rationale as an additional ground in *Miller v. Texas*.[183] In both cases the Court treated the second amendment right similarly to first and fourth amendment rights, subjecting all three to the contemporary doctrine that individual rights were protected only against the federal government and not against the states. Likewise, in *Robertson v. Baldwin* the amendment was grouped with the Bill of Rights as a whole in illustrating the generalization that rights guaranteed to individuals are nevertheless subject to qualifications.[184]

United States v. Miller,[185] a 1939 case, is the Supreme Court's only extended analysis of the second amendment. *Miller* arose out of a challenge to an early federal gun law. During the decade of Prohibition, with its gang wars, and the subsequent depression years of John Dillinger and Bonnie and Clyde, sawed-off shotguns and submachine guns had become widely identified in the public

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179 United States v. Cruikshank, 92 U.S. 542 (1875).

180 92 U.S. at 553.

181 116 U.S. 252 (1886).

182 *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) (denying that the Bill of Rights had been made applicable to the states by virtue of the privileges and immunities clause of the 14th amendment); Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833) (holding that the fifth amendment applies only against the federal government, not against the states).

183 153 U.S. 535 (1894). Although this case and its predecessors represent a doctrine which has long been superseded by the concept of selective incorporation, *see, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment right to jury trial), extended analysis of these cases is required if only to correct the extraordinary way in which they have sometimes been read in relation to the second amendment. For instance, J. ALVIANI & W. DRAKE, *supra* note 2, at 9, cite the *Miller v. Texas* line of cases as evidence that "the Second Amendment does not guarantee a personal right to own firearms.... Personal self protection was never an issue in the adoption of the Second Amendment." In fact, nothing to support that interpretation will be found anywhere in those cases. Nor does it at all follow from their doctrine that the Bill of Rights applies only against the federal government. On the incorporation issue, see notes 206-32 *infra* and accompanying text.

184 165 U.S. 275, 281-82 (1897).

185 307 U.S. 174 (1939).

mind as "gangster weapons."[186] The National Firearms Act of 1934[187] contained various provisions against such weapons, including a prohibition, which Miller and a confederate were accused of violating, against the possession of a sawed-off shotgun that had been transported in interstate commerce. The defendants successfully moved the trial court to void their indictment on the ground that this prohibition violated the second amendment. On the Government's appeal, (pg.248) the Supreme Court reversed, emphasizing that the defendants had merely attacked the indictment (and, therefore, the statute) on its face, without any attempt at a factual demonstration that sawed-off shotguns were the kind of weapons contemplated by the amendment. The Court followed the reasoning of those nineteenth-century courts and commentators who construed the right to arms as individual but applicable only to those weapons commonly used for militia purposes:

> In the absence of any evidence tending to show that possession or use of any "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Aymette v. State*, 2 Humphreys (Tenn.) 154, 158.[188]

This holding has been widely misunderstood, most surprisingly by proponents of the individual right position. They have even gone so far as to denigrate its authority by pointing out that it was rendered on the basis of only the Government's one-sided briefing.[189] Additionally, critics have attacked what they suppose to be the opinion's factual basis, pointing out that shotguns were used by regular troops in World War I and Vietnam, and by guerrillas, commandos, and so on in World War II and other twentieth-century conflicts.[190]

Equally surprising, state's right proponents have acclaimed the opinion. Ignoring the fact that its holding focuses entirely on the weapon, they have emphasized its language linking the amendment's purpose to the "militia": "With obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."[191] But this statement, which appears at approximately the median point of the opinion, in fact repudiates the state's right argument when read in the context of what the Court indicated "the militia" to be. The ensuing half of the opinion is given over to exhaustive citations of original and secondary sources that demonstrated to the Court that:

> The signification attributed to the term Militia appears from the debates (pg.249) in the [Constitutional] Convention, the history and legislation of Colonies and States, and the

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[186] *See* L. KENNETT & J. ANDERSON, *supra* note 23, at 202-03.

[187] National Firearms Act, ch. 757, 48 Stat. 1236 (1934). L. KENNETT & J. ANDERSON, *supra* note 23, at 204-12, extensively discuss the history of the Act's provisions.

[188] 307 U.S. at 178; *see also* note 173 *supra*.

[189] *See, e.g.*, Caplan, *supra* note 10, at 44-48; Gardiner, *supra* note 10, at 88. Having been released by the trial court, the defendants filed no brief on appeal, but simply disappeared into the criminal milieu from which they had involuntarily surfaced.

[190] *See* Cases v. United States, 131 F.2d 916, 922 (1st Cir. 1942); Black, *From Trenches to Squad Cars*, AM. RIFLEMAN, June 1982, at 30, 72-73.

[191] 307 U.S. at 178.

> 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.[192]

Perhaps *Miller* has been so misunderstood by zealous partisans because it steers an almost perfect middle course between today's contending extremes—those who claim that the amendment guarantees nothing to individuals versus those who claim that its guarantee is unlimited. Far from upholding the state's right position, the Court clearly recognized that the defendants could claim the amendment's protection as individuals, and that, in doing so, they need not prove themselves members of some formal military unit like the National Guard.[193] At the same time the Court's focus on the weapon (pg.250) suggests rational limitations on the kinds of arms that the amendment guarantees to individuals. Such arms must be both of the kind in "common use" at the present time and provably "part of the ordinary military equipment."[194] Those who have accused the Court of factual inaccuracy have simply misunderstood its legal conclusion as a finding of fact. *Miller* does not characterize shotguns (or even sawed-off shotguns) as outside the amendment's protection *per se*. *Miller* rests on the obvious proposition that it is not judicially noticeable, in the absence of factual proof, that sawed-off shotguns are "in common use" and form "part of the ordinary military

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[192] 307 U.S. at 179 (emphasis added). The real difficulty with *Miller*'s flawed militia-centric interpretation is not that it diminishes the individual right approach, but that it tends to exaggerate to absurdity the extent of the right afforded. *Miller*'s concentration on militia-type weaponry has sometimes been taken as suggesting the unwelcome conclusion that private citizens have a guaranteed right to own all the mass destructive weaponry of sophisticated modern warfare, from tanks and rocket launchers to ICBMs and nuclear devices. When the amendment's other two purposes of personal self-defense and law enforcement are recognized, however, it becomes possible to conclude that the guarantee applies only to such military-type small arms as can reasonably be used also in law enforcement and civilian self defense. *See* notes 238-41 *infra* and accompanying text.

[193] Although the opinion contains no such language, its flawed militia-centric rationale plausibly leads to the conclusion that the amendment right is limited to the military-aged male population, which makes up the constitutional militia. Such a limitation ill accords with the amendment's intention and text, however. *See* notes 53-54 *supra*. Nor does it follow *Miller*'s axis of limitation, which revolves around the question of what kind of arms are by right protected, rather than what individuals enjoy that right. The court probably eschewed any discussion of the latter question as unnecessary because the defendants, being adult male citizens, were presumptively members of the constitutional militia.

If *Miller* is confined strictly to its facts, it goes no further than implicitly recognizing that the home possession of firearms by one who is presumptively a member of the constitutional militia preserves the efficiency thereof under modern conditions. Such a view follows from current military thinking that considers militiamen as a resource only for times of dire necessity, *e.g.*, keeping order when both the Army and the federalized National Guard have been committed overseas and/or in the aftermath of an atomic attack. Given that the very circumstances which require the calling up of militiamen today may also preclude their drawing arms from centralized armories, their home possession of arms facilitates militia service today no less than in the 18th century. Moreover, the home possession of firearms by potential militia members would presumably facilitate familiarity with at least those weapons. To be able to call upon a cadre of people already familiar with weapons (particularly those weapons they would actually be using) would seem particularly important for the militia today, in the absence of a compulsory training requirement like those that existed in the 18th century. *See* text at note 49 *supra*.

Significantly, home and/or individual possession of firearms is the rule today in nations like Israel and Switzerland, which continue to rely substantially upon the militia concept. In Switzerland, every man of military age is required to keep a fully automatic assault rifle (or, if an officer, a pistol) in his home, along with ammunition; and the shooting sports are strongly encouraged for the entire population. C. GREENWOOD, *supra* note 44, at 4; J. STEINBERG, WHY SWITZERLAND? ch. 6 (1976). In Israel, voluntary ownership of firearms is encouraged for the entire population, while the government has donated firearms to kibbutzim and other farming villages in areas likely to be subject to terrorist or military attack. Reservists are encouraged to carry their submachine guns or assault rifles with them at all times, particularly when traveling on the public streets. *See* Bruce-Briggs, *supra* note 9, at 56-57; *Order by Israel Puts Even More Guns on Street*, L.A. Times, July 5, 1978, at 1, col. 3.

[194] On the limitations of the individual right, see notes 235-71 *infra* and accompanying text.

equipment."[195] The *Miller* Court therefore returned the case to the trial court, where the defendants could have attempted the unenviable feat of demonstrating that sawed-off shotguns fell within the limiting criteria that *Miller* enunciated as defining the weaponry protected by the amendment.[196]

Miller is the Supreme Court's first and last extended treatment of the second amendment. This may seem surprising in light of the amount of legislation which the previous twenty-five years had seen on this controversial subject. But federal law has never gone beyond denying firearms to criminals, the mentally unstable and juveniles. Nor, until recently, has any state or local jurisdiction attempted to deny responsible adults the possession of firearms for lawful purposes. So the cases have involved only various provisions of the federal Gun Control Act of 1968. Challenges to these under the amendment have been summarily rejected by lower federal courts. Typical, and often repeated, are observations to the effect that "there is no showing that prohibiting possession of firearms by felons," the mentally unsound, children, or narcotics addicts "obstructs the maintenance of a 'well regulated militia.'"[197]

In 1981, Morton Grove, Illinois, banned the civilian possession of (pg.251) handguns,[198] thus becoming the only American jurisdiction to have attempted the confiscation of a common form of civilian armament since the Civil War.[199] The district court rejected a second amendment challenge to that ordinance without endorsing or accepting either the state's right or the individual right interpretation.[200] It felt bound by *Presser* and other nineteenth-century holdings that the amendment was inapplicable against the states. Many state courts have also endorsed this proposition in rejecting second amendment challenges.[201]

A few state or federal cases have gone beyond upholding gun laws on these limited grounds, or those suggested in *Miller*, to embrace the exclusively state's right viewpoint.[202] At least one of these cases, holding that the amendment provides for no individual right, expressly divorces itself

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[195] *See* text accompanying note 188 *supra*. As to standards for judicial notice, *see generally* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 687; 9 J. WIGMORE, EVIDENCE §§ 2565-83 (1940).

