The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate Over the Right to Bear Arms

Robert Hardaway

Follow this and additional works at: https://scholarship.law.stjohns.edu/jcred
"The Gun Lobby's interpretation of the Second Amendment is one of the greatest pieces of fraud, I repeat the word fraud, on the American People by special interest groups that I have ever seen in my lifetime."

Former Chief Justice of the United States Supreme Court
Warren Burger 2

INTRODUCTION

There are sound public policy reasons why gun ownership by law abiding citizens in a free society should be protected. Good public policy, however, cannot be formulated as long as there remain fundamental misconceptions about the meaning and history of the Second Amendment of the U.S. Constitution and the law interpreting it. In August of 1994, an exasperated

1 Robert Hardaway is Professor of Law at the University of Denver College of Law. Elizabeth Gormley and Bryan Taylor both graduated from the University of Denver College of Law in 2001.

American Bar Association, finding itself unable to match the Gun Lobby's publicity campaigns, pleaded for help from the legal profession to educate the American public about the meaning of the Second Amendment and the intent of the Constitutional Framers. Specifically, the ABA sought help in clarifying the fact that the United States Supreme Court and lower federal courts have consistently, uniformly held that the Second Amendment to the United States Constitution is related to a "well regulated militia and that there are no federal constitutional decisions which preclude the regulation of firearms in private hands. . . ."3

Even the American Civil Liberties Union, not an organization known to suffer perceived constitutional violations lightly, has tried valiantly, though largely in vain, to educate the American public that the Second Amendment is a collective rather than an individual right.4

The exasperation of the American Bar Association is understandable, and this article is a humble response to its plea.

"It seems that no bad idea can ever die," observes Gary Wills in his recent book A NECESSARY EVIL.5 He cites the irrational fear of extreme right wing groups that the fluoridation of water represented a sinister communist conspiracy to poison Americans gradually seeped through "our political culture from truck stops to the Ivy League."6 Similarly, he notes that academic support has even seeped through in support of the Gun Lobby's view of the Second Amendment. They defend an individual right to bear arms, Wills writes, and "argue for insurrection as a right guaranteed within the United States Constitution" guaranteed

3 Brannon P. Denning, Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment, 26 CUMB. L. REV. 961, 963 (1995); see U.S. v. Emerson, 46 F. Supp. 2d 598, 610-11 (N.D. Tex. 1999) (noting that individual right to keep and bear arms may be subjected to "limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country."); rev'd, 270 F.3d 203 (5th Cir. 2001).


5 GARY WILLS, A NECESSARY EVIL (Simon and Schuster 2000).

6 Taylor Branch, Roll over, Madison, N.Y. TIMES, Jan. 24, 2000, at 82 (reviewing G. WILLS, A NECESSARY EVIL (Simon and Schuster 2000)).
specifically, in the Second Amendment. He further quotes a Yale Professor who claims that "fresh from their own revolutionary experience, the last thing the Framers would have done is to deny the People the means of armed insurrection"\(^7\) against their own government.

Two hundred years of intense judicial scrutiny and case law holding that there is no individual right to bear arms leaves the Gun Lobby undeterred. In *U.S. v. Miller,\(^8\)* and yet again in the 1980 case of *U.S. v. Lewis,\(^9\)* the United States Supreme Court stated in no uncertain terms that "the second amendment guarantees no right to keep and bear a firearm that does not have some reasonable relationship to the preservation or efficiency of a well-regulated militia."\(^10\) With a single exception containing non-bonding dicta,\(^11\) every Circuit Court in the past two hundred years has adhered to this now well-settled legal principle, which the Supreme Court reaffirmed yet again in the *Lewis* case and rejected the "individual rights" theory posited by the Gun Lobby.\(^12\)

---

7  WILLS, supra note 5, at 208 (quoting AKHIL REED AMAR AND ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 175 (N.Y. Free Press 1998)). But see Harold S. Herd, Re-Examination of the Firearms Regulation Debate and Its Consequences, 36 WASHBURN L.J. 196, 246 (1997) (concluding there is no constitutional right to insurrection).


10  Lewis, 445 U.S. at 65 n.8 (quoting Miller to affirm proposition that Second Amendment guarantees no right to bear arms) (emphasis added); Miller, 307 U.S. at 178.

11 See United States v. Emerson, 270 F.3d 203 (5th Cir. 2001) (finding that court supported concept of individual right to bear arms, but nevertheless, affirmed lower court rule).

12 See, e.g., United States v. Chavez, 204 F.3d 1305 (11th Cir. 2000); U.S. v. Baker, 197 F.3d 211 (6th Cir. 1999); San Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121 (9th Cir. 1996); Hickman v. Block, 81 F.3d 98 (9th Cir. 1996); U.S. v. Farrell, 69 F.3d 891 (8th Cir. 1995); Love v. Peppersack, 47 F.3d 120 (4th Cir. 1995); U.S. v. Hale, 978 F.2d 1016 (8th Cir. 1992); Quilici v. Morton Grove, 695 F.2d 261 (7th Cir. 1982); U.S. v. Oakes, 564 F.2d 384 (10th Cir. 1977); U.S. v. Wilbur, 545 F.2d 764 (1st Cir. 1976); U.S. v. Warin, 530 F.2d 103 (6th Cir. 1976); U.S. v. Johnson, 497 F.2d 548 (4th Cir. 1974); Cody v. U.S., 460 F.2d 94 (8th Cir. 1972); Cases v. U.S., 101 F.2d 916 (1st Cir. 1942); U.S. v. Tot, 131 F.2d 261 (3rd Cir. 1942), rev'd, 319 U.S. 463 (1943).

But see David B. Kopel, The Supreme Court's Thirty - Five Other Gun Cases: What the Supreme Court Has Said about the Second Amendment, 18 ST. LOUIS U. PUB. L. REV. 99. Second Amendment scholar David Kopel cites Runnebaum v. Nationsbank of Maryland, N.A., 123 F.3d 156 (4th Cir. 1997), to the contrary. This court stated therein that "[n]either gathering in a group nor carrying a firearm are one of the major life activities under the ADA... though individuals have the constitutional right to peaceably assemble... and to keep and bear arms, U.S. Const. Amend. II." 123 F.3d 156, 171 n.8 (4th Cir. 1997) (en banc, plurality op.). This is, of course, strictly dicta that does little to contravene the long history of circuit court rulings against an individual right to bear arms. Moreover, the mere recitation by a court of the words "right to bear arms" should not necessarily be construed as endorsing the individual rights school.
As the American Civil Liberties Union has noted, "if indeed the Second Amendment provides an absolute, constitutional protection for the right to bear arms in order to preserve the power of the people to resist government tyranny, then it must allow individuals to possess bazookas, torpedoes, SCUD missiles and even nuclear warheads, for they, like handguns, rifles and M-16s are arms. Moreover, it is hard to imagine any serious resistance to the military without such arms."

Nevertheless, heated and passionate debate continues on the meaning of the Second Amendment, often inflamed to a fever pitch by the Gun Lobby in its advertising, circulars, and newsletters.

Despite its public rhetoric, however, the Gun Lobby has taken a much different legal approach in the Courts. As *U.S. News and World Report* recently reported, "the NRA doesn't even use second amendment arguments to challenge the gun laws

Kopel's thesis is that the Supreme Court has always regarded the Second Amendment as a guarantee of a broad, individual right to arms. This thesis is probably convincingly refuted by the unanimous rulings of the circuit courts that there is no broad right to arm and the failure of the Supreme Court to grant cert to correct this pervasive misapprehension.


Chuck Klein, *The Other Right to Bear Arms, Use the Ninth Amendment to Save the Second, GUNS AND AMMO*, Dec. 19, 1999, at 23. Interestingly, the author of the article did not distance himself from this argument. Instead, his response to the ACLU is to argue "[t]rue or false, good or bad, founders intention or not, does not affect in any way our individual right to use inalienable arms to protect our life, our liberty and all of our other unlisted rights." *Id.*

14 *See* Marietta Pennsylvannia Militia, http://www.mariettamapa.com/marietta_militia.html (visited March 2, 2001) (stating unorganized militia is protected under Second Amendment). The Marietta, Pennsylvania Militia is typical of these hyperventilating organizations. This particular group asserts that:

[although the unorganized militia can be called up for lawful (sic) (Constitutional) purposes, it is not under the direct control of any state or political jurisdiction. It represents the authority and power of the People over the government and stands as the last defense of the citizens of the country against domestic tyranny. *Id.*]
anymore.\footnote{15} When the NRA appealed the Brady bill, it based its argument on Tenth Amendment grounds, and never even mentioned the Second Amendment; yet it continues to tout its own self-interested interpretation of the Second Amendment as a public relations strategy to raise funds. Nor did the NRA seek a writ of certiorari to the Supreme Court after the recent Ninth Circuit decision in \textit{San Diego County Gun Rights Committee v. Reno} upholding the California assault-weapons ban.\footnote{16}

As second amendment scholar Andrew Herz has observed,

By labeling every measure that in any way affects access to firearms as the first step down a slippery slope leading to confiscation of all weapons, the NRA attempts to keep its members in a state of constant panic and paranoia over the supposedly totalitarian machinations of an allegedly hostile federal government.\footnote{17}

Herz also quotes the journalist Dan Moldea, to whom an NRA spokesman has said "[y]ou keep any special interest group alive by nurturing the crisis atmosphere: keep sending those cards and letters in. Keep sending money."\footnote{18}

Judge Robert Bork, the conservative proponent of "originalism" who was denied confirmation to the U.S. Supreme Court by the Senate because of his strict constructionist views, has branded the Gun Lobby's interpretation of the Second Amendment as an intentional deception, and not "law as integrity."\footnote{19}

Although the Circuit Courts interpreting the U.S. Supreme Court in \textit{Miller} have uniformly held that the Second Amendment right to bare arms is not an individual right,\footnote{20} the \textit{Miller} case...
itself is now over sixty years old. The Supreme Court has declined certiorari in at least nine circuit court cases rejecting the theory of an individual right to bear arms. As long as each circuit court is following Miller and Lewis, it may reasonably be argued that there has been no need for the Court to accept certiorari because the law is clear and the circuit courts are following it, and that it is highly improbable that the Supreme Court would leave uncorrected nine circuit court interpretations of such a high profile amendment of the Bill of Rights.


In Justice Thomas' concurring opinion in Printz, he writes that a federal law regulating firearms may be unconstitutional "[i]f... the Second Amendment is read to confer a personal right to keep and bear arms... As the parties did not raise this argument, we need not consider it here." 521 U.S. 898, 945-46 (1996). Thomas indicates that there is a "colorable argument" in favor of the right and that the Court will someday resolve the issue. The most that can be gleaned from the opinion is that Thomas will entertain the broad right argument. Thus, Kopel's assertion that "Thomas appears to support [sic] individual right" is, therefore, premature. Kopel, supra note 12, at 111.

In Muscarelo, the case turned on the meaning of the term "carries a firearm" under federal law. 524 U.S. 125, 126 (1998). Justice Ginsburg's dissenting opinion asserted that the meaning of the phrase is what the Second Amendment would suggest: to "wear, bear, or carry... upon the person or in the clothing or in a pocket, for the purpose... of being armed and ready for offensive or defensive action in a case of conflict with another person." Id. at 139-50. Kopel extrapolates from this opinion that "a person carrying a gun for personal protection could be said to be bearing arms. If individuals can bear arms, then the right to bear arms must belong to individuals." Kopel, supra note 12, at 119. Again, it appears that Kopel is overreaching. Even if the constitutional meaning of "bear" is to carry, it does not follow that Justice Ginsburg intended to extend constitutional protection to anyone capable of carrying a firearm. The collective view does not depend solely on a restrictive definition of the word bear but on the modifying first phrase of the Amendment. Thus, individuals have a right to bear arms but only for the purpose of serving in a well-regulated militia. Given that militias must be "armed and ready for offensive or defensive action in case of conflict with another person," Justice Ginsburg's definition is perfectly compatible with the collective interpretation. It is therefore not possible to discern Justice Ginsburg's interpretation of the Second Amendment from the Muscarelo opinion.

It seems that any judicial reference to the words "right to bear arms" is taken by Kopel to support his position. But see Rohner, supra note 48, at 53-54 for the argument that "bear arms" has a strictly military connotation.

One scholar notes that:

The main reason there is such a vacuum of useful Second Amendment understanding... is the arrested jurisprudence of the subject as such, a condition due substantially to the Supreme Court's own inertia - the same inertia that similarly afflicted the First Amendment virtually until the their decade of this twentieth century when Holmes and Brandeis finally were moved personally to take the First Amendment seriously (as previously it scarcely ever was).


See, e.g., Herz, supra note 17, at 77 (citing cases discussed).
Although it is the law student chant that denials of certiorari are technically not to be interpreted as indicating the Supreme Court's approval of a circuit court's decision, Peter Linzer, in his massive study in the COLUMBIA LAW REVIEW on the meaning of certiorari denials, reveals that a denial of certiorari indicates that most of the Supreme Court justices were not, in fact, dissatisfied with the circuit court's decision. For example, if even one circuit court (let alone nine or more) held that the Fourteenth Amendment did not protect the civil rights of African Americans, it is difficult to imagine that the Supreme Court would not grant certiorari in order to make an obvious correction on such a critical issue.

Nevertheless, if the purpose of law - and not least constitutional law - is to provide a fair and just framework and guide for human behavior, it must surely follow that any law or construction of law which is not widely understood or which is actively misunderstood, cannot adequately perform the very function of law. In the face of an unrelenting stream of self-interested interpretations from interest groups, it will simply not do to refer the average man or woman on the street to the Miller case itself, or to the mass of appellate decisions uniformly rejecting the theory of an individual right to bear arms. Nor will it do to rely solely on Peter Linzer's thesis that denials of certiorari in cases involving high profile or substantial constitutional issues indicate that the Supreme Court was not dissatisfied with a circuit court's decision.

Every year, the Supreme Court dedicates a substantial portion of its judicial energies to deciding what cases will be granted certiorari. The criteria for accepting what cases to accept for full review are 1) conflict between circuit courts; 2) conflict between federal circuit and state courts; 3) federal circuit departure from usual course of judicial proceedings; 4) conflict between highest state courts on important federal question; 5) important federal questions that have not been decided by the Supreme Court; 6) decisions on important federal questions that conflict with

23 Peter Linzer, The Meaning of Certiorari Denials, 79 COLUM. L. REV. 1227, 1229 (1979) (noting that while not necessarily biggest factor in deciding whether to grant certiorari, satisfaction with judgment is factor); see also Herz, supra note 17, at 78 (suggesting more behind denial of certiorari than lack of interest); The Uncertainty of Cert., 105 HARV. L. REV. 1795, 1795 (May 1992) (noting decisions to grant certiorari are “strategic calculations” for desired result).
Supreme Court decisions. In light of these criteria, the question arises as to why the Supreme Court has not granted certiorari in cases in which the Second Amendment would provide the controlling issue of law. While the fact that there is no substantial disagreement in the circuits might be used as a rationale for declining to grant certiorari, it is submitted that such a rationale fails to consider fully what must surely be the countervailing consideration of public perception - or misperception - of the rights set forth in the Second Amendment.

It is the purpose of this article to explore the reasons for the High Court's refusal to resolve one of the most contentious constitutional debates of all time. At a time when the Court is willing to dedicate considerable judicial energies to such questions as giving a benediction at a high school football game why is the issue of the right to bear arms considered so unworthy of High Court attention?

It has been suggested that the High Court is reluctant to grant certiorari in a Second Amendment case for the very reason that the issue is so contentious - the proverbial legal "hot potato." However, it is difficult to imagine an issue more contentious and divisive than abortion, which the Court has not hesitated to

24 See Supreme Court Rules 10 (a),(b),(c) (2000) (listing reasons for granting certiorari). But see The Uncertainty of Cert., supra note 23, at 1795 (noting selection process is somewhat of mystery).

25 See U.S. v. Baker, 197 F.3d 211, 214 (6th Cir. 1999) (discussing due process clause and intent requirement necessary to be convicted of possession of firearm.); Hickman v. Block, 81 F.3d 98 (9th Cir. 1996); U.S. v. Farrell, 69 F.3d 891, 892 (8th Cir. 1995) (holding that government need only prove knowingly or intentionally but not specific knowledge of statute); Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995) (denying due process claim against state police for wrongly denying his application to obtain firearm); U.S. v. Hale, 978 F.2d 1016, 1018 (8th Cir. 1992) (denying defendant claim that Second Amendment bars federal government from banning particular weapons seized because they have military use.); Quilici v. Morton Grove, 695 F.2d 261, 271 (7th Cir. 1982) (holding that village ordinance which bars possession of handguns within village does not violate Illinois Constitution, Second, Ninth and Fourteenth Amendments); U.S. v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977) (noting that defendant's Second Amendment rights were not violated by federal statute which regulated machine guns); U.S. v. Warin, 530 F.2d 103,107 (6th Cir. 1976) (discussing defendants argument in support of possession of firearm and connection to phrase "a well regulated militia"); U.S. v. Johnson, 497 F.2d 548, 549 (4th Cir. 1974) (discussing defendants Second Amendment claims); Cody v. U.S., 460 F.2d 34, 37 (8th Cir. 1972) (holding that Second Amendment was not violated); Cases v. U.S., 131 F.2d 816, 919 (1st Cir. 1942) (discussing Federal Firearms Act).

26 See Santa Fe Indep. School Dist. v. Doe, 530 U.S. 290, 305 (2000) (involving violation of Establishment Clause with student initiated prayer); see also The Uncertainty of Cert., supra note 23, at 1795 (noting selection process is somewhat of mystery and only 5% of more than 5,000 petition are granted).
address directly in many decisions. The notion that the High Court is simply too timid to resolve a contentious legal issue is therefore distinctly unsatisfying, given that the settlement of such issues is one of the primary reasons for the very existence of the High Court.

A second suggestion is that the Court, already under a heavy burden of cases, is simply not prepared at this time to open up a whole new area of the law. According to this theory, the Court already knows that the Second Amendment cannot be resolved in any one decision, just as *Roe v. Wade* did not resolve the abortion question. Rather, any Second Amendment case will simply open up a Pandora's box of new Second Amendment issues requiring frequent clarification and refinement, thus encouraging a flood of litigation. At present, the NRA declines even to seek *certiorari* in Second Amendment cases (presumably because an adverse and recent decision rejecting an individual rights theory would be difficult, if not impossible, to keep or hide from the American public). Thus, if the High Court were to decide even one Second Amendment case, the dam would break and flood the Court with the pent-up demand for Second Amendment decisions accumulated in sixty years of Supreme Court silence. Again, however, the fear of protracted litigation has never inhibited the Court in such other high profile constitutional areas such as abortion or school prayer.

A third theory is that the Court is concerned about the attack on its own integrity that might occur if it were to reaffirm *Miller* today and clarify its provisions in accordance with the Court of Appeals decisions. The High Court has rarely been unmindful of its chief vulnerability - namely, the lack of its own internal

27 *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914, 930 (2000) (ruling that Nebraska statute was unconstitutional as undue burden on right to partial birth abortion); Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 846 (1992) (reaffirming woman's right to choose abortion before fetal viability; some provisions of Pennsylvania law upheld and others ruled unconstitutional); Harris v. McRae, 448 U.S. 297, 326 (1980) (upholding federal restrictions on use of federal funds to reimburse cost of abortions under Medicaid program); Bellotti v. Baird, 443 U.S. 622, 649 (1979) (upholding that Massachusetts statute requiring minor to obtain parental consent or judicial approval before receiving abortion unconstitutionally burdened right to abortion). *See generally* *Roe v. Wade*, 410 U.S. 179 (1973) (recognizing woman's constitutional right to abortion).

28 *See* U.S. v. Lewis, 445 U.S. 55, 65 (1980) (providing only perfunctory footnote setting forth essential holding in *Miller*, while not resolving ambiguities in *Miller* alleged by Gun Lobby); *see also* Kopel, *supra* note 12, at 112 (noting *Lewis* Court's attitude toward Second Amendment is ambiguous but probably does not support broad individual right, further, even if it is recognized, right is "less fundamental" than some others).
means of enforcing its own decisions. Every Supreme Court justice in the last century doubtless recalls with a shudder President Andrew Jackson's famous tirade: "The Supreme Court has made their decision; now let them enforce it!"29 In the end, of course, the Court relies upon its own moral authority for obedience, and the efficacy of the Constitution itself depends upon that obedience. The great Supreme Court justices have always been alert to what they consider the greatest constitutional dangers of all - widespread disrespect, resistance, or even confrontational disobedience to its rulings. No scholar doubts that when Justice Marshall deliberated the case of *Marbury v. Madison*,30 in 1803, the Chief Justice took fully into account the debilitative loss of prestige, which might have followed a refusal by the President to obey a judicial order of mandamus to appoint judges submitted by a previous administration. Justice Marshall's *tour de force* was in establishing the Court's great power of judicial nullification while at the same time achieving a factual result which the President had supported.

Likewise, the High Court (and the nation) survived widespread disobedience and disrespect for its decision in the *Dred Scott* case only by force of arms and a violent civil war.31 Thus, this theory must be given some attention. Given the great power which the Gun Lobby has accumulated in recent years, including its power


30 5 U.S. 137 (1803) (beginning of judicial interpretation of Constitution by Court).

31 See Kopel, supra note 12, at 179-180 (arguing that Scott v. Sandford, 60 U.S. 393 (1856), supports broad individual school). One of the reasons that Chief Justice Taney found it necessary to deny black citizenship was that doing so would grant blacks all constitutional rights, including the right to keep and carry arms wherever they went. *Sandford*, 60 U.S. at 450. Taney said that "Nor can congress deny to the people the right to keep and bear arms..." *Id* But what Taney may have been referring to was what would then have been the frightening prospect of blacks having arms while in service to a militia. This result is consistent with the narrow reading of the Amendment in which a freed black would have the right as a full citizen of serving in a state militia. see also Edward A. Harnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 152 (1999) (noting Dred Scott was one of set of terrible decisions handed down by Court); Ronald J. Krotoszynski, *Dissent, Free Speech, and the Continuing Search for the "Central Meaning" of the First Amendment*, 98 MICH. L. REV. 1613, 1651 (May 2000) (noting President Lincoln's "scathing critique" of decision).
not only to influence public opinion, but to elect its supporters and punish its opponents, the Court may indeed fear a Gun Lobby backlash to any decision reaffirming *Miller*. If the spectacle of passionate demonstrations outside the Supreme Court during its abortion cases sends shivers down the spines of the high jurists today, one can only imagine how they might envision the demonstrations funded by the Gun Lobby. Surely, this theory goes, it is the course of least resistance not to stir the hornet's nest.

Nevertheless, it should be noted that the Court has an admirable record of courage in deciding issues of great concern, and providing leadership where the legislative bodies have been timid. In *Brown v. Board of Education*,\(^3\) for instance, the Court must have known the fierce resistance and even violence that would follow its decision outlawing desegregation. Nor did the prospect of a wave of future litigation seeking refinement of its principles ultimately deter the Court.

Finally, it has been suggested that the Court rejects *certiorari* of Second Amendment cases because some justices fear how their colleagues might rule, and therefore, prefer to await the retirement of several of the older justices in the hope that new justices might provide a strong consensus one way or the other in order to provide a united moral front to what would ultimately be a controversial opinion. It is no secret that the majority in *Brown* fiercely lobbied the potential dissenters on the Court to reach a unanimous decision, which would better withstand the foreseen popular rejection of its decision, particularly in the South. In *United States v. Nixon*,\(^3\) the Court also knew that a unanimous decision was imperative in order to present the President with a mandate, which left no political room for disobedience.

It is the purpose of this article to examine all these theories, and to provide the basis for a reasoned decision clarifying the right to bear arms under the Second Amendment.

This article is divided into four parts. Part I examines the history of the original drafting and ratification of the Second Amendment. In particular, it reviews the record of the

---

32 347 U.S. 483, 495 (1945) (holding that "separate but equal is... inherently unequal").

Constitutional Convention. At Convention, not a word was expressed concerning an individual right to bear arms; there was, however, considerable concern expressed, particularly by representatives of the Southern states, about a standing army. The Southern states not only demanded that the Constitution not forbid slavery but also that states be permitted to keep their militias.

In the Bill of Rights Debates, which followed ratification of the Constitution by the states, representatives demanded a "militia" amendment, which forbade the elimination of militias via the indirect means of banning firearms for those serving in the militias. Although a draft of the Second Amendment, which did not contain a militia preamble to the right to bear arms, was proposed, it was soundly defeated by the U.S. Senate and replaced with the draft specifically setting forth the militia preamble. Part I further explores the thesis that the founding fathers somehow intended to include in the Second

34 See Robert Hardaway, A Right to Bear Arms? Courts Don't Buy Gun Owners' Claims, DENV. ROCKY MOUNTAIN NEWS, June 4, 1995, at 86A (stating Constitution clearly gives Supreme Court - not gun owners - power to interpret Second Amendment in context of "well-regulated militia"); see also Paul Campos, Ardent Gun Debate Offers No Solutions, DENV. ROCKY MOUNTAIN NEWS, May 9, 2000, at 40A (discussing debate on gun control sponsored by Colorado Bar Association that centered on whether Second Amendment guarantees individual or collective right to bear arms); Carla Crowder, Constitutional Scholars Blast NRA, Say Gun Group Has Deceived Public, DENV. ROCKY MOUNTAIN NEWS, March 28, 2000, at 7A (relating argument that Second Amendment does not guarantee individual right to bear arms, but right to bear arms in relation to well-regulated militia) (emphasis added).

35 See Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971) (finding that "The right of the people to keep and bear arms shall not be infringed; a well armed but well regulated militia being the best security of a free country, but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.") (quoting proposed amendment); see also Ariel A. Rodriguez, Is the Right to Bear Arms Individual, Collective, Insurrectionist or All of the Above?, 10 SETON HALL CONST. L.J. 797, 798-803 (2000) (assesing arguments for individual versus collective right to bear arms); Andrew M. Wayment, The Second Amendment: A Guard for Our Future Security, 37 IDAHO L. REV. 203, 222 (2000) (quoting U.S. v. Emerson, 46 F. Supp. 2d. 598, 604 (N.D. Tex. 1999), rev'd, 270 F.3d 203 (5th Cir. 2001) (explaining Framers of Constitution considered individual right to keep and bear arms as "paramount right by which [all other rights could be protected]").

36 See Schwartz, supra note 35, at 280 (discussing proposed amendment); see also Carl T. Bogus, The Hidden History of the Second Amendment, 31 U.C. DAVIS L. REV. 309, 321 (1998) (stating that "The Second Amendment was not enacted to provide a check on government tyranny; rather, it was written to assure the Southern states that Congress would not undermine the slave system by using its newly acquired constitutional authority over the militia to disarm the state militia and thereby destroy the South's principal instrument of slave control. In effect, the Second Amendment supplemented the slavery compromise made at the Constitutional Convention in Philadelphia and obliquely codified in other constitutional provisions."); Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 62 TENN. L. REV. 461, 466, 503-512 (1995) (discussing critical interpretations of Second Amendment and whether it allows individuals right to bear arms as opposed to only militia).
Amendment a citizen's right of armed insurrection against their own democratically elected government.

