An Uncertain Right: The Second Amendment and the Assault Weapon Legislation Controversy

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Weapons change but man who uses them changes not at all.

Gen. George Smith Patton

"[T]he right of the people to keep and bear Arms," although rarely debated by legal scholars, is often the focus of political and legal controversy. In recent years, the United States has exper-

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1 Letter from Gen. George Smith Patton to Cadet George S. Patton IV (June 6, 1944) (written one year before Gen. Patton's death).
2 U.S. Const. amend. II. The Second Amendment reads, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” Id. At the time of enactment, copies of the text were reproduced by hand, and the capitalization and punctuation of the amendment are therefore not uniformly documented. See David T. Hardy, The Second Amendment and the Historiography of the Bill of Rights, 4 J.L. & Pol. 1, 1 n.1 (1987).
5 Although the Second Amendment is not the only academically-ignored section of the Bill of Rights, the others are neglected for good reason. See Levinson, supra, at 640-41 & n.25. For instance, the Third Amendment, which prohibits the quartering of soldiers “in any house, without the consent of the owner,” is ignored by legal scholars because it has virtually no contemporary significance. Id.; see also infra note 28 (text of Third Amendment).

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enced alarming increases in violent crime, and although much of


This topic is continuously the subject of articles and editorials in major newspapers across the country. See Levinson, *supra* note 3, at 641. In fact, at the time of the writing of this Note, over 90 articles and editorials concerning gun control have appeared in major newspapers during 1991 alone. See, *e.g.*, Carl Ingram, *Lungren, Roberti OK Rewriting of '89 Gun Law*, L.A. Times, Aug. 29, 1991, at A3 (California’s law banning military style assault guns rewritten to ensure enforceability); Wayne King, *A Lesson in Beating Gun Control to the Draw*, N.Y. Times, May 26, 1991, § 4, at 6 (New Jersey State House succumbed to lobbyist pressure and proposed bill exempting sporting guns from assault rifle ban); *A Gun Law to Be Proud of*, L.A. Times, Jan. 1, 1991, at B4 (editorial condoning implementation of ban on sale of military-style assault weapons). Furthermore, it is of major concern to the National Rifle Association ("NRA") and other associations organized by gun enthusiasts. See *NRA Bylaws*, art. II, reprinted in *Freedman*, *supra* note 3, at 34. The NRA Bylaws declare the following to be the organization’s main purposes and objectives:

1. To protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens;

2. To promote public safety, law and order, and the national defense;

3. To train members of law enforcement agencies, the armed forces, the militia, and the people of good repute in marksmanship and in the safe handling and efficient use of small arms;

4. To foster and promote the shooting sports, including the advancement of amateur competitions in marksmanship at the local, state, regional, national, and international levels;

5. To promote hunter safety, and to promote and defend hunting as a shooting sport and as a viable and necessary method of fostering the propagation, growth, conservation, and wise use of our renewable wildlife resources.

The Association may take all actions necessary and proper in the furtherance of these purposes and objectives. *Id.* Along with the Citizens Committee for the Right to Keep and Bear Arms, the NRA is the most powerful pro-gun faction in America. See Udulutch, *supra*, at 19 n.2. With an operational budget of over $85,000,000, the NRA is considered to be one of the most powerful and influential lobbyist groups in the nation. See Vivienne Walt, *NRA Weapon Against Gun Ban Grows Bigger*, Newday (Nassau & Suffolk ed.), Feb. 24, 1991, at 13, 47.

* See U.S. Dep’t of Justice, *1990 Uniform Crime Reports* 7 (1991) [hereinafter Crime Reports]. Statistics indicate that in the United States, a violent crime is committed every 17 seconds. *Id.* From 1989 to 1990 alone, homicides increased nine percent, and both robber-
the problem may be traced to poverty, unemployment, lack of education, and the prevailing drug crisis, many people perceive the proliferation of guns on our streets as the most immediate cause of this upsurge in violent crime. Consequently, federal, state, and local legislators have become embroiled in debates regarding the enactment of legislation to increase the regulation of firearm sales in general and to ban the sales of the controversial "assault weapons."

The gun control debate of course centers on the Second
Amendment, with those in opposition to gun control, including the National Rifle Association ("NRA"), asserting that the amendment guarantees an individual right to keep and bear arms and gun control advocates claiming that the amendment protects only the state's right to maintain organized military units. Although proponents of both views raise compelling constitutional, political, and sociological questions, gun control debates have, on the whole, been influenced more by passion than by rational thought.

This Note will examine the constitutional right to keep and bear arms and the controversy surrounding assault weapon legislation. Part One explores the historical background of the right to keep and bear arms from the common law to the enactment of the Second Amendment. Part Two analyzes the two principal interpretations of the amendment, discusses its application against the states, reviews judicial interpretation of the Second Amendment, and suggests that, because the debate is influenced more by political ideology than by sound constitutional interpretation, both gun control advocates and individual rights proponents have advanced theories that conflict with their traditional interpretations of the Constitution. Finally, Part Three focuses on recent assault weapon legislation and examines the legal challenges to and the practical considerations of this type of gun control.

I. HISTORICAL BACKGROUND OF THE SECOND AMENDMENT

A. Colonial America

During this country's colonial period, gun ownership "was
deemed a basis of character and citizenship."12 Many of the Founding Fathers, including George Washington, Thomas Jefferson, and James Madison, owned and collected firearms.13 Indeed, at least one commentator has observed that a certain religious quality marked the relationship between a man and his weapon.14

Just as much of our common law is traceable to the common law of England, so too is the issue of gun ownership.15 In 1689 the

12 See Freedman, supra note 3, at 45.
13 See id. President Washington was an avid collector of guns; according to some estimates, he owned “more than fifty firearms, including, rifles, shotguns, and pistols.” Id.; see also Kates, supra note 3, at 228 (“[Washington’s] writings are full of laudatory references to various firearms he owned or examined.”).

Thomas Jefferson “was also strongly in favor of gun ownership.” Id. at 229. In a letter to his 15-year-old nephew, Jefferson wrote:

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.

Id. (quoting The Jeffersonian Cyclopedia 318 (John P. Foley ed., 1967)).

James Madison wrote that the colonists should never fear their government because of “the advantage of being armed, which the Americans possess over the people of almost every other nation.” The Federalist No. 46, at 321 (James Madison) (Jacob E. Cooke ed., 1961). During Virginia’s constitutional convention, Patrick Henry put forth the proposition that “[t]he great object is that every man be armed” and that “[e]veryone who is able may have a gun.” See Kates, supra note 3, at 229 (quoting 3 Jonathan Elliot, Debates in the Several State Conventions 45 (2d ed. 1836)).

14 See Kates, supra note 3, at 229 (quoting 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, University of Michigan)).

15 See Ehrman & Henigan, supra note 8, at 7 (central thesis of gun control opponents is that old common law of England supports fundamental, personal right to be armed); Levinson, supra note 3, at 647 (contemporary American historiography links development of American political thought, including its constitutional aspects, to republican thought in England); see also Dowdut, supra note 2, at 60 (discussing historical background and intent of Framers of Constitution).

Those persons asserting that the right to keep and bear arms existed at common law usually trace its history to Henry II’s Assize of Arms of 1181. See, e.g., Ehrman & Henigan, supra note 8, at 8 (discussing decree and related subsequent events); Halbrook, supra note 3, at 38-40 (same). The Assize of Arms reads as follows:

1. Let every holder of a knight’s fee have a hauberk [(a tunic of chain mail)], a helmet, a shield and a lance. And let every knight have as many hauberks, helments, shields and lances, as he has knight’s fees in his demesne.
2. Also, let every free layman, who holds chattels of rent to the value of 16 marks, have a hauberk, a helmet, a shield and a lance. Also, let every layman who holds chattels worth 10 marks have an ‘aubergel’ [(a breastplate)] and a headpiece of iron, and a lance.
3. Also, let all burgesses and the whole body of freemen have quilted doublets and a headpiece of iron, and a lance.
4. Moreover, let each and every one of them swear that before the Feast of St.
Protestant-dominated British Parliament, alarmed by King James II’s support for the growing Catholic movement in England, enacted a bill of rights containing a provision that protected an individual’s right to keep and bear arms. The Protestants perceived this right as a fundamental principle of liberty and as being es-

Hilary he will possess these arms and will bear allegiance to the lord king, Henry namely the son of the Empress Maud, and that he will bear these arms in his service according to his order and in allegiance to the lord king and his realm. And let none of those who hold these arms sell them or pledge them or offer them, or in any other way alienate them; neither let a lord in any way deprive his men of them either by forfeiture of gift, or as a surety or in any other manner.