[196] On the applicability of these criteria to handguns, see notes 239-40 *infra* and accompanying text.

[197] United States v. Synnes, 438 F.2d 764, 772 (8th Cir. 1971), *vacated on other grounds*, 404 U.S. 1009 (1972); *see also* United States v. Warin, 530 F.2d 103, 106 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976).

[198] Morton Grove ordinance 81-11. In 1982 the cities of San Francisco and Berkeley, California, followed suit, but their ordinances were quickly invalidated on state statutory grounds. Doe v. City and County of San Francisco, 136 Ca. App. 3d 509, 186 Cal. Rptr. 380 (1982).

[199] In 1861 the secessionist legislature of Tennessee ordered the confiscation of all firearms. This was intended both to disarm the state's substantial Unionist minority and to gather arms for the Confederates. *See* Moon, *A Brief Historical Note on Gun Control in Tennessee*, 82 CASE & COM. 38 (1977). The enactment was declared unconstitutional shortly after the war's end. Smith v. Ishenhour, 43 Tenn. (3 Cold.) 214 (1866). Detailed discussions of the history of American firearms legislation, both state and federal, appear in L. KENNETT & J. ANDERSON, *supra* note 23, ch. 8, and Kates, *Toward a History of Handgun Prohibition in the United States*, in RESTRICTING HANDGUNS, *supra* note 6.

[200] *See* Quilici v. Morton Grove, 532 F. Supp. 1169 (N.D. Ill. 1981), *aff'd*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 52 U.S.L.W. 3266 (U.S. Oct. 3, 1983) (No. 82-1822).

[201] *E.g.*, Galvan v. Superior Court, 70 Cal. 2d 851, 452 P.2d 930, 76 Cal. Rptr. 642 (1969); State v. Amos, 343 So. 2d 166 (La. 1977); Hardison v. State, 84 Nev. 125, 437 P.2d 868 (1968); Harris v. State, 83 Nev. 404, 432 P.2d 929 (1967); Burton v. Sills, 53 N.J. 86, 248 A.2d 426 (1967), *appeal dismissed*, 394 U.S. 812 (1969).

[202] *E.g.*, United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977); Stevens v. United States, 440 F.2d 144, 149 (6th Cir. 1971); Cases v. United States, 131 F.2d 916 (1st Cir. 1942); United States v. Tot, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943).

from *Miller*.[203] But a number of other such cases actually cite *Miller* as their authority.[204] This is startling in light of the inconsistency between their usage of "militia" as a particular military force and *Miller*'s exhaustive exposition of the eighteenth-century definition of "militia" as comprising "all [militarily capable] males ... bearing arms supplied by themselves."[205] (pg.252)

III. On the Question of Incorporation Against the States

The discussion thus far has focused almost entirely upon the second amendment as a restraint upon federal governmental activity. The cases just mentioned suggest that state or municipal regulation is not within the scope of the amendment. As a practical matter, however, although the kind of prohibitionary-confiscatory legislation that the amendment forbids,[206] has been proposed at the federal level, it has never come close to enactment there. Nor does this seem likely in the foreseeable future.[207] From time to time, a few states have enacted legislation which could conceivably be subject to second amendment objection,[208] but in recent years legislative activity raising questions central to the second amendment has been limited to the municipal level. The most drastic example is the complete prohibition on home possession of handguns recently enacted by Morton Grove, Illinois.[209] This legislation clearly raises the question of whether the amendment should be considered incorporated against state and local governments through the due process clause of the fourteenth amendment.

The numerous cases citing *Presser v. Illinois* and *Miller v. Texas* for the proposition that the amendment is not incorporated[210] cannot survive rigorous analysis. The *Presser/Miller* view derives from a concept of federalism (*i.e.*, that civil liberties are guaranteed only against the federal government and that their infringement by the states is not the business of the federal judiciary) that

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[203] Cases v. United States, 131 F.2d 916, 922 (1st Cir. 1942).

[204] *See* Quilici v. Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982), *cert. denied*, 52 U.S.L.W. 3266 (U.S. Oct. 3, 1983) (No. 82-1822); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977); Stevens v. United States, 440 F.2d 144, 149 (6th Cir. 1971).

[205] 307 U.S. at 179; *see* text accompanying notes 35-56 & 191-93 *supra*.

[206] *See* notes 235-41 *infra* and accompanying text.

[207] H.R. 40, 97th Cong., 1st Sess., 127 CONG. REC. H32 (daily ed. Jan. 5, 1981), introduced by Representatives Bingham and Yates, would have completely prohibited the home possession of handguns by civilians. It was apparently never introduced into the Senate and was not expected to pass out of committee even in the House of Representatives. Back in 1972 a more modest bill, which would have prohibited new sales of nonsporting handguns (but not confiscated those already in circulation), passed the Senate, but failed to pass the House. This bill represents the high water mark for prohibitionist legislation.

[208] *Compare* 1886-1887 Ala. Acts No. 4 § 17; 1881 Ark. Acts ch. 96 § 3; 1901 S.C. Acts No. 435; 1879 Tenn. Pub. Acts ch. 96 (banning the sale of "Saturday night special"-type pistols), *with* 1923 Ark. Acts No. 430, § 1; 1933-34 Hawaii Sess. Laws ch. 26, § 3; 1925 Mich. Pub. Acts No. 313; 1921 Mo. Laws ¶ 69,691 § 3; 1911 N.Y. Laws ch. 195; 1919 N.C. Sess. Laws ch. 197, § 1; 1913 Or. Laws ch. 256, § 1 (requiring permits for the sale and/or ownership of pistols). Most of these laws appear to have been at least partially motivated by desire to deny access to firearms to racial or ethnic minorities and political dissenters. Whether in repudiation of these purposes or for other reasons, the Oregon, Arkansas, Tennessee and Alabama laws have been repealed. *See* Kates, *supra* note 11, at 14-22. Minnesota and Illinois have recently passed laws aimed at prohibiting the sale of "Saturday Night specials" variously defined. *See* ILL. ANN. STAT. ch. 38, § 24-3(g) (Smith-Hurd 1977); MINN. STAT. ANN. § 624-7 16 (West Supp. 1983). For a discussion of this legislation and its validity within the second amendment, see note 240 *infra* and accompanying text.

[209] *See* note 198 *supra*.

[210] *See* note 201 *supra*.

has long been (pg.253) discredited.[211] Moreover, strictly speaking, the suggestion that *Presser v. Illinois* and *Miller v. Texas* reject *due process* incorporation misreads the actual holdings in those cases. What they literally held was only that the Bill of Rights did not apply against the states *ab initio* and was not incorporated against them by the *privileges and immunities* clause of the fourteenth amendment. Presumably the attitude toward federalism which led the nineteenth-century Court to reject privileges and immunities incorporation would equally have led it to reject due process incorporation, if anyone had then imagined it.[212] But to apply the *Presser/Miller* reasoning to negate due process incorporation of the second amendment today is to extend those cases beyond their holdings. However logical that extension might have seemed in 1886, it is absurd today when the result would be to contradict the entire doctrinal basis of modern incorporation of the Bill of Rights against state and local government.[213]

Absent the misleading spectre of *Presser* and *Miller*, the weakness of the argument against application of the second amendment (pg.254) to the states is evident. In deciding whether a provision of the Bill of Rights is so fundamental as to justify incorporation, the Supreme Court has traditionally employed two criteria: The extent to which the right is rooted in our Anglo-American common law heritage, as well as its Greek and Roman antecedents;[214] and how highly the Founders themselves valued the right.[215] The great esteem in which the Founders held the right to arms has already been exhaustively detailed. Familiar to them in their own colonial law,[216] derived from the

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[211] *Compare* Miller v. Texas, 153 U.S. 535, 538 (1894) ("[I]t is well-settled that the restrictions of the (second and fourth) amendments operate only on the Federal power and have no reference whatever to proceedings in state courts."); Presser v. Illinois, 116 U.S. 252, 265 (1886) ("[T]he [second] amendment is a limitation only upon ... the National government, and not upon ... the States."), *with* Duncan v. Louisiana, 391 U.S. 145, 147-50 (1968) ("[M]any of the rights guaranteed by the first eight amendments ... have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment."); Mapp v. Ohio 367 U.S. 643, 650-55 (1961) (holding the fourth amendment search and seizure protections applicable to the states through the fourteenth amendment); Gitlow v. New York, 268 U.S. 652, 666 (1925) (holding the first amendment freedom of speech binding on the state through the fourteenth amendment); Twining v. New Jersey, 211 U.S. 78, 99 (1908) ("it is possible that some of the personal rights safeguarded by the first eight Amendments against the National action may also be safeguarded against state action").

[212] Due process incorporation's first appearance in a Supreme Court case appears to be as a dictum in Twining v. New Jersey, 211 U.S. 78, 99 (1908). *See* note 211 *supra*.