Part II traces the judicial history of interpretation of the Second Amendment by U.S. courts. Although this part cites all decisions found which refer, even in dicta, to the Second Amendment, it is revealed that the underlying Second Amendment issue requiring clarification is quite simple. In 1981, in *U.S. v. Lewis* the Court held: "The Second Amendment guarantees no right to keep and bear a firearm that does not have some reasonable relationship to the preservation or efficiency of a well-regulated militia." Part II explores the only two reasonable interpretations of this language. The first is that the right to bear arms is granted only to those who require such arms for service in the militia. The second interpretation is that every citizen has the right to bear an arm of the type that might be *used* by a militia.

The Courts of Appeal have uniformly adopted the first interpretation. Typically, as in *U.S. v. Tot,* the Courts have stated:

> It is abundantly clear both from the discussions of this amendment contemporaneous with its proposal and adoption and those of learned writers since, that this amendment, unlike those providing for protection of free speech and freedom of religion, *was not adopted with individual rights in mind,* but as protection for the states in the maintenance of their militia organizations against possible encroachment by the federal power.


38 *Tot,* 131 F.2d 261 (3d Cir. 1942), rev'd, 319 U.S. 463 (1943).

39 *Tot,* 131 F.2d at 266 (emphasis added) (intimating that in addition to vast majority of federal courts, state courts have also largely concurred); see, e.g., People v. Bergstrom, 544 P.2d 396, 397-98 (Colo. 1975) (affirming defendant's conviction for "felon with a gun" statute); People v. Blue, 544 P.2d 385, 387 (Colo. 1975) (affirming charges of gun possession); People v. Barger, 732 P.2d 1225, 1226 (Colo. Ct. App. 1986) (agreeing that right to bear arms is limited); People v. McCloskey, 244 P. 930, 930-31 (Cal. Ct. App. 1926) (stating that "It is a well-recognized function of the legislature in the exercise of the police power to restrain dangerous practices and to regulate the carrying and use of firearms and other weapons in the interest of the public safety . . . "); People v. Gonzales, 237 P. 812, 812-13 (Cal. Ct. App. 1925) (dealing with "Firearms Act"); People v. Camperlingo, 231 P. 601, 604 (Cal. Ct. App. 1924) (discussing that "It therefore becomes apparent that the right of a citizen to bear arms is not acquired from any constitutional provision . . . ").
The second interpretation, which no court of appeals decision has yet adopted, is the apparent view of some members of the Gun Lobby. The advocates of this view argue that current militia law applies to "literally the entire body of armed citizenry." Unfortunately for these advocates, the law does not define the militia as the body of armed citizenry. Rather, the militia consists of all able-bodied males between the ages of 17 and 45 years of age who are not members of the National Guard or the Naval Militia. This creates a dilemma for the broad based advocates, for they:

are at a loss to explain how the broad-based definition of the "militia" in the statute books or the colonial model of a militia - supports the assertion of an individual right of gun ownership for all citizens.... Are the theorists who advocate a broad second amendment right willing to pursue their argument to its necessary conclusion that women and older males have no constitutional right to own guns?

Part II will examine several of the most obvious difficulties of this second interpretation, not the least of which is that no appeals court has ever adopted it. The following questions are explored with regard to this second interpretation: 1) If only arms which are useful for military application are covered by the Second Amendment, could the United States then ban all

40 Marietta Pennsylvania Militia, http://www.mariettapa.com/marietta_militia.html (visited March 2, 2001) (stating unorganized militia is protected under Second Amendment); compare U.S. CONST. art. I, § 8 (stating Congress has right to organize militia) with Bogus, supra note 36, at 321 (suggesting Madison provided significant key to constitutional construction when he said nothing in Bill of Rights can alter text of Constitution).

41 See 10 U.S.C.S. § 311(a) (2000). In fact, militia laws in this country have never recognized the universal right to possess firearms. The first Militia Act enacted in 1792 provided that the militia consisted of white males between 18 and 45. accord Resnick, Private Arms as the Palladium of Liberty: The Meaning of the Second Amendment, 77 U. DET. MERCY L. REV. 1, 34 (1999). Furthermore, some have argued that the right of a citizen to bear arms is not acquired from any constitutional provision. accord Camperlingo, 231 P. at 604.

42 Keith A. Ehrman and Dennis A. Henigan, The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?, 15 U. DAYTON L. REV. 5, 49-50 (1989) (arguing present-day National Guard is modern equivalent of 18th century state militia, thus rendering Second Amendment anachronistic and its protections unnecessary); see also Don B. Kates, Jr., Handgun Prohibition and the Original Meaning of the Second Amendment, 82 MICH. L. REV. 204, 225 (1983) (stating Second Amendment was response to perceived lack of individual rights guarantees, not as state's right proponents contend, reaction to standing army and militia control provisions of Art. I, § 8); David E. Vandercoy, The History of the Second Amendment, 28 VAL. U. L. REV. 1007, 1009 (1994) (arguing Second Amendment recognizes not only individual right to arms, but right to be armed at level equal to government).
weapons which would not be useful to any militia, such as "Saturday Night Specials"? 2) Would the Second Amendment then guarantee to every citizen all weapons that a militia might use, such as canons, tanks, hand grenades, high explosives, bazookas, or even small tactical nuclear weapons? 3) How does one apply this interpretation if in fact it can be shown that no militia in fact exists today in the U.S.?

Part III explores the public policy aspects of Second Amendment applications. While acknowledging that public policy has no direct or formal role in purely statutory or constitutional construction, it is noted that many U.S. Supreme Court decisions have considered public policy in constitutional interpretation. Also addressed is the extent to which public policy and safety should be considered in constitutional interpretation. For example, should the fact that there were 20,000 handgun deaths in the U.S. compared to 93 in Japan, which has strict gun laws, be considered in Second Amendment analysis?

Finally, Part IV sets forth conclusions to the questions raised in the first four parts.

43 See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 888 (1992) (striking down requirement of notification of husband prior to obtaining abortion for fear requirement would provoke physical abuse against wife or children); Brown v. Bd. of Educ., 347 U.S. 483, 483 (1946) (ordering desegregation of schools, because no one reasonably may be expected to succeed in life if denied opportunity of education), modified, 349 U.S. 294, 300 (1955) (specifically noting equity has been characterized by practical flexibility in shaping its remedies and by facility for adjusting and reconciling public and private needs); U.S. v. Darby, 312 U.S. 100, 122-23 (1940) (upholding working wage and hours regulation to prevent substandard labor conditions); Muller v. Oregon, 208 U.S. 412, 420-21 (1908) (upholding state law limiting number of hours women may work based on need to preserve health of women).


45 The conclusions are those of lead author Robert Hardaway. Co-authors Liesl Gormley and Bryan Taylor, who prepared respectively preliminary drafts of Parts I and II, do not necessarily agree with all of the conclusions of the primary author in Part IV.
I. HISTORY OF THE SECOND AMENDMENT

In 1789 the House of Representatives and the U.S. Senate drafted the Bill of Rights. By 1791, the States had ratified the Bill of Rights, which was subsequently incorporated into the United States Constitution as the first ten amendments. Despite the interceding two hundred years, there is little consensus regarding even the most basic meaning of the Second Amendment. There may be no provision in the entire Constitution from which such great consequences flow but about which such little unanimity has been achieved. Part of the confusion arises from the structure and wording of the amendment itself. A facial reading would suggest that the provision is internally contradictory: the first clause appears to be a guarantee of arms only to state militias; the second clause may be read as an absolute right of every individual to keep and bear arms. The purpose of this section is to clarify and reconcile these clauses. This effort is grounded in the belief that the Constitution is to be interpreted according to the intent of those who drafted and ratified the document.

This article will address three schools of Second Amendment thought. These three schools will be referred to as "the narrow individual right" view and the "broad individual right" view. The broad individual right view pictures the Second Amendment as guaranteeing an "individual right to bear arms for all legal private purposes - barring virtually all regulations of

46 See generally David E. Vandercoy, The History of the Second Amendment, 28 VAL. U. L. REV. 1007, 1009 (1994) (arguing Second Amendment recognizes not only individual right to arms but right to be armed at level equal to government); But cf. Ehrman & Henigan, supra note 42, at 57 (arguing intent behind Second Amendment in framers mind was to have states retain right to organize and maintain militia "armed guard," rather than granting ample right to each individual).

47 See U.S. CONST. amend. II. (stating "[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"); see also Ralph J. Rohner, The Right to Bear Arms: A Phenomenon of Constitutional History, 16 CATH. L. REV. 53, 55 (1966) (arguing, "is there any individual right to keep and bear arms for purposes other than collective security through a well-organized militia?").

48 See Ralph J. Rohner, supra note 47, at 53-54 (rejecting notion of living Constitution in which despite Second Amendment protection for traditional right to bear arms, "times may change to such degree that no such basic right can be justified in present circumstances," even based on our constitutional heritage).

49 See Herz, supra note 17, at 61-62 (explaining "narrow individual right" view and "broad individual right view").
The more narrow individual right school views the Second Amendment as guaranteeing an individual right to arms only when possession of the weapon is related to participation in a state militia. A third school, called the states right or collective rights view, sees the Second Amendment as guaranteeing the ability of the states to raise a militia but secures no right to the individual.

Many scholars and at least one federal court have ignored the narrow right school. In place of a narrow individual right theory, broad right advocates assert a state or collective right to possess or bear arms. One writer, for example, frames the question as follows: "whether the Second Amendment recognizes the right of each citizen to keep and bear arms, or whether the right belongs solely to state government and empowers each state to maintain a military force." By demonstrating that the Second Amendment was intended to apply to individuals and not states, gun rights proponents can claim that individuals have an absolute right to gun ownership. It will be submitted that such analysis does little to resolve issue of which of the three schools of thought is valid.

There are two relevant Second Amendment questions. The first question is whether the right belongs to the individual. Professor Yassky believes the question to be confused because "[a]ll constitutional rights - even those most obviously concerned with government structure rather than individual freedom - ultimately belong to individuals in the sense that individuals can sue to vindicate them." The proper question assumes that the
Second Amendment recognizes some individual right but asks what the scope of the right is. This article argues that the scope of the individual right is limited to those circumstances in which the individual participates in a government militia.

Until recently, the courts have unanimously viewed the Second Amendment either as a state right or narrow individual right. Many legal scholars, lawyers, and the American Bar Association concur that there is no broad individual right to gun ownership. Many civil libertarian organizations, which usually protect an individuals right against government, such as the American Civil Liberties Union (ACLU) and the National Coalition to Ban Handguns, take the position that the Second Amendment does not grant an unlimited individual right to gun ownership. Unfortunately, the broad individual rights view seems to have been accepted by the public, thus leading to Chief Justice Burger's concern about the deliberate misrepresentation of individuals exercising that function.

55 See, e.g., Kates, supra note 42, at 206 (describing polarizing debate between individual rights theory and exclusively state's right view); Vandercoy, supra note 46, at 1009 (arguing that Second Amendment recognizes not only individual right to arms but right to be armed at level equal to government). But see, e.g., David I. Caplan, Restoring the Balance: The Second Amendment Revisited, 5 FORDHAM URB. L.J. 31, 40-41 (1976) (contending that first Congress maintained that well-regulated militia was "necessary" to security of free state as opposed to merely "sufficient," because normal process may be insufficient to protect people all the time); Ehrman & Henigan, supra note 46, at 57 (arguing that intent behind Second Amendment in framers mind was to have states retain right to organize and maintain militia "armed guard," rather than granting ample right to each individual); Peter B. Feller & Karl L. Gotting, The Second Amendment: A Second Look, 61 NW. U. L. REV. 46, 67-70 (1966) (stating that Second Amendment is collective right rather than individual right, where every state would be protected by independent state militia). But see Robert Dowlut, The Right to Arms: Does the Constitution or the Predilection of Judges Reign?, 36 OKLA. L. REV. 65, 65-67 (1983) (arguing that collective right to bear arms does not exclude individual right to bear arms); Richard E. Gardiner, To Preserve Liberty—A Look at the Right to Keep and Bear Arms, 10 N. KY. L. REV. 63, 64 (1982) (arguing individual right to bear arms originated in English Common Law and individual right to bear arms does not depend on Second Amendment); Stuart R. Hays, The Right to Bear Arms, A Study in Judicial Misinterpretation, 2 WM. & MARY L. REV. 381, 381-821 (1960) (tracking historical development of restriction of arms); Robert A. Sprecher, The Lost Amendment, 51 A.B.A. J. 554 (1965). See generally 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).

56 See Kates, supra note 42, at 207-08 (quoting ACLU's summary of its national board action during 1980 meeting view towards Second Amendment agreeing with Supreme Court's long-standing interpretation of Second Amendment); see also A.B.A., Policy Book (Aug. 1975).

57 See Kates, supra note 42, at 207-08 n.15 (quoting ACLU's summary of its national board action during 1980 meeting view towards Second Amendment agreeing with Supreme Court's long-standing interpretation of Second meeting).
existing law to the American people.\textsuperscript{58} The Supreme Court's standard for constitutional interpretation is as follows:

in the construction of the language of the Constitution . . . we are to place ourselves as nearly as possible in the condition of the men who framed that instrument. Undoubtedly, the framers . . . had for a long time been absorbed in considering the arbitrary encroachments of the Crown on the liberty of the subject . . .\textsuperscript{59}

In order to determine the intent of the framers and ratifiers of the Second Amendment, three areas should be examined: first, English history and the broad right to possess arms; second, colonial history and the process of the Second Amendment's proposal and ratification; third, the primary arguments of the broad right theorists. These arguments include whether the Amendment embraces a "right of insurrection", the chronological placement of the Amendment in the Bill of Rights, and arguments relating to the Amendment's construction.

\textit{A. The Historic Right to Bear Arms in England}

The common law of England directly influenced the development of law in the United States. To the extent that it was appropriate to the circumstances of the colonies, the body of the common law "crossed the Atlantic with the colonists."\textsuperscript{60} The charters that created the colonies assured the settlers that they would have the same rights and immunities as if they had remained in England.\textsuperscript{61} This is particularly true with regard to the possession of arms. The dangers posed by the unsettled lands "made the common law tradition of an armed citizenry both

\textsuperscript{58} See generally 121 CONG. REC. 42, 112 (1975) (stating seventy percent of respondents endorsed individual rights alternative, while 3\% said it applied to both individual citizens and National Guard).

\textsuperscript{59} Ex parte Bain, 121 U.S. 1, 12 (1887).


\textsuperscript{61} See Malcolm, \textit{supra} note 60, at 289. Connecticut's charter assured the colonists that they would "have and enjoy all Liberties and Immunities of free and natural Subjects . . . as if they and everyone of them were borne within the Realms of England." \textit{Id.; see also} SCHWARTZ, \textit{supra} note 35, at 280 (stating colonists entitled to English common law).
appropriate and crucial to the survival of plantations." 62

Ultimately, many of the liberties and rights recognized in the
common law were incorporated into the American Bill of
Rights. 63 It is argued that the right to possess arms as it existed
in the ancient English system deeply influenced the right as it
was codified under the Second Amendment. 64 If it can be
demonstrated that the common law encompassed only the right
to possess arms that related to a military function, then this is
compelling evidence of the scope of the right incorporated into
the American Constitution. 65

62 Malcolm, supra note 60, at 289; see also Kates, supra note 42, at 231 (stating that
"[T]he very character of the people . . . was related to the individual's ability and desire to
arm himself against threats to his person, his property and his state.").

63 See ENGLISH BILL OF RIGHTS (1689), 1 W. & M.; see also The Avalon Project at the
Yale Law School: English Bill of Rights 1689, available at
http://www.yale.edu/lawweb/avalon/england.htm (last modified Nov. 25, 2001). Among the
rights recognized by the English Bill of Rights of 1689 that appear to have influenced the
American Bill of Rights are the following: "That it is the right of the subjects to petition
the king, and all commitments and prosecutions for such petitioning are illegal . . .,
[T]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel and
unusual punishments inflicted . . ." Malcolm, supra note 60, at 289-90 (arguing that, with
some significant modifications, this document also influenced drafting of Second
Amendment).

64 See Malcolm, supra note 60, at 289 (finding that "Nearly all writers agree . . . that
an accurate reading of the Second Amendment is indispensable to resolving current
debates over gun ownership, and that a clarification of the common law tradition is
necessary to that reading."); see also Brief for Appellant at 9, U.S. v. Miller, 307 U.S. 174
(1939) (Robert Jackson, acting as Solicitor for United States, said: "In determining the
nature and extent of the Second Amendment, we must look to the common law on the
subject as it existed at the time of the adoption of the Amendment.").

65 See Kates, supra note 42, at 238 n.144 (arguing founders believed English law too
severely restricted right to possess arms and Second Amendment expanded right). But
see WILLS, supra note 5 (making case for narrow individual rights interpretation with
minimal reference to English common law). Two of the cases cited by Kopel acknowledge
an individual right to bear arms specifically referring to the English common law. See
Brown v. Walker, 161 U.S. 591, 635 (1896) (Field, J., dissenting) (noting that "The
freedom of thought, of speech, and of the press; the right to bear arms . . . are, together
with exemption from self-crimination, the essential and inseparable features of English
liberty." (citing Bradley, J. in: Boyd v. U.S., 116 U.S. 616, 635 (1886)). Kopel says that
"Justice Field's paragraph is not a list of state power, it is a list of personal rights won at
great cost - rights which may never be trampled by the legislature's perceived needs of the
moment." See Kopel, supra note 12, at 167-68. However, the court in Robertson v.
Baldwin, 165 U.S. 275, 281 (1897), listed a number of rights in the Bill of Rights that are
not absolute, including "the right of the people to keep and bear arms (Article 2) is not
infringed by law prohibiting the carrying of concealed weapons." Kopel says, "the laws did
not forbid state militias from carrying concealed weapons. The prohibitions on concealed
carry are the exceptions that prove the rule. Only if the Second Amendment is an
individual right does the Court's invocation of a concealed carry exception make any
sense." See Kopel, supra note 12, at 166. But the Robertson opinion also says that the Bill
of Rights "were not intended to lay down any novel principles of government, but simply
to embody certain guarantees and immunities which we had inherited from our English
ancestors . . ." Robertson, 165 U.S. at 281. Since English law never recognized an
individual right to weapons for private purposes, neither would the Second Amendment.
The reference to concealed weapons laws is simply stating a truism: the concealed carry
1. The Duty and the Right to Have Weapons

Prior to the Glorious Revolution, the people of England were required to bear arms in order to participate in military and police action. There is no question that this duty was rooted in antiquity. Some analysts argue that, prior to the Norman conquest, the Saxons developed a system in which every free man must have weapons suitable to the infantry and was obligated to serve in the militia. According to Blackstone, King Alfred, ruler of England from 871 to 901 A.D., decreed that "all subjects of his dominion were the realm's soldiers." The militia system was used primarily for defensive purposes, being called out only in those districts that were threatened with attack. This limitation was probably a reflection of the nature of the militia itself. Under this system, military obligations are of short duration; members would not be available for the long sieges necessary to project power against other countries. During this time, the great expense of maintaining a standing army demanded a relatively heavy reliance on the militia. For instance, in the Battle of Hastings, King Harold could muster a force of only 2,200 professional soldiers, but the total size of the militia at the time numbered about 50,000.

The militia system was formalized and expanded under the Angevin monarchs. In 1181, Henry II instituted the Assize of Arms. This decree stated that every freeman was to keep arms laws are not unconstitutional because they apply to individuals in their private functions; the constitutional right to arms applies to those performing military functions.

---

66 See infra note 334 (finding that Glorious Revolution was brought about by James II abusive conduct on throne and resulted in William and Mary taking power).

67 See David T. Hardy, Armed Citizens, Citizen Armies: Towards a Jurisprudence of the Second Amendment, 9 HARV. J. L. & PUB. POL'Y 559, 562 (1986) (stating that every free man was obliged by law to keep weapons and armour and serve in fyrd, and he was unable to sell or alienate his weapons in any way). See generally CHARLES WARREN HOLLISTER, ANGLO-SAXON MILITARY INSTITUTIONS ON THE EVE OF THE NORMAN CONQUEST (Clarendon Press 1962).

68 Vandercoy, supra note 46, at 1009; see also Hardy, supra note 67, at 562-63 n.14 (distinguishing Anglo - Saxon system from Continental system on grounds that where English system was more open, Continental system limited duty of fighting and right to armaments to wealthier classes).


70 See generally Fields and Hardy, supra note 69, at 3 (discussing military obligations and durational times generally).

71 See Fields and Hardy, supra note 69, at 3 (citing D. HOWARTH, 1066 THE YEAR OF THE CONQUEST 80-1 (1970)).
to aid in the defense of the kingdom. The individuals were responsible for providing their own arms, according to the value of their chattels, and to serve the King at their own expense. Another Assize of Arms in 1253 expanded the military duties beyond freemen to include serfs. In 1285, Edward I passed the Statute of Winchester. This imposed two relevant duties on the English people. First, the law dictated "What Armour each Person shall have in his House." The general duty was that "Every man between Fifteen Years of Age, and Sixty Years, shall be assessed and sworn to Armor according to the Quantity of their Lands and Goods..." Secondly, however, the law imposed police duties on the people. Upon hearing the hue and cry of one of the townspeople, the others were obliged to pursue...
the criminal. During this period, it is clear that the English people had a duty to possess arms to act on behalf of the common good in military and police actions. It is much less clear that they had a right to possess weapons. Even if such a right were implied, it surely did not extend to the possession of weapons for whatever purpose the people wished. As one scholar argues, there was clearly a recognized duty to keep and bear arms which had long been ingrained in the political and social structure of the country. These "duties" implied no corresponding "right" on their face, but it seems a fair conclusion that they may have been so understood by the citizens of the day: if they were required to keep arms to held assure public tranquility, did they not have a right to that tranquility, and hence a right to the weapons needed to assure it? Even if this inference is allowed, it does not expand the "right" beyond the purpose of collective security in its broadest sense.

The next four hundred years amply demonstrated that the English people had no private right to the unrestricted possession or use of weapons. In 1328, Edward III enacted the Statute of Northampton, prohibiting the carrying of arms in a public place. Similarly, laws were passed forbidding the use of...

79 See Statute of Winchester, 1285, Edw. III c. 4 (noting that part of title of CAP. VI is: "A Hue and Cry shall be followed...." That same statute requires: "And from henceforth let Sheriffs take good Heed, and Bailiffs, within their Franchises and without, be they higher or lower, that have any Bailiwick or Forestry in Fee, or otherwise, that they shall follow the Cry with the Country, and after, as they are bounden [sic]..."). WILLS, supra note 5, at 68 (arguing that membership in militia was necessarily circumscribed because of its police function).

80 See Rohner, supra note 47, at 60 (noting origin of right to bear arms); see also Andrew D. Herz, supra note 17, at 61 n.11 (arguing some authors espouse narrow individual right to bear arms). See generally Anthony J. Dennis, Clearing the Smoke from the Right to Bear Arms and the Second Amendment, 29 AKRON L. REV. 57, 65 (1995) (mentioning authors who argue scope of Second Amendment should be limited).

81 See Statute of Northampton, 1328, Edw. III c.3 s. 3. The law reads:

Item, it is enacted, That no Man great nor small, of what Condition soever he be, except the King's Servants in his Presence, and His Ministers in executing of the King's Precepts, or of their Office, and such as be in their Company assisting them, and also upon a Cry made for Arms to the Peace, and the same in such places where such Acts happen, be so hardy to come before the King's Justices, of the King's Ministers doing their Office with Force and Arms, nor bring no force in affray of the peace, nor to go nor ride armed by Night nor by day, in fairs, Markets, nor in the Presence of the Justices or other Ministers, nor in no part elsewhere, upon Pain to forfeit their Armour to the King, and their bodies to Prison at the King's Pleasure.

See also 87 ENG. REP. 75, 76 (1686) (construing statute in Sir John Knight's case where accusation was that: "the defendant did walk about the streets armed with guns, and that he went into the Church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King's subject." The defendant was acquitted. The statute was construed as a codification of the common law that forbade terrifying others with...
Hunting

Gun restrictions were not always related to hunting. In 1541, Henry VIII decreed which weapons may be held by whom. No one with an annual income of less than 100 pounds was permitted to "use to keep in his or their houses or elsewhere any cross-bow, hand-gun, hagbut or demi-hake..." This was specifically a decree aimed at criminals, those of "evil disposed minds and purposes, [who] have willfully and shamefully committed, perpetrated, and done divers detestable and shameful murders, robberies, felonies, riots, and routs..." with the aid of the prohibited weapons. Thus, the law did not restrict ownership of all weapons; it "merely limited the use of those weapons most common in crime."

The reign of James I witnessed a flurry of weapons law. Three games laws, in 1604, 1605, and 1609, were passed. These acts increased the property requirements for hunting, prohibited the use of certain weapons in hunting, and permitted homes to be searched for the prohibited weapons. One writer has
speculated that these acts were made not only to preserve game but because James I lived in fear of being attacked by his subjects. The use of games acts were also a customary means to curb lower class violence. In 1603, James eased the duty to be armed by repealing the State of Winchester, "eliminating the special obligations to possess arms, and simultaneously enacted a requirement that magazines of arms and provisions shall be collected in one place in each county."

Perhaps the most onerous restrictions were decreed during the reign of Charles II. The Militia Act of 1672 authorized the militia to disarm subjects at their discretion. The Act was regarded by the people as a blatant use of law to disarm the people to enhance the power of the army and, hence, the Crown.
The 1670 Games Act also disturbed the people of England. Although ostensibly a game act, the law "deprived the great majority of the community all legal right to have firearms."93 Where previous game acts were enforced by justices of the peace and local constables, this law empowered the gentry to enforce the law on their own estates.94 Not only did the law prohibit ownership of a gun for any reason, including personal protection, it "effectively transferred nearly exclusive power of the sword to the county gentry."95

The political needs of James II prompted the attempt to actually disarm the English people. When James ascended to the throne in 1685, he was a practicing Catholic in a country that was overwhelmingly Protestant. At the time, England operated under the 1673 Test Act that was designed to preclude Catholics from public office by requiring all public officials to take the Anglican sacrament.96 During his short reign, James II devoted himself to increasing the power of Catholics in the army and the royal governing system. The Test Act proved no impediment to these designs as he appointed large numbers of Catholics to positions of power.97 James's reign also witnessed a huge

93 MALCOLM, supra note 76, at 65. Malcolm and other commentators refer to this law as the 1671 Game Act. Statutes at large indicate that the law was passed in 1670. The law specifies that those not having lands of a yearly value of 100 pounds "are hereby declared to be persons by the laws of this real not allowed to have or keep for themselves, or any other person or persons, any guns, bows . . . but shall be and are hereby prohibited to have, keep or use the same." 22 Car. 2, ch. 25, § 2; see also Schwoerer, supra note 88, at 35 (discussing this restrictive measure). Malcolm argues that this was the first law to criminalize possession of firearm per se; "[i]t was no longer necessary to prove illegal use or intent . . . " Malcolm, supra note 60, at 304. 94 MALCOLM, supra note 76, at 70 (stating that "the new class of gentry-appointed officials placed the task of game preservation directly in the hands of the gentry . . . "); see also Kopel, supra note 89, at 1346 (discussing use of law by gentry to search selectively). See generally Schwoerer, supra note 88, at 52 (indicating games act were enforced according to attitude of local gentry). 95 22 Car. 2, ch. 25 (setting forth language of statute); MALCOLM, supra note 76, at 76; see also Ingram and Ray, supra note 4, at 496 (indicating no one lower in rank than son could carry gun). 96 See Malcolm, supra note 60, at 95 (describing Act as requiring all public officials to swear to oaths of allegiance and supremacy to Anglican Church); see also 25 Car. 2, ch. 2 (giving actual language of statute); Laura Zwicker, Note, The Politics of Toleration: The Establishment Clause and the Act of Toleration Examined, 66 IND. L.J. 773, 776 (1991) (indicating Test Act of 1673 made church Anglican domain). 97 See MALCOLM, supra note 76, at 101 (indicating these appointments included at least one hundred Catholic army officers); see also Hardy, supra note 67, at 578 n.88 (stating at one point, dispensations from Test Act included 2 generals, 6 colonels, 9 majors, 24 captains, and 30 lieutenants). By 1688, half the lieutenants and 800 justices of the peace had been relieved of their duties and replaced by Catholics or Protestant ministers. MALCOLM, supra note 76, at 103; Schwoerer, supra note 88, at 44 (stating
increase in the size of the army. The combination of the larger army and its increasingly Catholic influence led people to fear subjugation to Catholicism.