5. If anyone bearing these arms shall have died, let his arms remain for his heir. Id. at 38. Similar provisions were set out in acts by Henry III and Edward I. Id. at 39-40.

As with the right to keep and bear arms, the regulation of weapons seemed to flow from the English common law. See FREEDMAN, supra note 3, at 43 (discussing arms limitations in early English law); HALBROOK, supra note 3, at 40-43 (discussing gun control laws of absolute monarchs); Ehrman & Henigan, supra note 8, at 8 (possession of arms regulated since early times).

See Ehrman & Henigan, supra note 8, at 11-13. After ascending to the throne, James II increased the size of the army, began replacing Protestant army officers with Catholics, id. at 11-12, and sought to disarm the Protestants. See HALBROOK, supra note 3, at 43-48. Fear of the strength of the Catholic movement in England caused the “Glorious Revolution” in 1688, resulting in James II’s abdicating the throne and fleeing the country. See id. at 43. The aim of the Revolution was to abolish the standing army of James II, estimated at 53,000, see Ehrman & Henigan, supra note 8, at 12, and to restore to the Protestants the right to keep and bear arms. See HALBROOK, supra note 3, at 43.

Ehrman & Henigan, supra note 8, at 11-14; Newman, supra note 4, at 4; see also HALBROOK, supra note 3, at 43-46. “These rights to petition and to keep and bear arms, the only individual rights recognized in the English Bill of Rights, reappeared exactly a hundred years later in a more absolute form as Articles I and II of the American Bill of Rights.” Id. at 46. The pertinent section of the English Bill of Rights relating to the Second Amendment reads as follows:

Whereas the late King James II did endeavor to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom by ... raising and keeping a standing army within this kingdom without the consent of Parliament and quartering soldiers contrary to law, by causing several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law ... and ... for the vindicating and asserting of ancient rights and liberties ... [we] declare ... that the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against the law; that the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law.

Ehrman & Henigan, supra note 8, at 12 (quoting 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 42-43 (1971) (alterations in original)). But see id. at 14 (historical evidence does not suggest, however, that English Bill of Rights established individual right to use arms for any lawful purpose).

See Newman, supra note 4, at 4 (1689 Bill of Rights codified precepts which were already considered fundamental principles of liberty). See generally HALBROOK, supra note 3, at 47 (discussing common law of England). “I cannot see, why arms should be denied to any man who is not a slave, since they are the true badges of liberty . . . .” Id. (quoting
sential to the preservation of their own lives.\textsuperscript{19}

In colonial America, the tendency to adopt the basic precepts of English law, together with the fear of attack by Indians and the general uncertainty of the new world, resulted in the approval of individual gun ownership.\textsuperscript{20} Weapons possession was a natural by-product of the times,\textsuperscript{21} and in some instances the entire adult male citizenry was affirmatively required to possess arms.\textsuperscript{22}

B. The Militia

The militia, well established in England, was employed in the colonies to provide law enforcement and protection against attack.\textsuperscript{23} The militia was comprised of every able-bodied adult male,

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Andrew Fletcher, Political Works 35 (1749) (Robert Watson ed., 1798)). "Richard Henry Lee opined that "to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them . . . ." Dowlut, supra note 2, at 65 (quoting Letters From the Federal Farmer to the Republican 124 (1978)).
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\textsuperscript{19} See Ehrman & Henigan, supra note 8, at 13 (commentators suggest that England's Bill of Rights "assert[ed] the right of the Protestants to protect themselves from persecution by their Catholic enemies"); see also Freedman, supra note 3, at 44. "This right of self-defense was apparently found in the law of nature and 'is not, nor can be, superseded by any law of society.'" Id. (quoting Michael Foster, Crown Cases 273-74 (London, 1776)); Kates, supra note 3, at 230 (Founders believed "self-defense [was] an inalienable natural right").

\textsuperscript{20} See Freedman, supra note 3, at 44. The Indians, themselves victims of invasions by the English, French, Dutch, and Spanish, at times responded aggressively, and this threat to the colonists, together with other conditions prevailing on the frontier, "required every citizen to go armed for his own defense." Frederick Bernays Wiener, The Militia Clause of the Constitution, 54 Harv. L. Rev. 181, 186 (1940).

\textsuperscript{21} See Freedman, supra note 3, at 44.

\textsuperscript{22} See Kates, supra note 3, at 215 n.46. "In 1623, Virginia forbade its colonists to travel unless they were 'well armed.'" Id. In 1631, Virginia's colonists were bound to participate in target practice on Sundays and had to bring their weapons to church. Id. Virginia gun ownership law was supplemented in 1658 with a requirement that all households have a functioning firearm, and in 1673, the State provided indigent citizens with firearms and required them to repay the government for the weapon at a reasonable price when they had the means to do so. Id.

Georgia required that "'every male white person' carry a rifle or pistol every time he attended church, and church officials were empowered to search each person no less than fourteen times per year to insure compliance." Freedman, supra note 3, at 22 (quoting Act for the Better Security of the Inhabitants by Obliging the Male White Persons to Carry Firearms to Places of Public Worship (1770), reprinted in 1775-1780 Georgia Colonial Laws 471 (1932)).

In Massachusetts, the first session of the legislature required both free men and indentured servants to own a weapon, and later, in 1644, imposed a fine upon any person who was not armed. Kates, supra note 3, at 215 n.46.

\textsuperscript{23} See Kates, supra note 3, at 214-15.
with each member expected to supply his own weapon and ammuni-
tion and to be on call for drills and periodic duty.24

Influential Federalists, including George Washington, dissatisfied
with the performance of the militia during the Revolutionary
War25 and believing that uniformity in arms, discipline, and train-
ing were necessary for effective protection against foreign inva-
sion,26 sought the establishment of either a professional standing
army or a centrally controlled militia.27 The Anti-Federalists, con-
cerned with the threat of federal government oppression, strongly
opposed the Federalist plan, preferring instead the placement of
military power “in the hands of civil authorities and the people at
large.”28 This conflict was a continual source of tension between

24 See id. at 215; see also Freedman, supra note 3, at 21-25 (commenting on well-regu-
lated militia); Wiener, supra note 20, at 182 (discussing historical background of colonial
militia). “[E]very adult male was required to keep and bear his own arms, for there were no
police protection and no standing army in peacetime.” Freedman, supra note 3, at 21.

A militiaman was a citizen soldier in the truest sense. Militia were not organized
and trained to fill in for a standing army, or to build sandbag dikes after a heavy
rain. They were designed as a collection of ordinary citizens of all callings, each
with a personal, deep stake in his family's community and in the polity of which
he was a member.

Newman, supra note 4, at 4.

25 See Ehrman & Henigan, supra note 8, at 20; Wiener, supra note 20, at 182 (deficien-
cies of militia were subject of “bitter complaint”). George Washington stated that “‘[t]o
place any dependence on [the] Militia, is, assuredly, resting upon a broken staff . . . . If I
was called upon to declare upon Oath . . . whether the Militia have been most serviceable
or hurtful upon the whole; I should subscribe to the latter.'” Id. at 183 (quoting Letter from
George Washington to the President of Congress (Sept. 24, 1776), reprinted in 6 The Writ-
ings of George Washington 106, 110, 112 (1932)).