[213] *Presser* does, however, contain a far-reaching, but little noted, dictum suggesting that U.S. CONST. art. I, § 8, cl. 15 and 16 proscribes state or local wholesale arms prohibitions or confiscation. In the *Presser* court's view, cl. 15 envisions an armed citizenry which Congress is empowered to call forth whenever necessary to execute the laws, suppress rebellions or repel invasion. A state would directly infringe that congressional prerogative if it prohibits firearms possession by the constitutional militia, *i.e.*, the military-age male populace. As the court stated:

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the [second amendment] out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security and disable the people from performing their duty to the general government.

116 U.S. at 265. Authorities indicating the continued importance of an armed citizenry for militia duty are reviewed at notes 283-84 *infra*. Militia considerations might not, however, preclude legislation against the possession, ownership, sale or manufacture of "Saturday Night Special"-type firearms that are unfit for military or police duty. *See* note 240 *infra* and accompanying text.

[214] *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 795 (1969) (protection of double jeopardy held fundamental); Duncan v. Louisiana, 391 U.S. 145, 151-54 (1968) (right to jury trial fundamental); Klopfer v. North Carolina, 386 U.S. 213, 225-26 (1967) (right to speedy trial fundamental); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (right to counsel fundamental).

[215] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 152-53 (1968); Klopfer v. North Carolina, 386 U.S. 213, 225 (1967).

[216] *See* notes 46-48, 156 *supra* and accompanying text.

earliest known English legal codes,[217] the right to arms was in their day hailed as not only fundamental to their English legal and political heritage, but implicit in the (to them) premier and seminal natural law right of self-defense.[218] Likewise the right to keep personal arms was so fundamental a part of Graeco-Roman law that every commentator known to the Founders proclaimed it the basis of republican institutions and popular liberty.[219]

Above and beyond the general criteria which normally govern incorporation is the question of specific legislative intent. There is ample evidence that the authors of the fourteenth amendment actually intended to protect the right to arms from state or local interference. The quantum of that evidence considerably exceeds the evidence that they intended to protect any of the rights which have heretofore received incorporation. The fourteenth amendment was enacted at a time when the Republicans were still utterly dominant in Congress by reason of their continuing exclusion of the delegations of the southern states. Section 1 goes virtually unmentioned in the debate on the fourteenth amendment—beyond the statement of Representative Thaddeus Stevens that it was intended to constitutionalize the underlying principles of the immediately preceding 1866 Civil Rights Act,[220] thereby placing them beyond repeal upon (pg.255) the southern delegations' return.[221] It is therefore to the 1866 Act that we must turn to understand the purposes of section one of the fourteenth amendment.

The principle underlying the 1866 Civil Rights Act was nothing less than the repudiation of the whole juridical basis of southern slavery. Under the legal theory of slavery, blacks were not human beings, but intelligent livestock, incapable of possessing property or of having a right to defend it or themselves.[222] Pursuant to this theory, *Dred Scott* and various preceding southern court

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[217] Professor Whisker finds references to, or recognition of, the right in pre-Norman law, back to the period before the reign of Alfred the Great (871-899) when England was divided into various kingdoms. *See* J. WHISKER, OUR VANISHING FREEDOM: THE RIGHT TO KEEP AND BEAR ARMS 3 (1973) (citing the 602 Code of Ethelbert of Kent and a circa 650 law of Edric of Kent). The Laws of Canute (reigned 1016-1035) imposed a fine on anyone who illegally disarmed a subject.

[218] *See* notes 109, 111 & 153 *supra* and accompanying text.

[219] *See* text at notes 114-28 *supra*.

[220] Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

[221] CONG. GLOBE, 39th Cong., 1st Sess., 2459 (1866). *See generally* Frank & Munro, *The Original Understanding of Equal Protection of the Laws*, 50 COLUM. L. REV. 131, 141 (1950). Although the drafting of the amendment was a joint effort by a number of Republicans, of whom Stevens was the most prominent, the assignment of its introduction to Rep. Bingham, (R-Ohio) further demonstrates its relationship to the 1866 Civil Rights Act, which had passed a few weeks earlier. Bingham had opposed that Act, not out of any fundamental disagreement with its provisions, but because he believed them to exceed federal constitutional authority under the thirteenth amendment. By constitutionalizing the basic principles of the 1866 Act, the fourteenth amendment removed the danger, of which the Republicans were highly cognizant after Dred Scott v. Sanford, 60 U.S. (19 How.) 690 (1856), that the Act might be over turned by the Supreme Court. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949). Indeed, in advocating the fourteenth amendment's enactment, one prominent Republican complained that southern courts were declaring the 1866 Act unconstitutional—and enforcing laws banning guns for freedmen. CONG. GLOBE, 39th Cong., 1st Sess. 3210 (1866) (statement of George W. Julian).

[222] Kates, *Abolition, Deportation, Integration: Attitudes Toward Slavery in the Early Republic*, 53 J. NEGRO HIST. 33, 37 & n.25 (1968):

> The majesty and consistency of [ante-bellum] American law uniformly regarded slaves as property, incapable of possessing a cognizable interest in personal security. Within this theory the rape or murder of a slave was no more than a crime against property—and no crime at all if committed by the master.
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> ....
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> By constitutional, statutory, decisional, administrative and customary law the position of the slave was fixed. He could not possess arms or liquor, make contracts, own land or personalty, travel freely, give testimony or serve as a juror or in any other public office, learn to read or write, act independently as a religious leader, intermarry with whites, compete in the free labor market—above all, he had no political rights. The prohibitions

decisions had declared blacks incapable of citizenship and upheld legislation against their possessing arms.[223] The 1866 Act in effect overruled (pg.256) *Dred Scott*[224] as an adjunct to its general purpose of immutably conferring upon blacks legal standing as free citizens.[225] In so doing it implicitly conferred upon them the right of arms under the second amendment. As we have seen, central to the idea of freedom and citizenship in Anglo-American law and philosophy were the rights to personal security and property, to self defense—and to the possession of arms for those purposes.[226]

Moreover, it appears that proscribing anti-gun laws was expressly contemplated by the authors of the 1866 Act and fourteenth amendment. The *betes noir* of the Congress of 1866 were the Black Codes that had immediately spewed from the all-white southern legislatures after Appomattox. These Codes sought to reduce the new freedman to peonage, perpetuating against him all the legal disabilities which had previously characterized his status as a slave. As the *Special Report of the Anti-Slavery Conference of 1867* noted, among the most obnoxious provisions of these Codes were those by which blacks were "forbidden to own or bear firearms," as they had been under slavery, "and thus were rendered defenseless against assaults" by their former masters or other whites.[227] Congressman after congressman, including the Senate sponsors of both the 1866 Act and the fourteenth amendment, expressed their outrage at the denial of the freedman's right to arms.[228] In summarizing what the 1866 Act would accomplish, its House and Senate sponsors cited Blackstone's classification of the "absolute rights of individuals", stating that these were the essential human rights being conveyed.[229] Finally, myriad statements and an official committee report in

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of arms, liquor and travel were enforced by a more or less well organized system of special and general searches and night patrols of the *posse comitatus*. Justice to the slave was, within the law or within its enforcement, summarily meted out by masters, possemen and judicial officials alike. As Mr. Chief Justice Taney succinctly expressed it: "[the Negro slave had] no rights which the white man was bound to respect." Scott v. Sanford, 60 U.S. (19 How.) 690, 701 (1856) (footnote omitted).

[223] *See* notes 176-78 *supra* and accompanying text. Conversely, abolitionist legal treatises had offered as plain evidence of the unconstitutionality of slavery the fact that its legal theory abridged the second amendment right of blacks to keep arms. *See, e.g.*, L. SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 98 (1860); J. TIFFANY, TREATISE ON THE UNCONSTITUTIONALITY OF SLAVERY 117-18 (1849) (reprinted 1969). Since these commentaries provided the legal underpinnings for the constitutional thought of the Radical (and moderate) Republicans of 1866, they are of particular significance for understanding the scope of the fourteenth amendment. *See* J. TEN BROEK, EQUAL UNDER LAW 125 (1965) (originally published as THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT); Graham, *The Early Antislavery Background of the Fourteenth Amendment*, 1950 WIS. L. REV. 479.

[224] *Dred Scott* is overruled by § 1 of the 1866 Act, *supra* note 220, which declares "that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are ... citizens of the United States." This clause was adopted later as the first sentence of the fourteenth amendment.

[225] Stating that its purpose was to guarantee the former slaves the rights inherent in their new status, both the House and the Senate sponsors of the 1866 Act quoted Chancellor Kent's listing of the rights of a free person: "'the right of personal security, the right of personal liberty and the right to acquire and enjoy property.'" CONG. GLOBE, 39th Cong., 1st Sess. 1118 & 1757 (1866) (statements of Rep. Wilson and Sen. Trumbull) (quoting 2 J. KENT, COMMENTARIES 1 (New York 1827)).

[226] *See* notes 109-11 & 117-18 *supra* and accompanying text.

[227] *Reprinted* in H. HYMAN, THE RADICAL REPUBLICANS AND RECONSTRUCTION 217 (1967). *See generally* E. COULTER, THE SOUTH DURING RECONSTRUCTION 1865-1877, at 40 n.43 (1947); W. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 167, 172, 223 (1962).

[228] *See* Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON U. L. REV. 1, 21-25 (1981).

[229] *See* CONG. GLOBE, *supra* note 225, at 1115-18; text accompanying note 153 *supra*.

relation to the anti-KKK legislation enacted in 1871[230] shows an unchallenged assumption (pg.257) by a Congress largely identical in personnel to that of 1866 that the fourteenth amendment they had enacted five years earlier encompassed second amendment rights.[231]

In sum, the only viable justification for denying incorporation of the second amendment against the states today is the exclusively state's right view that the amendment does not confer an individual right. If the amendment only guaranteed a right of the states it would be self contradictory to incorporate it into the fourteenth amendment.[232] But as this state's right interpretation of the amendment is itself not viable historically, it therefore follows that the second amendment should be held applicable to the states through the due process clause of the fourteenth.