James II also pursued the tactic of disarming his opponents. In 1686 he ordered the militia "to cause strict search to be made for such muskets or guns and to seize and safely keep them until further order" because "a great many persons not qualified by law, under pretense of shooting matches keep muskets or other guns in their houses." The orders were issued under the authority of the Militia Act or the 1670 Games Act. Because of the size of the project and the fear of alienating the people, it is possible that the militia failed to carry out the orders on a large scale. Further, as the case of Sir John Knight illustrates, the courts were not always compliant with regard to James' disarmament scheme. But the public had little doubt that, as James II appointed Catholic officers to army and armed Catholic subjects).

See MALCOLM, supra note 76, at 101 (indicating these appointments included at least one hundred Catholic army officers); see also Hardy, supra note 67, at 578 n.88 (stating at one point, dispensations from Test Act included 2 generals, 6 colonels, 9 majors, 24 captains, and 30 lieutenants). By 1688, half the lieutenants and 800 justices of the peace had been relieved of their duties and replaced by Catholics or Protestant ministers. Malcolm, supra note 60, at 103; Schwoerer, supra note 88, at 44 (stating James II appointed Catholic officers to army and armed Catholic subjects).


Fields and Hardy, supra note 69, at 13; see also Kopel, supra note 89, at 1347 (discussing searches for firearms); Joseph E. Olson and David B. Kopel, All the Way Down the Slippery Slope: Gun Prohibition in England and Some Lessons for Civil Liberties in America, 22 HAMLINE L. REV. 399, 402 (1999) (discussing searches ordered by James II without warrants).

See Fields and Hardy, supra note 69, at 13 (stating that James II followed disarming initiative started by his brother, using Militia Act and Hunting Act); Kates, supra note 42, at 236 (arguing this disarmament policy had added benefit of discouraging dissent because, in crime plagued England not many people were courageous enough to want to live without weapons needed for defense of themselves and their families); see also Ingram and Ray, supra note 4, at 496 (setting forth orders issued under Militia Act and Games Act of 1670); Olson and Kopel, supra note 100, at 403 (stating loss of liberty resulting from actions authorized under Militia Act and Games Act).

See MALCOLM, supra note 76, at 105 (stating that James had given up on his militia enforcing Acts); see also Malcolm, supra, note 60, at 105 (discussing laws in England prohibiting ownership of guns). But see Hardy, supra note 67, at 577 (stating at least one contemporary Londoner said James officers went from house to house to search for arms, and at some places quantities were seized).

See 87 ENG. REP. 75, 75 (1686) (discussing acquittal of defendant accused of terrifying Kings subjects with weapons); Malcolm supra note 60, at 105 (arguing defendant was ultimately released because Kings Bench was not prepared to approve use
James tilted the balance of power towards Catholics, the prospect of general disarmament loomed greater. James's downfall may ultimately have been precipitated by the birth of his son. The English people may have endured the reign of one Catholic king, now they were faced with the prospect of a long line of Catholic rule. James's eldest daughter, Mary, was married to William of Orange; both were devoutly Protestant and fighting for that cause on the continent. William and Mary appeared to be the best candidates to reverse England's slide into Catholic rule. Within a month of the birth of James's son, seven prominent Englishmen sent a letter to William assuring him the support of the English people should he lead an invasion. The strength of James's army was purely illusory. Defections were so numerous, and those who joined the invaders so great, that within 6 weeks of landing on England, William had forced James to flee to France. The Glorious Revolution had been a bloodless coup.

2. The English Declaration of Rights

As a condition to taking power, Parliament required William of [the Statute of Northampton to disarm law-abiding citizens).

104 See MALCOLM, supra note 76, at 106 (discussing James's attempt to impose Game Act and largely Catholic militia as signs of general disarming).

105 See Bogus, supra note 36, at 378-83 (discussing James' desire to restore Catholicism to England); Malcolm, supra note 60, at 109 (arguing English people were patient with James because, due to his age, he was unlikely to have another child and, upon his death, throne would pass to his Protestant daughter, Mary).

106 See MALCOLM, supra note 76, at 109 (discussing William and Mary's fight from abroad to keep England from falling into Catholic rule); see also HENRY HALLMAN, THE CONSTITUTIONAL HISTORY OF ENGLAND, volume 2, 245-46 (1978) (explaining William's diligent preparation for his successful invasion).

107 See MALCOLM, supra note 76, at 110 (stating that invitation to William urged him to "save the realm"); see also HALLMAN, supra note 106, at 246-47 (discussing invitation to invade England and pledge of support of English sent to William). See generally BRIAN L. BLAKELEY & JACQUELIN COLLINS, DOCUMENTS IN ENGLISH HISTORY: EARLY TIMES TO THE PRESENT 217 (John Wiley & Sons, Inc. 1975) (describing terms of invitation to William and Mary to invade).

108 See MALCOLM, supra note 76, at 111-12 (explicating ease and expediency of William's victory); H. Richard Uviller & William G. Merkel, Symposium on the Second Amendment: Fresh Looks: The Second Amendment in Context: The Case of the Vanishing Predicate, 76 CHI.-KENT. L. REV. 403, 449 (2000) (stating that different English factions, once in opposition, joined forces to support William and Mary's Glorious Revolution); see also HALLMAN, supra note 106, at 252-53 (stating that James' flee to France was favorable circumstance to revolution).

109 See Hardy, supra note 67, at 579 (discussing James' flee to Continent from daughter Mary and son-in law, William of Orange); Uviller & Merkel, supra note 108, at 451 (affirming that Glorious Revolution was bloodless victory). See generally Schwoerer, supra note 88, at 31 (describing events of Glorious Revolution).
and Mary to accept certain limits on monarchical power. These limits were set forth in the Declaration of Rights. The Declaration of Rights consists of a grievance section and a rights section. The general grievance was that James II "did endeavor to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom ...". The means utilized by James to accomplish this end was "[b]y causing several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law ..." The right that was intended to address this grievance was set forth as follows: "That the subjects which are Protestants may have arms for their defense suitable for their conditions and as allowed by law ..."

Commentators differ in their interpretation of this English document. The broad right advocates emphasize the absence of any mention of a militia. Thus, it is asserted that this document transformed the possession of weapons from feudal duty to individual right. Alternatively, it is argued that the

110 See Fields & Hardy, supra note 69, at 20 (describing formulation and goals of Declaration of Rights); David B. Kopel, The Second Amendment in the Nineteenth Century, 1998 BYU L. REV. 1359, 1539-40 (1998) (stating that English Declaration of Rights placed restrictions on government as check on its power); see also Uviller & Merkel, supra note 108, at 451 (noting that English Declaration of Rights shifted power from Crown to Parliament).


112 BLAKELEY & COLLINS, supra note 107, at 119; The Avalon Project, supra note 111; see also Uviller & Merkel, supra note 108, at 449 (stating that English Protestants' major grievance with James' rule was his royal establishment of army composed disproportionately of Catholics and Catholic sympathizers).

113 BLAKELEY & COLLINS, supra note 107, at 219; The Avalon Project, supra note 111; see also Kopel, supra note 110, at 1539-40 (quoting English Declaration of Rights).

114 See Fields and Hardy, supra note, 69 at 22 (arguing Declaration recognized individual right to keep and bear arms that was separate and distinct from related concept that militia was especially appropriate way of defending free republic).

115 See id. (stating notions of individual rights would spread rapidly throughout liberal colonies); Kates supra note 42, at 238 (stating right must have been granted to individuals because there were no states in England to be protected against disarmament); Malcolm supra note 60, at 306 (stating right was recognized to protect individuals against militia, precisely because militia had been instrument used to disarm law-abiding citizens).

This argument is further buttressed by the modification of the wording of the document in Parliament. The original wording was "[I]t is necessary for the public safety that the subjects which are Protestants, should provide and keep arms for their common defense . . . " Hardy supra note, 67 at 582. By omitting the reference to common defense, the final version is consistent only with the view that an individual right was intended. Id. at 583.
document codified "the common law liberty to possess arms." That this right is explicitly subject to laws passed by Parliament does not deter the broad rights advocates from their argument. They argue that existing laws, especially the most offensive Militia Act and Games Act, were modified at the time of the declaration to exclude firearms. This was required to make the laws compatible with the allegedly newly declared right. Furthermore, legislative and judicial acts subsequent to the Declaration recognize that possession of certain arms for certain purposes was beyond current government regulation. Several eighteenth century court cases acknowledge that "a man may keep a gun for the defense of his house and family..." or that current laws "do not prohibit a man from keeping a gun for his own necessary defense..." Similarly, unlike previous game acts, the 1692 Game Act did not specifically list firearms as one of the prohibited weapons. When interpreting this law, the courts specifically excluded guns from the coverage of the regulation. According to the broad rights interpretation of the Declaration, the document implicitly put possession of firearms beyond the reach of the government. One advocate of this view concludes her analysis as follows:

The English Bill of Rights of 1689, however, not only

116 Kates, supra note 42, at 240; see Fields & Hardy, supra note 69, at 20 (noting that Declaration was not intended as "radical statement" of rights of individuals); Hardy, supra note 67, at 580 (stating that Declaration was codification of existing law and not introduction of new rights).

117 See Fields & Hardy, supra note 69, at 21 (stating that Militia and Game/Hunting Acts were changed to conform to Declaration of Rights); Malcolm supra note 60, at 309 (noting purposeful exclusion of firearms from Game and Militia Acts). See generally HALLMAN, supra note 106, at 271 (opining that Declaration and new laws made it impossible for government to usurp established liberties of people).

118 See Malcolm, supra note 60, at 308 (discussing changes in English laws subsequent to Declaration of Rights); see also Hardy, supra note 67, at 581-82 (stating that "firearms were pointedly excluded" from existing laws so as to be consistent with Declaration of Rights).

119 Kates, supra note 42, at 240 (quoting Mallock v. Eastly, 7 Mod. 482, 489, 87 Eng. Rep. 1370, 1374 (K.B. 1744)) (holding "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" and 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").

120 See Malcolm, supra note 60, at 309 (discussing prohibitions listed in Game Act of 1692). See generally Fields & Hardy, supra note 69, at 20-22 (noting that changes in English law were due to Declaration of Rights).

121 See Malcolm, supra note 60, at 311 (opining that English courts interpreted Acts so as to exclude use of guns). See generally Fields & Hardy, supra note 69, at 20 (proposing that right to bear arms was recognized as existing law).
reasserted, but guaranteed, the right of Protestant subjects to be armed. The qualifying clauses of the Bill that appear to limit arms ownership were, in fact, interpreted in a way that permitted Catholics to have personal weapons and allowed Protestants, regardless of their social and economic status, to own firearms. The ancillary clause "as allowed by Law" merely limited the type of weapon that could be legally owned to a full-length firearm, enforced the ban on shot, and permitted legal definition of appropriate use.122

There are several difficulties with this analysis. First, it evaluates the provision in isolation from the context of history and the other provisions of the document. The grievance was not mere disarmament but disarmament of Protestants "at the same time when papists were both armed and employed."123 The declaration was a response to "rulers who disarmed their political opponents and who organized large standing armies which were obnoxious and burdensome to the people."124 The declaration was not a response to the harms that individuals inflicted upon each other but a response to the harm inflicted upon them by a monarch.125 In historical context, there is no basis for the conclusion that the provision was intended to protect the right of individual self-defense. It was intended to protect the common needs of the people against an abusive government.126

The declaration protected the rights of Protestants from abusive monarchy in two ways. First, it protected their right to participate in the militia. Although the right to arms provision

122 Malcolm, supra note 60, at 313.
123 Aymette v. State, 21 Tenn. 154, 156 (Sup. Ct. 1840) (quoting English Declaration of Rights); see also Ehrman & Henigan, supra note 42, at 9 (noting right to bear arms provision is result of Protestant and Catholic tensions over their respective roles in militia and army); Kates, supra note 42, at 236 (quoting English Declaration of Rights).
124 Brief for Appellant at 9, U.S. v. Miller, 307 U.S. 174 (1939); see also Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right, 54 GEO. WASH. L. REV. 452, 456 (1986) (noting Declaration of Rights was in response to dissatisfaction with policies of disarmament and standing armies); Kopel, supra note 89, at 1349 (quoting draft of British subjects' grievances regarding disarmament and standing armies).
125 See Aymette, 21 Tenn. at 157 (finding that "The complaint was against the government The grievances to which they were forced to submit were for the most part of a public character ... "); see also Halbrook, supra note 124, at 456 (discussing dissatisfaction that prompted Declaration of Rights); Kopel, supra note 89, at 1349 (noting grievances of English subjects).
126 See Bellesiles, supra note 88, at 571 (discussing limitations on English right to bear arms as indicia of collective right to arms); Ehrman & Henigan, supra note 42, at 9-10 (noting English right to bear arms is limited). But see Malcolm, supra note 60, at 313 (arguing that English right to bear arms is broad, not limited right).
does not contain the word militia, it is no accident that it immediately follows the provision against standing armies.127 The provision acts as a militia clause permitting access to weapons to fulfill the functions of an army without the oppressive tendencies of an army.128 Read together, the two provisions codify the ancient right of possession of weapons collective security. Two scholars agree that putting the provision into context makes it clear that the right of Protestants to have arms was designed to assure that Protestant participation in military affairs, and related only to the preservation of the Protestant religion. In that sense, it comprehended what might be termed a class right rather than an individual right; individual self-defense was not within its protective purpose.129

The second means of protecting the interests of Protestants was by transferring power over the militia from the monarch to Parliament.130 Because only Parliament had the power to pass laws regulating access to arms, the security of the people would no longer be subject to the abusive and self-serving proclamations of a king. Both the grievance and the right

127 See generally Lund, supra note 99, at 9 (noting wide belief that James II wanted to impose his religion through standing army); Schwoerer, supra note 88, at 33 (noting provision of Declaration read as follows: "[t]hat the raising or keeping of a standing army within the kingdom in time of peace, unless it be with the consent of Parliament, is against law."); The Avalon Project, supra note 111.

128 See Lawrence Delbert Cress, An Armed Community: The Origins and Meaning of the Right to Bear Arms, in 71 No. 1 J. OF AM. HIST. 22, 26 (1984) ("[g]uaranteeing access to arms for Protestants, which was linked in the same sentence to the prohibition against standing armies, was intended to ensure a stable government free from the disruptions caused by Catholic Jacobites and the ambitious intrigues of future monarchs."); see also Ehrman & Henigan, supra note 42, at 14 (arguing English Bill of Rights was restatement of preference of militia and rights of Protestants to participate in military); Schwoerer, supra note 88, at 38-39 (noting that provision guaranteed collective right).

129 Feller & Gotting, supra note 55, at 481; see Aymette, 21 Tenn. at 157 (stating that when, therefore, Parliament says, "that subjects which are Protestants may have arms for their defense, suitable for their condition as allowed by law", it does not mean for their private defense, but being armed, they may as a body, rise up to defend their just rights, and compel their rulers to respect the laws).

130 See Bogus, supra note 36, at 383 n.365 (quoting JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996), for the proposition that "[t]he Declaration asserted both parliamentary and popular rights; but its crucial feature was that all the rights it proclaimed were to be protected against abuse by the Crown, the great and even sole danger to English rights and liberties."); Joyce Lee Malcolm, Gun Control and the Constitution: Sources and Exploration of the Second Amendment, 62 TENN. L. REV. 813, 813 (1995) (citing U. S. Supreme Court Justice Joseph Story for statement that Second Amendment was people’s protection against "the usurpation and arbitrary power of rulers"); David S. Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 YALE L.J. 551, 560(1991) (describing citizenry as "structure" ready to defend liberty against state and federal governments).
demonstrate that the Declaration was intended to protect the people from abusive government, not as a means of individual self-defense.

The second problem for broad rights advocates is more serious. Whatever right is recognized by the provision, it is specifically subject to government control. This is subversive to their view of the Second Amendment in which the right to arms is beyond all government control.\(^{131}\) The first restriction is that the people have a right to arms only as "suitable to their conditions."\(^{132}\) But the right to arms had always been subject to this restriction. For example, the 1670 Game Act restricted possession of arms to those of sufficient wealth.\(^{133}\) The Declaration thus codified the historic English principle that access to arms was specifically not a universal right.\(^{134}\) Secondly, the Declaration makes clear that it is within the province of Parliament to decide what the conditions to possess are.\(^{135}\) Prior to the Declaration, Parliament

\(^{131}\) See Kates, supra note 42, at 237-38 (arguing that qualification of Parliamentary control is manifestly unimportant in interpreting Second Amendment, which was expressly intended to restrict legislative as well as executive branch); Id. at 237 (opining that importance of English Bill of Rights is undeniable support for individual right position); Id. at 238 (declaring that contextual analysis of document suggests that right existed only for common defense, not individual or self-defense purposes); see also supra text accompanying notes 123-130.

\(^{132}\) See Herd, supra note 7, at 202 (stating that true purpose of Games Act of 1671 was to permit selective disarmament based on social class); Wayment, supra note 35, at 212 (declaring that American colonists carried from England deep-seated belief that right to bear arms primarily served as defense against despotic attempts to subvert liberty); Kevin J. Worthen, The Right to Keep and Bear Arms in Light of Thornton: The People and Essential Attributes of Liberty, 1998 BYU L. REV. 137, 165 (1998) (stating that right protects sovereignty of people and is not necessarily constitutional right to possess arms for any other purpose).

\(^{133}\) See MALCOLM, supra note 76, at 120 (recognizing that "for generations, citizens had been required to contribute arms to the militia according to their condition, that is, according to their rank and income."); see also Herd, supra note 7, at 202 (pointing out that restricting arms to land-owning class gave King control of militia loyal to him); Kopel, supra note 89, at 1345 (stating Act's purported concern with deterring poachers was pretext in pursuit of Crown's policy of disarmament).

\(^{134}\) See Aymette, 21 Tenn. at 154, 157 (stating "the law, we have seen, only allowed persons of certain rank to have arms, and consequently this declaration of right had reference to such only. It was in reference to these facts, and to this state of English law, that the second section of the amendment to the Constitution of the United States was incorporated into that instrument."); Funk, supra note 89, at 425 (referring to law's ancient origins as dating back to 1300's). But see Docal, supra note 91, at 1105-06 (stating that English Declaration of Rights adopted by Parliament in 1689 recognized historical right of individuals to bear arms).

\(^{135}\) See Aymette, 21 Tenn. at 157 (affirming that English Declaration of Rights gave Parliament right to grant privilege to bear arms to certain people); Bogus, supra note 36, at 385 (arguing that because Declaration was intended to restrain power of monarchy, this phrase must refer to power of Parliament); The Avalon Project, supra note 111 (stating King may not suspend or execute any laws without consent of Parliament).
could enact a law that effectively disarmed all Englishmen.\textsuperscript{136} This power remained unchanged by the document; it was the power of the crown that was diminished. As law professor Carl Bogus has argued, the document "did not give Protestants an individual right to have arms; it decreed that Parliament, and not the crown, would determine the right of Protestants to have arms."\textsuperscript{137} Both before and after the Glorious Revolution, individuals had a right to be armed only at the forbearance of government.

3. Conclusion from English History

Prior to the Glorious Revolution, the English people had no right to be armed. Access to arms was permitted as a means of providing for their common defense. It was always recognized to be within the power of the Parliament or the Crown to restrict ownership of arms to whatever degree necessary or expedient. All participants in the Second Amendment debate agree that the Declaration of Rights did not create any new rights for the English people.\textsuperscript{138} Read in the context of the document, the arms provision was in actuality a militia provision, permitting individual access to arms for the limited reason of common defense. The provision shifted the right to control the militia from the monarch to the Parliament, which presumably would be less abusive of the rights of the people in general and Protestants in particular. There has never in English history been recognized an individual right to possess arms that transcended the power of the government to restrict arms. As one scholar has

\begin{itemize}
\item \textsuperscript{136} See Kates, supra note 42, at 237 (stating Parliament intended phrase "allowed by law" to preserve its power to disarm citizens); Joyce Lee Malcolm, \textit{That Every Man Be Armed: The Evolution of a Constitutional Right}, 54 GEO. WASH. L. REV. 452, 456 (1986) (pointing out that 1688 English Bill of Rights required Parliamentary approval for maintaining professional armies during peacetime); see also Bellesiles, supra note 88, at 571 (declaring that right to bear arms under English Bill of Rights was limited by religious belief, social condition, and law).
\item \textsuperscript{137} Bogus, supra note 36, at 384.
\item \textsuperscript{138} See Bogus supra note 36, at 378 n.330 (quoting British historian Thomas Babington Macaulay as follows: "Not a single new right was given to the people. The whole English law, substantive and adjective, was, in the judgment of all the greatest lawyers, of Holt and Treby, of Maynard and Somers, exactly the same after the Revolution as before it."); Olson & Kopel, supra note 100, at 402 (stating that Declaration of Rights was prepared by Parliament in haste and viewed as statement of existing rights of Englishmen); Wayment, supra note 35, at 208 (declaring that Parliament sought to codify the right to keep and bear arms as one among many of people's ancient rights and liberties).
\end{itemize}
said:

the first "right to bear arms" to achieve constitutional recognition was penned in an age, and by men, well-knowing that there were inherent limitations on such a right - limitations properly derived from essential power of their government, and limitations which had, and could have, no relation to the political oppressions which engendered the right. The right to bear arms, therefore, was established as a "fundamental principle" by nations well aware of the parallel principle of police power - i.e., the protection of the public health, safety, and welfare.139

The proposition that all gun ownership is within the power of the Parliament to regulate has surely been confirmed by the history of England subsequent to the Declaration of Rights. Firearms have been stringently regulated,140 and "for all practical purposes the average citizen cannot lawfully obtain firearms in Great Britain at the present time."141 The broad rights advocates must therefore argue that the Second Amendment prohibits American law making bodies from regulating guns when English legislators have come to the opposite conclusion regarding the Declaration of Rights. It is an argument of surpassing irony that American law respects the fundamental rights established by British history better than the British do.142

139 Rohner, supra note 47, at 63.

140 See Rohner, supra note 47, at 63 (stating some of more significant British regulations are Gun License Act of 1870, Pistols Act of 1903, and Firearms Act of 1937). See generally Bellesiles, supra note 88, at 573 (stating that careful circumspection of gun ownership in early New England colonies was based on English common law); Herd, supra note 7, at 199-204 (reviewing history of English firearm regulation).

141 Feller & Gotting, supra note 55, at 49.

142 See Kates, supra note 42, at 237-38 (arguing that this position completely misses distinction between American system of constitutional rights and nonconstitutional English system in which even most sacrosanct rights guaranteed by one Parliament may be abrogated by its successors); see also Randy E. Barnett and Don B. Kates, Under Fire: The New Consensus on the Second Amendment, 45 EMORY L.J. 1139, 1220 (1996) (pointing out courts, under Necessary and Proper Clause of U.S. Constitution, would be empowered to decide constitutionality of act of Congress prohibiting any person from bearing arms even as means of preventing insurrection). But see Herz, supra note 17, at 57-58 (arguing that Second Amendment right to bear arms is limited by Supreme Court decision to well- regulated militia and law-making bodies have abrogated their duty and prerogative to create viable anti-gun legislation).
B. The American Right to Bear Arms

1. Militias and Standing Armies in the Colonies

Law and tradition traveled across the Atlantic with the colonists. The number of dangers facing the colonists demanded an active militia system. The English army was far too remote to provide any means of defense when needed. The system essentially mimicked the English militia concept by requiring that everyman of military age and capacity was enrolled for military service and was required by law to provide and keep at his own expense specified arms and equipments for such use. As in England, the militia acted as both a police force and a military force. Use of the militia system was a consequence of both political and economic considerations. Undoubtedly, the history of abuses suffered by the English people at the hands of a standing army were well known to the colonists. But even had a standing army been desired, the colonies were too poor to muster either the manpower or the finances to maintain one.

Sentiment against standing armies grew as the colonies

143 See David T. Harry, Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment, 9 HARV. J.L. & PUB. POL’Y 559, 587-88 (1986) (stating colonists in New World needed private armament to degree unknown in their motherland due to shortage of fighting manpower, external danger in form both of Indians and of rival Dutch, French, and Spanish colonists, and heavy dependence upon hunting for their meat supply); Herd, supra note 7, at 204 (declaring that natural threats present in colonies inspired colonists to duplicate militia system developed under their English heritage); Kates, supra note 42, at 214 (pointing to colonists inability to afford cost of maintaining standing army as primary motive for adoption of English militia system).

144 See Kates, supra note 42, at 215 (stating England was too far away to defend colonies). See generally Herd, supra note 7, at 204-05 (noting need for colonists to protect themselves); Ingram & Ray, supra note 4, at 497 (discussing need for colonists to protect themselves).

145 But see Kates, supra note 42, at 215 (arguing duty applied to all households, not just those with males of military age and capacity). See generally Herd, supra note 7, at 205 (noting duty imposed on colonist to keep arms and participate in militia).

146 See Kates, supra note 42, at 215 n.46 (stating "[i]n Virginia in 1623, it was forbidden to travel without being 'well armed;' in 1631, colonists were required to engage in targeting practice on Sunday, and then 'bring their pieces to Church.' A 1658 statute required every household to have a functioning firearm; in 1673, it was required that anyone who was too poor to purchase a firearm would have one purchased for him. Massachusetts required both citizens and indentured servants to possess arms"); Id. at 215 (discussing duties of colonial militia); see also Fields & Hardy, supra note 69, at 23-24 (discussing role of colonial militia).