26 See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 330-31 (Max Farrand ed.,

27 See Ehrman & Henigan, supra note 8, at 20. George Washington preferred a militia
consisting of a body of younger men from the community “who should be properly officered,
and periodically trained under uniform supervision.” Wiener, supra note 20, at 183.

28 Freedman, supra note 3, at 46; see also Ehrman & Henigan, supra note 8, at 21;
Kates, supra note 3, at 225. The Anti-Federalist's were concerned with giving control over
the militia to a central authority. Ehrman & Henigan, supra note 8, at 21. “Having just
fought a war against a powerful ruler who used the military as his tool of enforcement, many
. . . were not anxious to give their militias to the new central government.” Id.

The Anti-Federalists believed that the original Constitution, as written prior to the en-
actment of the Bill of Rights, was unclear as to whether the states had the power to arm and
train the militia if Congress failed to do so. Id. at 22. The fear of federal disarmament of
the states fueled demand for the enactment of the Second Amendment. Id. However, the Anti-
Federalists believed that the protection supplied by the Second Amendment would be insuf-
ficient if control of state militias was given to the federal government. Kates, supra note 3,
at 225 n.87. There was concern that the federal government might abuse its power over the
militia “either by making militia service intolerable or by failing to organize the militia at
all”—thus necessitating the formation of a standing army. Id. Such was the case in England
the Federalists and the Anti-Federalists during the debates on ratification of the Constitution.\textsuperscript{28}

Notwithstanding their differences regarding the establishment of a centralized military, references throughout the debates to self-protection and expressions of concern regarding the federal government's power to outlaw weapons and to disarm the people suggest that both sides believed in the individual right to keep and bear arms.\textsuperscript{30} In fact, given that the establishment of a professional police force was many years away when the Constitution was adopted and that several states ratifying the Constitution made recommendations similar to the New Hampshire proposal, which "include[d] a bill of rights providing 'Congress shall never disarm any citizen, unless such as are or have been in actual rebellion,'"\textsuperscript{31} one can argue that the one thing Federalists and Anti-Federalists agreed on was that citizens should be allowed to arm themselves.

However, historical evidence of the Framers' actual intent regarding the scope of the Second Amendment remains unclear. Per-

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\textsuperscript{28} See Wiener, supra note 20, at 184. "The Debates reflect, in part at least, widespread and exaggerated fears of standing armies." Id.; see also supra note 17 (section of English Bill of Rights addressing standing armies).

\textsuperscript{30} See Thrie, supra note 3, § 5-2, at 299 n.6.; Dowlut, supra note 2, at 62; Kates, supra note 3, at 221-22.

That the people have a right to bear arms for the defence [sic] 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 . . . . Dowlut, supra note 2, at 62 (quoting \textit{Pennsylvania and the Federal Constitution} 1787-1788 422 (1888)). But see Ehrman & Henigan, supra note 8, at 20 (nowhere in constitutional debates was there discussion of right to keep or bear arms.).

\textsuperscript{31} Kates, supra note 3, at 222; see also supra note 24 (referring to lack of police protection).
suasive authority exists to support conflicting theories for interpreting the amendment. Because of this uncertainty, the onus is on the courts to provide a contemporary construction of the right to keep and bear arms.

II. INTERPRETING THE RIGHT TO KEEP AND BEAR ARMS

A. The Text: State's Right v. Individual Right

"No one has ever described the Constitution as a marvel of clarity, and the Second Amendment is perhaps one of the worst drafted of all of its provisions." However, the amendment is unlike other amendments in the Bill of Rights in that it contains its own preamble. The preamble—"A well regulated militia, being necessary to the security of a free State . . ."—has been the focus of the debate between those who believe that the Second Amendment protects only the states' right to establish a military force and those who view the amendment as protecting the individual's right.

Gun control advocates, as well as the majority of courts and scholars, support the state's right view, asserting that the pream-
ble is dispositive and limits the right to bear arms to the context of a state organized militia. In contrast, opponents of gun control argue that because the amendment addresses “the right of the people to keep and bear arms,” it creates an unequivocal right to be asserted by individuals. They contend that the Framers would not have employed the words of an individual guarantee if they were concerned only with the necessity of a militia.

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See Ehrman & Henigan, supra note 8, at 42-50; Kates, supra note 3, at 207, 214; Lund, supra note 35, at 105; Newman, supra note 4, at 4; see also Freedman, supra note 3, at 67-68, 78 (state's right view justifies gun control as constitutional). Professor Tribe, in his footnote on the Second Amendment, see supra note 3, indicated that the preamble does in fact explain the purpose of the Amendment and that “the framers and ratifiers [of the Constitution] opted against leaving to the future the attribution of [other] purposes . . . choosing instead to explicitly legislate the goal of the Amendment in terms of which the provision was to be interpreted.” Tribe, supra note 3, § 5-2, at 299 n.6 (quoting John H. Ely, Democracy and Distrust 95 (1989)).

See Kates, supra note 3, at 218 (state's right view not in accord with constitutional construction); Lund, supra note 35, at 107 (Second Amendment mentions “right of the people' to keep and bear arms” rather than right of states to regulate militia); see also Freedman, supra note 3, at 35-36 (listing numerous articles advocating individual right approach); Hardy, supra note 2, at 1 n.3 (support of individual right view exploded from 1982 to 1987). See generally Dowlut, supra note 2, at 60-71 (historical background and constitutional interpretation supports individual guarantee to arms).

In 1975, a national poll revealed that 70% of the general public believed that the Second Amendment guarantees an individual's right to bear arms, while an additional 3% thought it gave both an individual right to bear arms and a state right to establish an official armed militia. See Kates, supra note 3, at 207 n.11; Lund, supra note 35, at 105 n.3. Curiously enough, polls also indicate wide public support for some form of gun control. See Kates, supra note 3, at 207 n.11.

See Dowlut, supra note 2, at 64-68; Kates, supra note 3, at 214-20; Levinson, supra note 3, at 645-50; see also Lund, supra note 35, at 107 (equating “right of the people” with “right of the states” violates Constitution's obvious meaning); cf. Wendy Brown, Guns Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's the Embarrassing Second Amendment, 99 Yale L.J. 661, 661 (1989) (Second Amendment may be “token and vehicle of collective civic resistance against the domestic imperialism of centralized state power”). But see Ehrman & Henigan, supra note 8, at 32-34 (Framers never intended to provide for individual right).

Individual right proponents observe that the Framers of the Constitution defined the term "militia" as "every able-bodied man." See Alan M. Gottlieb, The Rights of Gun Owners 7 (1981). Indeed, in the twentieth century, "militia" has been defined in title 10 as "the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia." 10 U.S.C. § 311(b)(2) (1988) (emphasis added). Furthermore, according to the individual right view, "well regulated" does not mean "government controlled"; at the time of the Second Amendment's ratification, the term meant "properly disciplined." See Hardy, supra note 37, at 628 n.329.
As with many other constitutional dilemmas, the issue is not disposed of easily. Proponents of the state’s right and individual right theories firmly support their extreme views, ignoring the possibility that the amendment was intended to recognize both “the importance of the militia to a free state” and the “individual right to own and carry arms.” Thus, it is up to the courts to reconcile the meaning of the amendment’s text and to uncover its true significance.

B. Incorporation Against the States

Advocates of the individual right view, believing that their absolutist interpretation of the Second Amendment is applicable against the state’s via the Fourteenth Amendment, contend that the states, like the federal government, are precluded from regulating against individual gun ownership. To support their view, they

Another source of support for the individual right interpretation is James Madison’s original design for the Bill of Rights. See Lund, supra note 35, at 107 n.3. Madison planned to insert the Bill of Rights into the text of the original document. Id. Specifically, the right to keep and bear arms was to be inserted not into article I, § 8 or article I, § 10, where the military and militia clauses are situated, but into article I, § 9, along with the First Amendment. Id. Article I, § 9 is the “principle ‘individual rights’ section of the original Constitution.” Id. But cf. Ehrman & Henigan, supra note 8, at 32 (Madison’s original draft of Second Amendment focused on military).