IV. TOWARD A DEFINITION OF SECOND AMENDMENT RIGHTS AND THE PROPER SCOPE OF GUN CONTROL

Recognizing that the amendment guarantees an individual right applicable against both federal and state governments by no means forecloses all gun control options. Gun control advocates must, however, come to grips with the limitations imposed by the amendment—just as advocates of increasing police powers to deal with crime must come to grips with the limitations imposed by the fourth, fifth and sixth amendments. As with those amendments, determining what limitations the second imposes will require detailed examination of its colonial and common law antecedents.[233] The phrase "the right of the people to keep and bear arms," so opaque to us, was apparently self-defining to the Founders, who used it baldly and (pg.258) without any attempt to define it. Presumably they felt that clarification was unnecessary because they were constitutionalizing a pre-existing right to arms whose parameters they knew under their colonial law and practice as it had developed out of the early English common law.[234]

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[230] Legislation designed to enforce the fourteenth amendment, and in particular to suppress the KKK was introduced in 1871. CONGRESSIONAL GLOBE, 42d Cong., 1st Sess. 174 (1871) (Introduced as "an act to protect loyal and peaceable citizens in the South....", H.R. No. 189). Passed as the Enforcement Act, 17 Stat. 13 (1871). Section 1 of the legislation survives as 42 U.S.C. § 1983 (1976). *See* Halbrook, *supra* note 228, at 25 n.141, 27 n.146 and accompanying text.

[231] *See* Halbrook, *supra* note 228, at 25-28. For the relationship between the two Acts and the personnel of the two Congresses which enacted them, see Kates, *Immunity of State Judges Under the Federal Civil Rights Acts:* Pierson v. Ray *Reconsidered*, 65 NW. U. L. REV. 615, 621-23 (1970).

[232] *See, e.g.*, J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 455 (2d ed. 1983); *see also* note 171 *supra*.

[233] *Cf.* Payton v. New York, 445 U.S. 573, 593-96 (1980) (interpreting fourth amendment by reference to a combination of materials including Coke's *Institutes*, pre-colonial case law, and American colonial commentary and practice); Benton v. Maryland, 395 U.S. 784, 795 (1969) (guarantee against double jeopardy construed by reference to Blackstone both as an authority on pre-colonial English practice and as the guide followed by the colonists in establishing American legal principles); Duncan v. Louisiana, 391 U.S. 145, 151-52 (1968) (right to jury trial defined by reference to Blackstone, as well as to independent evidence of American colonial and preceding English legal practice); Klopfer v. North Carolina, 386 U.S. 213, 223-25 (1967) (right to speedy trial defined by reference to Coke and English legal practice back to the Magna Carta).

[234] This is not to suggest that the meaning will be as readily understandable to us or as easily applied, particularly as to control proposals or options that bear little resemblance to those with which the Founders were familiar. Indeed, it will not be easy to determine even what control options were familiar to them outside of those commonly embraced by colonial law, *see* note 156 *supra* , the early common law principles set out by English commentators, *see* note 153 *supra*, and the absolute prohibition of the 1671 Game Act and the other Stuart arms confiscation devices, *see* notes 135-39 *supra* and accompanying text. It is difficult if not impossible to determine precisely what knowledge the Founders had of English arms controls contemporary to their own time. In general, Americans seem to have believed the contemporary English law (or practice) far more restrictive than their colonial law or the original common law and Madison and Tucker found the exception-riddled English Bill of Rights guarantee insufficient. *See* notes 144 & 155 *supra*. In view of these real or perceived differences, the amendment cannot be slavishly construed with reference to contemporary English law. As with any constitutional guarantee whose "historic roots are in English history," it nevertheless "must

The remainder of this Article is devoted to sketching out some of the amendment's implications in relation to a few of the more commonly encountered "gun control" proposals. The intention is not to resolve definitively the constitutionality of any of these, much less of the entire gamut of possible control options, but only to outline some relevant lines of inquiry.

A. *Limitations on the Right of the General Citizenry To "Keep" Weapons*

The preceding sections of this Article demonstrate that, in general, the second amendment guarantees individuals a right to "keep" weapons in the home for self defense.[235] Several limitations on this (pg.259) right have already been suggested, however. First and foremost are those implicit in *United States v. Miller*, suggesting that the amendment protects only such arms as are (1) "of the kind in common use" among law-abiding people and (2) provably "part of the ordinary military equipment" today.[236] The analysis presented throughout this Article indicates that the "ordinary military equipment" criterion is infected by *Miller*'s conceptually flawed concentration on the amendment's militia purpose, to the exclusion of its other objectives. Decisions recognizing that concerns for individual self-protection and for law enforcement also underlie right to arms guarantees involve at once greater historical fidelity and more rigorous limitation upon the kinds of arms protected. These decisions suggest that only such arms as have utility for *all three* purposes and are lineally descended from the kinds of arms the Founders knew fall within the amendment's guarantee.[237] Reformulating *Miller*'s dual test in this way produces a triple test that anyone claiming the amendment's protection must satisfy as to the particular weapon he owns. That weapon must

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be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English ...." United States v. Brewster, 408 U.S. 501, 508 (1972). On the debate over the relevance of original intent in determining constitutional rights, see note 28 *supra*.

[235] *See* notes 53-64 & 192-95 *supra* and accompanying text. G. NEWTON & F. ZIMRING, *supra* note 13, at 255, suggests that the 1671 Game Act's prohibition of firearms ownership to all but the high nobility demonstrates that the common law right to *arms* did not apply to *firearms*. By the same token, reference might be made to a series of statutes of Henry VIII which prohibited both gun and crossbow ownership by commoners. *See* REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION, *supra* note 10, at 12 nn.9-12. Incredible as it may seem, the primary rationale for these Henrician prohibitions (explicitly avowed in all five statutes) was that crossbow and gun possession was distracting Englishmen from their legally required ownership of, and arduous regular practice with, the long bow, which was still thought of as vitally necessary to English military defense. A secondary purpose (several times avowed) was that the "king's dere" were being "distroyd" by crossbow or gun-armed poachers. A tertiary concern (mentioned in only one of the five enactments) was to prevent the misuse of these weapons in crime. *Id.* at 1-2.

It is difficult to see any of this Henrician legislation playing an affirmative part in the colonial right-to-arms tradition upon which the amendment is based. In all probability the Founders were entirely ignorant that the Henrician legislation had ever existed. The anachronism of its principal purpose having become evident by the latter part of Henry's reign, he repealed the legislation by proclamation—more than 65 years before the settlement of the American colonies and over 200 before Madison's birth. *Id.* Doubtless the Founders were familiar with the 1671 Act since its repudiation had been one of the purposes of the arms guarantee in the English Bill of Rights. But the only relevance that execrated Act had to the Founders' thought was as a model of what the second amendment was intended to foreclose. *See* notes 137-51 *supra* and accompanying text. Moreover, legally speaking, neither the Henrician legislation nor the 1671 Game Act could have formed any part of the colonial law on arms. They were excluded by the inapplicability principle as they were clearly not suited to colonial conditions. *See* note 155 *supra*. Such legislation was wholly inconsistent with the arms policy upon which both Britain and the Colonies had operated from the colonies' inception. This policy, *see* notes 46-48 *supra* and accompanying text, called for the colonists to arm themselves for self defense rather than burdening or depending upon the remote military resources of the mother country. The weapons with which they were to be armed expressly included "pistols." Yet these would plainly have been forbidden had the Henrician legislation been considered applicable. *See* the colonial statutes cited at notes 46-48 *supra*.

[236] *See* notes 188, 192-96 *supra* and accompanying text.

[237] *See* People v. Brown, 253 Mich. 537, 541, 235 N.W. 245, 246-47 (1931); *see also* State v. Kessler, 289 Or. 359, 364-66, 614 P.2d 94, 98-100 (1980); State v. Duke, 42 Tex. 455, 458 (1875) (construing state constitutions).

provably be (1) "of the kind in common use" among law-abiding people today; (2) useful and appropriate not just for military purposes, but also for law enforcement and individual self-defense, and (3) lineally descended from the kinds of weaponry known to the Founders.

This triple test resolves the *ad absurdum* and *ad horribilus* results (to which *Miller*'s sketchy and flawed militia-centric discussion greatly contributed) sometimes viewed as flowing from an individual right interpretation of the amendment.[238] Handguns, for example, (pg.260) clearly fall within the amendment's protection. That handguns are *per se* "in common use" among law-abiding people and combine utility for civilian, police and military activities is not only provable but judicially noticeable.[239] On the other hand, such a factual demonstration would be difficult as to at least some of the weapons commonly denominated "Saturday Night Specials."[240] Legislation selectively prohibiting them might, therefore, be consistent with the amendment. Gangster weapons like brass knuckles, blackjacks, sandbags, switchblade knives and sawed-off shotguns unquestionably can be prohibited since they fail to meet both the "common use" and tripartite appropriateness branches of the test. The possession of (pg.261) billy clubs is clearly protected, but mace or similar chemical spray weapons would not be unless they can be shown to be lineally descended from some form of weapon known to the Founders. Likewise, the amendment does not protect the possession of fully automatic weapons, grenades, rocket launchers, flame throwers, artillery pieces, tanks, nuclear devices, and so on. Although such sophisticated devices of modern warfare do have military utility, they are not also

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[238] *See, e.g.*, Cases v. United States, 131 F.2d 916, 922 (1st Cir. 1942) (arguing that, since any and all weapons have proved useful in modern (particularly guerrilla) warfare, *Miller*'s militia-centric rationale provides no viable limit on the kinds of arms guaranteed by the amendment); Royko, *Machine Guns Don't Kill, People Kill*, Chi. Sun Times, Dec. 19, 1981, at 2, col. 1; *cf.* United States v. Warin, 530 F.2d 103 (6th Cir.) (reasoning that the amendment does not guarantee an individual right to possess machine guns because, if it did, there would be no limit to the kinds of weaponry embraced in the right), *cert. denied*, 426 U.S. 948 (1976); J. WHISKER, *supra* note 217, at 112-13 (arguing that since bazookas, cannon, and the like have never been used by criminals or terrorists in this country, and since such weapons are generally too heavy, bulky and expensive to operate for criminals or terrorists, government should not deny the law-abiding citizen's "right" to own, for instance, "a 20 mm. recoiless rifle simply for his own pleasure and perhaps to shoot ten times a year in a deserted part of the country").