147 See Herd, supra note 7, at 204 (discussing lack of funding and manpower for colonial standing army); Kates, supra note 42, at 214 (noting colonists did not have funds or manpower to maintain standing army); Encarta Encyclopedia, Militia, available at http://encarta.msn.com/index/conciseindex/AC/0AC75000.html (last visited Oct. 21, 2001) (noting lack of colonial funds for army).
became restless under British rule. The Seven Year War was the colonies first experience with a standing army of professional troops. The presence of the army generated hostility among those citizens who initially refused to pay for lodging and supplies for the troops. They capitulated only after being threatened with the presence of yet more troops. Victory in the war created a larger frontier that England was now forced to defend. This, of course, required more men and greater expenses forced upon the colonists. In 1765, the British Parliament enacted both the Quartering Act, requiring Americans to pay for lodging and supplies for the soldiers, and the Stamp Act, to raise revenue to cover the costs of maintaining the army. As the number of troops increased, so did tensions with the citizens; "the newspapers of the time were filled with reports of insults, fights, robberies, and rapes attributed (correctly or not) to the British troops." The hostilities grew more intense due to the Boston Massacre in 1770 in which


149 See Fields & Hardy, supra note 69, at 24 (noting use of standing army in colonies during war); Herd, supra note 7, at 205 (discussing English use of standing army in colonies); Ingram & Ray, supra note 4, at 497 (noting England sent standing army to colonies during Seven Years War).

150 See Ehram & Henigan, supra note 42, at 14-15 (discussing colonial objections to standing armies); see also JOHN DERRY, English Politics and American Revolution 51 (St. Martin's Press 1977) (noting objections to standing army); Fields and Hardy, supra note 69, at 24 (noting colonial dissatisfaction with having to pay for standing army).

151 See Fields & Hardy, supra note 69, at 24. See generally DERRY, supra note 130, at 51 (stating same); Ehram & Henigan, supra note 42, at 14-15 (noting colonial dissatisfaction with paying for standing army).

152 See Fields & Hardy, supra note 69, at 24 (noting that England's territory increased after war); see also DERRY, supra note 130, at 51 (listing additional territories England acquired after war); Lectures on American History, supra note 146 (discussing additional territories acquired by England as result of war).


154 Hardy, supra note 67, at 589; see O. DICKERSON, BOSTON UNDER MILITARY RULE xi (1936) (discussing how British soldiers were encouraged to be insolent, abusive and act criminally without repercussions within Boston); see also Joseph C. Sweeney, The Admiralty Law of Arthur Browne, 26 J. MAR. L. & COM. 59, 67 (1995) (noting that Samuel Adams, "that genius of revolutionary communication," developed incident of March 5, 1770 into Boston Massacre).
troops, defending themselves against a mob, killed five Bostonians.155

The mounting likelihood of violence caused the British to attempt to disarm the colonists. The fear that the Americans were arming and organizing themselves for war led to a ban on the British export of muskets and ammunition to the colonies. The British troops confiscated stores of weapons used by the militias at a number of sites, including Williamsburg, Salem and Concord.156 The efforts ultimately had the opposite of the desired effect; the raids precipitated the battles of Lexington and Concord and directly led to the Revolutionary War.157 There is no doubt that the mind of the American colonist linked the presence of the standing army to the evils that they had suffered.158 According to the Declaration of Independence, one of

155 See Leonard J. Long, The Life and Death of Law: Law's Role as the Bastard in William Shakespeare's the Life and Death of King John, 18 QUINNIPIAC L. REV. 1, n.196 (1998) (noting soldiers on trial for Boston Massacre received either acquittals or releases by pleas of "benefit of clergy"). But see Cress, supra note 128, at 28 (asserting that this event "left little doubt that hired soldiers could be the agents of political oppression" and this political oppression and Boston Massacre in general, made revolution inevitable for many colonists). See generally, Stephanie A. Doria, Adding Bite to the Watchdog's Bark: Reforming the California Civil Grand Jury System, 28 PAC. L.J. 1115, n.64 (1997) (indicating that after Boston Massacre there is some evidence suggesting that Boston grand jury may have indicted four innocent civilians suspected of being British sympathizers after Boston Massacre); L. Kinvin Wroth, Traditional Forms of Sub Federal Institutions: Article Notes for a Comparative Study of the Origins of Federalism in the United States and Canada, 15 ARIZ. J. INT'L & COMP. L. 93, 107(1998) (explaining that Boston Massacre of 1770 made revolution inevitable for many colonists).

156 See Ingram and Ray, supra note 4, at 497 (asserting that British attempts to disarm colonists following Stamp Act in 1765 culminated with their seizure of stores of ammunition and weapons in 1775); see also Feller & Gotting, supra note 55, at 53 (observing there is no record of any individual having been disarmed by British nor any evidence that either populace or revolutionary leaders conceived that any individual right to bear arms was violated by British colonial policy and noting that battles of Lexington and Concord were not engendered by British intentions to disarm single man, but rather their move to disarm militia; Hardy, supra note 67, at 590-92 (noting various ways British attempted to disarm colonists, including banning exports of guns and ammunition to colonies, seizing stores of weapons and ammunition, and even offering to allow trade outside of Boston if Bostonians surrendered all firearms).

157 See Ingram and Ray, supra note 4, at 497 (indicating these seizures led to battles of Lexington and Concord and eventually Revolutionary War); see also Hardy, supra note 67, at 591 (asserting that confrontation with local militiamen forced British column to back off to avoid bloodshed at Salem, Massachusetts and British column was forced to withdraw into Boston with heavy casualties at Concord); David E. Murley, Private Enforcement of the Social Contract: DeSahney and the Second Amendment Right to Own Firearms, 36 DUQ. L. REV. 827, 832-833 (1998) (noting that repression and seizure of colonist's weapons led to colonial militia preventing English from seizing firearms at the armory in Salem, Massachusetts and two months later the English were driven back at Concord).

158 See Feller & Gotting, supra note 55, at 49 (discussing British transgressions of quartering troops in private homes, independence and superiority of military power over civil power, court-martialing of citizens, use of mercenary soldiers, and seizure of militia
the "injuries and usurpations" committed by King George was that "[h]e has kept among us, in times of peace, Standing Armies, without the consent of our legislators." The colonial experience thus essentially confirmed the English experience with regard to the relationship between standing armies and militias. First, standing armies were instruments of oppression and must remain under "control of the civil authority and only under extraordinary circumstances..." Second, in ordinary circumstances, a militia was "the proper instrument in a free society to provide for the defense of individual states." But there appears to have been little notion of the right of the individual to the possession of guns. The emphasis was on the need of a militia to substitute for a standing army to protect the collective security of the people.

2. State Constitutions and Declarations of Rights

With the prospect of independence from England looming, many colonies began drafting constitutions. These documents shed light on the rights of the people deemed important enough to codify in a constitution. Initially, it should be noted that the original twelve state constitutions had provisions relating to the military. Most of the documents prohibited standing armies and


162 *See* Hardy, supra note 67, at 597 (stating that these documents contained all pre-1787 American guarantees of rights available).
set forth the militia as the proper defense of a free state. Only four of the constitutions specified a right to bear arms. Among these states, Massachusetts also included a right to keep arms. It will be argued that even these states did not intend to recognize a broad individual right to firearms. But even if such a broad right were codified by these documents, that only a minority did so militates against the conclusion that there was "strength and universality of contemporary sentiment..." in favor of a right to possess arms for any purpose.

The Virginia Constitution is widely regarded as the most influential. It was the first drafted and hence became the model for other states. Further, this document had the most dramatic impact on the drafting of the federal Bill of Rights. Article XIII of the Virginia Declaration of Rights set forth the following:

That a well-regulated Militia, composed of a body of the people, trained to arms, is the proper, natural, and safe defense of a free State; that Standing Armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to and governed by civil power.

163 See Ehrman & Henigan, supra note 42, at 15-16 (discussing establishment of state constitutions). See generally Davidson & Walters, supra note 161, at 50 (stating National Guard serves as today's modern militia with duties limited to defense of states); Szczepanski, supra note 161, at 197-98 (discussing purpose of militia is for security of free states).

164 See Feller & Gotting, supra note 55, at 54-56 (stating that Pennsylvania, North Carolina, Massachusetts and Vermont were only states providing for right to bear arms). See generally Ehrman & Henigan, supra note 42, at 15 (discussing establishment of state constitutions).

165 See Feller & Gotting, supra note 55, at 56 (pointing out that Massachusetts had extended right to bear arms).

166 Kates, supra note 42, at 222. But see Lois G. Schwoerer, Symposium on the Second Amendment: Fresh Looks: To Hold and Bear Arms: The English Perspective, 76 CHI.-KENT L. REV. 27, 28 (2000) (discussing how individuals had right to bear arms for any purpose); Wayment, supra note 35, at 212-19 (discussing historical background that prompted forefather to grant right to bear arms for any purpose).

167 See Ehrman & Henigan, supra note 42, at 16 (addressing influential nature of Virginia Constitution); see also, Feller & Gotting, supra note 55, at 54 (focusing on influence of Virginia due to outstanding leaders and thinkers such as George Mason, James Madison, Thomas Jefferson, Patrick Henry, George Washington, and John Marshall).

168 See Ehrman and Henigan, supra note 42, at 16 (stating that Virginia's influence can be seen in six amendments being adopted in federal Bill of Rights which were first expressed, at least partially, in Virginia's Declaration of Rights and in James Madison, who participated in Virginia's Convention and later authored federal Bill of Rights).

169 Ehrman & Henigan, supra note 42, at 16; see also Robert Dowlut, Gun Control and the Second Amendment, 15 U. DAYTON L. REV. 59, n.2 (1989) (stating that California,
advocates that this declaration is an "inclusive statement" that combines four Second Amendment issues: "the right of the individual to possess arms, the fear of the professional army, the reliance on militias controlled by individual states, and the subordination of the military to civilian to control." The plainest meaning of the declaration is to establish a militia in place of a standing army. If there is any grant of an individual right, it is only that the body of the people have a right to access arms in order to fulfill this military function. Even this right is only implicitly granted, as necessary to secure "the proper, natural, and safe defense of a free State..." There is no basis for reading this provision as recognizing an individual right beyond a military function.

A majority of states followed Virginia's lead. New Jersey's Constitution made no reference to a right to bear arms. The Delaware document provided that "a well-regulated militia is the proper, natural and safe defense of a free government." The Maryland declaration was virtually the same. Both Delaware and Maryland's documents stand for the proposition that substituting a militia in place of a standing army is an
"essential right in maintaining governments of free men."  

New Hampshire's Constitution declared that "[a] well regulated militia is the proper, natural, and sure defense of a state." It is indisputable that a majority of states followed Virginia's lead in guaranteeing the existence of a militia in place of a standing army. If there is any right associated with this principle, it is only the right to have arms for the cause of common defense.

The constitutions of Pennsylvania, Massachusetts, Vermont, and North Carolina all make reference to the right to bear arms. Pennsylvania is generally regarded as the leader of this group. The Pennsylvania Constitution recognizes:

That the people have a right to bear arms for the defense of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.

---

175 Hardy, supra note 67, at 594 argues:
It has been claimed that the Second Amendment's choice of words . . . indicates a desire to protect the States against federal infringement of their right to possess an organized militia, no individuals in their right to own arms. The inclusion of parallel guarantees in the state bill of rights entirely refutes this view. There was at this period no federal government; these state bills of rights were intended, not to grant power to the state governments, but to reserve individual rights from among the grants of state powers.
There is no textual basis for Hardy's view that these state declarations acted to reserve individual rights. It is true that essentially the same provision serve essentially different functions: the state declarations establish that militias will serve in place of a standing army; the Second Amendment put the militia beyond the power of Congress to disarm it. But there is no reason why the same provision cannot address different concerns in the state constitutions compared to the federal constitution. Hardy also seems to have changed his mind. In a later article, he recognizes that the Virginia Constitution (and presumably those constitutions based on it) does not explicitly recognize an individual right to bear arms. See Fields and Hardy, supra note 69, at 27-28.

176 Cress, supra note 128, at 30; see also Thomas B. McAffee & Michael J. Quinlan, Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?, 75 N.C.L. REV. 781, 843 (1997) (stating that Pennsylvania's 1776 Declaration of Rights included first provision guaranteeing right to bear arms and subsequent state constitutions used similar language for similar guarantees); Wayment, supra note 35, at 214 (stating that Pennsylvania, North Carolina, Vermont, and Massachusetts have adopted provisions guaranteeing right to bear arms).

177 See Feller & Gatting, supra note 55, at 54; see also Dowlut, supra note 169, at 26 (stating same proposition).

178 See Herd, supra note 7, at 206 (discussing Pennsylvania and Virginia's constitutional provisions regarding right to bear arms); Szepanski, supra note 161, at 211-12 (comparing Pennsylvania and Virginia's arms provisions).


180 "Only the citizenry, trained, armed and organized in the militia, could be
A facial reading of the language seems to suggest a broad right for individual self-defense, as distinct from defense of the state. Many commentators do not agree. Comparing the Pennsylvania with the Virginia provision indicates that only the first clause is substantially different. Given that both provisions are written in the context of limiting the influence of standing armies, it seems reasonable to conclude "that the arms clause [in the Pennsylvania Constitution] was, in effect, a substitute for the militia clause [in the Virginia Constitution]." Thus, the reference to "defense of themselves" is permitted only in connection with participation in the militia.

depended on to preserve republican liberties for 'themselves' and to ensure the constitutional stability of 'the state.'" Cress, supra note 128, at 29. A more thorough explanation of the difference between defense of themselves and defense of the state is as follows:

under Lockean social contract theory, it would be appropriate to emphasize the separation between government and the governed. In other words, "defense of themselves" referred to the collective defense of lives and property of the inhabitants of the state; "defense of . . . the state," on the other hand, referred to the protection of the state political framework and the perpetuation of state sovereignty.

These scholars acknowledge that the Pennsylvania provision can reasonably be interpreted in different ways. They conclude that the right applies only to the collective defense of the people, "similar to the concept of a militia 'composed of a body of the people' as found in the Virginia counterpart." Feller & Gotting, supra note 55, at 54. Their analysis ultimately depends on a comparison to the Virginia provision, and they argue that "no substantive change was intended by the different wording of the first clause." Feller & Gotting, supra note 55 at 55.


Ehrman & Henigan, supra note 42, at 18; see Kopel, supra note 110, at 1359, n.662 (citing to Pennsylvania Constitution's language that "as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up"). But see Calvin Massey, Guns, Extremists and the Constitution, 57 WASH. & LEE L. REV. 1095, 1102-1103 (2000) (noting that historian Saul Cornell examined the Pennsylvania Constitution as well as both private and public comments of its drafters to conclude that there was considerable conflict over interpretation of the right to bear arms guarantee).

See Cress, supra note 128, at 29 notes that "only the citizenry, trained, armed, and organized in the militia, could be depended on to preserve republican liberties for 'themselves' and to ensure the constitutional stability of 'the state.'" However, a more thorough explanation of the difference between defense of themselves and defense of the state is as follows: under Lockean social contract theory, it would be appropriate to emphasize the separation between government and the governed. In other words "defence of themselves" referred to the collective defense of the lives and property of the inhabitants of the state; "defence of . . . the state," on the other hand, referred to the protection of the state political framework and the perpetuation of state sovereignty.

These scholars acknowledge that the Pennsylvania provision can reasonably be interpreted in different ways. They conclude that the right applies only to the collective defense of the people, "similar to the concept of a militia 'composed of a body of the people'
The Pennsylvania Constitution contained the most expansive right to arms provision. The other constitutions that make reference to a right to bear arms explicitly indicate that the right is only in conjunction with the common defense. The language settled on by North Carolina was "[t]hat the people have a right to bear arms for the defense of the State." The Massachusetts Bill of Rights reads "[t]he people have a right to keep and bar arms for the common defense, and as in times of peace armies are dangerous to liberties, they ought not to be maintained without consent of the legislature." These states clearly recognize the right to possess arms only on the condition that they be used for common defense. There is, in fact, not a single state constitution at the time that unambiguously recognized the right to arms for private purposes. These constitutions grew out of the historic development that militias were favored over standing armies due to the oppressive tendencies of the latter. There may have been an individual right to bear arms, but the

as found in the Virginia counterpart." Feller & Gotting, supra note 55, at 54. Their analysis ultimately depends on a comparison to the Virginia provision, and they argue that "no substantive change was intended by the different wording of the first clause." Feller & Gotting, supra note 55, at 55.

184 Feller & Gotting, supra note 55, at 56; see Cottrol & Diamond, supra note 171, at 1315 (noting that North Carolina explicitly recognized right to bear arms in its Constitution). See generally Murley, supra note 157, at n.32 (affirming that Pennsylvania, North Carolina, Vermont and Massachusetts all explicitly recognize right to bear arms).

185 The Massachusetts Constitution of 1780 provided:

The people have a right to keep and to bear arms for the common defence. And as in time of peace armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.

Uviller & Merkel, supra note 108, at 403, n.682; see Christopher Chrisman, Constitutional Structure and the Second Amendment: A Defense of the Individual Right to Keep and Bear Arms, 43 ARIZ. L. REV. 439, 450 (2001); see also Szczepanski, supra note 161, at 220.

186 See McIntosh, supra note2, at 673-74 (asserting that constitutional right of Congress to raise standing army was considered grave threat to popular liberty, and was only justified by its necessity for defense against foreign aggressors, therefore, right to bear arms was intended to check potential abuses of federal government that can raise standing army). While, Malcolm may be conclusory, her conclusion is shared by other commentators. See Dennis, supra note 80, at 79 (claiming that attempts to limit individual right to use and bear arms using theory that Second Amendment only guarantees arms bearing within context of militia service must inevitably fail).

187 See Davies, supra note 160, at 75 (stating that one renowned commentator noted that anti-militarism arose in colonial America partly because of belief that professional soldiers were agents of oppression); see also Stanley H. Friedelbaum, Traditional State Interests and Constitutional Norms: Impressive Cases in Conventional Settings, 64 ALB. L. REV. 1245, 1279 (claiming Ohio Constitution went beyond "a preference for a militia over a standing army, and the deterrence of governmental oppression that might result from a pronounced role of the standing army).
scope of the right was limited to participation in the common defense.

3. The Constitution and the Second Amendment

In recognition of recent history, the first national document did not allow for a standing army. All military functions under the Articles of Confederation were to be performed by state militias. The weakness of the militia system was easily apparent during the Revolutionary War. The weaknesses became more glaring when the militias struggled to put down Shay's Rebellion. Specific provisions in the Constitution were intended to rectify these deficiencies. Most importantly, the Constitution provides for congressional power "[t]o raise and support Armies but no Appropriation of Money to that Use shall be for a longer Term than two years..." Further, and equally

188 See ARTICLES OF CONFEDERATION, art. VI (stating that while it is forbidden to keep any vessel or any body of forces in times of peace, "every State shall always keep up a well regulated militia, sufficiently armed and accoutered... "); see also LT. James T. Lang, JAGC, USN, Should I Stay or Should I Go: The National Guard Dances to the Tune Called by Two Masters, 39 CASE W. RES. L. REV. 165, 167 (asserting that Articles of Confederation withheld military power from central government and bestowed powers upon states); Sam Ruby, "Don't Ask Don't Tell" and the National Guard: Federal Policies on Homosexuality in the Military vs. the Militia Clauses of the Constitution, 85 CAL. L. REV. 955, 960 (1997) (noting nation's military affairs were controlled by state governments).

189 See Bogus, supra note 36, at 340-41 (stating that Minutemen usually are regarded as having performed very poorly during war. They were not well trained and were not good shots. As a result, Minutemen "deserted in droves;" regular soldiers were positioned behind militia members "with orders to shoot the first militiaman to run."); see also id. at 340 (commenting that historian Charles Royster notes that as early as 1776, militia concept had lost all supporters and all states preferred to be defended by Continental Army); Hardy, supra note 67, at 592 (noting that even broad rights advocate admits that "[t]he militia generally acquitted themselves poorly during the major organized battles of the war, and were the subject of constant and bitter criticism."). But see id. at 592 (suggesting that militia played enough of role in small skirmishes that they helped determine the war's outcome).

190 See Paul Finkelman, A Well-Regulated Militia: the Second Amendment in Historical Perspective, 76 CHI.-KENT L. REV. 195, 211-212 (2000) (stating that in 1786, group of Massachusetts farmers, led by Daniel Shays, took up arms to protest economic effects of war. They were able to shut down courts and threatened a civil war with help of some militiamen that joined their cause. Militiamen from eastern Massachusetts eventually thwarted Shays' Rebellion, but political leaders took note and supported a stronger national government); see also Ruby, supra note 188, at 961 (noting that this was one of situations that proved Articles were too weak); Bruce Ackerman and Neal Katyal, Our Unconventional Founding, 62 U. CHI. L. REV. 475, n.66 (1995) (citing David Szatmary that "the rebellion convinced the elites of the foreign states that the proposed gathering at Philadelphia must take place").

191 U.S. CONST. art. 1, §8, cl. 12. (finding that Madison and Hamilton convincingly argued need for a standing army due to failings of militia during Revolutionary War). In Federalist 25, Hamilton said:

Here I expect we shall be told that the militia of the country is its natural bulwark
distressing to those opposing centralized power, the militia had been federalized. Congress was authorized "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States..."192 The only militia power reserved to the states was "the Appointment of Officers, and the Authority of training the militia according to the discipline prescribed by Congress."193 In the eyes of the Federalists, the past had proven that the militia, to be effective, had to be federalized. The discipline of militia members, in particular, was of paramount concern.194 Federal authority over the militia would also create and would be, at all times, equal to the national defense. This doctrine in substance had like to have lost us our independence. It cost millions to the United States that might have been saved. The facts, which form our own experience forbid a reliance of this kind, are too recent to permit us to be the dupes of such a suggestion. The steady operations of war against a regular and disciplined army can only be successfully conducted by a force of the same kind.

Federalist 25. WILLS, supra note 5, at 112.

In the Virginia ratifying convention, Madison asserted that relying on militias for national defense was an open invitation to other countries to attack: "If, Sir, Congress be not invested with this power, any powerful nation, prompted by ambition or avarice, will be invited by our weakness to attack us; and such an attack, by disciplined veterans, would certainly be attended with success when only opposed by irregular, undisciplined militia." WILLS, supra note 5, at 116. Thus, as Madison argued in Federalist 41, the new constitutional structure could not possibly prohibit a standing army "unless we could prohibit in like manner the preparation and establishments of every hostile nation." WILLS, supra note 5, at 116. See Alan Hirsch, The Militia Clauses of the Constitution and the National Guard, 56 U. CIN. L. REV. 919, 933 (1988) (discussing Hamilton's comments in Federalist 25 of standing army serving "common defense" and "peace or safety of the community" lest enemies "encircle the union" and nation be at "mercy of foreign invaders," and that Madison in Federalist 41 declared standing armies necessary to present "forbidding posture" and for "repelling foreign enterprises on our safety"); see also Currie, The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791, 61 U. CHI. L. REV. 775, 815 (1994) (commenting that standing armies in peace time was major concern of Anti-Federalists).

192 U.S. CONST. art. I, §8, cl. 16. See generally Anthony Gallia, Your Weapons, You Will Not Need Them, 33 AKRON L. REV. 131, 138 (1999) (noting that there was debate before ratification of Second Amendment over whether provision guarding against standing armies was necessary); McIntosh, supra note 2, at 673-74 (stating that ability to raise standing army was considered grave threat to popular liberty and was only justified when it was necessary against foreign invaders).

193 U.S. CONST. art. I, §8, cl. 16; see Dennis, supra note 80, at 57 (explaining that Anti-Federalists wanted decentralized government where federal government did not have too much power or ability to gain more power over time); Hirsch, supra note 191, at n.12 (explaining that state's militia control is not reserved 10th Amendment power, but can be found in Article I §8, clauses 15 and 16 where former specifies only conditions which justify federal control over militia and latter provides states with authority to train militia).

194 See Roy G. Weatherup, Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment, 2 HASTINGS CONST. L.Q. 961, 983 (1975) (stating that Madison argued primary object is to secure effectual discipline of Militia and quoting Madison: "[t]his will no more be done if left to the states separately than the requisitions have hitherto paid by them. The states neglect their militia now, and the more they are..."
uniformity in arms and training. But of the two means of military power recognized by the document, a standing army and a militia, both were put under federal control.

Structuring the military institutions along these lines caused grave concerns for the Anti-Federalists. These concerns fit with their "unifying theme . . . that the new government would overreach its powers, destroy the states, deprive the people of their liberty, and create an aristocratic or monarchical tyranny." The Anti-Federalists had two specific concerns with regard to the military structure of the new country. First, the document established a standing army, historically a means of oppression; second, it gave nearly exclusive jurisdiction over the militia to the federal government. Given that the federal government had been conferred "the crushing power of a standing army", any resistance by the states against the government would be futile. But the Second Amendment, which did not prevent the federalization of the militia, did consolidate into one nation, the less each will rely on its own interior provisions for its safety, and the less prepare its militia for that purpose . . . . The discipline of the militia is evidently a national concern, and ought to be provided for in the national Constitution.

See also Uviller & Merkel, supra note 108, at 474 (stating that militia's previous ineffectual efforts became most compelling impetus to formation of stronger union with more vigorous executive, reliable military, and effective judicial system); David Yassky, The Second Amendment: Structure, History and Constitutional Change, 99 Mich. L. Rev. 588, 608 (2000) (stating that Federalists argued that best security against standing army was to make militia as available as possible to Federal Government).

See Ehrman & Henigan, supra note 42 at 20 (stressing that Federalists desperately felt that country needed strong central government); see also Bogus, supra note 36, at 368 (noting that Federalists wanted Congress to have authority to organize militia as it saw fit); Szczepanski, supra note 161, at 247 n.61 (citing Ehrman & Henigan and commenting that Federalists argued that in order to have effective militia, extensive national authority over militias was necessary to ensure more national uniformity in arms, discipline and training).

Weatherup, supra note 194, at 984; see also Don Higginbotham, The Second Amendment in Historical Context, 16 Const. Comment. 263, 268 (1999) (stating that Anti-Federalists' concern was with states having to share control of their militias with federal government); Hirsch, supra note 191, at 925 (stating that many framers feared that federally controlled militia would be used against individual states).

Weatherup, supra note 194, at 987 (commenting that small portion of totally militia would be made into select unit, much like standing army, and it would also place exclusive jurisdiction over the militia in hands of general government); see also Wills, supra note 5, at 13 (stating that specific provisions that gave rise to concern, according to Garry Wills, were creation of standing army (Article I, §8, cl. 12), federalizing state militias through authority to arm, discipline, and call them for national service (Article I, §8, cl. 15 and 16), and, by making president the commander in chief, combining civil and military authority "in a way redolent of monarchism.")

nothing to alleviate this concern. Even under the amended Constitution, the militia was subject to congressional will for pay, training, equipment, and being called for national service.\textsuperscript{199} The second concern related to Congress' exclusive ability to "arm" the militia under Article I, ' 8, clause 16, thus "prevent[ing] the states from doing so themselves."\textsuperscript{200} The combination of the standing army provision and the militia provision thus potentially gave the federal government a monopoly on military force.\textsuperscript{201} This was the fear that the Second Amendment, by putting the militia's access to arms beyond congressional reach, was intended to address.\textsuperscript{202} Interestingly, in the discussion

\textsuperscript{199} See WILLS, supra note 5, at 113 (noting that among four objectionable provisions of Constitution, Second Amendment did not eliminate, alter, or weaken a single one; thus, he argues that Amendment did not address this fear of standing armies as threat to freedom). See generally Paul E. McGreal, Unconstitutional Politics, 76 NOTRE DAME L. REV. 519, 542-48 (2001) (discussing the history of the Constitution, the Congressional power to create a standing army, and the Second Amendment); Rodriguez, supra note 35, at 801 (discussing argument set forth by Gary Wills regarding Second Amendment).