See Earl R. Kruschke, The Right to Keep and Bear Arms 158 (1985) (“right to keep and bear arms is nothing less than a continuing American dilemma”).

Hardy, supra note 2, at 2-3, 59. “[N]either the collective [right] nor individual school of thought is correct insofar as it claims to entirely explain the [S]econd [A]mendment, and both are correct, insofar as they purport to offer partial explanations.” Id. at 3; see also Newman, supra note 4, at 4.

See Hardy, supra note 2, at 59-62; see also supra notes 12-31 (discussing historical background of Second Amendment).

See Hardy, supra note 2, at 5. As part of the celebration of 200th anniversary of the Bill of Rights, Charles W. Newman stated that

[t]he Second Amendment should be a constant reminder to both the citizenry and the government of one of the basic precepts of democracy: that the government serves by the authority of the people, and at the pleasure of the people. That we have the right to keep and bear arms cautions us to protect our civil liberties jealously. Each of us is the ultimate guarantor of his or her own freedoms, and the freedoms of another. It is a responsibility not to be taken lightly, and one to be fully considered . . . .

Id.

See Halbrook, supra note 3, at 107-53; Restricting Handguns: The Liberal Skeptics Speak Out 180-81 (Don B. Kates, Jr. ed., 1979) [hereinafter Restricting Handguns]; Kates, supra note 3, at 253-58; Levinson, supra note 3, at 652-54; Lund, supra note 35, at 112-13. Individual right advocates believe that the right to keep and bear arms applies to the states because it meets the criteria set by the Supreme Court in determining whether a “provision of the Bill of Rights is so fundamental as to justify [its] incorporation”: (1) it is
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refer to the legislative history of the Civil Rights Act of 1866 and the Fourteenth Amendment, both enacted in response to the "Black Codes," which were adopted in many southern states to prevent freed slaves from sharing the rights enjoyed by other citizens, including the right to possess arms.46 Citing congressional intent to guarantee for all citizens the rights enumerated in the Bill of Rights, individual right advocates cannot see "how the Second Amendment could not be considered incorporated against the states by the Fourteenth."47

State's right advocates, of course, oppose the incorporation view,48 maintaining that even if the Second Amendment guarantees an individual right to keep and bear arms—which they do not believe it does—the Supreme Court in United States v. Cruikshank,49 Presser v. Illinois,50 and Miller v. Texas51 had already established that the amendment's restrictions apply only against the federal government.52 However, their reasoning cannot withstand deep rooted in our heritage; and (2) the Framers held the right in high regard. See Kates, supra note 3, at 254 & n.215.

46 See HALBROOK, supra note 2, at 111-17; HALBROOK, supra note 3, at 107-15; Restricting Handguns, supra note 45, at 180-81; Kates, supra note 3, at 254-57; Levinson, supra note 3, at 651; Lund, supra note 35, at 113 n.25.

In 1857, the Supreme Court in Scott v. Sandford held that a freed slave could not possess arms. 60 U.S. (19 How.) 393, 417 (1857). Writing for the Court, Chief Justice Taney reasoned that the right to bear arms, like the right to travel from one state to another, was an unequivocal attribute of citizenship. See id. at 416-17. Chief Justice Taney stated that because the Framers clearly did not consider a black person as having the right to bear arms, a Black could never be considered a citizen for that particular constitutional purpose. Id. at 417.

The Special Report of the Anti-Slavery Conference of 1867 noted that by prohibiting from owning or bearing arms, the Black Codes rendered Blacks defenseless against attacks by their former masters or other Whites. See Restricting Handguns, supra note 45, at 181; Kates, supra note 3, at 256. Responding to cases like Scott and the South's attempt to curtail the Thirteenth Amendment, Congress enacted the Civil Rights Act of 1866, and two years later the Fourteenth Amendment, in an effort to prevent states from infringing on the freedoms enumerated in the Bill of Rights. See HALBROOK, supra note 3, at 153; Restricting Handguns, supra note 45, at 181; Kates, supra note 3, at 255-56.

47 Restricting Handguns, supra note 45, at 181.

48 See Ehrman & Henigan, supra note 8, at 52-57; Kates, supra note 3, at 257; Memorandum of Points and Authorities of Amici Curiae in Support of Defendant's Motion to Dismiss and in Reply to Plaintiff's Opposition at 3-8, Fresno Rifle and Pistol Club v. Van De Kamp, 746 F. Supp. 1415 (E.D. Cal. 1990) (No. 90-097), appeal docketed, No. 91-15466 (9th Cir. July 29, 1991) [hereinafter Memorandum of Amici Curiae].

49 92 U.S. 542 (1876).

50 116 U.S. 252 (1886).

51 153 U.S. 535 (1894).

52 See Ehrman & Henigan, supra note 8, at 52-57. In Cruikshank, the Court stated that the right to bear arms...
close scrutiny because it relies upon cases that were decided before the concept of incorporation was adopted. Nonetheless, because of the Supreme Court's rejection of "the proposition that the entire Bill of Rights applies to the states," a number of federal and state courts refuse to incorporate the Second Amendment against state governments.

C. Judicial Interpretations

In its analysis of the Second Amendment, the Supreme Court has consistently approved the interpretation offered by state's right advocates. In United States v. Miller, for example, the Court upheld the National Firearms Act of 1934, which outlawed the possession of sawed-off shotguns transported in interstate commerce. Writing for the Court, Justice McReynolds stated that the Second Amendment must always be interpreted and applied in light of its "obvious purpose[:] to assure the continuation and is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National Government.

Cruikshank, 92 U.S. at 553.

63 See Ehrman & Henigan, supra note 8, at 56; Levinson, supra note 3, at 653; see also Dowlut, supra note 2, at 71 (Presser and Cruikshank have "little precedential value"); Kates, supra note 3, at 252-53 & nn.211-12 (Presser and Miller cannot survive rigid constitutional analysis). The first incorporation case was delivered three years after Miller, in Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897), where the Supreme Court first applied the Fifth Amendment Takings Clause to the states via the Fourteenth. Id. at 241.

64 Quilici v. Village of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982) (citations omitted), cert. denied, 464 U.S. 863 (1983). The Supreme Court has established that not every right enumerated in the Bill of Rights applies to the states. See, e.g., Stanley v. Georgia, 394 U.S. 557, 564 (1969) (incorporating only rights "fundamental to our free society"); Duncan v. Louisiana, 391 U.S. 145, 150 n.14 (1968) (incorporating only rights necessary to American concept of ordered liberty); see also Memorandum of Amici Curiae, supra note 48, at 6 (arguing that Supreme Court has made only certain rights applicable to states).


66 See Ehrman & Henigan, supra note 8, at 40-41; Brief Amici Curiae in Support of Respondents on Petition for Writ of Certiorari to the United States at 9-13, Farmer v. Higgins, 907 F.2d 1041 (11th Cir. 1990) (No. 90-600), cert. denied, 111 S. Ct. 753 (1991) [hereinafter Farmer Brief]. But cf. Dowlut, supra note 2, at 71 (Supreme Court cases on Second Amendment do not decide "full scope and meaning of right").


68 Id. at 178.
render possible the effectiveness of [state militias].” Accordingly, because a sawed-off shotgun has no “reasonable relationship to . . . a well regulated militia,” and because “its use could [not] contribute to the common defense,” the Court concluded that the statute was constitutional. Although the Court’s language might be interpreted as extending Second Amendment protections to any weapon with military utility, courts have dismissed such arguments as inconsistent with the context of the opinion.

More recently, in Lewis v. United States, the Supreme Court reaffirmed its state’s right approach, which has been consistently followed by both federal and state courts. Reiterating its holding in Miller, the Court stated that “legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties.”

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59 Id. But see Dowlut, supra note 2, at 73-74 (Court’s decision in Miller was one-sided); Lund, supra note 35, at 109-10 (Miller leads to ridiculous results).