[239] As to the commonality of the handgun, exclusive of militarily-owned weapons, the American gun stock was estimated in 1981 as including not less than 54 million handguns. Kates, *supra* note 17, at n.2 and accompanying text (unpaginated manuscript). In general, a broad range of large-caliber, high-quality handguns combine suitability for military, law enforcement and civilian self-defense uses. Indeed, the vast majority of such weapons commonly sold to civilians in the United States for self-defense were specifically developed for the military and/or police market (or are the lineal descendants of models that were so developed). *See, e.g.*, A. BRISTOW, THE SEARCH FOR AN EFFECTIVE POLICE HANDGUN (1971); M. JOSSERAND & J. STEVENSON, PISTOLS, REVOLVERS AND AMMUNITION, ch. 7 (1967); W. SMITH, SMALL ARMS OF THE WORLD, chs. 10-12 (J. Smith 9th ed. 1960). The military/police origin of these weapons is often evidenced by their current designations: Smith and Wesson model 10 ("Military and Police"), and models 36, 37 and 60 ("Chiefs Special"—regular, airweight and stainless); Colt "Government Model" (.45 ACP), "Lawman," and "Trooper" (.357 magnum), "Official Police," "Police Positive," "Detective Special," and "Agent" (.38 special). The origins and designations of imported handguns are similar: Walther PP and PPK (the initials stand for German police organizations), the standard weapon of the German Luftwaffe during World War II; Star "Guardia Civil"; and Webley R.I.C. ("Royal Irish Constabulary"). Even those handguns which are not specifically designed with military and/or police use in mind are designed, manufactured and operate in manners closely analogous, or identical, to those used by the police or military forces of various nations. *See, e.g.*, *id.* at 58-93, 159-92. Indeed, a substantial proportion of the civilian gun stock consists of former military weapons, captured in warfare or kept by veterans as souvenirs. The Comptroller General has estimated that 8.8 million "war trophies" returned from World War II alone. GOVERNMENT ACCOUNTING OFFICE, HANDGUN CONTROL: EFFECTIVENESS AND COST 17-18 (1978).

[240] "Saturday Night Special" is the derisive name for a more or less distinct subspecies of handgun, identified primarily by inexpensiveness, small size and low quality of manufacture and metallurgy. *See* McClain, *"Saturday Night Special" Gun Regulation: A Feasible Policy Option?*, in Firearms & Violence, *supra* note 10. Twentieth-century countries have rarely if ever adopted as standard handguns for military and/or police purposes those of less than .32 caliber; the weapons they standardize tend to be relatively large and heavy and very well made. *See* A. BRISTOW, *supra* note 239; I. HOOG & J. WEEKS, MILITARY SMALL ARMS OF THE 20TH CENTURY (4th ed. 1981); J. OWEN, BRASSEY'S INFANTRY WEAPONS OF THE WORLD, 1950-1975; W. SMITH, *supra* note 239.

useful for law enforcement or for self-protection, nor are they commonly possessed by law-abiding individuals. Moreover, many of them may not be lineally descended from the kinds of weapons known to the Founders.

In addition to the tripartite test, two further limiting principles would tend to exclude the sophisticated military technology of mass destruction—or, indeed, anything beyond ordinary small arms—from the amendment's protection. First, since the text refers to arms that the individual can "keep *and* bear," weapons too heavy or bulky for the ordinary person to carry are apparently not contemplated. Second, according to Blackstone and Hawkins, the common-law right did not extend to "dangerous or unusual weapons" whose mere possession or exhibition "are apt to terrify the people."[241] Naturally, it would terrify the citizenry for unauthorized individuals to possess weapons that could not realistically be used even in self-defense without endangering innocent people in adjacent areas or buildings.

B. *Laws Prohibiting the Urban Possession of Rifles, Shotguns and Highly Penetrative Handgun Bullets*

This last limiting principle might also allow legislation against keeping rifles and shotguns loaded for defense, at least in urban areas. Although it appears that most people who keep firearms for self-defense today depend upon handguns, it is unfortunately the case that some urbanites continue to rely on long guns.[242] While a rifle or shotgun is clearly more effective than a handgun if the sole consideration is instantly killing a burglar,[243] the various potential (pg.262) side effects of firing such a weapon in an urban environment make it unacceptable.

Consider penetration: even the .44 magnum, the most powerful of all handguns, penetrates no more than thirteen inches in wood, while revolvers in the far more commonly owned .32 to .38 calibers range from two to seven inches in penetration.[244] In contrast, the relatively underpowered military surplus carbine with which President Kennedy was killed penetrates forty-seven inches.[245] So a householder or shopkeeper who uses a rifle against a robber is imposing on others a very considerable risk that the bullet will penetrate all the way through the intended target and successive wood or stucco walls, entering the street or a neighboring building with enough remaining velocity to kill an innocent third party. While a shotgun's discharge does not have equivalent penetration because its velocity is far less, that velocity still substantially exceeds all but the most powerful

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[241] 4 W. BLACKSTONE, COMMENTARIES *149; 1 W. HAWKINS, *supra* note 153, at 136. Blackstone was discussing a statute that properly made the carrying of such weapons a criminal breach of the peace. Similarly, Hawkins approved the criminalization of "affray," an offense that included the display of terrifying weapons.

[242] *See* McClain, *Firearms Ownership, Gun Control Attitudes and Neighborhood Environment*, 5 LAW & POLICY Q. 299, 305-07 (1983).

[243] The superior deadliness of long guns is touted by the field director of the National Coalition to Ban Handguns among others. Deriding the message behind NRA publicity of instances in which handgun-armed householders routed burglars, he recommends "a twelve gauge shotgun," for it will not only protect the householder better, but serve society as well by "permanently ending the intruder's crime career,"—that is, a shotgun blast will kill him instead of inflicting a nonfatal wound such as a handgun would be likely to do. Fields, *Handgun Prohibition and Social Necessity*, 23 ST. LOUIS U. L.J. 35, 41 (1979). A handgun wound will result in death 5-10% of the time, while a comparable 12-gauge shotgun wound will result in death 80% or more of the time. *See* Kleck, *Handgun-Only Gun Control: A Policy Disaster in the Making*, in FIREARMS & VIOLENCE, *supra* note 10.

[244] D. GRENNELL & M. WILLIAMS, LAW ENFORCEMENT HANDGUN DIGEST 194-95 (1972); Steindler, *Warning: Your Walls Are Not Bullet Proof* in GUNS FOR HOME DEFENSE (G. James ed. 1975).

[245] Lattimer & Lattimer, *The Kennedy-Connally Single Bullet Theory*, 50 INTL. SURGERY 524, 529 (1968).

handguns.[246] Moreover, a householder or shopkeeper who elects to defend his premises with a riot gun's promiscuous spray may end up hitting one or more of his own innocent children or customers, along with the robber. In contrast, a handgun fires one bullet at a time which, if accurately aimed, is unlikely to pass through the robber, or, if it does so, will bury itself harmlessly in the wall.

By the same token, accidental discharges with long guns (particularly rifles, which can penetrate horizontally through successive houses on a city block or vertically through the floors and ceilings of successive apartments in a high rise) are much more dangerous than with handguns. This danger is multiplied by the fact that a rifle or shotgun kept loaded for home or store defense is much more likely to suffer accidental discharge than is a handgun. A rifle or shotgun (pg.263) kept ready to fire can discharge simply through impact if dropped on a floor; a modern revolver will not. A long gun is also much more difficult than a handgun to lock or hide away from inquisitive children. Finally, if an inquisitive three-year-old does locate a loaded rifle or shotgun, pushing the safety to "off" and pulling the trigger is literally "child's play"; he would not be strong enough to operate the trigger on a revolver or the slide on an automatic pistol.[247]

These technical factors are reflected in the concrete form of firearms accident statistics. Fifty years ago, long guns outnumbered handguns seven-to-one and were the principal weapons kept loaded in the home—handguns being possessed by less than one in thirteen Americans. In contrast, handguns today represent one-third of the total gunstock and one in every four American households contains them.[248] Even though the handgun stock has grown to the point of displacing long guns in the home defense role, however, Americans continue to buy many more long guns (apparently for sport) each year than they do handguns.[249] Yet this enormous increase in all kinds of firearms has been accompanied by the decline of per capita accidental firearms fatalities to the lowest point since the compilation of such statistics began.[250] It is difficult not to attribute this decline to the general change-over to handguns for home defense. Indicative of the dangers presented by the practice of keeping loaded long guns is the fact that, although handguns undoubtedly represent 90% or more of the weapons kept loaded at any one time today, only 15.5% of accidental firearms deaths appear to involve handguns.[251]

Based on these statistics, an urban community (or a state legislature) might arguably rely on the "dangerous or unusual" weapon exclusion to prohibit the keeping of loaded long guns within

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[246] The more powerful military-caliber rifles which Americans generally favor exhibit muzzle velocities in the range of 2500-3500 feet per second. A shotgun expels its projectiles at 1300-1350 feet per second, a velocity level reached only by handguns in the .44 magnum and .357 magnum calibers. Most handguns generate velocities of less than 1000 feet per second. *See* D. GRENNELL & M. WILLIAMS, *supra* note 244, at 188; GUN DIGEST 257-68 (K. Warner ed. 1982).