\textsuperscript{200} Ehrman and Henigan, supra note 42, at 28. A Federal control of the militia's arms would mean that arsenals might go unstocked, that arms not be kept in supply, or not updated, or not to be kept in repair. Id. See WILLS, supra note 5, at 120; Bogus, supra note 36, at 340-41. Professor Carl Bogus makes a compelling argument that the purpose of the Second Amendment was to permit southern states to arm militias as a means of suppressing slave rebellions. Id. Militias had already proven themselves to be totally ineffective in fighting war. Id. It is a valid question, then, why militias were conceived to be necessary at all. Id. Bogus explains that the only active militias in the country were in the South where they acted as slave patrols. Id. at 336. Such patrols were necessary to prevent uprisings such as occurred in Stono, South Carolina in 1739 when a slave insurrection killed twenty one whites. Id. at 333. The Constitution was drafted during a time of growing northern antipathy toward slavery. Id. at 330. The southern states, and in particular, foresaw a possibility under the Constitution in which Congress may disable the militia, leaving the slavery states defenseless against a mass uprising. Id. at 350. The Second Amendment was thus part of the Constitution's slavery compromise: Congress was prohibited from emasculating the South's primary instrument of slave control. Id. at 371. Under this interpretation, the constitutional provision defended by broad rights advocates as a bulwark against government tyranny was ironically intended as a constitutional codification of the slavery system. Id.

\textsuperscript{201} See Ehrman and Henigan, supra note 42, at 33 (explaining traditional fear of standing armies in hands of powerful central government had instilled in Americans belief that militia was proper form of defense, and stating proposed Constitution authorized standing armies and granted Congress sweeping power over militia, arguing many saw possibility of Congress failing to maintain militias effectively and were unsure if states retained authority to do so, and discussing concern from viewpoint of individual citizen as right to keep and bear arms in his capacity as state militiaman). See generally Rodriguez, supra note 36, at 799 (discussing argument by Dennis Henigan regarding Second Amendment).

\textsuperscript{202} See WILLS, supra note 5, at 120-121 (stating that amended Constitution would assure militias could continue their past role, but now with federal support; Madison was implying that militias were subordinately useful, as he said states would be); see also Ehrman and Henigan, supra note 42, at 29 (noting that this meaning of Second Amendment would seem to demonstrate that militia was not viewed as armed citizenry at large but were instead state-organized bodies, because states, or Congress, failure to train, organize and arm militias could only have such devastating impact if government
regarding the concerns with the Constitution and the need for a Second Amendment solution, there is not a single word spoken about ownership of guns for private purposes.203

The Virginia ratification convention is particularly helpful in

was largely responsible for them); Reynolds, supra note 36, at 467-69 (discussing argument by scholars that Framers of Constitution intended Second Amendment to protect individual right to arms).

203 See Ehrman and Henigan, supra note 42, at 33:

[In none of the conventions, writings, or debates preceding the Second Amendment was there any discussion of a right to have weapons for hunting, target shooting, self-defense, or any other non-militia purpose. No such discussion appears in the Constitutional Convention records, the Anti-federalist writings, Virginia's ratifying debates, state constitutions of the 1770s, or Congressional debates on the Bill of Rights. Id. Compare Stephen P. Halbrook, To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791, 10 N. KY. L. REV. 13, 18, 39 (1982) (stating that typical response of broad right advocate is that right to have weapons is for non-political purposes, such as self-protection and hunting, but never for aggression, arguing this is part of heritage of free people; also continuing, stating that those who adopted Bill of Rights were not willing to clutter it with details such as non-political justifications for right, or list of what everyone knew to be common arms, such as muskets, scatterguns, pistols and swords), with WILLS, supra note 5, at 259 (showing that such argument appears to be extremely dubious, not least because of its schizophrenic logic). If Halbrook is right, the founders considered the private possession and use of guns to be among the most important rights, the heritage of a free people. Why then would codifying this most precious right in the Constitution be considered clutter? Id. As Garry Wills notes, if Congress had intended the Second Amendment to cover possession of guns for private uses, it could, with great verbal economy, have said keep at home and bear. Id. Moreover, the failure to clarify this meaning stands in stark contrast to English history from which the Second Amendment comes. Id. The right to have arms for non-political purposes was hardly obvious; English history is replete with examples of forbidding access to guns for hunting. Id. Given this history, it is exceptionally odd that not a single person put on record a clarification that the ownership of guns for private purposes was beyond legislative reach. Id.]

But see Edmund S. Morgan, In Love with Guns, N.Y. REV., at 30 (2000) (commenting that Edmund S. Morgan discusses article written by Michael A. Bellesiles, entitled Arming America: The Origins of a National Gun Culture). Arguing perhaps the reason the issue was never raised at the convention is the exact opposite as the one proposed by Professor Halbrok. Id. At the time of the founding, guns were not common arms, used widely for such purposes as self-protection and hunting. Id. As historian Michael A. Bellesiles demonstrates, guns were far too scarce and cumbersome to be much use to anyone, including the militia. Id. Muzzleloading muskets were the only kind of gun available until almost the end of the Civil War. Id. These took minutes to reload and had less range (about 8 to 10 yards) and accuracy compared to the bow. Id. Given this limited military efficacy, no one is sure why the musket replaced the long-bow as the primary weapon of the English military. Id. Military practice at the time was to fire a single volley and then make a charge for hand to hand combat. Id. at 31. Private ownership of arms was simply not widespread. Id. Most Americans were farmers who did not rely on hunting for meat. Id. Probate records suggest that only 14% of estates included a gun, and about half of these were not in working order. Id. at 30. Familiarity with guns was so limited that those joining the militia had to be taught how to fire. Id. Among those joining the Massachusetts militia during the French and Indian War only 25% brought their own guns. Id. The myth of the American gun owner was a means of creating an American identity from our English forbears. Id. at 32. But it was not until the Civil War that reality finally reflected this myth. Id.

See generally Bellesiles, supra note 88, at 580-81 (noting that colonies efforts arm colonists).
understanding the meaning of the Second Amendment. Among all of the conventions, Virginia focused on the militia issue most intensively; further, James Madison, a native Virginian who participated in the convention, constructed the Amendment based on the arguments offered in the debate. Unfortunately for the broad rights advocates, the debate focused exclusively on the fear of federalizing the militia. Anti-federalists such as George Mason argued that the document allowed Congress to disarm and render the militia useless: "Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it for Congress has an exclusive right to arm them . . . ." Thus, Mason insisted on "an express declaration that the state governments might arm and discipline them." The critical exchange regarding the jurisdiction over the militia occurred between James Madison and Patrick Henry. When Madison responded to the Anti-Federalist challenge by asserting that the authority to provide arms was concurrent, Henry noted that this would render the constitutional allocation of powers over the militia nonsensical:

If the power be concurrent as to arming them, it is concurrent in other respects. If the states have the right of arming them, and concurrently, Congress has a concurrent power of appointing the officers, and training the militia. If Congress has that power, it is absurd. To admit this mutual concurrence of powers will carry you into endless absurdity: that Congress has nothing exclusive on the one hand, nor the


205 Henigan, *supra* note 204, at 117-118. See generally Bogus, *supra* note 36, at 326-27 (discussing anti-federalist strategy against ratification of Constitution); Vandercoy, *supra* note 42, at 1025 (discussing Mason's assertion that "history has demonstrated that [an] effective way to enslave a people is to disarm them").

206 Bogus, *supra* note 36, at 348 (discussing views of Manson with regard to creation, discipline and arming of militia); compare Vandercoy, *supra* note 42, at 1025 (discussing Manson's view of relationship between arms and liberty), with Feller and Gotting, *supra* note 55, at 60 (discussing views of John Marshall, who claimed it was obvious that states retained concurrent right to arm their militias, for "[I]f Congress were to neglect militia we can arm them ourselves . . . cannot Virginia import arms?").
Madison was forced to concede that the Constitution did not grant states the right to arm their militias. He was also forced to concede that no harm would be incurred if the federal government did not have this exclusive power. The Second Amendment thus recognizes the need to guarantee alternative means of arming the militia "to relieve some of the anti-Federalist paranoia about Congress emasculating" the institution. Again, however, the debate strictly concerned

207 Bogus, supra note 36, at 351. Patrick Henry is commonly used by broad rights advocates to argue in favor of a right to arms for personal reasons. Id. Gary Wills, To Keep and Bear Arms, N.Y. REV. BOOKS, Sept. 21, 1995 at 62. Wills notes that Henry's use of the word arms is cognate with regimentals, such as military equipment. Id. Wills argues that Henry is saying that if the states could not do this heretofore, how is the federal government to do it? Id. Wills demonstrates that Henry was not in favor of the Second Amendment. Id. But if he wanted a broad right to arms, and this is what the Second Amendment guaranteed, he should have been happy with it and supportive. Id.

Further, although it is argued that the Second Amendment is a response to Henry's argument regarding concurrent powers over the militia, his failure to support ratification should bar him as a source to understand the Constitution. WILLS, supra note 5, at 253. Jefferson said that the meaning of the Constitution should be located in the words of those who voted for it, not those who voted against it. Id. at 254. Many of the Anti-Federalists quoted by broad rights advocates - Patrick Henry, Richard Whitehill, Richard Henry Lee, and William Grayson - did not support the amended Constitution, at least in part, because they lost the militia argument: they wanted militias instead of a standing army, not militias and a standing army. Id. at 121. To attempt to understand the meaning of the Second Amendment through the words of these people is to violate the Jeffersonian maxim. Id. at 121.

Thus, Wills argues that use of Henry's words in this manner is an example of the broad rights school's tendency to use quotes that turn out to be truncated, removed from context, twisted, or applied to a debate different from that over the Second Amendment. WILLS, supra note 5, at 62.

208 Bogus, supra note 36, at 352-86. Building on his argument that the Second Amendment was intended to placate the slave holding states, Bogus asserts that there is a perfect parallel between the adoption of the Amendment and the adoption of the English Bill of Rights:

In 1689, Parliament needed to address the fear that Protestants might be disarmed and left defenseless against Catholics. In 1789, Madison needed to allay the fear that the militia might be disarmed, leaving whites defenseless against blacks. Madison followed Parliaments solution. Both the Declaration and the Second Amendment resolve the problem by transferring the power to disarm the favored group (Protestants and the militia) from the distrusted arm of government (the Crown and Congress) to a more trusted authority (Parliament and the states). See generally Kopel, supra note 12, at 182.

Kopel asserts a case, Houston v. Moore, which is relevant to the concurrence debate. Id. Houston v. Moore, 18 U.S. 1 (5 Wheat) (1820). In this case, Houston was indicted under Pennsylvania law for failure to appear for failure to appear for federal militia duty during the 1821 war. Id. Pennsylvania argued that it had the power to punish militia members under the Tenth Amendment. Id.; Kopel, supra note 12, at 182. Kopel argues that if the Second Amendment granted state power over the militia, this would have been the argument used. Id. However, concurrent power over militia members did not extend to discipline. Id. The federal government retained exclusive power to discipline under Art.
arms in the context of a militia and never addressed arms for personal uses. 209

Following the practice of most states, Virginia appended to their ratification resolution both a declaration of principles and suggested amendments. The amendments were "designed to secure these principles." 210 One principle reads as follows:

Seventeenth, That the people have a right to keep and bear arms; that a well-regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defense of a free state. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as circumstances and protection of the community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil Power. 211

The amendment designed to protect these principles reads as follows:

"Eleventh, That each State respectively shall have the power to provide for organizing, arming and disciplining it's (sic)

I, §8, cl. 16. Id. The states had concurrent jurisdiction under the Second Amendment only with regard to providing arms. Id.
But see David Yassky, supra note 53, at 190 (responding to and distinguishing arguments made by Professor Kopel); Vandercoy, supra note 46, at 1035 (discussing anti-federalist argument that retention of power by states was necessary to secure rights of people).


One author contends that the Second Amendment was not addressing state militias because [t]he Second Amendment did not grant the states any powers over their militia that the article I, section 8 militia clause did not already grant. The power of the states to legislate on militia matters existed prior to the formation of the Constitution and, not being prohibited by the Constitution, remains with the states.

This argument ignores the ratification debate in which Anti-Federalists express a fear that the federal government may have the exclusive power to provide arms to the militia. In this light, the Second Amendment is intended to mollify these fears by guaranteeing access to arms in the event of congressional neglect. Id. See generally Rodriguez, supra note 35, at 803. (discussing proposition that Second Amendment does not guarantee each individual a right to keep and bear arms for private, non-militia purposes); Steve Bachmann, Starting Again With the Mayflower...England’s Civil War and America’s Bill of Rights, 20 QUINNIPIAC L. REV. 193, 227-31 (2000) (noting development of Second Amendment).

210 Weatherup, supra note 194, at 992. See generally Herbert B. Chermside, Jr., JD, Constitutional Right to Bear Arms, 79 AM. JUR. 2D. WEAPONS & FIREARMS 4 (1975) (discussing Second Amendment); McGreal, supra note 199, at 542-48 (discussing history of Constitution, Congressional power to create standing army and Second Amendment).

211 Weatherup, supra note 194, at 993. See generally Chermside, supra note 210(discussing Second Amendment); McGreal, supra note 199, at 542-48 (discussing history of Constitution, Congressional power to create standing army and Second Amendment).
own Militia, whensoever Congress shall omit or neglect to provide for the same."212

In isolation, it is perhaps possible to read the first clause of the seventeenth declaration as endorsing a broad, private right to arms.213 In the context of the ratification resolution, however, this interpretation is not tenable. Obviously, the eleventh right grants no personal right to possess a gun for non-militia purposes. In light of the amendment, the declaration must be limited to the same principle; any ownership of guns for non-militia purposes would be unsecured by the amendment. This is also the meaning of the seventeenth declaration read as a whole. The declaration is plainly concerned with defining the ability of a state to raise and arm a militia as a defense of its sovereignty against an oppressive federal standing army.214 As would be expected, the resolution is a mirror reflection of

212 Weatherup, supra note 194, at 993. See generally Chermside, supra note 210(discussing Second Amendment); McGreal, supra note 199, at 542-48 (discussing history of Constitution, Congressional power to create standing army and Second Amendment).

213 This interpretation is only possible if one ignores the eighteenth century understanding of the phrase "keep and bear arms". The common interpretation of the term "bear arms" at that time period was a term of art meaning "participating in military affairs, not merely carrying weapons." Carl T. Bogus, supra note 36, at 357. Garry Wills describes this same concept in the following manner: "One does not bear arms against a rabbit." WILLS, supra note 5, at 64. It has also been noted that to "bear arms" means "to serve in the armed forces of the state." John Levin, The Right to Bear Arms: The Development of the American Experience, 48 CHI.-KENT L. REV. 148, 153 (1971).

214 Laurence Tribe endorses the view that the purpose of the Second Amendment is the protection of state sovereignty:

[T]he sole concern of the [Second Amendment's framers was to prevent such federal interferences with the state militia as would permit the establishment of a standing national army and the consequent destruction of local autonomy. Thus the inapplicability of the [Second Amendment to purely private conduct to state action, and to congressional firearms controls not shown to interfere with the preservation of state militia, comports with the narrowly limited aim of the [Second Amendment as merely ancillary to other constitutional guarantees of state sovereignty.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 299 n.6 (2d ed. 1988).

Tribe's view has changed in his third edition of AMERICAN CONSTITUTIONAL LAW, in which he expresses greater sympathy for the individualized right to own guns. H. Richard Uviller & William G. Merkel, supra note 185, at n.8. Another view is that those who advocate a states rights explanation of the Amendment "have not attempted any explanation as to why a purely structural limitation to preserve state power would have been drawn from the pre-existing constitutional provisions that served to limit state government." Thomas B. McAffee & Michael J. Quinlan, supra note 92, at 826. Another interesting view is that: "[F]ears about whether the federal government would attempt to destroy the slave system were voiced at the ratifying conventions in the other Southern states, as were apprehensions about federal control over the militia. But it was at Richmond that concerns about slave control and federal authority over the militia were united, producing a new rationale for a right to bear arms." Bogus, supra note 36, at 357-58.
the issues discussed in the debate. Both are concerned with the ability to arm a militia when Congress refuses to do so. Neither makes any mention of a right to arms for non-militia purposes.

The Second Amendment endured a number of permutations before it reached its final form. Madison's original version combined and modified the seventeenth and nineteenth declarations of the Virginia resolution: "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person." Given the ratification context from which these clauses came, it should be noncontroversial that the proposal did not embody a right to the private, non-militia possession of arms. The broad rights school nevertheless insists that Madison intended the proposal to embrace a broad right to the personal ownership of firearms.


216 Given the context of the Virginia ratification process, it is reasonable to conclude that the Second Amendment does not embody an individual right, unlike other Amendments in the Bill of Rights which were designed to do so, such as the First, Fourth, Fifth, and Sixth Amendments. Uviller & Merkel, supra note 185, at 435. If Madison had intended a broad right to own firearms, there were certainly proposals available that he could have proposed to express this proposition. In Massachusetts, Sam Adams suggested an amendment that the "Constitution never be construed to authorize Congress to... prevent the people of the United States, who are peaceable citizens from keeping their own arms. New Hampshire recommended an amendment that "Congress shall never disarm any citizen unless such as are or have been in Actual Rebellion." Levin, supra note 213, at 159. A minority of the Pennsylvania ratification convention supported a proposal "[t]hat 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." Kates, supra note 42, at 222 (emphasis added). Moreover, in light of only four state constitutions containing the right to bear arms, and only a minority of those states adopting an individualized right to do so, "[t]here is little reason to believe that, in rummaging among a collection of more than four hundred different provisions, Madison would have selected one embraced by a small and divided minority of states." Bogus, supra note 36, at 364-65.

217 Madison first conceived of amendment by interlineation. This amendment was initially to be inserted, along with the right to freedom of the press, religion, and speech, between clauses 3 and 4 in Article I, '9. It is asserted that this proves the broad right character of the proposal because:

[A]rticle I, Section 9...concerns limitations on Congress's (sic) power over citizens, namely, no suspension of habeas corpus, no ex post facto laws, and no bills of attainder. Madison's suggested placement of this amendment demonstrates that he understood the right to bear arms to be an individual right. Had Madison viewed the right to be as the state's right, the more logical placement of the right would have
Wills notes that this interpretation ignores the context of the entire amendment: "The whole sentence looks to military matters, the second clause giving the reason for the right's existence, and the third giving an exception to that right. Every part is explained in relation to every other part." 218

The versions subsequently adopted by Congress endorsed Madison's basic language but altered the emphasis. The House approved wording as follows: "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed; but no one scrupulous of bearing arms shall be compelled to render military service in person." 219 The significant alteration was the transposition of the militia clause and the right to bear arms clause. But most commentators, including some of the broad rights school, acknowledge that this "strengthened the military context . . . " 220 The Senate further tightened the language, dropped the religious scruples clause, and ratified the version that became part of the Constitution: "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." 221 The deletion of the religious scruples clause again been in Article I, Section 8, clause 16, which reserves to the states the power to appoint the officers of the militia and provides authority to train the same.

Vandercoy, supra note 46, at 1036.

Another article articulates the same argument: "suggested placement of the Second Amendment reflected recognition of an individual right rather than a collective right of states or a right dependent upon the existence of a militia." Resnick, supra note 41, at n.24. Moreover, commentators, such as Levinson, Lund, and Ehrman & Henigan have often cited Madison as standing for the proposition that the Framers intended a broad right to bear arms. Szczepanski, supra note 90, at 207 & n.63.

218 See WILLS, supra note 5, at 63.

219 See Nelson Lund, The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders, 4 TEX. REV. L. & POLITICS 157, 181 (1999) [hereinafter The Ends of Second Amendment] (quoting language of House version of Second Amendment); see also Nelson Lund, supra note 99, at 34 & n.77 (stating House version was devised by committee of James Madison, Roger Sherman, and John Vining, citing 1 ANNALS OF CONGRESS 749 (Joseph Gales ed., 1789)).

220 WILLS, supra note 5, at 63. Wills notes that Joyce Lee Malcolm, a broad rights advocate, agrees with this interpretation because the change "perhaps intentionally put more emphasis on the militia. Id. at n.12. Similarly, another argument is that the replacement of the semicolon with a comma, along with the transposition of the two clauses, "tighten[ed] the connection between the militia and the right to keep and bear arms." Bogus, supra note 36, at 370.

221 Lund, The Ends of Second Amendment, supra note 219, at 181. Broad rights advocates make much of the fact that the Senate rejected a proposal to include the words "for the common defense after to keep and bear arms. Professor Halbrook argues that the rejection of the proposal to limit the amendments recognition of the right to bear arms for the common defense meant to preclude any limitation on the individual right to have
strengthens the militia orientation of the Amendment. In the constitutional convention, Elbridge Gerry expressed the fear that the clause would be a means to disarm the militia, because the rulers could "declare those who are religiously scrupulous and prevent them from bearing arms." Under a broad right theory, those declared "religi

ously scrupulous" would nevertheless have a constitutionally guaranteed right to arms. Disarmament could occur only if the right to arms applied strictly in the military context and some portion of the population were declared ineligible for militia service. The concerns about the clause make sense only if the right to arms is limited to militia participation. Thus, from the origination of the wording in the Virginia ratification debate through the final changes to the Amendment, the concept was never intended to embrace a broad right. Or, arms . . . " Halbrook, supra note 203, at 35. Another writer reiterates the claim, arguing that "[t]he Senate refused to limit the right to bear arms by voting down the addition of the words 'for the common defense.'" David I. Caplan, Handgun Control: Constitutional or Unconstitutional? - A Reply to Mayor Jackson, 10 N.C. CENT. L.J. 53, 55 (emphasis added). But Wills argues that the term common defense:

was used in the Articles of Confederation to mean for the joint action of the states, not (as Halbrook would maintain) for any military use at all. Including the phrase [in the Second Amendment] would have given the state militias power to bear arms only in conjunction with other states - which was clearly not the aim.

Wills, supra note 5, at 256 (emphasis added).

Wills also notes that the military context of the Second Amendment is the obvious meaning even without the addition: The military sense is the obvious sense. It does not cease to become the obvious sense if something that might have been added was not added. Id. at 64 (emphasis added).

222 Vandercoy, supra note 46, at 1037 (quoting Gerry); see also Kopel, supra note 110, at n.118 (noting Gerry's disapproval of "religious scruples" language); Uviller & Merkel, supra note 185, at 501 (noting Gerry's fear that such discretionary authority to declare whole segments of population ineligible for service would vitiate the militia and noting his proposal to confine clause to "religious sect[s] scrupulous of bearing arms").

223 Nelson Lund maintains that [all] the major changes made during the congressional process increased the clarity with which the Second Amendment protects an individual right, not a right of the states to maintain military organizations. Lund, The Ends of Second Amendment, supra note 219, at 181. Lund points to the elimination of the conscientious objector clause, the phrase the well armed militia and the description of the militia as composed of the body of the people. Each of these phrases could have suggested that the right to keep and bear arms was somehow restricted to the context of military service. Id. But Lund deigns not to describe how these changes actually support his argument. It has already been shown that deleting the religiously scrupulous clause is supportive of the narrow rights theory. Well armed" was probably dropped because well regulated includes well armed. Wills, supra note 5, at 63. And given the insistence of the broad rights theorists that a militia includes the entire citizenry, one fails to see how dropping composed of the body of the people strengthens Lund's case.

An argument has also been advanced regarding the change of best security of a free state to necessary to the security of a free state:

The proposal for what was to become the second amendment initially stated that a well-regulated militia was the best" security of a free state, but this was later to read "necessary" to the security of a free state. It is important to note that the Congress
as Garry Wills notes, "[t]he whole context of the amendment was always military."224

C. The Broad Rights Arguments

1. The Constitutional "Right" of Insurrection

One of the most commonly made arguments by the broad individual rights advocates is that the Second Amendment embodies some sort of right of insurrection.225 This is a difficult argument to sustain given the numerous, and sometimes explicit, provisions against insurrection in the Constitution.226 Perhaps did not advance a proposal which would have held a well-regulated militia to be "sufficient to the security of a free state. Quite to the contrary, the first Congress recognized that the ordinary processes of law might not offer sufficient protection to the people during the period between the outbreak of violence and the mobilization of the organized militia. The right to keep and bear arms for purposes other than militia service thus seems to have been clearly contemplated by the second amendment. Caplan, supra note 55, at 40-41.

It is not clear from the argument, however, that an unorganized militia could respond more quickly to violence than an organized militia, and nowhere is this concern reflected in the discussion of the Second Amendment. Garry Wills suggests that the change from "best" to necessary might demote the right to bear arms by comparison with other rights (perhaps, say, free speech is the very best security of freedom), but it does not alter the thing being discussed. WILLS, supra note 5, at 63 (emphasis added).224 WILLS, supra note 5, at 64 (containing quote); see also Ehrman & Henigan, supra note 42 at 32 (stating "[t]he background of the Amendment indicates that Congress did not intend to confer a broad 'individual' right to carry arms, outside of the military context"); Jonathan E. Lowy, Symposium: The Second Amendment, 10 SETON HALL CONST. L.J. 839, 844 (2000) (noting framers' view of Second Amendment as revolving around militia); But see Brannon P. Denning, Professional Discourse, The Second Amendment And The "Talking Head Constitutionalism" Counterrevolution: A Review Essay, 21 S. ILL. U. L.J. 227, n.29 (1997) (characterizing Wills' use of Latin etymology of "bear" and "arms" to reach that conclusion as "curious").

225 This view is illustrated in the following quotation: The revolutionary understanding of the Second Amendment is founded on the idea that "the right to bear arms exists to protect the American populace from governmental tyranny." McIntosh, supra note 2, at 679. Another embracing this view is Carl Bogus, who states that "[l]ittle effort is made to put those statements [of insurrectionist theory] in context or connect them to the drafting, proposing, or ratifying of the Second Amendment." He illustrates this point by referring to Thomas Jefferson, an insurrectionist who is often cited to support this view. However, he did not even play a role in the drafting of the Second Amendment. Insurrectionists, of course, were a minority among the Framers. Bogus, supra note 36, at 395-96.