60 Miller, 307 U.S. at 178.

61 See Dowlut, supra note 2, at 74-75; Levinson, supra note 3, at 654. Weapons with military utility include many of the ones categorized as “assault weapons.” See infra notes 75-139 and accompanying text (discussing assault weapons and related legislation).

62 See, e.g., Quilici v. Village of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982) (proposition that guarantee of right to keep and bear arms is not subject to state restriction is “based on dicta quoted out of context”), cert. denied, 464 U.S. 863 (1983).


64 Id. at 65 n.8; see also United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977), cert. denied, 435 U.S. 926 (1978); United States v. Tot, 131 F.2d 261, 266 (3d Cir. 1942), rev’ed on other grounds, 319 U.S. 463 (1943); Cases v. United States, 131 F.2d 916, 922-23 (1st Cir. 1941), cert. denied, 319 U.S. 770 (1943); Sandidge v. United States, 520 A.2d 1057, 1058 (D.C.), cert. denied, 484 U.S. 868 (1987); In re Atkinson, 291 N.W.2d 396, 398 n.1 (Minn. 1980).

Although the judiciary continues to view the Second Amendment as protecting a state’s right to a well regulated militia, some courts in states with “right to bear arms” provisions in their constitutions, see supra note 2, have found an individual right to arms for self-defense on state constitutional grounds. See Kalodimos v. Village of Morton Grove, 470 N.E.2d 266, 269 (Ill. 1984); Kellogg v. City of Gary, 562 N.E.2d 685, 694 (Ind. 1990); People v. Brown, 235 N.W. 245, 246 (Mich. 1931). Nevertheless, some of the same state courts have acknowledged that such an individual right is not absolute, but subject to state regulation. See Kellogg, 562 N.E.2d at 694.

65 Lewis, 445 U.S. at 65 n.8. The most recent case to almost reach the Supreme Court on the issue of gun control is Farmer v. Higgins, 907 F.2d 1041 (11th Cir. 1990), cert. denied, 111 S. Ct. 783 (1991). The Court in Farmer denied certiorari to a case involving a challenge to a federal statute prohibiting the private ownership of machine guns not lawfully possessed prior to May 19, 1986. See id. (challenge to 18 U.S.C.A. § 922(o) (West Supp. 1991)).
D. Constitutional Interpretation or Political Ideology?

Commentators on the Second Amendment have noted the irony that both individual right and state's right advocates offer interpretations of the Second Amendment that directly conflict with their general understanding of the remainder of the Constitution. The stereotypical "conservative," who traditionally interprets the Bill of Rights narrowly, often reads the Second Amendment broadly in favor of the individual right approach, while the person customarily labelled a "liberal" because of his or her expansive reading of the Constitution, generally favors the restrictive state's right interpretation. It is suggested that supporters of both views are influenced more by their respective causes than by their convictions regarding the Framers' intent. This explains why state's right advocates assert that the phrase "right of the people" pertains to individuals in the First and Fourth Amendments, but pertains solely to the states in the Second Amendment. It also clarifies why, given the historical reality of the militia being "comprised of every adult male," each possessing his own weapon, state's right proponents do not at least recognize the individual right as falling within the penumbra of rights that emanate from the specific guarantees of the Bill of Rights to "give them life and substance." Finally, it would provide an explanation for the in-

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66 See Kates, supra note 3, at 206-11; Levinson, supra note 3, at 641; Newman, supra note 4, at 4. See generally Ely, supra note 38 (discussing constitutional interpretation).
67 See Kates, supra note 3, at 207-10; Levinson, supra note 3, at 652 n.73 ("conservatives," who have restrictive view of Bill of Rights incorporation doctrine, strongly advocate incorporation of Second Amendment against states); see also supra notes 45-55 and accompanying text (discussing incorporation doctrine and Second Amendment).

Many "intellectuals," favoring the state's right theory, speak out in opposition to the individual right to bear arms. See Lund, supra note 35, at 105. Ironically, some of the most vocal supporters of gun control, in direct conflict with their anti-gun beliefs, have used their political influence to obtain a permit to possess or carry a firearm. See Kates, supra note 3, at 208-09 & n.17. "Although such permits are officially available only on a showing of 'unique need' to carry a defensive weapon," the list of permit holders includes such zealous advocates of gun control as Nelson Rockefeller, former New York City Mayor John Lindsay, and former New York Times publisher Arthur Ochs Sulzberger. Id.
68 See Kates, supra note 3, at 218; Lund, supra note 35, at 107; see also Levinson, supra note 3, at 645 (term "people" is used similarly in First, Second, Fourth, Ninth, and Tenth Amendments). But see Employment Div. v. Smith, 494 U.S. 872 (1990) (interpreting Free Exercise Clause portion of First Amendment narrowly); cf. Ehrman & Henigan, supra note 8, at 47-48 (Second Amendment is distinguishable from other parts of Bill of Rights because it protects public interest, not private interest).
69 See Walker, supra note 3, at 1412; see also Griswold v. Connecticut, 381 U.S. 479, 484 (1965). "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Id.
consistencies between the individual right position and the limited gun control provisions endorsed by organizations like the NRA.\textsuperscript{70}

In a study of the right to keep and bear arms, there is no “need to join up sides and engage in [a] vigorous political struggle.”\textsuperscript{71} Gun control is not an issue to be debated only by “gun nuts” and “bleeding-heart liberals.”\textsuperscript{72} It affects all of us and demands thoughtful treatment and debate.\textsuperscript{73} We must remember that the Second Amendment, as part of the Bill of Rights, is an essential component of our legal system: if we claim that “‘the Second Amendment is not worth the paper it is written on, [then] what price the First?’”\textsuperscript{74}

III. BANNING ASSAULT WEAPONS

A. Legislative Attempts

The alarming homicide rate in the United States has often been directly attributed to the proliferation of handguns.\textsuperscript{75} Recently, however, disturbing events have shifted the focus of attention from handguns to assault weapons.\textsuperscript{76} In January 1989, a gunman armed with an AK-47 semi-automatic rifle killed five children while spraying over one hundred rounds of ammunition across a

\textsuperscript{70} See Kates, supra note 3, at 209-10. “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.” Id. at 209.

\textsuperscript{71} Levinson, supra note 3, at 659.

\textsuperscript{72} See id.

\textsuperscript{73} See id. at 658-59; Newman, supra note 4, at 4-5; cf. Freedman, supra note 3, at 46-47 (“[A] constitution is not to receive a technical or strained construction.”) (quoting Commonwealth v. Harmon, 366 A.2d 885, 897 (Pa. 1976)).

\textsuperscript{74} Levinson, supra note 3, at 658 (quoting Fred Donaldson, Letter to the Editor, Austin America-Statesman, July 8, 1989, at A19) (criticizing supporters of 1989 Supreme Court decision deeming flag-burning protected under First Amendment).

\textsuperscript{75} See Crime Reports, supra note 5, at 12. In the last few years, firearms were used “in approximately three of every five murders committed in the United States.” Id.

In 1990 alone, approximately 50% of all reported murders were committed with handguns, 6% with shotguns, 4% with rifles, and 4% with other or unknown types of firearms. Id.

The numbers are much higher in large urban cities. In New York City, for instance, handguns caused 68% of all homicides during 1989 and accounted for the deaths of 1,476 persons in 1990. See New York City Police Dept., Illegal Firearms: Legislation, Questions and Answers 16 (1991). The ease with which criminals are able to obtain guns is illustrated by the New York City Police Department’s confiscation of 33,789 firearms in 1989 and 1990. Id. at 8.

\textsuperscript{76} See supra note 8 and accompanying text; infra notes 83-84 and accompanying text.
Stockton, California schoolyard. More recently, on October 16, 1991, a gunman killed twenty-two people in a cafeteria in Belton, Texas. Such devastating events, although not always involving assault weapons, have moved gun control advocates to propose a complete ban on assault weapons; they assert that these weapons are designed solely to kill human beings, and serve no legitimate sporting or recreational purpose.