[247] The author has confirmed this by actual experiment with children of this age.

[248] *Compare* Benenson, *supra* note 3, at 720 (quoting 1937 estimate by U.S. Attorney General Homer Cummings), *with* Kates, *supra* note 17, at n.2 (unpaginated manuscript), *and* WEAPONS, CRIME AND VIOLENCE IN AMERICA, *supra* note 3, at ch. 2.

[249] The controversy surrounding the quadrupling of handgun sales over the past 20 years has tended to obscure the fact that long gun production has always exceeded that of handguns in the United States. For the seven years preceding 1980, for instance, long gun production outstripped handguns by 75%. Indicative of the phenomenal increase in long gun ownership is the fact that in that seven-year period more than one-third as many long guns were manufactured as in the entire preceding 70-year period. *Compare* G. NEWTON & F. ZIMRING, *supra* note 13, at 172 (giving 1899-1968 statistics), *with Production Figures of the American Firearms Industry 1973-1979*, AM. FIREARMS INDUS. MAG., Dec. 1980, at 32.

[250] NATIONAL SAFETY COUNCIL, 1982 ACCIDENT FACTS 15 (indicating a 68% decline in the per capita rate of accidental firearms fatalities from 1913-1932, when it was 2.5 per hundred thousand population, to 1978-81, when it was 0.8 per hundred thousand population).

[251] Private communication from National Safety Council (Mar. 28, 1983). This estimate is based on 1979 figures only, as no others are available.

densely populated municipal areas. By parity of reasoning, cognate restrictions (pg.264) might be placed on the kind of handguns which could be kept for self-defense or at least on kinds of ammunition. Such legislation might prohibit special high-penetration ammunition like the controversial KTW bullet, magnum ammunition for magnum revolvers, or full metal-jacketed ammunition for high-powered automatic pistols. Alternatively or cumulatively, the legislature might affirmatively limit those possessing high-velocity handguns to ammunition specially designed for low penetration, such as hollow point and semi-wadcutter.

C. *Licensing and Registration Requirements/or Gun Ownership*

The terms gun "licensing" and "registration" are susceptible to multiple interpretations, although most people, including nonlegal scholars and opinion poll formulators, seem lamentably ignorant of this fact.[252] Under the form known as discretionary or "restrictive" licensing, the applicant has no right to have a gun or to be issued a permit by the police *even if* he meets all statutorily prescribed criteria. His application may be denied simply because enough permits have already been issued to others, or because his reason for desiring a firearm is not deemed important or compelling enough.[253] Such a discretionary or restrictive licensing system, which is the form advocated by proponents of eliminating or radically reducing civilian gun ownership,[254] is clearly inconsistent with the second amendment's guarantee of a personal right to possess arms.

In sharp contrast to restrictive licensing are both "permissive" licensing and registration. Under a permissive licensing system the applicant is entitled to licensure as of right unless he falls into certain proscribed categories—*e.g.*, juveniles, convicted felons and the (pg.265) mentally unbalanced.[255] Registration, though often confused with licensing, literally means only that owners must identify themselves and their firearms to the police or some other designated authority.[256] Registration is generally tied to an overall control system, however, which, like permissive licensing, proscribes handgun ownership by classes of persons, such as felons and juveniles, with a high potential for misuse.[257] Neither registration nor permissive licensing are *per se* violative of the

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[252] *See* Kates, *Toward a History of Handgun Prohibition in the United States*, in RESTRICTING HANDGUNS, *supra* note 6, at 27-28.

[253] *See* Kates, *supra* note 17, at n.1 and accompanying text (unpaginated manuscript). In one jurisdiction, informally established administrative criteria automatically deny handgun-purchase permits to homosexuals, nonvoters, women who lack their husband's permission, and anyone whom the sheriff personally dislikes. New York City permits have been denied on such bases as: post-nasal drip that caused the applicant to repeatedly clear his throat during the application interview demonstrated that he was "too nervous" to be trusted with a handgun; a son who "had been in trouble with the police," although the applicant himself had "a spotless record." Hardy & Chotiner, *supra* note 6, at 205, 209-11. In 1957, the New York City Police Department announced that henceforth applications would be entertained only from those desiring handguns to defend property. Reasons like target shooting or gun collecting, which did not contemplate the use of the gun against another human being, were not deemed important or compelling enough to warrant receiving an application form. Kates, *supra* note 17, at n.1 and accompanying text (unpaginated manuscript).

[254] *See, e.g.*, G. NEWTON & F. ZIMRING, *supra* note 13, at 83 (coining the terms "restrictive" and "permissive" licensing, and favoring the former).

[255] *See, e.g.*, CONN. GEN. STAT. §§ 29-33 (1983) (handgun may be purchased only upon application, which is deemed granted unless within two weeks licensing authority rejects, based on finding of felony conviction); MASS. ANN. LAWS, ch. 140, § 129B (Michie/Law. Coop. 1981) (every applicant "shall be entitled to" issuance of a firearms identification card allowing purchase or possession of firearms unless he has been convicted of a felony within the last five years, is under treatment for drug addiction, or habitual drunkenness, has been an inmate of a psychiatric institution, or penetitiary, etc.).

[256] *See* Bruce-Briggs, *supra* note 9, at 42; Kaplan, *supra* note 13, at 17-18.

[257] *See, e.g.*, CAL. PENAL CODE §§ 12072, 12073 (Deering 1980).

amendment since they operate only to exclude gun ownership by those upon whom the amendment confers no right.[258]

Nevertheless, it has been argued that registration and permissive licensing cannot sustain scrutiny under the amendment, in that they undercut one of its most important purposes: deterring potential despots by the prospect that, in a country with perhaps 160 million civilian firearms, even an initially successful coup would result in internecine civil or guerilla warfare.[259] By destroying the anonymity of gun ownership, licensing or registration laws would make it possible for a despot to follow up his coup by confiscating all firearms.

Whatever the abstract cogency of this argument, the concept of anonymity or privacy in gun ownership profoundly departs from the conditions under which the Founders envisioned the amendment operating. Under the militia laws (first colonial, then state and eventually federal), every household, and/or male reaching the age of majority, was required to maintain at least one firearm in good condition. To prove compliance these firearms had to be submitted for inspection periodically.[260] While the firearms-maintenance provisions of state law and the First Militia Act have long since been repealed, federal law continues to classify the entire able-bodied male citizenry aged seventeen to forty-five as "the militia of the United States."[261] This being the country's ultimate military resource, men (pg.266) in this group remain liable for muster in dire military emergencies, *e.g.*, when necessary to keep order in the aftermath of an atomic attack or when both the Army and the National Guard have been deployed overseas.[262] Since one can scarcely argue that the First Militia Act violated the amendment,[263] it is difficult to see that it would be unconstitutional for Congress even today to require every member of the present militia to possess a firearm and regularly present it for inspection to assure that it is being maintained in good working order. Alternatively, and fully consistent with these purposes, a national gun registration scheme could allow federal authorities to mobilize selectively those members of the unorganized militia who are already armed and presumably familiar with the handling of weapons.[264] In sum, the historical background of the second amendment seems inconsistent with any notion of anonymity or privacy insofar as the mere fact of one's possessing a firearm is concerned.

D. *Laws Prohibiting Firearms to Felons*

Current federal, and many state, laws prohibit the possession of firearms by anyone who has been convicted of a felony.[265] Since a substantial majority of murderers appear to have prior felony records, it has recently been suggested that strong enforcement of such laws could effectively reduce

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258 As to felons, see text accompanying notes 266-67 *infra*. As to juveniles, suffice it to say that the militia laws specifically excluded those below the age of majority. *See* notes 46-48, 54 *supra*.

259 *See* Caplan, *supra* note 10, at 51; notes 281-82 *infra* and accompanying text.

260 *See* notes 46, 48-49 *supra* and accompanying text.

261 10 U.S.C. § 311 (1982).

262 *See* Sprecher, *supra* note 10, at 667.

263 *See* note 49 *supra* and accompanying text.

264 *See* note 193 *supra* and accompanying text as to the militia value of allowing individual ownership and home possession of firearms.

265 *See, e.g.*, 18 U.S.C. § 922(g), (h) (1982) (all firearms); CAL. PENAL CODE § 12021 (Deering 1980 & Supp. 1983) (handguns).

homicidal violence.[266] The constitutionality of such legislation cannot seriously be questioned on a theory that felons are included within "the people" whose right to arms is guaranteed by the second amendment. Felons simply did not fall within the benefits of the common law right to possess arms. That law punished felons with automatic forfeiture of all goods, usually accompanied by death. We may presume that persons confined in gaols awaiting trial on criminal charges were also debarred from the possession of arms. Nor does it seem that the Founders considered felons within the common law right to arms or intended to confer any such right upon them. All the ratifying convention proposals which most explicitly detailed the recommended right-to-arms amendment excluded criminals and the violent.[267] (pg.267)

E. *Laws Restricting the Right To Carry Arms Outside of the Owner's Own Premises*

Largely as a result of gun-owner organizations' own legislative proposals, the laws of every state but Vermont prohibit at least the carrying of a concealed handgun off one's own premises.[268] A common proposal, already the law in many jurisdictions, is to prohibit even the open carrying of handguns (or all firearms), with limited exceptions for target shooting and the like, without a permit.[269] A further proposal would impose a mandatory minimum jail sentence for the unauthorized carrying of a handgun (or any firearm) off the owner's premises.[270]

The constitutionality of such legislation under the amendment can be established on the same basis as the unconstitutionality of a ban on possession. Smith's research in seventeenth and eighteenth-century colonial statutes indicates that, while the statutes used "keep" to refer to a person's having a gun in his home, they used "bear" only to refer to the bearing of arms while engaged in militia activities.[271] Thus the amendment's language was apparently intended to protect the possession of firearms for all legitimate purposes, but to guarantee the right to carry them outside the home only in the course of militia service. Outside that context the only carrying of firearms which the amendment appears to protect is such transportation as is implicit in the concept of a right to possess—*e.g.*, transporting them between the purchaser or owner's premises and a shooting range, or a gun store or gunsmith and so on.