226 Garry Wills counts no less than five such constitutional prohibitions against insurrection. In addition to the fairly explicit prohibitions discussed above, Wills asserts that the subordination clause and the extradition clause were made, in part, in response to the threat of insurrection. Wills refers to subordinating the militia to federal control in Art. I, §8, cl. 15 and 16 was made in order to provide for general protection and defense. WILLS, supra note 5, at 213. In this way, militias would actually be used to suppress insurrections, not foment them. One purpose behind the extradition clause in Art. IV, § 2, cl. 2 was to extradite insurrectionists like the Shays rebels; thus, insurrection was not an
the most obvious constitutional prohibition against insurrection is the treason clause which forbids making war against the United States.\textsuperscript{227} Armed insurrection obviously is making war on the United States. Therefore, far from embodying a right of insurrection, the Constitution explicitly criminalizes the act. Further, the militia clauses themselves deny any right of insurrection. One of the constitutional functions of the militia is to suppress insurrection.\textsuperscript{228} It strains credulity to believe that the same institution would be empowered with the right to engage in insurrection and the duty to suppress them. As one writer expresses, the Constitution cannot view the militia both as a means by which government can suppress insurrection and as an instrument for insurrection against the government. It must be one or the other. "The Militia Clauses make clear which one it is."\textsuperscript{229} Lastly, the militia was intended to implement the guarantee clause.\textsuperscript{230} This provision reflects Madison's desire to
expressly guarantee the "tranquility of the states against internal as well as external dangers." The primary concern underlying the provision was to secure the ability to put down insurrections such as Shay's Rebellion. Taken together, these clauses "make it overwhelmingly clear that the Constitution was framed to forbid, prevent, and punish insurrection against its own laws - as, indeed, any constitution that claims legitimate authority must do."233

basis for determining qualifications of their government officials); John C. Coffee, Jr., Modern Mail Fraud: The Restoration of the Public/Private Distinction, 35 AM. CRIM. L. REV. 427, 431 (1998) (noting that Guarantee Clause was established to give Congress authority to regulate state and local corruption).

231 WILLS, supra note 5, at 221; see also N.Y. v. U.S., 505 U.S. 144, 186 (1992) (White, J., dissenting) (discussing what role Guarantee Clause plays in preserving state institutions from federal standards); aff'd, 973 F.2d 705 (2d Cir. 1992); see also Clovegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion) (Black, J., dissenting) (stating "violation of the great guaranty of a republican form of government in States can not be challenged in the courts" because of political question doctrine).

232 See WILLS, supra note 5, at 211 (discussing necessity of provision); see, e.g., Luther v. Borden, 48 U.S. 1, 42 (1849) (Woodbury, J., dissenting) (deciding which of two rival governments was legitimate in Rhode Island after Dorr's Rebellion. The Court stated, "it rests with Congress [and not judiciary] to decide what government is the established one in a State. For as the United States guarantee[s] to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not").

233 See WILLS, supra note 5, at 115, 214. Wills acknowledges the differences between English and American systems which mitigated need for militias to defend people by stating:

[The British use of armies on its own island had mainly been for internal purposes, in dynastic struggles of rival houses for the throne, or in religious wars - between Protestants and Catholics, or between Presbyterians and Anglicans. This experience had led to a national fear of armies as repressive. In America, not only would the army be under legislative control, but there was no Crown to be struggled for, no establishment of national religion in need of repressive power.

Id.

This constitutional prohibition against insurrection is a significant departure from English and colonial history in which arms were held to oppose government obnoxious to the people. Prior to the Revolutionary War, most state constitutions embraced the principle of revolution but after the War "the need for stable and orderly government grew, and the philosophy of rebellion withered", id. see also Fields & Hardy, supra note 69, at 30-31. Hardy discusses the evolution of protection and notes:

[By 1780, Americans had begun to reassess the legal and functional nature of the militia along lines similar to what had occurred in England a century before. The ancient concept of the general militia as a "constitutional institution," serving as a check on governmental excesses was starting to erode. In its place was emerging the belief that the interests of the people now could be protected effectively by the establishment of democratic governments, offering legal guarantees of individual rights.

Id.

Even broad rights advocates acknowledge that the Founding Fathers nurtured the concept that democratic, not military, mechanisms were seen as the proper check on government. John Levin, supra note 213, at 154 (stating "the fundamental problem facing the [constitutional] convention was not to support and nourish a revolutionary situation, but to create a viable federal government out of the jealous and independent states.")
To assert a constitutional right of insurrection is fundamentally illogical. The Constitution could not embrace the means of its own destruction. As Lincoln said in his first inaugural address, "[i]t is safe to assert that no government proper ever had a provision in its organic law for its own termination . . . it being impossible to destroy it except by some action not provided for in the instrument itself."234 The right of insurrection inheres intrinsically in all people, regardless of the government under which they live; "it does not derive its sanction from a disputed interpretation of an amendment with an altogether different purpose."235

The right is also functionally unworkable. Broad right advocates do not argue that every attempt of insurrection is "lawful."236 But if some insurrections are lawful and others not,

234 See WILLS, supra note 5, at 217-18 (noting other great American thinkers have made same point). James Madison said that, "resorts within the purview of the Constitution are not the same as the 'ultimate ratio of revolution.'" Andrew Jackson said, "[s]ucession, like any other revolutionary act may be morally justified by the extremity of oppression; but to call it a constitutional right is to confound the meaning of terms . . . "); THE FEDERALIST No. 46, at 601-02 (James Madison).

Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate [state] governments . . . forms a barrier against the enterprises of ambition . . . Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms . . . . A militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves fighting for their common liberties and united and conducted by government possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops; see also Hardy, supra note 67, at 600 (explaining that this excerpt expresses founders' "belief in the virtue of individual citizen armament as a guarantee of individual freedom."). However, what the quote, when taken in context, is referring to is Madison's thought experiment in which a tyrannical government is threatening the states with the army. Madison stated, "the State governments with the people on their side would be able to repel the danger". Id. (arguing Madison obviously was not describing "individual citizen armament." Rather, Madison defined militias as "the military instrument of state government," not simply as collection of unorganized, privately armed citizens). Madison saw the armed citizen as important to liberty to the extent that the citizen was part of a military force organized by state governments. But see WILLS, supra note 5, at 70 (posing that since passage was written before Second Amendment was conceived, Madison could not be explicating its meaning). Rather, Madison was describing conditions that trigger revolution and how the revolution can fall against established constitutional order. He also states it is not the "well-regulated militia" under the Constitution that is being described, but the revolutionary effort of a people overthrowing any despotism that replaces the Constitution and makes it void. In Madison's dire hypothesis, all bets are off and the pre-government right of resistance.

235 WILLS, supra note 5, at 215-17 (noting Sanford Levinson, proponent of Second Amendment right of insurrection, refers to right as "appeal to heaven."). Wills fully agrees with this notion but notes that "[t]he appeal to heaven is an appeal away from the earthly authority of the moment, not to that authority." Id. It makes no sense to say that I must overthrow this abomination, but only because it has given me permission to do so.

236 See William C. Plouffe, A Federal Court Holds the Second Amendment in an
there must be some authority to make this decision. This creates
the ludicrous prospect of insurrectionists having to appeal to the
government to determine if their desire to overthrow the
government is legitimate. "Surely the right would be an empty
one if it permitted government authority, in the form of courts, to
substitute its judgment for that of the individual citizen on the
issue of whether the government had abused its power."\textsuperscript{237} The
right, in effect, is voided, because it is precisely the tyrannical
government that would never recognize a legitimate cause for
insurrection. But if review is not unworkable because it voids
the right, "[h]ow does the theory permit the government to
prevent the formation and use of private armies by extremist
groups, whether of the right or of the left?"\textsuperscript{238} Ultimately, of
course, the right of insurrection is a prescription for anarchy.
There is no shortage of groups who sincerely feel that
government has betrayed its constitutional limits. To allow such
groups the right to possess arms for the purpose of exercising
their right of insurrection would soon mean that there is no
nation left to fight over. As one writer has well said,

What is the origin of our liberty under the Constitution? If the
courts are prepared to follow the insurrectionists to the
conclusion that constitutional liberty ultimately comes from the
barrel of a gun, the Second Amendment may prove to be a
weapon of destruction aimed at the rest of the Bill of Rights.\textsuperscript{239}

\textit{Individual Right: Jeffersonian Utopia or Apocalypse Now?}, 30 U. MEM. L. REV. 56, n.153
(describing right of insurrection and phrases question as follows: "It would seem to be a
legitimate government function to suppress unlawful insurrection, but it also seems
appropriate to revolt against tyranny. So what are the criteria that would justify
revolution?"). Plouffe asserts that the Whiskey Rebellion of 1794 and the Montana
Freeman of 1996 were illegitimate. However, he appears to make this judgment without
consulting any criteria for legitimacy. \textit{But see} Bogus, \textit{supra} note 36, at 395 (noting
Founders did not seem to have been concerned about any criteria to justify revolution).
During Shay’s Rebellion, Massachusetts Governor John Hancock sent state troops with
instructions "to kill, slay, and destroy if necessary, and conquer by all fitting ways,
enterprises, and means whatsoever, all and every one of the rebels. If there is any
evidence that Governor Hancock or anyone else considered whether this might have been
a legitimate rebellion, or whether they thought there is even such a thing as a Second
Amendment rebellion, it has not been demonstrated by Plouffe.

\textsuperscript{237} Ehrman & Henigan, \textit{supra} note 42, at 125.

\textsuperscript{238} \textit{Id.} at 129. \textit{See}, e.g., Captain David C. Rodearmel, \textit{Military Law in Communist
Communist leader Mao Tse-tung first stated mantra “political power grows out of the
barrel of a gun”).

\textsuperscript{239} \textit{See} Kates, \textit{supra} note 42, at 230 (interpreting the Second Amendment as follows:
"believing self-defense an inalienable natural right, and deriving from it the right to resist
tyranny, [the Founding Fathers] guaranteed the right of individuals to possess arms"); \textit{see}
2. Chronological Order in the Bill of Rights

A common argument is that placing the right to bear arms in the Second Amendment demonstrates that a broad based individual right was intended. The first and third through ninth amendments of the Bill of Rights were considered to be individual rights. It has been argued that if the Framers had intended the Second Amendment to be a collective right, then it would have been placed towards the end of the Bill of Rights. Under this theory, the organization of Bill of Rights was to list private rights first. In fact, however, the right of the states to preserve a "well-regulated militia" and "to bear arms" was drafted many times. By June 8, 1789, an early draft was fourth on the list of the Bill of Rights. By August it had moved

*also* The Federalist No. 28, at 277 (stating "[i]f 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. . .").

240 See, e.g., Gallia, supra note 192, at 138.

241 See Kates, supra note 42, at 220 (looking to language and contextual placement of Second Amendment to argue Framers intended only to create individual rights, and that states rights appear later beginning with Tenth Amendment); see also 12 Papers of James Madison 306-07 (R. Rutland & C. Hobson ed. 1979) (letter of Oct. 20, 1788, from Madison to Edmund Pendleton) (discussing Anti-Federalists' objections to Constitution.) These objections were not just limited to lack of individual rights, but about how the Constitution was being modeled after Blackstone's organization of five most important principles for the survival of English liberty, and how five principles were well established in first three articles of the Constitution and the first two amendments. Specifically, first, how the legislature should function (in the British system Parliament) is found in Article I; second, what the presidents role was (monarch) is found in Article II; third, the role of the courts is found in Article III; fourth, the fundamental rights of freedom are established in the First Amendment; and fifth the right to bear arms is found in the Second Amendment; see also Gallia, supra note 192, at 140 (stating that despite fact that Court has never specifically mentioned intent of framers regarding Second Amendment, all other substantive rights that are enumerated in remaining eight amendments are "fundamental" individual rights; Second Amendment seemingly should be given same accord).

242 See Papers of James Madison, supra note 241, at 308-07; see also Dennis, supra note 81, at 70 (stating that as Madison was instrumental in drafting Second Amendment, his personal notes stating that amendments he had written "relate 1st to private rights" is evidence that framers intended Second Amendment to be private right).

243 See Hardy, supra note 67, at 609 (stating that Madison originally conceived that provisions of Bill of Rights would be interlined into existing body of Constitution); see also Vandercoy, supra note 46 at 1036 (discussing Madison's proposal that wording of Second Amendment, "the right of the people to keep and bear arms shall not be infringed" be placed, along with rights of free speech, press, and religion in Article I, Section 9, between Clauses 3 and 4, all provisions limiting Congress' power over citizens (i.e. no suspension of habeas corpus, no ex post facto laws, and no bills of attainder)). Madison must have "understood the right to bear arms to be an individual right"; see also Dennis, supra note 81, at 69-70 (noting that Second Amendment had been edited before it was ratified).

244 Congressional Register, June 8, 1789, vol. 1, p. 427.
up to the sixth position. Then, later in August, as the House was considering the amendment, it had moved back down to fifth. Once the bill was sent to the Senate, it remained fifth on the list. On September 9, 1789 the Senate passed a vote to strike it as the fifth and make it the fourth. After the Senate had finished and approved the Second Amendment as we know today, it became the fourth amendment. It finally became the Second Amendment only because the first two amendments were not ratified. Thus, the belief that the Amendments were placed so individual rights were placed first has no historical basis. Indeed, the first two amendments which ultimately failed to be ratified had nothing to do with individual rights.

3. Construction of the Second Amendment

The reason the Drafters precede the "right to bear arms" clause with "a well regulated Militia" was because it was to be a preamble that was to set out its purpose. The history of the Second Amendment "indicate[s] that the central concern of [the] framers was to prevent such federal interferences with the state militia as would permit the establishment of a standing national army and the consequent destruction of local autonomy." The historical meaning indicates there was no strong notion of an

245 GAZETTE OF THE U.S., August 22, 1789, at 249, col. 3.
247 Id. at 174.
248 Id. at 176.
250 Marcus, supra note 248, at 218 (stating that first two Amendments concerned taking of property without compensation and protection of individual rights).
251 Sanford Levinson, The Embarrassing Second Amendment, 99 YALE L.J. 637, 644 (1989) (citing one broad right theorist who contends that construction of Second Amendment must not be so limiting; that right to keep and bear arms cannot be interpreted into nonexistence by limiting it to one of its purposes and that to hold otherwise, it would violate the principle that "[c]onstitutional provisions for the security of a person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as though it consisted more in sound than substance"); see also, Richard E. Gardiner, supra note 55, at 83 (stating that it is doubtful, however, that Second Amendment should be so liberally construed that it defies original intent of the framers to limit possession of firearms to a militia context, and that such a theory of construction becomes even more doubtful when it imposes massive social costs (see Part III)).
252 LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 299 fn. 6 (2d. ed. 1988).
individual right "to bear arms." Thus, the right to bear arms is a qualified right, "recognized only in the context of the people forming a well-regulated Militia to protect the security of the free states. It clearly does not provide for an individual right to bear arms independent of the militia clause." Some broad rights advocates assert that the Second Amendment should be understood as consisting of an operative clause and a justification clause. Professor Eugene Volokh has developed the most interesting argument in this regard. Aside from the Copyright and Patent Clause, the Second Amendment is the only constitutional provision that contains its own

253 See Levinson, supra note 251, at 644 (taking position taken by American Civil Liberties Union (ACLU) which says Amendment is protecting only right to maintain "an effective state militia... [The] individual's right to bear arms applies only to the preservation or efficiency of a well-regulated [state] militia. Except for lawful police and military purposes, the possession of weapons by individuals is not constitutionally protected"); see also WILLS, supra note 5, at 257 (stating that some narrow rights advocates argue that this conclusion is also compelled by 18th century understanding of specific words used in Amendment). For instance, Wills argues that "[b]ear arms refers to military service, which is why the plural is used... one does not bear arm, or bear an arm, that the word means, etymologically, equipment and that it refers to the 'equipage of war' and that it does not refer to guns for hunting purposes"); [o]ne does not bear arms against a rabbit"). But see Dennis, supra note 81, at 68 (stating that Thomas Jefferson clearly believed in existence of individual right to bear arms by including language "No free man shall ever be debarred the use of arms" in his proposed constitution for Virginia in 1776); Harman, supra note 92, at 413 (stating that National Rifle Association and majority of legal scholars embrace theory that Second Amendment was intended to be individual, rather than collective right).

254 See Herd, supra note 7, at 210 (giving fairly comprehensive grammatical treatment of Second Amendment). By stating that the subject of the Amendment is "the right of the people to keep and bear arms." The "infringement" phrase is the predicate. By themselves, the subject and the predicate would clearly indicate a broad individual right. But this neglects the absolute clause: "[a] well-regulated Militia, being necessary to the security of a free State..." Thus, "the militia clause of the Amendment modifies or qualifies the subject. It explains the purpose for the Amendment." Id. Under this analysis, "the Second Amendment plainly and clearly means: '[Because] [a] well-regulated Militia, [is] necessary to the security of a free State..." Thus, "the militia clause of the Amendment modifies or qualifies the subject. It explains the purpose for the Amendment." Id. Under this analysis, "the Second Amendment plainly and clearly means: '[Because] [a] well-regulated Militia, [is] necessary to the security of a free State..." Thus, "the militia clause of the Amendment modifies or qualifies the subject. It explains the purpose for the Amendment." Id. The author says this analysis was completed with the help of a professional editor. Id. at n.129. But see Resnick, supra note 41, at 5 (stating that in contrast, a broad rights advocate claims that two grammatical experts reach the opposite conclusion). One of these experts, Roy Copperud, is "on the usage panel of the American Heritage Dictionary." Copperud's analysis leads to his conclusion that.

The thrust of the sentence is that the right shall be preserved inviolate for the sake of ensuring a militia... The right to keep and bear arms is not said by the amendment to depend on the existence of a militia... The right to keep and bear arms is deemed unconditional by the entire sentence.

Id. at 7.

These are difficult conclusions to argue against, given that they are unsupported by any analysis. Undoubtedly, both broad and narrow advocates could bring to the stand an equal number of experts to support their interpretations. The meaning of the Second Amendment is probably better understood by its historical context and the logical ramifications of its construction, not by dueling grammarians).
preamble. In Volokh's argument, the operative right in the Second Amendment is "the right of the people to keep and bear arms" and the justification of the right is to provide for a militia, "being necessary to the security of a free state." A facial construction of these clauses would be that a right should be no broader than its justification; thus, individuals have a right to bear arms only to the extent that it is related to a militia or defense of a state. Or, as Volokh sets forth the issue, "[s]ome argue that justification clause should be read as a condition on the operative clause: The right to keep and bear arms is protected only when it contributes to a well-regulated militia or only when the well-regulated militia is necessary to the security of a free State."

Volokh's response to the question flows from his review of state constitutional provisions. Although rarely occurring in the federal Constitution, state constitutions often contain justification clauses. Volokh explains that there need be no exact fit between the right and the justification: "one should


256 Volokh, supra note 255, at 802 (explaining that Volokh does not explicitly indicate what he believes is operative clause and what is justification clause but noting that it is critical to his argument that "[t]he justification clause . . . refers to the militia."); see also Roger I. Roots, The Approaching Death of the Collective Right Theory of the Second Amendment, 39 DUQ. L. REV. 71, 110, n.15 (2000) (stating that Volokh calls the opening clause of the second amendment its "justification clause" rather than a "purpose clause" because the only thing indicated by it is its drafters' justification for the right to bear arms, and not any notion that the right is contingent on the purpose of ensuring a well-regulated militia, as some authorities have postulated). See Generally David Yassky, supra note 194, at 617 (commenting that Volokh's work shows that scope of a constitutional provision is not necessarily limited by its "purpose clause").

257 Volokh supra note 255, at 801; see also Scott A. Henderson, United States v. Emerson: The Second Amendment As an Individual Right – Time to Settle the Issue?, 102 W. VA. L. REV. 177, 200 (1999) (noting that those who espouse the collective rights school argue that the justification clause places a limitation or a condition precedent on the right).

258 Volokh supra note 255, at 799 (showing, for instance, that Massachusetts, New Hampshire and Vermont constitutions contain following provision: "The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action, or complaint, in any other court or place whatsoever.").

The New Hampshire Ex Post Facto Article reads as follows: "Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made either for the decision of civil causes, or the punishment of offenses." Id. at 805; see also Resnick, supra note 41, at 3 (stating that it is not uncommon for state constitutional provisions to contain justification clauses).
expect the possibility of a mismatch between justification clause and operative clauses: The means chosen to serve the end will often be somewhat broader or narrower than the end itself. But it's the means that are being made into law."\textsuperscript{259} In Volokh's words, the justification clause does not "\textit{trump} the meaning of the operative clause..."\textsuperscript{260} Thus, there may be no law to "deprive people the right to keep and bear arms, even if their keeping and bearing arms in a particular instance doesn't further the Amendment's purposes."\textsuperscript{261}

Volokh has made a convincing case that the breadth of a right may exceed its justification. It is less convincing that this premise compels the conclusion he asserts. The questionable aspect of his analysis is the breakdown of the Amendment into operative and justification clauses. It is clear that the "right of the people to keep and bear arms" is justified by the need for "security of a free state"; but to which clause does the militia belong?\textsuperscript{262} Only if the militia belongs to the justification clause may the right of the people be broader than participation in a militia or acting for the preservation of a state.\textsuperscript{263} If the militia

\begin{itemize}
\item \textsuperscript{259} \textit{Id.} at 810. For instance, the Speech and Debate Articles in note 260 would protect "the freedom to defame people with impunity" even though this is not "essential to the rights of the people." \textit{Id.} at 799. Similarly, New Hampshire's Constitution "bans all ex post facto laws, not only the highly unjust ones." \textit{Id.} at 805.
\item \textsuperscript{260} \textit{Id.} at 807; see also Michael C. Dorf, \textit{Symposium on the Second Amendment: Fresh Looks: What Does the Second Amendment Mean Today?}, 76 CHI. KENT. L. REV 291, 347, n. 57 (2000) (citing same); David C. Williams, \textit{Response: The Unitary Second Amendment}, 73 N.Y.U. L. REV. 822, 824 (1998) (agreeing with Volokh by saying that "Rather than using the purpose clause to trump the operative clause, I have sought to interpret the latter in light of the former, so that there is no tension between the two.").
\item \textsuperscript{261} \textit{Id.} at 806. But see Lund, \textit{The Ends of Second Amendment, supra} note 219, at 176 (commenting argument is made completely without reference to ratification debate or historical right to bear arms). Another commentator makes the same argument relative to the Patent and Copyright Clause. He argues that this clause does not authorize Congress to protect only those writing and inventions that promote the progress of science and useful arts, as we can easily see from the fact that copyrights are granted to Hustler magazine and the ravings of racist demagogues, not to mention a wide range of literature that overtly seeks to retard the progress of science and useful arts. \textit{Id.}
\item \textsuperscript{262} Volokh seems to acknowledge that the Second Amendment requires a three step analysis that does not occur in his examples from state constitutions: "[t]he Framers may have intended the right to keep and bear arms as a means toward the end of maintaining a well-regulated militia - a well trained army citizenry - which in turn would have been a means toward the end of ensuring the security of a free state." Volokh \textit{supra} note 255, at 806. Even while setting up this framework, Volokh assumes without reason that the militia belongs more to the third step justification clause and not to the first step operative clause. Perhaps this is because the first line of the provision generally sets forth the justification. This is not, however, an ironclad rule. The first clause of the Speech and Debate Article, for instance, first sets forth the right and then the justification. Volokh \textit{supra} note 255, at 806.
\item \textsuperscript{263} Volokh and other broad rights advocates must argue that the individual right
belongs to the operative clause,\textsuperscript{264} Volokh's conclusion does not follow. Under this reading, the individual right to own guns would be constrained by participation in a militia because the limitation occurs in the operative clause.\textsuperscript{265} The broad rights advocates would then be reduced to arguing the logical absurdity that the individual right is broader than itself.

Should the reference to the militia be construed as belonging to the justification or the operation of the Second Amendment? It is more likely that it belongs to the operative clause.\textsuperscript{266} The militia has no independent justification or reason to exist. Its function is strictly in subservience to larger ends; in this context, it exists to protect the security of the state. It fulfills this function by operating as the tool through which armed individuals come to the aid of the state. The operative right should thus be read as a conjunction of the right to bear clause and the militia clause: the right belongs to individuals in a militia. Under Volokh's analysis, it is possible that individuals in a militia have rights broader than relate to the security of a state. It is not possible, however, that there is any constitutionally protected individual right to bear arms outside of a militia. To read the Amendment in this manner would require not that the right is broader than the justification but that the right is broader than itself. Thus, Volokh's argument collapses for failure to identify the militia as belonging to the operative clause of the Amendment.

Volokh's argument is that the militia clause is not qualifying. A separate argument advanced by broad rights advocates is the militia clause is actually amplifying. This argument states that

\textsuperscript{264} The operative clause would thus essentially mean "the right of the people in a militia to keep and bear arms, shall not be infringed." This is the typical interpretation made by narrow rights advocates. See e.g. supra note 7 (regarding Herd's restatement of right).

\textsuperscript{265} Volokh cites a list of cases (among which Love v. Pepersack, United States v. Hale, and United States v. Warin are discussed in Part II) which he says stand for the proposition that the right is conditioned by the justification. Volokh supra note 255, at 801 n.27. Actually, these cases could be read as incorporating the militia provision into the rights clause, not as constraining the right to the breadth of the justification.

\textsuperscript{266} Interpreting the Second Amendment in this way results in a somewhat awkward and bifurcated phrasing. The Amendment would first partially state the right ("a well-regulated militia"), then a justification ("being necessary for the security of a free state") and then finish stating the right ("the right of the people to keep and bear arms, shall not be infringed.") While this phrasing may be awkward, it is not anomalous. The Massachusetts, New Hampshire, and Vermont Speech and Debate Article, for instance, essentially follows the same right-justification-right pattern. Volokh supra note 255.
both clauses of the Amendment embody a separate right. However, the argument may also be viewed from the logics of legal construction. Under the two rights theory, it is odd that the Framers would have bothered with the recognition of a "collective right to maintain a militia." The recognition of a broad individual right, by itself, prevents Congress from disarming the militia. Thus, the right to form a general militia is actually a subset, not an amplification, of the individual right. It is unlikely that the Framers would recognize both the broad individual right and the smaller collective right when the former swallows the latter.

D. Conclusion

The militia clause is an inconvenient provision of the Second Amendment for broad rights advocates. The meaning of the clause is a linear descendent of the right as embodied in the English Bill of Rights. In England prior to the Bill of Rights, there was no right to have weapons. Perhaps a large part of the country was armed, but the purpose was to provide for the collective purposes of military defense and police duty. The

267 See supra text accompanying notes 65 & 204.

268 Professor Lund makes essentially the same argument from the broad rights perspective. He contends that a militia oriented right in the Second Amendment is duplicative of the militia clause in the Constitution because: Article I already provides the federal government with virtually plenary powers to organize, train, and maintain a military establishment as efficient and powerful as it can afford; moreover, by clear implication, article I also provides for the existence of organized state-based military forces. To all of this, the Second Amendment would add absolutely nothing if it had been designed to promote the military readiness of the nation. Nelson Lund, The Second Amendment, Political Liberty, and the Right to Self Preservation, 39 ALA. L. REV. 103, 114 (1988). But the Second Amendment is only duplicative if the Constitution allowed the states the authority to arm their own militias. The silence of the document in this respect was precisely the concern of some Anti-Federalists. See supra text accompanying notes 12 & 175. The Second Amendment added the guarantee that the federal government does not have sole authority to arm the militias.