Prior to January 1989, only the federal government and one state, West Virginia, had enacted some form of assault weapon regulation. However, the federal legislation was limited to fully automatic weapons, and the West Virginia statute was of limited utility, since it did not even define the term “assault weapon.” In 1989, reacting to the Stockton tragedy, federal, state, and local legislatures began efforts to implement a more comprehensive ban on this type of firearm. In that year alone, twenty-seven cities and counties enacted ordinances to ban assault weapons. However, many attempts to ban assault weapons, including all proposed federal legislation, have been defeated as a result of the powerful

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78 See Thomas C. Hayes, Gunman Kills 22 and Himself in Texas Cafeteria, N.Y. Times, Oct. 17, 1991, at A1. Although the Texas gunman used a .9mm handgun rather than an assault weapon, gun control advocates cited this tragedy to bolster their national campaign to ban assault weapons, which suffered a major defeat just one day later, when the House of Representatives struck down a bill to ban the sale and ownership of assault weapons. See H.R. 3371, 102d Cong., 1st Sess. (1991); Clifford Krauss, House Resoundingly Defeats Ban on Semiautomatic Arms, N.Y. Times, Oct. 18, 1991, at A1, A14.

79 See Thompson, supra note 77, at 652 (quoting CAL. PENAL CODE § 12275.5 (West 1990)); Dinkins, supra note 8, at 1-2.


81 See 18 U.S.C.A. § 922(o) (West Supp. 1991). Section 922(o) prohibits the private possession of machine guns not lawfully possessed before May 19, 1986. Id. A machine gun, for the purposes of § 922, is a firearm which shoots automatically more than one shot by a single pull of the trigger. See id. § 921(a)(23) (referring to definition in 26 U.S.C. § 5845(b) (1988)). Thus, assault weapons such as semi-automatic shotguns and rifles are not included within this definition. See, e.g., New York, N.Y., [1991] N.Y. Local Laws § 6 (No. 78) (amending NEW YORK, N.Y., ADMIN. CODE § 10-301 (Williams 1986 & Supp. 1990) (defining “assault weapon”)).

82 Thompson, supra note 77, at 651; see W. VA. CODE § 61-7-8 (1988).

83 See Thompson, supra note 77, at 649.

84 See CENTER TO PREVENT HANDGUN VIOLENCE, CITY AND COUNTY ORDINANCES ENACTED IN 1989 (1990) (available from Center to Prevent Handgun Violence in Washington, D.C.).
B. Court Challenges

While NRA resources present an imposing obstacle to an assault weapons ban, it appears that if Congress does enact such legislation, NRA efforts to challenge the law in court will be futile. Numerous pro-gun groups have challenged state and local legislatures’ efforts to ban assault weapons, but courts generally have been unreceptive to their arguments.

1. Second Amendment

Notwithstanding the courts’ historical rejection of the individual right interpretation of the Second Amendment, pro-gun groups continue to challenge assault weapon legislation on this basis. In *Fresno Rifle & Pistol Club v. Van de Kamp*, the California assault weapon law, the first state-wide restriction in the country, was attacked on Second Amendment grounds. After tracing the history of the amendment, the district court held, not surprisingly, that “the Second Amendment stays the hand of the National Government only . . . [and] that the Constitution has left the question of gun control to the several states.” Given the Supreme Court’s recognition of the states’ authority to enact specific gun control

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87 See infra notes 88-123 and accompanying text.

88 See supra notes 56-65 and accompanying text (discussing judicial interpretation of Second Amendment).


90 Id. at 1417; see Jay Matthews, *NRA Loses Court Challenge to California Assault-Gun Ban*, The Washington Post, Sept. 11, 1990, at A5. Assault weapon legislation has also been challenged as violating the “right to keep and bear arms” provisions in state constitutions. See, e.g., *Hale v. City of Columbus*, 578 N.E.2d 881, 886 (Ohio Ct. App. 1990) (upholding local ordinance as substantially related to police power under Ohio State Constitution), *appeal denied*, 569 N.E.2d 604 (Ohio 1992); *Quilici v. Village of Morton Grove*, 695 F.2d 261, 268 (7th Cir. 1982) (individual right is subject to state’s police power), *cert. denied*, 464 U.S. 863 (1983); State v. Fennell, 382 S.E.2d 231, 233 (N.C. App. 1989) (weapons of mass destruction may be regulated notwithstanding state constitutional guarantee).

91 *Fresno*, 746 F. Supp. at 1419.
laws and its endorsement of the state’s right approach to the Second Amendment, any opposition to assault weapon legislation on Second Amendment grounds appears doomed to the same result as reached in Fresno.\textsuperscript{92}

2. Right to Privacy

Another argument advanced by pro-gun groups is that assault weapon legislation violates a person’s constitutional right to privacy.\textsuperscript{93} However, this argument extends this nebulous right far beyond the areas that have been traditionally considered constitutionally protected.\textsuperscript{94}

To prevail on a right to privacy argument, those challenging an assault weapon ban would have to demonstrate that the right to possess an assault weapon is fundamental or implicit in the concept of ordered liberty.\textsuperscript{95} Although the right of privacy “has been applied in a myriad of areas, such as the right of a person not to have his name or likeness used without his consent, the right to be left alone, freedom of choice in marriage and family life, and so forth,”\textsuperscript{96} the application of this concept to the possession of firearms seems tenuous at best.\textsuperscript{97} While there is support for the contention that an individual has a personal if not inalienable right to self-defense,\textsuperscript{98} the Supreme Court has asserted, in dicta, that firearms possession should not be accorded right to privacy

\textsuperscript{92} See supra notes 56-65 and accompanying text (courts find no individual right to possess arms in Second Amendment).

\textsuperscript{93} See Fresno, 746 F. Supp. at 1419; Kates, supra note 3, at 205 & n.6.


\textsuperscript{96} Fresno, 746 F. Supp. at 1420; see also Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (certain constitutional guarantees create penumbral rights of privacy); supra note 94 (cases recognizing privacy right).

\textsuperscript{97} See Fresno, 746 F. Supp. at 1419-22. The Fresno court observed that there were no holdings “equat[ing] the right to privacy with the right of self-defense, or the right to possess firearms.” Id. at 1422.

\textsuperscript{98} See supra note 19 and accompanying text (discussing inalienable right to self-defense).
3. Bills of Attainder

Some pro-gun advocates have challenged assault weapon legislation on the ground that such laws violate the constitutional prohibition against Bills of Attainder, which are defined as "legislative acts ... that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." Because many assault weapon laws contain lists of specifically prohibited weapons identified by model and by the manufacturer's name, they do apply to "easily ascertainable members of a group." However, the punishment for past conduct that characterizes Bills of Attainder differs from the penalties prescribed in assault weapon statutes because, among other things, assault weapon statutes penalize future rather than past misconduct. Furthermore, while Bills of Attainder are

99 See Bowers v. Hardwick, 478 U.S. 186, 196 (1986); Stanley v. Georgia, 394 U.S. 557, 568 n.11 (1969). In Stanley, the Supreme Court stated the following:

What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendments.

Id.; see also Bowers, 478 U.S. at 195 ("Stanley itself recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods.").

100 U.S. Const. art. I, § 10. cl. 1 ("No State shall ... pass any Bill of Attainder."); see also Fresno, 746 F. Supp. at 1422 (plaintiff argued that California Assault Weapon Control Act was Bill of Attainder); Cody v. United States, 460 F.2d 34, 37 (8th Cir.) (firearm regulation challenged as Bill of Attainder), cert. denied, 409 U.S. 1010 (1972).