CONCLUSION

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[266] Kleck & Bordua, *The Factual Foundation for Certain Key Assumptions of Gun Control*, 5 LAW & POLY. Q. 271, 291-94 (1983).

[267] *See* notes 70, 72 & 83 *supra* and accompanying text.

[268] *See* VT. STAT. ANN. tit. 13, § 4003 (1974) (prohibition limited to carrying with intent to commit crime, or within a state institution or upon its grounds). As to the NRA's sponsorship of the Uniform Revolver Act, from which such legislation largely derives, see note 23 *supra*.

[269] *See, e.g.*, TEX. PENAL CODE ANN. § 46.02(a) (Vernon 1974).

[270] Scholars continue to debate whether this legislation has any significant impact on the crime rate. *Compare* Deutsch & Alt, *The Effect of Massachusetts' Gun Control Law on Gun-Related Crimes in the City of Boston* , 1 EVALUATION Q. 543 (1977), *with* Hay & McCleary, *Box-Tiao Time Series Models for Impact Assessment: A Comment on the Recent Work of Deutsch and Alt*, 3 EVALUATION Q. 277 (1979). For a general discussion of the strengths and weaknesses of the studies, see WEAPONS, CRIME AND VIOLENCE IN AMERICA, *supra* note 3, at 9-20. The latest and most negative assessment of the mandatory penalty device, a study done for the U.S. Department of Justice, is K. CARLSON, MANDATORY SENTENCING: THE EXPERIENCE OF TWO STATES (1982).

[271] *See* notes 58-62 *supra* and accompanying text.

The second amendment's language and historical and philosophical background demonstrate that it was designed to guarantee individuals (pg.268) the possession of certain kinds of arms for three purposes: (1) crime prevention, or what we would today describe as individual self-defense; (2) national defense; and (3) preservation of individual liberty and popular institutions against domestic despotism. It is often suggested that each of these purposes is obsolete and, therefore, that the amendment itself is obsolete. The national defense is fully provided for by our Armed Forces, supplemented by the National Guard, and a citizenry possessing only small arms could neither deter nor overthrow a domestic military despotism possessing tanks, aircraft and the other paraphernalia of modern war.[272] Likewise the possession of arms for self defense "is becoming anachronistic. As the policing of society becomes more efficient, the need for arms for personal self-defense becomes more irrelevant...."[273]

Yet evidence can be offered to dispute each of these claims of obsolesence. As to the necessity of personal self-defense it is regrettably the case that enormous increases in police budgets and personnel have not prevented, for instance, the per capita incidence of reported robbery, rape and aggravated assault from increasing by 300%, 400% and 300% respectively since 1960.[274] Increasingly police are concluding, and even publicly proclaiming, that they cannot protect the law-abiding citizen, and that it is not only rational for him to choose to protect himself with firearms,[275] but a socially beneficial deterrent to violent crime.[276] This is, of course, a highly

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[272] *See* Clark, *Reducing Firearms Availability: Constitutional Impediments to Effective Legislation and an Agenda for Research*, in FIREARMS & VIOLENCE, *supra* note 10.

[273] Levin, *supra* note 13, at 166-67.

[274] *Compare* FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT. OF JUSTICE, CRIME IN THE UNITED STATES - 1960, at 33, *with* FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT. OF JUSTICE, CRIME IN THE UNITED STATES - 1980. *See generally* WEAPONS, CRIME AND VIOLENCE IN AMERICA, *supra* note 3.

[275] *See, e.g.*, *Urban Merchants Find Guns Vital, And Most Police Units Now Agree*, N.Y. Times, July 20, 1974, § 1, at 39, col. 1; Kates, *supra* note 17, at n. 14 and accompanying text (unpaginated manuscript) (collecting similar evidence):

> Of over 5,000 officers who responded to a 1977 poll, 64% felt that an armed citizenry deters crime, and 86% stated that, if they were private citizens, they would keep a firearm for self defense.... These results may be subject to question since the poll was done for an organization which lobbies against handgun prohibition legislation. But in 1976 police chiefs and high ranking administrators were polled nationwide by the Research Division of the Boston Police Department which was then headed by Robert DiGrazia, an outspoken proponent of handgun prohibition. [The departmental survey reported]: "A substantial majority of the respondents looked favorably upon the general possession of handguns by the citizenry (excludes those with criminal records and a history of mental instability). Strong approval was also elicited from the police administrators concerning possession of handguns in the home or place of business." Indeed, by a bare majority, the respondents endorsed the idea that private citizens should be allowed to actually carry firearms with them at all times for self-protection. In answer to another question, the respondents opined that officers lower ranking than themselves would be even less favorably disposed toward "gun control."

[276] Fundamental to systematic discussion of these issues is the distinction between any self-defense value gun ownership may have and any potential crime deterrence value. For instance, G. NEWTON & F. ZIMRING, *supra* note 13, at 62-68, are unassailably correct in asserting that a gun owner rarely has the opportunity to *defend* his home or business against burglars because they generally take pains to strike only at unoccupied premises. But this fails to address two important issues of *deterrence.* First, Kleck and Bordua calculate that a burglar's small chance of being confronted by a gun-armed defender probably exceeds that of his being apprehended, tried, convicted and actually serving any time. One would then ask which is a greater deterrent: a slim chance of being punished or a slim chance of being shot? *See* Kleck & Bordua, *supra* note 266, at 282. Second, and even more important, fear of meeting a gun-armed defender may be one factor in the care most burglars take to strike at only unoccupied premises. In this connection, remember that it is precisely because burglary is generally a non-confrontation crime that victim injury or death is so very rarely associated with it—in contrast to robbery, where victim death is an all too frequent occurrence. If the deterrent effect of victim gun possession reduces victim death or injury by helping make burglary an overwhelmingly nonconfrontation crime, that *deterrent* benefits burglary victims and society in general, even though the *defense* value to the gun owners themselves is negligible.

controversial (pg.269) matter,[277] though the more recent scholarship has tended to vindicate the police point of view.[278] For present purposes it is unnecessary to resolve this controversy. The mere fact of its existence (pg.270) demonstrates that the asserted irrelevancy of self-defense today has not been so clearly proved as to justify the abandonment of an expressly guaranteed constitutional right.

The argument that an armed citizenry cannot hope to overthrow a modern military machine flies directly in the face of the history of partisan guerilla and civil wars in the twentieth century. To make this argument (which is invariably supported, if at all, by reference only to the *American* military experience in *non*-revolutionary struggles like the two World Wars[279]), one must indulge in the assumption that a handgun-armed citizenry will eschew guerrilla tactics in favor of throwing themselves headlong under the tracks of advancing tanks. Far from proving invincible, in the vast majority of cases in this century in which they have confronted popular insurgencies, modern armies have been unable to suppress the insurgents. This is why the British no longer rule in Israel and Ireland, the French in Indo-China, Algeria and Madagascar, the Portugese in Angola, the whites in Rhodesia, or General Somoza, General Battista, or the Shah in Nicaragua, Cuba and Iran

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Polls of convicted felons suggest that the average criminal has no more desire to meet an armed citizen than the average citizen has to meet an armed criminal:

> Surveys among prison populations uniformly find felons stating that, whenever possible, they avoid victims who are thought to be armed, and that they know of planned crimes that were abandoned when it was discovered that the prospective victim was armed. Indeed, in these surveys prison denizens expressed support for handgun prohibition on [the grounds] ... that it would make life safer and easier for the criminal by disarming his victims without affecting his own ability to attack them. Typical of prisoner comments, according to criminologist Ernest van den Haag of New York University, was: "Ban guns; I'd love it. I'm an armed robber."

Silver & Kates, *Self-Defense, Handgun Ownership, and the Independence of Women in a Violent, Sexist Society, in* RESTRICTING HANDGUNS, *supra* note 6, at 139, 151 (footnote omitted). These conclusions are confirmed by the largest such survey yet conducted. The as-yet-unpublished results of this study in ten major prisons across the nation by the Social and Demographic Institute of the University of Massachusetts, are set out in its director's letter of May 10, 1983, to the author [hereinafter cited as Prison survey].

[277] *See, e.g.*, G. NEWTON & F. ZIMRING, *supra* note 13, at 61-68; M. YEAGER, J. ALVIANI & N. LOVING, HOW WELL DOES THE HANDGUN PROTECT YOU AND YOUR FAMILY? (1976); Rushforth, Hirsch, Ford & Adelson, *Accidental Firearm Fatalities in a Metropolitan County (1958-1973)*, 100 AM. J. EPIDEMIOLOGY 499 (1975). The Rushforth study is the source of the well-known statistic that a handgun held by a homeowner is six times more likely accidentally to kill a relative or acquaintance of the homeowner than to kill a burglar. It and the Yeager study are assailed as partisan and unreliable by Wright, who concludes that the six-to-one figure is arrived at through statistical legerdemain. Wright, *The Ownership of Firearms for Reasons of Self-Defense*, (paper delivered to the 1981 annual meeting of the American Society of Criminology), *reprinted in* FIREARMS & VIOLENCE, *supra* note 10; *see also* Kleck & Bordua, *supra* note 266, at 281 (criticizes the Yeager study); Silver & Kates, *supra* note 276, at 152-56 (discusses the efficacy of citizens keeping guns for self-defense purposes).