269 Malcolm seems to suggest that the militia clause guarantees the ability of the state to raise a militia. She argues that the Second Amendment continued the tradition of the colonies forming militias, implying "a people armed and trained to arms." Malcolm, supra note 60, at 314. First, if the Amendment does guarantee a state right, this is contrary to the normal broad right argument that the Second Amendment would only guarantee individual rights. See supra text accompanying notes 12, 35, 42, & 55. Second, most commentators seem to accept that the purpose of the militia clause was to prevent Congress from disarming the militia; supra text accompanying notes 36, & 115. This would have been accomplished by a broad individual right, obviating the need for a separate militia clause. Under Malcolm's argument, the only unique right recognized by the militia clause is the state's right to train the militia. This would seem to be a thin reed upon which to rest the broad individual right argument.
enactment of numerous laws amply demonstrated that there was no right to weaponry that was beyond the reach of the Parliament or the crown. It is also undisputed that the Bill of Rights created no new rights. That there was no right of individual possession of arms for private purposes before this document voids any pretension that such a right existed after the document. The Bill of Rights was meaningful because it guaranteed that Protestants would not be treated unequally compared to Catholics in terms of possession of arms. It also transferred control of weapons law to the Parliament so that the English militia would never again be the tool of royal machinations. But the document also codified the central features of possession of arms in the country: arms were primarily important as tools of collective safety, and they were within reach of the law to regulate. The subsequent history of England shows beyond peradventure that there was no private right to firearms. The American colonies put great emphasis on the militia. This was primarily a function of the strong historic aversion against standing armies. The aversion intensified during British occupation of the colonies. But in again the historical record is devoid of any suggestion of an individual right to bear arms outside a military function. This is shown in the original state constitutions, not one of which unambiguously recognizes such an individual right. The militia itself came under severe criticism for its performance during the War, and again during Shay's Rebellion. To the Federalists, agitating for ratification of the Constitution, it was obvious that the defense of the country required a standing army. To the Anti-Federalists, fears of the oppressive tendencies of the standing army was of the primary reasons for opposing the Constitution. This fear was compounded by the elusive authority of the Congress to arm the militia. The security of the state resided strictly in the forbearance of the federal government. The Second Amendment was born from this tension. This provision would assure that the states could address their own internal strife without concern that Congress would attempt to disarm them. Again, the record is strikingly bare regarding evidence that any individual right for private purposes was intended. The entire ratification process indicates that it was the security of the state, not the security of the individual, that was the concern.
The broad right advocates consistently refer to three arguments to support their position. Although each argument could be dismissed for lack of historic support, they are given more particularized consideration. The first argument is that private possession of arms is necessary to secure the people's right to insurrection against oppressive government. But this right is flatly contradicted by several constitutional clauses. These include the treason clause, which criminalizes insurrection; the militia clause, in which the militia, ironically, is the means by which insurrection is to be put down; and the guaranty clause, which is a guaranty by the federal government to aid the states in putting down insurrection. America's greatest political thinkers have also disputed that the Constitution does, or could contain the seeds of its own destruction. Lastly, such a right is not functional, because it depends on the evaluation of the very government it is attempting to overthrow to determine whether the uprising is lawful. The second argument is that placement of the Amendment as second among the Bill of Rights proves it is a broad, individual right. But the placement of the Amendment was strictly accidental and reveals nothing about its meaning. It was originally the fourth in a long list of proposed amendments, some of which were rejected. The first two proposed amendments, both rejected, dealt with state's rights; it is thus perfectly plausible that the Second Amendment's primary concern was state sovereignty, not securing an individual right to arms. The last argument deals with construction of the Amendment. One interpretation is that the scope of the right is not limited to its stated justification. But this argument fails because it cannot demonstrate that the militia is actually part of the justification and not part of the right. A second interpretation is that the Amendment guaranteed a right to arms for both personal and military uses. But if the founders had intended a broad right, this would include use of arms for militia purposes; the Amendment would not have been written so that the Second Clause swallows the first.
II. LEGAL HISTORY OF THE SECOND AMENDMENT

A. Second Amendment Law

*Miller* is the only United States Supreme Court case directly addressing the Second Amendment in the 20th Century. This case came before the Supreme Court concerning §6 of the National Firearms Act of 1934.270 Jack Miller and Frank Layton were charged with "unlawfully, knowingly, willfully, and feloniously transporting in interstate commerce... a double barrel 12-gauge Stevens shotgun having a barrel less than 18 inches in length... [and] not having registered said firearm as required."271 A Kansas district court opinion held that §6 of the Act violated the Second Amendment to the Constitution, and took judicial notice that a short-barreled shotgun was a militia weapon.272 Subsequently, the plaintiffs appealed.273

The Supreme Court reversed and remanded the case to the district court.274 Justice McReynolds, for a unanimous court, simply held that

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in 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

270 48 STAT. 1236 (1934). The law provides that:
It shall be unlawful for any person who is required to register as provided in Section 5 hereof and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in Section 4 hereof, to ship, carry, or deliver any firearm in interstate commerce. The Act was passed in response to public outrage over the activities of organized crime. It required a license to transfer or transport interstate short-barreled rifles and shotguns, machine guns, or silencers. Further, the act imposed taxes on firearms transported in interstate commerce. Penalties for violation of the act included fines and imprisonment. *Id.*


272 *Id.* at 176-77 (dismissing defendants' indictments).

273 *Id.* It should be noted that the indictment was quashed in the district court, making the defendants legally free to go. Miller and Layton were off the hook, and were unwilling to risk an unfavorable outcome in the Supreme Court. Thus the defendants did not have counsel appear at the Supreme Court to engage in oral argument, and further did not submit a brief on their behalf to the Supreme Court. *Id.* at 174. Further prejudicing defendant's chances at the Supreme Court, one author contends that the "government attorneys did not inform the court of holdings clearly in favor of the individual's right to keep and bear arms independently of militia participation." Caplan, *supra* note 55 at 44-45.

274 *Miller*, 307 U.S. at 182 (holding that case should be reversed and remanded).
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.275

There are two possible interpretations of this holding. The first is that the Second Amendment guarantees the right to bear arms to those who need such arms in order to serve in the militia. The second is that every citizen has a right to possess a weapon of the type used by a militia. Under this reasoning, Miller grants an unrestricted right to possess weapons if these are ordinary military equipment of the day.276

The first interpretation has been uniformly adopted by all of the Circuit Courts.277 The second interpretation of Miller, though not adopted by a single Circuit Court, has nevertheless been put forth by the Gun Lobby. However, several problems arise under this interpretation, even for individual gun rights advocates. For instance, Miller would allow regulation of private possession of any firearm that would not be of use in a militia.278

275 Id. at 178. One commentator urges that this ruling be read narrowly for three reasons: the holding invites a narrow construction; the rationale would lead to "manifest absurdities" if followed strictly; and the court did not hear the defendant's oral arguments. Lund, supra note 219, at 166. Lund believes Miller should be read to approve restrictions only on weapons that have the special characteristics shared by those in the National Firearms Act of 1934 "i.e., slight value to law-abiding citizens and high value to criminals." Id. at 171.

276 See Stephen P. Halbrook, Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right To Keep and Bear Arms, 62 TENN. L. REV. 597, 616 (1995) (noting court did not suggest possessor must be member of militia or National Guard, but asked only whether firearm could have militia use, stating that private, individual character of right protected by Second Amendment went unquestioned); see also David G. Savage, GOP Politics Stalls Judicial Nominations, L.A. TIMES, Nov. 28, 1997, at A1 (discussing judicial activism and political repercussions).

277 See U.S. v. Tomlin, 454 F. 2d 176, 176 (1972) (using Miller as controlling precedent for Second Circuit); Halbrook, supra note 276, at 637-39 (noting consistency of circuits in their construction of Second Amendment); see also U.S. v. McCutcheon, 446 F.2d 133, 136 (1971) (citing Miller court's rationale, affirming lower court ruling dismissing Second Amendment claim).

278 Kopel analyzes the analogy made by treating the First and Second Amendments as constitutionally identical: guaranteeing an individual right, but not an absolute right, and describes this reasoning as reckless. Kopel, supra note 12, at 147-48. The Harlan opinion is most reasonably read as comparing the First and Second Amendments in one respect: the text grants absolute rights and the Supreme Courts then place limits on the exercise of the rights. This is an enormous leap of logic supported by a limited comparison that Amendments are constitutionally identical in all respects and therefore guarantees an individual right. See also Konigsberg v. State Bar of Cal., 366 U.S. 36, 51, n.10 (1961) (rejecting Justice Black's absolutist First Amendment philosophy, Justice Harlan noted Miller case and that absolute exercise of rights was restricted but not unconstitutional); Baird v. State Bar of Ariz., 401 U.S. 1, 3-4 (1971) (dismissing prior court "formulas" and applying only "the 45 words that make up the First Amendment" to determine whether
description applies to many types of firearms which are not used by national guard units (let alone non-existent militias), such as shotguns, Saturday Night Specials and antique guns. Yet many advocates of the individualist view of the Second Amendment and gun control opponents argue that these are the types of guns to which they have an individual right to possess. Even if Miller grants an individual right of possession, such guns, being without military value, could be regulated or banned by the state.

The second consequence has more disturbing ramifications. If Miller is to be read as granting an individual right to own weapons of military usefulness, this right would seem to be unqualified.285 This is the reductio ad absurdum of the individualist approach, for it would grant the individual the right to own any weapon of military application, regardless of the dangers the weapons posed to others. It was this ramification that led the First Circuit to reject the individualist interpretation of Miller.286 Thus, the broad individualist interpretation leads to the remarkable conclusion that the government can ban antique guns and collection items but cannot ban useful military hardware such as bazookas, tanks, grenades, or small tactical weapons.

Communist affiliation constituted adequate basis for school's refusal to admit certain students).

285 See Lund, supra note 99, at 109-10 (explaining how Court in Miller never raised any question about status of defendants as members of militia). If the decisive constitutional factor were the presumed "non-military nature of the shotgun", rather than the apparently "non-military nature of the defendants," it would seem to follow that private citizens are entitled under the Second Amendment to possess ordinary military weapons. Today this would include such items as fully automatic battle carbines and portable rocket launchers. It is not likely that the Miller Court intended this logical extension of its apparent reasoning, and it is virtually inconceivable that today's Supreme Court would accept it. See also Chuck Dougherty, Development of the Democratic Institutions & The Rule of Law in the Former Soviet Union: The Minutemen, the National Guard and the Private Militia Movement: Will the Real Militia Please Stand Up?, 28 J. MARSHALL L. REV. 959, 973 (1995) (explaining Miller Court defined militia according to colonial days, therefore civilians were determined to be members of militia; however, Court failed to take into account that in 1938 there was no militia system). See generally Kates, supra note 42, at 250 (pointing out United States Supreme Court has turned away every Second Amendment case since Miller).

286 See Cases v. U.S., 131 F.2d 916 (1st Cir. 1942) (dismissing reasonable relationship test because Supreme Court did not intend to formulate general rule); see also U.S. v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977) (denying protection to defendant as matter of public policy, even though he was technically member of Kansas State militia but he was not full member); U.S. v. Warin, 530 F.2d 103, 106 (6th Cir. 1976) (reiterating concern in Cases and held adult male's possession of weapon that was common in military conferred no special rights).
It has been clear to all Circuit Courts interpreting *Miller* that the Second Amendment strongly suggests a narrow right view of the right to bear arms. Thus, the Amendment must be interpreted so as to "assure the continuation and render possible the effectiveness of such forces" (referring to the militia). The term militia as used in the Second Amendment were those forces which "the states were expected to maintain and train . . . ." When a state organized a militia, the "men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." The purpose of calling the militia was to act "in concert for the common defense." There is nothing in the *Miller* Court's discussion of the history of the Second Amendment that suggests an individual right to bear arms for his own uses. The intent of the Second Amendment was to give individuals an unrestricted access to firearms when the individual had been called to serve in a state militia and when the individual was acting in concert for the common defense.

The Solicitor General Robert Jackson, later renowned for his vigorous prosecution of Nazis in Nuremburg, argued a collective rights interpretation of the Second Amendment in the plaintiff's brief. The *Miller* Court found in his favor. His argument

---

287 See Ehrman and Henigan, supra note 42, at 47-48 (acknowledging Second Amendment embodies individual right, but right is narrow because it is violated only by laws that, by regulating individual's access to arms, adversely affect states interest in strong militia); see also Government Policies Associated with the Second Amendment: Hearings Before the Subcomm. on Crime of the House of Representatives, 103d Cong. (1993) (statement of Edward E. Kallgren, cited in Denning, supra note 3, 964-66 (reporting that legislatures have broad power to regulate firearms, but federal and state court decisions in this century have been acting with view that Second Amendment permits exercise of broad power to limit private access to firearms by all levels of government).  
288 *Miller*, 307 U.S. at 177.  
289 Id. at 178.  
290 Id. at 179.  
291 Id. at 179 (stating militia exists to serve larger purpose of providing for common defense and should not be limited to ensuring effectiveness of state militias); see also Ehrman and Henigan, supra note 42, at 41 (rationalizing if militia becomes justification for Second Amendment, it is possible to construe right to be broader than justification).  
292 See Kates, supra note 42, at 250 n.193 (commenting on *Miller's* dicta as being far removed from holding, leaving it to lower courts to reconcile *Miller's* dicta and holding by making gun possession conditional on participation in militia); see also Dougherty, supra note 279, at 973 (explaining lower courts interoperations of *Miller*).  
293 See *Miller*, 307 U.S. 174 (1939), Brief for Appellant at 4-5 ("Indeed, the very language of the Second Amendment discloses that this right has reference only to the keeping and bearing of arms by the people as members of the state militia or other similar military organization provided for by law.").
demonstrates that in both England and the United States, "the right to keep and bear arms has been generally restricted to the keeping and bearing of arms by the people collectively for their common defense and security." The brief thus concludes that "[the right to keep and bear arms], however, it is clear, gave sanction only to the arming of the people as a body to defend their rights against tyrannical and unprincipled rulers. It did not permit the keeping of arms for purposes of private defense." Jackson also advanced the argument that ultimately became the Court's holding: "The arms referred to in the Second Amendment are, moreover, those which ordinarily are used for military or public defense purposes, and the cases unanimously hold that weapons peculiarly adaptable to use by criminals are not within the protection of the Amendment." The opinion strongly asserts a direct connection between the rights to keep and bear arms and a militia.

B. Legal History Up To Miller

1. U.S. v. Cruikshank

In U.S. v. Cruikshank, the Supreme Court had the opportunity to explain its view of the Second Amendment's relationship to the Fourteenth Amendment. The case involved an indictment that

---

294 Id. at 4.
295 Id. at 15 (stating further, "Indeed, the very declaration that a well-regulated militia, being necessary to the security of a free State, indicates that the right to keep and bear arms is not one which may be utilized for private purposes but only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state.").
296 Id. at 5.
297 See U.S. v. Miller, 307 U.S. 174, 178-9 (1930) (advocating militia support, "The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion"); see also Ehrman and Henigan, supra note 42, at 41 (explaining how ruling "directly contradicts the argument that the Second Amendment guarantees a right to bear arms for individual self-defense, sport-shooting, or other purposes unrelated to participation in state militias.").
298 See U.S. CONST. Amend. XIV, §1 (quoting pertinent section of Fourteenth Amendment which states "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); U.S. v. Cruikshank, 92 U.S. 542, 554 (1875) (Clifford, J.,
was handed down against over one hundred white individuals, including William Cruikshank, who had broken up a freedman's political meeting and deprived them of their arms. Under §6 of the Enforcement Act of 1870, the white men were indicted and convicted in the federal courts. Among the rights and privileges asserted were the "right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceable and lawful purpose" and the right of "bearing arms for a lawful purpose."

The Court acknowledged that the guarantees in the Bill of Rights restrain governments as opposed to individuals and states, and here, the necessary element of state action was missing. The Court dismissed the First Amendment count and

_dissenting_ (discussing how courts have only interpreted Second Amendment relating to _Miller_ decision, and therefore does not explain legal scholarship involving relationship between Second and Fourteenth Amendments); _see also_ U.S. v. Morrison, 529 U.S. 598, 622 (2000) (including _Cruikshank_ in compilation of Civil Rights cases and applying Fourteenth Amendment interpretation as protection of citizens from state, not from private action from another citizen).


Two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same.


_301_ _Cruikshank_, 92 U.S. at 553. _See_ Sanford Levinson, _Is the Second Amendment Finally Becoming Recognized as a Part of the Constitution? Voices from the Courts_, 1998 B.Y.U.L. REV. 127, 128 (1998) (discussing court's lack of attention toward Second Amendment); _see generally_ David Kopel, _supra_ note 110, at 1362 (discussing historical setting for decisions).

_302_ _See_ _Cruikshank_, 92 U.S. at 552 (noting federal government is restrained by Bill of Rights); Jay S. Bybee, _Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act_, 48 VAND. L. REV. 1539, 1599-1603 (1995) (discussing how _Cruikshank_ ruling marked onset of trend interpreting First Amendment rights as implied personal rights, and thereby bridging gap in interpretation between First Amendment and rest of amendments in Bill of Rights); _see also_ Matthew C. Porterfield, _State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism_, 35 STAN. J. INT'L L. 1, 9 (1999) (discussing original intention of First Amendment as protective measure for both citizens and states from federal limitations).
found that despite the Fourteenth Amendment, the First Amendment was "not intended to limit the powers of the State governments in respect to their own citizens, but to operate on the National government alone."303 It further held that because the right of the people to peaceably assemble was not "created" by the Constitution, the people must look to the states for protection of this right.304

The Court then relied on the same reasoning to dismiss the claim that the defendants collaborated to obstruct the plaintiff's right to "bear arms for a lawful purpose."305 They first noted that the right to bear arms was "not a right granted by the Constitution,"306 and went on to hold that the Second Amendment's language "means no more than it shall not be infringed by Congress."307 Therefore, the Court concluded with the notion that the internal police powers of the states were "not surrendered or constrained by the Constitution of the United States."308 Lower courts still cite this case to support the proposition that the Second Amendment does not hinder state gun control legislation, even if the legislation goes as far as an


304 See Cruikshank, 92 U.S. at 552 (noting right to assemble should be protected by States); see also Hack v. Oxford Health Care, Inc., 562 F. Supp. 295, 301 (D. Ind. 1983) (explaining difference between remedy provided by Congress for violation of individual's right to petition Federal government and that individual asserting right to petition State government); Worthen, supra note 132, at 155 (using U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) to argue the Cruikshank ruling can be interpreted to mean Congress should have no means by which to interfere with people's rights).

305 Cruikshank, 92 U.S. at 553. See Worthen, supra note 132, at 155-56 (interpreting Cruikshank ruling to mean Constitution does not protect individuals from "noncongressional interference" of right to assemble for lawful purpose); see also Uviller & Merkel, supra note 185, at 412-13 (suggesting Second Amendment's conspicuous non-incorporation into Fourteenth Amendment reflects evidence sentiment of Federalism).


307 Cruikshank, 92 U.S. at 553 (allowing "bearing arms for a lawful purpose," but never defining "lawful purpose", so perhaps it means limited to military purposes.) See Kopel supra note 110, at n.118 (interpreting Cruikshank to say individual's right to arms is protected by Second Amendment, but not created by it, because right derives from natural law and neither mentions states or militias, nor individual right to bear arms.); see also U.S v. Hale, 978 F.2d 1016, 1020 (1992), cert. denied, 507 U.S. 997 (1993) (stressing possibility of interpreting Second Amendment as individual right triggered when individual belongs to militia).

308 Cruikshank, 92 U.S. at 553.
outright ban on certain types of arms.

2. Presser v. Illinois

In Presser, the Supreme Court again addressed the applicability of the Second Amendment to the states. Mr. Presser and 400 other members of a worker's militia marched without a license through the streets of Chicago, with Presser on horseback carrying a sword and the workers carrying rifles. Mr. Presser was charged with violating an Illinois statute that made it a crime for "any body of men" other than the organized militia of Illinois or the troops of the United States "to associate themselves together as a military company, or organization, or to drill or parade with arms" in the towns of the state without a license from the Governor. He was convicted and fined ten dollars.

Presser appealed the Illinois Supreme Court decision, claiming that this law deprived him of his Second Amendment right to keep and bear arms. The United States Supreme Court upheld the statute forbidding private militias as a valid exercise of the state's police power, and answered Presser by holding that the right to gather as a group and hold armed parades was not included in the Second Amendment. The Court further stated

309 See Presser v. Illinois, 116 U.S. 252 (1885) (acknowledging that Presser and worker's militia marched without license through streets of Chicago carrying swords and rifles).

310 See Presser, 116 U.S. at 269 (noting that incorporated Illinois society called "Lehr und Wehr Verein," or "teaching and defense union" purports to improve "mental and bodily condition of its members" through "knowledge of . . . laws and political economy . . . and . . . in military and gymnastic exercises, . . . for the duties of citizens of a republic."); see also Robert Dowling, The Right to Keep and Bear Arms: A Right to Self-Defense Against Criminals and Despots, 8 STAN. L. & POL'Y REV. 25, 31 (1997) (justifying court's ruling as responsible exercise of properly placed judicial power); David B. Kopel & Christopher C. Little, Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition, 56 MD. L. REV. 438, 532 (1997) (arguing Presser ruling does not comport with view of "Domestic Disarmament").


312 See Presser 116 U.S. at 254 (acknowledging that Presser was convicted and fined ten dollars).

313 Id. at 264 (stating that Presser claimed deprivation of his Second Amendment rights).

314 Id. at 265 (denying private militia as valid exercise of state's police power).
The amendment is a limitation only upon the power of Congress and the National government, and not upon that of the states.\textsuperscript{315} The Court cited \textit{Cruikshank} as authority.\textsuperscript{316}

\section*{B. Lower Court Interpretations of Miller}

"An extraordinarily consistent body of case law has held that a variety of restrictions on private firearms ownership, use, and sales do not violate the Second Amendment, because such restrictions have no effect on the maintenance of a well-regulated militia the National Guard."\textsuperscript{317} Beginning with the \textit{Miller} decision and continuing through \textit{U.S. v. Henson},\textsuperscript{318} there has been a "collective judicial assumption made about the Second Amendment that the Framers could not have... meant that individuals should have a judicially-enforceable right to keep and bear arms."\textsuperscript{319} An analysis of lower court opinions will help in

\begin{itemize}
\item \textsuperscript{315} \textit{Id.}; \textit{See} Kopel, \textit{supra} note 12, at 174 (agreeing that \textit{Presser} would allow states to regulate firearms, but he argues that theory that Due Process clause of Fourteenth Amendment might protect substantive constitutional rights had not yet been invented);
\item \textit{See also} Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan J., dissenting) (stating liberty in Due Process cannot be limited by other guarantees of Constitution, "This 'liberty' is not a series of isolated points picked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms...";)
\item Kopel, \textit{supra} note 12, at 126-27 (arguing that Fourteenth Amendment's "liberty" belongs to individuals, not to state governments. \textit{See generally}, Hale, \textit{supra} note 265 (incorporating right of militia into rights clause not constraining right of militia by justification).
\item \textit{Presser}, 116 U.S. at 265 (citing \textit{Cruikshank} which set limits on the Second Amendment).
\item Herz, \textit{supra} note 17, at 68.
\item Denning, \textit{supra} note 3, at 971. In assessing the lower court's use of \textit{Miller}, Denning claims that:
\item the courts have moved so far away from what \textit{Miller} actually says that their citations of the case cease to have any meaning. The courts seem guilty of using the illegitimate precedent-avoidance techniques Karl Llewellyn described as "manhandling facts" and the "unvarnished citation of... alleged authorities" to avoid outcomes the court cannot stomach. \textit{Id.} at 971-72. Denning further claims that "[a] close examination of the lower courts opinions and comparison with the central holding of \textit{Miller}, however, reveals that the lower courts have demonstrated a remarkable obtuseness, sometimes lurching into intellectual dishonesty."
\item \textit{Id.} at 999.
\end{itemize}

Justice Black stands seemingly alone in his opinion that the Second Amendment does grant a broad individual right to keep arms. \textit{See} Duncan v. Louisiana, 391 U.S. 145, 162-66 (1968) (incorporating Sixth Amendment right to trial by jury into Fourteenth Amendment's Due Process guarantee). Justice Black wrote a concurring opinion in which he included the statements of Senator Jacob Howard, one of the primary sponsors of the Amendment. \textit{Id.} at 162. These comments describe the first eight amendments to the Constitution, including the right to keep and bear arms, as guaranteeing personal rights. \textit{See} Kopel, \textit{supra} note 12, at 146 (arguing that by including these remarks in his opinion, Justice Black was acknowledging individual right to arms). There are many good reasons to believe that Justice Black viewed the right to possess arms as an individual right. \textit{See}
understanding how the courts have interpreted Justice McReynold's holding in *Miller*. The most common approach to Second Amendment claims has been to apply "the *Miller* test." There is no solid consensus as to what that test consists of, however, a two-tiered test is common. This test includes:

Kopel, *supra* note 12, at 156-57 (arguing the 14th Amendment guarantees first eight amendments are enforceable against States and citing Justice Black who quoted Sen. Howard in his argument first eight amendments are list of individual rights); *See generally* Adamson v. California 332 U.S. 46, 51 (1947) (arguing Bill of Rights was adopted for individual but are inapplicable in similar actions by States). *But see* Kopel, *supra* note 12, at 157. In *Duncan*, Black is concurring with the Court. In *Adamson*, he wrote a dissenting opinion. Whatever else can be said about Justice Black's Second Amendment jurisprudence, there is surely no evidence that it ever represented the feelings of a majority of the Court.


At least one scholar believes the test can be manipulated to reach the result the court
[The first part] for the weapon and [the] second for the weapon holder. Even assuming that clear convincing proof had shown that sawed-off shotguns were not merely part of the military arsenal but in fact were standard issue as common as... helmets and furthermore it was a court martial offense to be found without it, it still would not have done Mr. Miller a whit of good. Mr. Miller fails miserably in the weapon holder test. He was not acting in the role of the member of the "militia," much less a "regulated militia," and least of all the "well regulated militia," described by the Court and the Second Amendment. The most that can be said for whose right emerged in Miller is that of the state militia's and their own arsenal.323

From this, the lower courts in the United States have had to determine what right the Court viewed the Second Amendment granted. "It seems clear that the right to bear arms is inextricably connected to the preservation of a militia. This is desires. Brannon P. Denning argues:

[T]here are basically three interpretations of Miller. The first concludes that Miller directs courts to grant Second Amendment protection only where there is some demonstrable relationship between the weapon that is restricted and the maintenance of a militia. As it became evident that almost any kind of weapon could be effectively used in combat, the courts' focus shifted to the state of mind of the possessor, i.e., did the person using or possessing the weapon have first and foremost in her mind the intent to insure the maintenance and efficacy of a militia. Finally, if a plaintiff can overcome the tests in the first two formulations of the test, the court might play its trump card: in individual can make such a colorable Second Amendment claim because the Second Amendment protects only a collective right of undifferentiated state citizens to form militias and to employ them to oppose federal tyranny. ... Over the years, the courts have moved so far away from what Miller actually says that their citations of the case cease to have any meaning.