102 See, e.g., CAL. PENAL CODE §§ 12,275-12,290 (West Supp. 1992); N.J. STAT. ANN. § 2C:39(w) (West Supp. 1991); [1991] N.Y. Local Laws § 6 (No. 78) (amending NEW YORK, N.Y., ADMIN. CODE § 10-301 (Williams 1986 & Supp. 1990)). The New York City statute, instead of listing specific weapons in the law itself, makes provisions for the New York City Police Commissioner to "designate specific semiautomatic centerfire or rimfire rifles or semiautomatic shotguns ... as within the definition of assault weapon, if the commissioner determines that such weapons are particularly suitable for military and not sporting purposes." Id.

103 See Brown, 381 U.S. at 461. A Bill of Attainder may deprive an individual or a group of people "by description rather than [by] name." Id. Therefore, whether there is a named individual or a group, the "distinction[] [is] without a difference." Id.

104 See Brown, 381 U.S. at 458 (Bill of Attainder not found where intention was to "forestall future dangerous acts") (quoting American Communications Ass'n v. Douds, 339
marked by punishment without trial, a person violating an assault weapon law is “entitled to all of the rights available to criminal defendants,” including the right to a judicial trial.\textsuperscript{105}

4. Takings Clause

Accompanying gun owners’ concerns regarding a potential ban on the sale of assault weapons is the fear that the next step will include confiscating assault weapons from current owners.\textsuperscript{106} In some jurisdictions, these fears have been realized in the form of legislation requiring owners of assault weapons to either surrender the firearm to the police or remove it from the jurisdiction.\textsuperscript{107}

Gun owners have challenged these statutes as violations of the Fifth Amendment Takings Clause\textsuperscript{108} on the ground that, assuming these laws benefit the public as a whole, individual gun owners should be compensated when their weapons are destroyed or reduced in value for the public good.\textsuperscript{109} Courts hearing these claims have considered “such factors as physical appropriation and diminution in value, together with validity of governmental authority, as revealed in the exercise of police power and eminent domain.”\textsuperscript{110}

Much to the frustration of gun owners, the Supreme Court has determined that a state has no duty to compensate a property owner if an entire class of property is destroyed for the public good.

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\textsuperscript{105} U.S. 382, 414 (1950)). Some assault weapon statutes allow current owners to keep their weapons after a registration process, see, e.g., CAL. PENAL CODE § 12285, while others establish time frames in which to allow owners to remove the weapons from the jurisdiction, see, e.g., [1991] N.Y. Local Laws § 10 (No. 78) (amending NEW YORK, N.Y., ADMIN. CODE § 10-303.1(d) (Williams 1986)) (allowing gun owners 90 days to dispose of their assault weapons).

The Supreme Court has established three tests for determining whether the punishment prescribed by a statute is like the punishment that characterizes Bills of Attainder. See Nixon, 433 U.S. at 473-78. Courts considering this question must examine: (1) whether the statute falls within the historical meaning of legislative punishment; (2) whether it does nothing to further a non-punitive legislative purpose; and (3) whether it indicates a legislative intent to punish. Id. The penalty contemplated for violations of assault weapon legislation does not violate these tests. See Fresno, 746 F. Supp. at 1423.

\textsuperscript{106} See Fresno, 746 F. Supp. at 1423.

\textsuperscript{107} See FREEDMAN, supra note 3, at 9.

\textsuperscript{108} See FREEDMAN, supra note 3, at 9; cf. Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 241 (1897) (due process clause requires state to compensate owner when taking property for public use).

\textsuperscript{109} See, e.g., [1991] N.Y. Local Laws § 10 (No. 78) (amending NEW YORK, N.Y., ADMIN. CODE § 10-303.1(d)(1) (Williams 1986)) (within ninety days after effective date, assault weapon owners may surrender weapon to police or remove it from jurisdiction).

\textsuperscript{110} U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: “nor shall private property be taken for public use without just compensation.” Id.

\textsuperscript{111} FREEDMAN, supra note 3, at 10.
rather than taken for public use." The state and lower federal courts, recognizing that many lawmakers consider assault weapons a threat to public safety, have applied this concept to uphold the destruction of weapons without compensation to the owners for their loss.

5. Civilian Marksmanship Program

Another argument offered by opponents of gun control is that states are precluded from banning assault weapons because the Federal Civilian Marksmanship Program preempts this area of gun regulation. Although the purpose of this program is to "promote rifle practice" in the United States, this argument

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111 See Miller v. Schoene, 276 U.S. 272, 279 (1928) (government does not exceed its constitutional powers upon destruction of one class of property to promote greater public value); Mugler v. Kansas, 123 U.S. 623, 669 (1887) (exercise of police power differs from taking because it allows destruction of property for public good). In Mugler, the Court found the government's destruction of alcohol during the prohibition era to be constitutional. Id. Accordingly, a similar argument could be made regarding the destruction of surrendered or confiscated assault weapons. See id.

112 See, e.g., CAL. PENAL CODE § 12,275.5 ("The Legislature finds and declares that the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens of [California]."); [1991] N.Y. Local Laws § 1 (No. 78) ("The [New York City] council . . . finds and declares that because assault weapons . . . pose a grave threat to law enforcement officers and to the public, it is necessary to impose restrictions on the possession, sale and use of such weapons . . . ").

113 See Fesjian v. Jefferson, 399 A.2d 861, 865 (D.C. 1979); see also Quilici v. Village of Morton Grove, 532 F. Supp. 1169, 1183-84 (N.D. Ill. 1981) (no taking found when "gun owners who wish to may sell or otherwise dispose of their handguns outside of" jurisdiction), aff'd, 695 F.2d 261 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983). But cf. Udulutch, supra note 4, at 41 (only controls falling short of complete ban on firearms would not require governmental compensation).

The New York City assault weapon law requires that any person legally in possession of assault weapons prior to the effective date of the law "peaceably surrender his or her assault weapon . . . for the purpose of destruction of such weapon by the [police] commissioner, provided that [the commissioner] may authorize the use of such weapon by the [police] department." [1991] N.Y. Local Laws § 10 (No. 78) (amending NEW YORK, N.Y., ADMIN. CODE § 10-303.1(d)(1) (Williams 1986)). It seems that this provision, allowing the use of surrendered assault weapons by the New York City Police Department, would require compensation to their owners since now the property is not being destroyed, but taken for public use. See supra notes 111 and accompanying text (compensation required for taking but not for destruction under police power); see also Chicago, B. & Q.R. Co., 166 U.S. at 241 (taking for public use requires compensation). But cf. George James, Trying to Rid the Streets of Guns, by Buying Them, N.Y. TIMES, Nov. 20, 1991, at B1 (District Attorney's office and Police Department initiated two week program to buy illegal guns from public).


115 10 U.S.C. § 4308(a)(3) (1988). The Civilian Marksmanship Program is administered by the President and headed by a commissioned officer of the Army or the Marine Corps.
has failed because the weapons banned by assault weapon statutes are not the same as those employed in national rifle competitions. Additionally, some courts have recognized that "Congress clearly expressed its intent not to occupy the field of intrastate gun control."  

6. Vagueness  

Assault weapon legislation may also be challenged as unconstitutionally vague. Legislatures attempting to define "assault weapons" encounter difficulties in distinguishing between military and sporting purposes and in keeping pace with changing technology and manufacturers' designs. Thus, the language of assault

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116 See Fresno, 746 F. Supp. at 1426-27. "This is not to say that the federal program outlined . . . in 10 U.S.C., section 4307 et seq. does not encourage local clubs to become proficient in assault weapons." Id. at 1427. However, if such encouragement is the intention of the program "it is significant . . . that no federal official or agency was a member of the plaintiffs' group[" challenging the ban in Fresno. Id.

The New York City assault weapon statute does not exempt sportsmen who use these weapons in shooting competitions. See [1991] N.Y. Local Laws § 12 (No. 78) (amending New York, N.Y. ADMIN. CODE § 10-305 (Williams 1986)). Thus, gun clubs fear that the law will inhibit their ability to attract competitors. See Eileen A.J. Connelly, Island Gun Owners Ban at Ban, STATEN ISLAND ADVANCE, Oct. 28, 1991, at A13 (local gun club feared that it could not hold competitions for Empire State Games or U.S. Olympic team).