[278] G. NEWTON & F. ZIMRING, *supra* note 13, at 61-68, conclude from the fact that householders in Detroit and Los Angeles killed few burglars in the mid-1960's, that gun owners rarely have the opportunity to foil criminal misconduct. The opposite is suggested by later figures from broader geographic areas and encompassing a fuller range of violent and confrontational felonies. Nationwide, 1981 FBI statistics show that citizens justifiably kill 30% more criminals than do police. In California, 1981 statistics show citizens justifiably killing twice as many felons as do the police; in Chicago and Cleveland it is three times as many. *See* Kleck & Bordua, *supra* note 266, at 290; Rushforth, Ford, Hirsch, Rushforth & Adelson, *Violent Deaths in a Metropolitan County—Changing Patterns in Homicide (1958-1974)* , 297 NEW ENG. J. MED. 531 (1977); Silver & Kates, *supra* note 276, at 156; Kates, *Can We Deny Citizens Both Guns and Protection?* , Wall St. J., Aug. 17, 1983, at 22, col. 6. Similar statistics for Houston-Dallas are reported in *Citizens' Gun Use on Rise in Houston*, N.Y. Times, Nov. 21, 1982, § 1, at 27, col. 1.

Moreover, justifiable homicide statistics provide an inherently distorted, under-representative picture of the value of civilian gun ownership. By analogy, the value of the police is not measured simply by how many criminals they kill, but rather by the entire universe of criminal activity deterred, as well as those criminals they wound, apprehend or scare off. Considering evidence on the entire universe of defensive handgun uses, Wright concludes that they are used at least as frequently in defense against criminals as they are by criminals in attacking citizens. *See* Wright, *supra* note 277. This conclusion is buttressed in Prison Survey, *supra* note 276, which reports that about 50% of the felons questioned (and a much higher proportion of the violent felons) stated that they had been interrupted, wounded, arrested or scared off by an armed citizen.

[279] *See, e.g.*, DeZee, *National Rifle Association and Gun Control*, in BUSINESS LOBBYING AND SOCIAL GOALS 212 (1979).

respectively—not to mention the examples of the United States in Vietnam and the Soviet Union in Afghanistan.[280] It is, of course, quite irrelevant for present purposes whether each of the struggles just mentioned is or was justified or whether the people benefitted therefrom. However one may appraise those victories, the fact remains that they were achieved against regimes equipped with all the military technology which, it is asserted, inevitably dooms popular revolt.

Perhaps more important, in a free country like our own, the issue is not really *overthrowing* a tyranny but *deterring* its institution in the first place. To persuade his officers and men to support a coup, a potential military despot must convince them that his rule will succeed (pg.271) where our current civilian leadership and policies are failing. In a country whose widely divergent citizenry possesses upwards of 160 million firearms, however, the most likely outcome of usurpation (no matter how initially successful) is not benevolent dictatorship, but prolonged, internecine civil war:

> A general may have pipe dreams of a sudden and peaceful take-over and a nation moving confidently forward, united under his direction. But the realistic general will remember the actual fruits of civil war—shattered cities like Hue, Beirut, and Belfast, devastated countrysides like the Mekong Delta, Cyprus, and southern Lebanon.[281]

Even if the general's ambition does not recoil from the prospect of victory at such cost, will his officers and men accept it? Additionally, he and they must evaluate the effect of civil war in leaving the country vulnerable to the very foreign enemies their coup is designed to unite it against:

> Because it leads any prospective dictator to think through such questions, the individual, anonymous ownership of firearms is still a deterrent today to the despotism it was originally intended to obviate.
>
> Implicit in the Bill of Rights, as in the entire structure of our Constitution, are the twin hallmarks of traditional liberal thought: trust in the people, and distrust in government, particularly the military and the police. We are apt to forget these constant principles in light of our government's generally quite good record of exerting power without abusing it. But the deterrent effect of an armed citizenry is one little-recognized factor that may have contributed to this. In the words of the late Senator Hubert Humphrey, "[t]he right of citizens to bear arms is just one more guarantee against arbitrary government, one more safeguard against the tyranny which now appears remote in America, but which historically has proved to be always possible."[282]

Moving to the argument that a militia is not necessary to the national defense, for constitutional purposes the issue appears to have been resolved by Congress. For Congress has determined that it remains necessary to classify the entire able-bodied male population aged seventeen to forty-five as the militia of the United States, subject to a potential call to arms in the

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[280] *See* Marina, *Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective*, in FIREARMS & VIOLENCE, *supra* note 10; Kessler, *Gun Control and Political Power*, 5 LAW & POLY. Q. 381 (1983).

[281] Hardy, *The Second Amendment as a Restraint on State and Federal Firearm Restrictions*, in RESTRICTING HANDGUNS, *supra* note 6, at 171, 184.

[282] *Id.* at 184-85.

case of dire military emergency.[283] Moreover, the recent military history of the United States (pg.272) shows that such militia units are still being called upon in time of military emergency.[284]

Finally, arguments as to whether the amendment is obsolete are of at most tangential import to its proper interpretation by the courts. After all, the second amendment is not the only provision of the Bill of Rights which is assertedly obsolete (or with the idea of which some Americans may today just happen to disagree). For instance, a judge may be absolutely convinced by scientific argument that the premise of free will which underlies freedom of religion has been invalidated by the modern psychological concept of brainwashing. He may believe a mother's anguished claims that only by such insidious techniques could her son have been induced by a "cult" to drop out of college and abandon the beliefs and lifestyle to which she raised him. Nevertheless, so long as the first amendment stands, no judge is free to disregard as obsolete the rights it confers on that young man and commit him to the custody of a "deprogrammer."[285] The seventh amendment, to take another example, clearly is obsolete, at least insofar as it requires jury trials in civil cases exceeding twenty dollars in controversy. Nevertheless, the courts continue faithfully to apply that amendment's dictate in all cases fairly covered by its literal wording and original spirit.[286] Though courts sometimes give constitutional rights *additional* scope in order to effectuate what is deemed to be their original intent, courts have no authority to reduce or eliminate the plain terms of a constitutional guarantee because they disagree with that intent or view it as obsolete.[287] The duty of the courts is to enforce the Constitution, not to (pg.273) arrogate to themselves the power to delete its provisions.[288] Generally

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[283] 10 U.S.C. § 311(1982). Sprecher, *supra* note 10, at 667, notes that the unorganized militia constitutes the only available substitute for national defense purposes in circumstances, like those of World War II, in which both the Army and the federalized National Guard have been deployed overseas. Recognizing that the unorganized militia can "not prevent an atomic attack," its mobilization may nevertheless be necessary to "preserve internal order after one." "Thus militias (by whatever name) are as important as ever, and perhaps more so in the atom-and-missile age...."

[284] As late as Pearl Harbor, a military emergency was deemed to require mustering individually armed citizens. Because available military personnel were insufficient to repel the Japanese invasion that seemed imminent, the Governor of Hawaii called upon citizens to use their personal arms in manning checkpoints and remote beach areas. (Ironically, many of those who responded were Japanese-Americans whose colleagues in California were soon to be imprisoned without benefit of trial or habeas corpus.) Across the country the unorganized militia proved a successful substitute for the National Guard, which was federalized and activated for overseas duty. OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE, U.S. DEPT. OF DEFENSE, U.S. HOME DEFENSE FORCES STUDY, 32, 34 (1981). Members of the unorganized militia, many of whom belonged to gun clubs and whose ages ranged from 16 to 65, served without pay and provided their own arms. *Id.* at 58, 62-63. The U.S. government, however, not only could not supply sufficient arms to the militia but "turned out to be an Indian giver" by recalling rifles. M. SCHLEGEL, VIRGINIA ON GUARD 131 (1949).

[285] *See, e.g.*, Rankin v. Howard, 633 F.2d 844 (9th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981).

[286] *See, e.g.*, Curtis v. Loether, 415 U.S. 189 (1974) (applying seventh amendment to damage actions for housing discrimination under the 1968 Civil Rights Act); Pernell v. Southall Realty, 416 U.S. 363 (1974) (applying seventh amendment to actions under special District of Columbia statute).

[287] *See, e.g.*, State v. Kessler, 289 Or. 359, 360, 614 P.2d 94, 95 (1980):

> We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.

Cf. note 28 *supra* (discussing the proper role of original intent in constitutional adjudication).

[288] Hamilton's explanation of the judicial function in THE FEDERALIST No. 78 remains as true today as it was when he penned it:

> [T]he right of the courts to pronounce legislative acts void ... [does not] by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former.

speaking, the power to withdraw a right explicitly guaranteed to the people is reserved exclusively to their state and federal legislatures in a process which is ornately hedged with safeguards, not the least of which is its protracted length.[289] As Mr. Justice Frankfurter noted in reference to criticism of the privilege against self-incrimination as an obstacle to the needs of law enforcement in an era of rampant crime: "If it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion."[290]

Unmistakably the Founders intended the second amendment to guarantee an individual right to possess certain kinds of weapons in the home certain kinds of circumstances. The precise details and parameters of that guarantee remain significantly unclear. In part this is because neither federal, state nor local governments have generally moved beyond gun control to the extreme of confiscation. In even larger part the delay in defining its parameters is attributable to the diversion and monopolization of legal analysis by the false dichotomy between the exclusively state's right and the unrestricted individual right interpretations. In fact, the arms of the state's militias were and are the personally owned arms of the general citizenry, so that the amendment's dual intention to protect both was achieved by guaranteeing to the citizenry a right to possess arms individually. Having dispelled the ahistorical exclusively state's right notion, it will become possible to move forward to analyzing how rational, effectual gun control strategies can be reconciled with the constitutional scheme.

THE FEDERALIST No. 78, at 577-78 (A. Hamilton) (J. Hamilton ed. 1864).

[289] We are reminded by Mr. Justice Douglas of Mr. Chief Justice Marshall's dictum that "it would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of [the Constitution] expressly provide, shall be exempted from its operation." Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69, 77 (1946).

[290] Ullmann v. United States, 350 U.S. 422, 427-28 (1956) (quoting Maffie v. United States, 209 F.2d 225, 227 (1st Cir. 1954)).