No provision of the chapter shall be construed as indicating an intent on the part of Congress to occupy the field in which such provision operates to the exclusion of the law of any state on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

Id.; see also C.D.M. Prods., Inc. v. City of New York, 350 N.Y.S.2d 500, 507-08 (Sup. Ct. N.Y. County 1973) (New York City Police Commissioner authorized to regulate firearms since federal government has not preempted field).


119 See BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, REPORT AND RECOMMENDATIONS OF THE ATF WORKING GROUP ON THE IMPORTABILITY OF CERTAIN SEMIAUTOMATIC RIFLES 6 (1989). "[T]he modern military assault rifle contains a variety of physical features and characteristics designed for military applications which distinguishes it from traditional sporting rifles." Id.

120 See Thompson, supra note 77, at 670.
weapon statutes may arguably fail to provide adequate warning of the types of firearms outlawed. Nevertheless, vagueness challenges to firearms legislation have been consistently rejected by the courts.

Notwithstanding the numerous challenges to the validity of restrictions on gun ownership, courts continue to uphold assault weapon legislation. Questions remain, however, regarding whether these laws are effective in preventing violent crime.

C. A Necessary Solution or Political Demagoguery?

"[N]o civil society could long exist in which individuals had an absolute right to own whatever armaments they chose." No one would suggest that there is a constitutional right to possess nuclear weapons for self-defense; it is obvious that the public is safer if certain types of weapons remain available solely to the military.

Many argue that assault guns fall within the class of weapons to which only the military should have access. Indeed, if assault weapons serve no purpose apart from the taking of human life, and if they are disproportionately utilized in the commission of...
crimes, then at a minimum they should be heavily regulated. However, for reasonable gun control regulations to be effective, they must be enacted at the federal level rather than on a piecemeal basis by the several states. Only then may limitations on the manufacture, sale, and possession of assault weapons have a significant practical effect.

A number of politicians, apparently believing that regulation is insufficient, advocate the banning of assault weapons. The assault weapon has become a popular target because it provides an easy explanation for the rapid increase in the levels of homicide and other violent crimes. Ironically, if the government enacts legislation banning assault weapons, law-abiding citizens are the only persons who will be deprived of their use. The reality is that gun control will not deter criminals from possessing or using assault weapons, if drug dealers can penetrate U.S. borders and

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128 See Judith Bonderman & Dennis A. Henigan, Paying the Bill for Violence, Nat’l L.J., Jan. 28, 1991, at 13 (assault weapons are 20 times more likely to be used during commission of crime than handguns, and 25 times more likely during drug offense). But see Johnson, supra note 8, at F2 (more police officers killed with knives and by criminals using motor vehicles than by assault weapons).


130 See Udulutch, supra note 4, at 43. Federal gun control legislation is the only effective and practical way to eliminate the trafficking of firearms from state to state. Id.

131 See id. at 41-42.

132 See, e.g., Dinkins, supra note 8, at 1-2 (speech against assault weapons).

133 See id.; see also supra notes 5-8 and accompanying text (discussing upsurge of violent crime in America and gun control); cf. supra notes 66-74 and accompanying text (Second Amendment debate is motivated more by politics than by rational thought).

At least one commentator has criticized the all-out battle against assault weapons by some politicians:

Semi-automatic firearm legislation is appealing to the uninformed because it uses the misnomers assault weapon or assault rifle. Hence, the official military definition is enlightening: “Assault rifles are short, compact, selective-fire weapons that fire a cartridge intermediate in power between submachinegun and rifle cartridges. Assault rifles have mild recoil characteristics and, because of this, are capable of delivering effective full automatic fire at ranges up to 300 meters.” The political advantage of mislabeling a semiautomatic firearm as a fully automatic firearm is obvious. However, a debate in which misinformation prevails can only lead to bad policy.

Dowlut, supra note 2, at 81 (footnote omitted) (quoting DEFENSE INTELLIGENCE AGENCY, U.S. DEP’T OF DEFENSE SMALL ARMS IDENTIFICATION AND OPERATION GUIDE—EURASIAN COMMUNIST COUNTRIES 105 (1976)).

134 See Lund, supra note 35, at 127; cf. Dowlut, supra note 2, at 82. “Crime . . . ‘must be prevented by the penitentiary and gallows, and not by a general deprivation of a constitutional privilege.’” Id. (quoting Wilson v. State, 33 Ark. 557, 560 (1878)).

135 See Lund, supra note 35, at 127; cf. Wayne King, New Jersey Law to Limit Guns is
reap millions of dollars in illegal profits, it is conceded that they will arm themselves accordingly.

It is often argued that a ban on guns is worthwhile if it saves one innocent life. However, this position ignores the reality that a gun can also be used to save a crime victim or some other innocent person from death at the hands of a brutal criminal. An absolute ban on assault weapons—as opposed to their reasonable regulation—is not a miracle cure for this country’s crime problem. Until legislators confront the core troubles affecting our society, such as drug abuse, unemployment, and the declining quality of public education, any indication that an absolute ban on assault weapons will provide even partial relief from the crisis may be fairly described as no more than political demagoguery.


See Dowlut, supra note 2, at 82 (legally possessed guns may deter crime). One court admitted that although the defendant violated a harsh gun licensing law, possessing the gun may have saved his life. See Commonwealth v. Lindsey, 489 N.E.2d 666, 669 (Mass. 1989); see also Dowlut, supra note 2, at 82 (“An armed people . . . serve as deterrent against crime.”). It is speculated that during the Texas incident in which a gunman killed 22 people, see supra note 78 and accompanying text, if one victim had carried a firearm, he or she might have saved his or her own life and the lives of many others. Cf. Dowlut, supra note 2, at 82 n.163 (illegal gun saved life). But cf. Debra Dobray & Arthur J. Waldrop, Regulating Handgun Advertising Directed at Women, 12 WHITTIER L. REV. 113, 115 n.16 (1991) (gun may give “false sense of security”) (quoting Gwen Holden, Executive Vice President of National Criminal Justice Association).

See Krauss, supra note 78, at A14 (behavior cannot be controlled) (quoting White House spokeswoman Judy Smith); cf. King, supra note 135, at 22 (“[New Jersey assault weapon] law is proving difficult if not impossible to enforce.”).

See supra note 6 and accompanying text; see also Dowlut, supra note 2, at 82 (gun control has several political functions); Norman Siegel, Let’s Debate Drug Policy, N.Y. Times, Jan. 4, 1991, at A27 (gun control must be augmented by confronting the drug problem).

The authors of this Note have attended funerals of New York City police officers killed in the line of duty, and observed as politicians seized the opportunity to advocate gun control as a means of protecting police officers’ lives. See, e.g., Jill Smolowe, A Brooklyn Man Seized in Slaying of Police Officer, N.Y. Times, July 19, 1980, § 2, at 22 (Mayor Koch advocated gun control). However, while sophisticated weapons remain widely available to criminals, the Commissioner of the New York City Police Department refuses to arm his
CONCLUSION

The necessity and propriety of some type of gun control, particularly as applied to assault weapons, must be acknowledged. Unfortunately, it is the law-abiding citizen, rather than the criminal, who is affected most by gun control. Criminals will continue to obtain firearms to further their illicit purposes. Thus, while the regulation of gun ownership has merit, if done on the federal level, severe penalties and restrictions should be geared towards those who misuse firearms rather than those who simply possess them. We can only hope that any legislation enacted will be prompted not by political ulterior motives, but by a sincere commitment to reducing violent crime through the improvement of the country's criminal justice, educational, and social systems.

The Second Amendment is an essential part of the Bill of Rights, and serves as a reminder that government acts at the will of the people. Nevertheless, courts continue to view the amendment as merely guaranteeing a state's right to maintain a well-regulated militia. Therefore, the extent of the right to keep and bear arms currently remains, at best, uncertain.

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