See Denning, supra note 3, at 971-72. Another commentator writes "[t]he test enunciated by the Miller court states that the Second Amendment protects such weapons as are (1) of the kind in common use among law-abiding people; and (2) provable as part of ordinary military equipment of today." Byron L. Beck, Second Amendment Militias Searching for Modern Day Redcoats Along the Shifting Rhetorical Battle Lines of a Gun Controlled Utopia, 21 W. ST. U. L. REV. 415, 442 (1994). Second Amendment Scholar Don B. Kates recommends reformulating the Miller test to provide that the "weapon must provably be (1) of the kind in common use among law-abiding people; and (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." Kate, supra note 42, at 259.

323 CRAMER, supra note 321, at 189-90. See generally, Denning, supra note 281, at 964 (quoting Kallgreen who stated, "[Miller held that] the scope of the people's right to bear arms is qualified by the introductory phrase of the Second Amendment regarding the necessity of a 'well regulated militia' for the 'security of a free State.' [Further, Miller held] that the 'obvious purpose' of the Amendment was to 'assure the continuation and... effectiveness of the state militias' and cautioned that the Amendment 'must be interpreted and applied with that end in view.'"). See e.g., Ehrman & Henigan, supra note 42, at 40 (arguing that present day National Guard is modern equivalent of 18th century state militia, thus rendering Second Amendment 'anachronistic and its protections unnecessary.').
precisely the manner in which the Supreme Court interpreted the Second Amendment in [Miller].

1. Cases v. US

In 1942, the First Circuit decided a case attempting to apply the Second Amendment holding from Miller. This court rejected the Miller Court's logic to formulate its ruling and instead looked to the state of mind of the person claiming a Second Amendment right. The court required that before asserting a Second Amendment claim, a citizen must have in mind the maintenance and preservation of the militia as his or her main concern. The defendant, Jose Cases Velazquez, shot...
another person at a beach club in Carolina, Puerto Rico, and was convicted for violation of the Federal Firearms Act of 1938, which prohibited convicted felons from possession of firearms. The court upheld the conviction and went on to try to explain what the Supreme Court meant in its holding in *Miller*.329

[U]nder the Second Amendment, the federal government can limit the keeping and bearing of arms by a single individual as well as by a group of individuals, but it cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia. However, we do not feel that the Supreme Court in this case was attempting to formulate a general rule applicable to all cases.330

The court was clearly concerned that an interpretation of *Miller* which looked to the type of gun used, rather than to its actual use in the militia, would prevent the government from prohibiting "the possession or use by private persons . . . of distinctly military arms, such as machine guns, trench mortars, anti-tank, or anti-aircraft guns."331 It logically follows from this interpretation that the federal government "would be empowered only to regulate the possession or use of weapons such as a flintlock musket . . . ."332 Therefore, the court analyzed the facts of this case in respect to what it thought the Supreme Court held in *Miller*. The court found that the defendant possessed a gun and ammunition and used the "firearm . . . without any thought

Consequently, Lund believes the *Cases* court simply misreads the Second Amendment as a provision protecting some right or interest of a government organized militia rather than the right of the people. *Id.* at 186. Of course, the individual right to arms would not be completely inconsequential today if there were anything like an active militia in existence. The fact that history has deemed such militias irrelevant should not permit us to reconstruct the Second Amendment into something not intended by the founders. But since such militias are unlikely to be resurrected, Lund correctly observes that Second Amendment law is strict in theory but fatal in fact. *Id.* at 187.

329 *Cases*, 131 F.2d at 922-23 (arguing *Miller* should not be applied as a general rule).

330 *Id.* at 922 The *Cases* decision was based on the statement "the rule which [*Miller*] laid down was adequate to dispose of the case before it and that we think was as far as the Supreme Court intended to go." One Commentator argues that the decision in *Cases* is illogical for the reason that the Supreme Court is rarely concerned with individual justice when granting certiorari. See Harman, supra note 92, at 437. Harman posits that the *Miller* case was taken by the Court because it presented a substantial issue of federal law that had not been decided on. *Id.* at 438.

331 *Cases*, 131 F.2d at 922. *But see* Denning, supra note 3, 982-84 (arguing that "[*Cases*] rejected the *Miller* decision out of hand and proceeded, inexplicably, to engrain a state of mind requirement onto the Second Amendment where one had not previously existed").

332 *Cases*, 131 F.2d at 922 (contending that *Miller* Court could not have possibly limited federal regulation to weapons that could be classified as "antiques" and "curiosities.").
or intention of contributing to the efficiency of the well regulated militia which the Second Amendment was designed to foster as necessary to the security of a free state."  

The *Cases* decision is famous for its ruling that the *Miller* opinion cannot be interpreted to grant the right to possess such destructive weapons as tanks, mortars, bazookas, and the like. It would be cited in many cases to come in support of the notion that the Second Amendment does not grant an individual right.

2. US v. Tot

In *Tot*, the court interpreted the *Miller* holding under a historical view of the Second Amendment to support its contention that there is no constitutional right to keep and bear arms.  

Frank Tot, a convicted felon, was found possessing a handgun, and convicted of violating the Federal Firearms Act of 1938, which made it a crime for a felon to carry a firearm capable of being fitted with a silencer. Tot appealed his conviction to the Third Circuit based on his rights under the Second Amendment. The court's decision held the following:

---

333 *Id.* at 923 (arguing defendant did not possess a gun in order to possess in any way to militia). One Commentator noted that the First Circuit severely altered Miller's "real relationship inquiry." *See* Shelton, *supra* note 320, at 119-20. Shelton argues "[w]hile the Miller court scrutinized the firearm's militia utility, the *Cases* court further inquired into whether the defendant's use of the weapon bore a reasonable relationship to militia purposes." *Id.* Shelton continued "[t]he court thus narrowed those able to raise Second Amendment defenses to those in "military organizations...and provided future courts with the leeway to find Second Amendment protection inapplicable to individuals." *Id.*

336 *See* Cases v. United States, 131 F.2d 916, 922-23 (limiting rule espoused in *Miller*). In addressing this contention, Second Amendment scholar Don Kates notes that since the text of the Second Amendment refers to arms that the individual can "bear, weapons too heavy or bulky for the ordinary person to carry are apparently no contemplated." Kates, *supra* note 42, at 261. Another commentator noted that even under the most liberal interpretation of the *Miller* test a weapon such as the "Saturday Night Special," handgun would bear no reasonable relationship to a militia's preservation because of its "inaccuracy and unreliability." Susan M. Stevens, *Kelley* v. *R.G. Industries: When Cases Make Good Law*, 46 MD. L. REV. 486, 498-499. Another commentator, not in the legal but political science field, addressed the prospect of such an unregulated armed citizenry in the following manner, "[t]he idea that vigilantism and armed insurrection are constitutionally sanctioned as voting is a proposition of absurdity that one is struck more by its boldness that by its pretensions to seriousness." Robert J. Spitzer, *Fresh Looks: Researching the Second Amendment*, 76 CHI. KENT. L. REV. 349, 362 (2000).

337 *Id.* at 265 (addressing same federal act at issue in *Cases* decision).  
338 *Id.* at 266. (appealing case based upon Second Amendment rights).
It is abundantly clear both from the discussions of this amendment contemporaneous with its proposal and adoption and those of learned writers since that this amendment, unlike those providing for protection of free speech and freedom of religion, was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachment by the federal power.\(^3\(^3\(^9\)\) (Emphasis added).

By recounting specific historical counts under James II, the court concluded that the colonists "wanted no repetition" of England's government for their adolescent American system.\(^3\(^4\)\(^0\)\) The court implied that the Second Amendment was drafted as an advisement to the government not to encroach upon the bounds put in place by the Constitution and to ensure that the United States would not return to the same government that they were subject to in England. Lastly, the court clearly did not think that the Second Amendment was enacted by the Framers to grant individuals the right to keep and bear arms.

The court went on to explain how "weapon bearing" was regulated by statute as far back as the Statute of Northampton in 1328.\(^3\(^4\)\(^1\)\) Throughout its decision, the court continuously asserted that the Second Amendment "was not adopted with individual rights in mind."\(^3\(^4\)\(^2\)\)

\(^3\(^3\(^9\)\)\) Id.; see also The Ends of Second Amendment, supra note 219, at 171 (observing that case introduced notion of state's rights into Second Amendment analysis). But see Yassky, supra note 53, at 192 (recalling Professor Yassky's hypothetical: If Tot had been militia member, Court may have recognized his right to possess gun). Once again, it is not the Second Amendment law that has suffocated individual rights, but the absence of militias. Further, hypothetical demonstrates meaninglessness of terms "states rights" and "individual rights."

\(^3\(^4\)\(^0\)\) See Tot, 131 F.2d at 266 ("The experiences in England under James II of an armed royal force quartered upon a defenseless citizenry was fresh in the minds of the Colonists. They wanted no repetition of that experience in their newly formed government."); see also McIntosh, supra note 2, at 679 (stating idea of Second Amendment was to protect Americans from government tyranny). But see Roland H. Beason, Prntz Punts on the Palladium of Rights: It Is Time to Protect the Right of the Individual to Keep and Bear Arms, 50 ALA. L. REV. 561, 565 (1999) (explaining that "militia" in eighteenth century language, did not mean organized group, but any adult male qualified for military service).

\(^3\(^4\)\(^1\)\) See Tot, 131 F.2d at 266; see also supra text accompanying note 81 (discussing description of statute).

\(^3\(^4\)\(^2\)\) See Tot, 131 F.2d at 266; see also Steven H. Gunn, Second Amendment Symposium: A Lawyer's Guide to the Second Amendment, 1998 BYU L. REV. 35, 36-42 (1998) (describing Second Amendment as protecting states, not individuals); Roots, supra note 256, at 73-75. But see Beason, supra note 334, at 579 (declaring that Miller rejected collective right theory, and emphasized individual's right to bear arms).

This case arose after the Cases and Tot disputes, and coincided with challenges to the federal gun control legislation of the late 1960's.

Francis Warin was convicted by an Ohio district court for possession of an unlicensed submachine gun, violating federal law. He claimed he was a member of a "sedentary militia" and he was modifying the gun in question so that he might offer it "to the Government as an improvement on the military weapons presently in use." The Sixth Circuit affirmed the conviction, and cited Cases as precedent.

The court further relied on a case it had decided five years earlier called Stevens v. United States, which held that since the Second Amendment "applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right to possess a firearm." Then the court used the Stevens decision to conclude, "it is clear that the Second Amendment guarantees a collective rather than an individual right.


The Eighth Circuit more recently described Cases as "one of the most illuminating circuit opinions on the subject of military weapons and the Second Amendment." Consequently, the court based its opinion in Hale on its interpretation of the Cases decision and not on Miller.

---

343 530 F.2d 103 (6th Cir.) (holding that under Second Amendment defendant's enrollment in militia did not provide him with right to violate federal statute by possessing illegal firearm).

344 Id. at 104 (affirming conviction of Warin for possession of submachine gun in violation of 26 U.S.C. §§ 5861(d), 5871).

345 Id. at 105. Warin had in fact designed and built the gun in question for the purpose of "testing and refining." Warin was an engineer and worked for a company that developed weapons for the government. Id.

346 Id. at 106 ("Agreeing as we do with the conclusion in Cases... that the Supreme Court did not lay down a general rule in Miller, we consider the present case on its own facts and in light of applicable authoritative decisions").

347 Id. at 106 (quoting Stevens v. U.S., 440 F.2d 144, 149 (6th Cir. 1971)).

348 Id. at 106-107 (upholding Warin's conviction on grounds that Second Amendment did not permit him to possess submachine gun unless he was militia member).

349 978 F.2d 1016 (8th Cir. 1992).

350 Id. at 1019 (relying on Cases to hold that unless defendant can show that firearm possession was related to military use, Second Amendment does not protect possession, rejecting reading of Miller as stating government cannot regulate firearms under any
Wilbur Hale was prosecuted and convicted for possession of an unregistered machine gun in violation of federal law.\textsuperscript{351} He made the argument that the indictment violated his Second Amendment rights, since the machine gun he possessed was exactly the type of weapon that would be employed by a military unit.\textsuperscript{352} Therefore, the weapons would contribute to the preservation of the militia, as stated in \textit{Miller}.\textsuperscript{353}

The Eight Circuit rejected this reading of \textit{Miller} and went into a historical analysis of the state of the militia when the Second Amendment was drafted, and where it stands today under the National Guard.\textsuperscript{354} The court then went on to cite \textit{Cases} for the following reason:

The claimant of Second Amendment protection must prove that his or her possession of the weapon was reasonably related to a well-regulated militia. . . . Where such a claimant presented no evidence either that he was a member of a military organization or that his use of the weapon was "in preparation for a military career," the Second Amendment did not protect the possession of that weapon.\textsuperscript{355}

\textsuperscript{351} \textit{Id.} at 1017 (affirming Hale's conviction for violation of 18 U.S.C.A. § 922(o) and 26 U.S.C. § 5861(d)).

\textsuperscript{352} \textit{Id.} at 1019 ("Hale introduced no evidence . . . of even the most tenuous relationship between his possession of the weapons and the preservation of a well regulated militia.").

\textsuperscript{353} \textit{Id.} at 1018 (stating that Hale's argument was based on reading of \textit{Miller} that claims Second Amendment bars government from regulating any firearms susceptible to military use); see also Oakes, \textit{supra} note 12, at 387 (applying \textit{Miller}'s "reasonable relationship" test between firearm possession and preservation of militia). \textit{But see} U.S. v. Miller, 307 U.S. 174, 178 (1939) (stating that since Miller's possession of firearms was not related to military use, the government could regulate his possession and uphold his conviction).

\textsuperscript{354} \textit{See Hale}, 978 F.2d at 1019. The court described that:

When the Second Amendment was ratified in 1791, the state militias functioned as both the principal units of military organization and as an implicit check on federal power. These militias were comprised of ordinary citizens who typically were required to provide their own equipment and arms. The Second Amendment prevented federal laws that would infringe upon the possession of arms by individuals and thus render the state militias impotent. Over the next 200 years, state militias first faded out of existence and then later reemerged as more organized, semi-professional military units. The state provided the arms and the equipment of the militia members, and these were stored centrally in armories. With the passage of the Dick Act in 1903, the state militias were organized into the national guard [sic] structure, which remains in place today. . . . Considering this history, we cannot conclude that the Second Amendment protects the individual possession of military weapons. In \textit{Miller}, the Court simply recognized this historical residue. \textit{Id.} (citations omitted).

\textsuperscript{355} \textit{Id.} at 1020 (citation omitted). This view of the Second Amendment responds to many of Kopel's Supreme Court opinions allegedly acknowledging in dicta an individual right. \textit{See} Kopel, \textit{supra} note 12, at 113–15. For instance, Kopel quotes Justice Stevens in his dissent in \textit{Spencer v. Kemna}: being found guilty of a crime "may result in tangible harms such as
5. Love v. Pepersack\textsuperscript{356}

More recently, the Fourth Circuit supported the collective rights view of the Second Amendment in the *Love* case. April Love had been arrested on four occasions, and subsequently convicted of a misdemeanor on one of these charges.\textsuperscript{357} She later tried to purchase a handgun and her application was denied.\textsuperscript{358} imprisonment, loss of the right to vote or to bear arms . . . ." \textit{Id.} at 114 (quoting 523 U.S. 1, 4 (1998) (Stevens, J. dissenting). It is asserted that "if an individual can lose his right 'to bear arms', he must possess such a right." \textit{Id.} at 114. This article does not argue, however, that no right is created by the Second Amendment. The issue is whether the right belongs to citizens as individuals or citizens organized collectively into militias. Nothing in Stevens' opinion suggests an individual right to bear arms. Instead, the opinion can be interpreted to mean a loss of the right to bear arms as a member of a collective militia. This view of the Second Amendment appears to be endorsed by the *Hale* court. This view may also reconcile the Amendments two seemingly contradictory clauses: the militia clause and the "right of the individual to keep and bear arms" clause.

In two of the cases that Kopel discusses, the party asserting a constitutional right is not an American citizen. \textit{Id.} at 128. In *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 262 (1990), the defendant was a Mexican citizen whose home in Mexico was raided by drug agents. The defendant argued that the evidence should be excluded under the Fourth Amendment. \textit{Id.} at 263. The Court held that "the people" protected by the Fourth Amendment, as well as the First and Second Amendment, "refers to a class of persons who are part of a national community . . . ." \textit{Id.} at 265. Kopel argues that "if the 'people' whose right to arms is protected by the Second Amendment are American people, then 'the right of the people' in the Second Amendment does not mean 'the right of the states.'" Kopel, \textit{supra} note 12, at 129. Again, however, Kopel's logic is compatible with the narrow rights interpretation of the Second Amendment.

Kopel also quotes the interesting case of *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In this case, German soldiers were captured, but asserted a Fifth Amendment right against self-incrimination. Kopel, \textit{supra} note 12, at 151-53. Justice Jackson, writing for the Court, rejected the claim because this would give German soldiers all constitutional rights, including the right to bear arms; it would require "the American judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second . . . ." \textit{Johnson}, 339 U.S. at 784. It is reasonable to conclude from this case, as Kopel does, that the soldiers are "individuals and as individuals would have Second Amendment rights, if the Second Amendment were to apply to non-Americans." Kopel, \textit{supra} note 12, at 152. However, it would also be possible to conclude that the opinion supports the collectivist view as well: the German soldiers could not be disarmed because they are part of a militia. Kopel attempts to circumvent this argument, noting that the Justice Jackson's opinion refuses to grant Second Amendment rights to guerilla fighters and "were-wolves." \textit{Johnson}, 339 U.S. at 784. Kopel argues that a militia "is an organized force under government control" but guerilla fighters are "small groups or individuals functioning in enemy territory beyond the reach of any friendly government." Kopel, \textit{supra} note 12, at 152 n.217. This is a distinction recognized in international law and Justice Jackson, as a judge in the Nuremberg trials, would have recognized the importance of the distinction. But it is not clear that this distinction has constitutional importance. Jackson's opinion perhaps does nothing more than recognize a kind of military action (guerilla fighting) which requires access to firearms. Kopel cannot demonstrate that Jackson's opinion does anything more than discuss bearing arms in certain military contexts. It certainly does nothing to acknowledge the right to possess arms beyond a military use.

\textsuperscript{356} 47 F.3d 120 (4th Cir. 1995).

\textsuperscript{357} \textit{Id.} at 122. (stating that Love was convicted of participating in obscene show and paid fine).

\textsuperscript{358} See Pepersack, 47 F.3d at 122 (stating Love was denied from purchasing handgun
She sued on Second Amendment grounds, and the Fourth Circuit affirmed the defendant's motion to dismiss. The court correctly concluded that "lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than an individual right." It further stated that it is the "collective right of keeping and bearing arms which must bear a 'reasonable relationship to the preservation or efficiency of a well-regulated militia.'" The court concluded that Love did "not identif[y] how her possession of a handgun will preserve or insure the effectiveness of the militia."

C. U.S. v. Emerson

Considering all the aforementioned cases that have held how the Second Amendment grants a collective right, it is hard to imagine that any responsible court, even a trial court, could hold differently. In 1999, however, the United States District Court for the Northern District of Texas implied that the Second Amendment grants an individual right to bear arms. The opinion was deeply influenced by the avalanche of recent broad rights scholarship. The court adopts the analytical framework based on her prior arrest record, although under Maryland code, prior arrest is not ground for denial of application).

---

359 See Pepersack, 47 F.3d at 124 (affirming judgment dismissing Love's claims based on fact that she failed to satisfy Miller "reasonable relationship" test).

360 See Pepersack, 47 F.3d at 124. See generally U.S. v. Hale, 978 F.2d 1016, 1020 (8th Cir. 1992) (stating purpose of Second Amendment is to restrain federal government from regulating possession of arms when such regulation would interfere with preservation of militia); U.S. v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977) (stating purpose of Second Amendment is to preserve effectiveness and continuation of state militia and courts must interpret and apply amendment with such purpose in view); U.S. v. Warin, 530 F.2d 103, 106 (6th Cir. 1976) (stating Second Amendment guarantees collective rather than individual right).

361 Pepersack, 47 F.3d at 124 (quoting U.S. v. Miller, 307 U.S. 174, 178 (1939)); see also U.S. v. Baer, 235 F.3d 561, 564 (10th Cir. 2000) (noting Supreme Court has long held that Second Amendment guarantees no right to bear arms that do not have reasonable relationship to preservation of well regulated militia); U.S. v. Bournes, 105 F. Supp. 2d 736, 744 (E.D. Mich. 2000) (stating defendant was unlikely to satisfy difficult burden of establishing possession of two unregistered was reasonably related well regulated militia).

362 Pepersack, 47 F.3d 120, 124 (4th Cir. 1995).

363 See Yassky, supra note 53, at 190 (asserting that Emerson court relied "heavily on revisionist scholarship" that advocates "a broader, individual-rights oriented approach to the Amendment"); see also Barnett and Kates, supra note 142 at 1142 (advocating acceptance of broad individual right view, that right of people to keep and bear arms is to be treated same as other rights secured by Bill of Rights); William Van Alstyne, The Second Amendment and the Personal Right to Arms, 43 DUKE L.J. 1236, 1239 (1994) (complaining of lack of useful Second Amendment case law).
of the broad individual right theorists, asserting that the right to bear arms is either a state collective right or an individual right. A historical examination convinces the court that "the right to bear arms has consistently been, and should still be, construed as an individual right." The court fails to address whether the right is absolute or whether it is limited by the terms of the Second Amendment.

In United States v. Emerson, Timothy Emerson was indicted for possessing a firearm while subject to a restraining order pursuant to federal law. Emerson moved to dismiss the indictment against him claiming that the statute is unconstitutional under the Second Amendment. The court looks to Miller but concludes that the case "did not answer the crucial question of whether the Second Amendment embodies an individual or collective right to bear arms." Emerson quotes Miller in describing "the purpose of the Second Amendment as 'assuring the continuation and rendering possible the effectiveness of [the Militia].'" Ironically, the Emerson court then ignores Miller and comes to a diametrically opposed conclusion regarding the purpose of the Second Amendment: "the framers designed the Second Amendment to guarantee an individual's right to arms for self-defense." In striking the law down, the court turned to textual and historical arguments to support its holding that Emerson had a Second Amendment right to possess his firearm. Unfortunately, none of the court's analysis is supportive of its holding that the Second Amendment guarantees a broad individual right to keep and bear arms.

364 See United States v. Emerson, 46 F. Supp. 2d 598, 600 (N.D. Tex. 1999), rev'd, 270 F. 3d 203 (5th Cir. 2001) (describing collective rights and individual rights schools of thought and stating that textual analysis of Second Amendment supports individual right to bear arms); Plouffe, supra note 236, at 61 (offering synopsis of Emerson and stating district court recognized collective and individual rights doctrines as two dominate schools of thought concerning Second Amendment interpretation).
365 Emerson, 46 F. Supp. 2d at 602.
366 See Emerson, 46 F. Supp. 2d at 599 (stating defendant Emerson was indicted for possessing firearm while under restraining order, in violation of 18 U.S.C. § 922 (g)(8)).
367 See Emerson, 46 F. Supp. 2d at 599 (stating Emerson challenged statute as unconstitutional exercise of congressional authority under Commerce Clause and Second, Fifth and Tenth Amendments).
368 Emerson, 46 F. Supp. 2d at 608.
369 Emerson, 46 F. Supp. 2d at 608 (quoting U.S. v. Miller, 307 U.S. 174, 178 (1939)).
370 Emerson, 46 F. Supp. 2d at 607.
1. Textual Analysis

The court correctly sets forth the argument of the narrow individual right advocates. Referring to a "collective right theory," the opinion sets forth the possibility that "the subordinate clause qualifies the rest of the amendment by placing a limitation on the people's right to bear arms." But rather than analyzing the question of the scope of the individual right, the court demonstrates why the Second Amendment is not a state right. By assuming that the right is either a broad individual right or a state right, the judge curiously overlooks the possibility that his own opinion posits: that there is an individual right to keep and bear arms qualified by participation in a militia. In protecting so narrow an individual right, Madison was recognizing the manner in which militias had historically functioned. In both English and colonial history, the individual militia members were responsible for providing their own weapons. In order to protect the ability of the state to raise an armed militia, the right of the militia members to access arms must be put beyond the power of the Congress to restrict. This construction is fully consistent with the courts initial observation that the Second Amendment is an individual right qualified by participation in a militia.

The same analysis also responds to the court's understanding of the word "people". The judge says that the meaning of the word in the Second Amendment must be the same as its meaning in the other amendments. The meaning of the word people

---

371 Emerson, 46 F. Supp. 2d at 601.
372 See Emerson, 46 F. Supp. 2d at 601 (stating that if right to bear arms were state right, Second Amendment would read, "[a] well regulated militia, being necessary to the security of a free State, the right of the States to keep and bear Arms, shall not be infringed"); see also Plouffe, supra note 236, at 63 (noting Emerson court's failure to address essential question of whether or not Second Amendment is fundamental right).
373 See Emerson, 46 F. Supp. 2d at 602 (stating Englishmen were required to bear arms and serve in military and citing Virginia statute requiring heads of families to furnish themselves and all family members capable of bearing arms with firearms); see also David E. Johnson, Note, Taking a Second Look at the Second Amendment and Modern Gun Control Laws, 86 KY. L.J. 197, 202 (1998) (noting that in eighteenth century America, "the militia was the entire adult male citizenry, who were not simply allowed to keep their own arms, but affirmatively required to do so"); Plouffe, supra note 236, at 70 (discussing several pre-American Revolution colonial laws that mandated ownership and even public carrying of arms).
374 See Emerson, 46 F. Supp. 2d at 601 (stating Supreme noted that phrase "the people" in Second Amendment has same meaning in both Preamble and First, Fourth, Fifth and Ninth Amendments of Constitution); see also, McIntosh, supra note 2, at 676 (differentiating between political right to bear arms as collective right of revolution and
"refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."\textsuperscript{375} According to the judge, this "supports a holding that the right to keep and bear arms is a personal right retained by the people, as opposed to a collective right held by the states."\textsuperscript{376} A narrow individual rights advocate has no qualm with this interpretation. But the judge's analysis certainly does not address the possibility that the individual right of the people may be limited to participation in the militia.

The opinion attempts to reconcile the competing Second Amendment clauses. The judge essentially adopts the justification reading of the militia clause.\textsuperscript{377} He asserts that "the function of the subordinate clause was not to qualify the right, but instead to show why it must be protected."\textsuperscript{378} The argument

civil right to bear arms as personal right of self defense); Rakove, \textit{supra} note 207, at 106 (arguing Second Amendment controversy is distinguishable from other Constitutional disputes by degree to which individual right interpretation rests upon commitment to originalism).

\textsuperscript{375} Emerson, 46 F. Supp. 2d at 601 (quoting \textit{U.S. v. Verdugo-Urquidez}, 494 U.S. 259, 265 (1990)); \textit{see also The Ends of the Second Amendment, supra note 219, at 173 (stating phrase "the right of the people" as used in Second Amendment is same as phrase used in First and Fourth Amendments where phrase is used to protect rights of individuals, not states). \textit{See generally}, Daniel A. Farber, \textit{Disarmed By Time: The Second Amendment and the Failure of Originalism}, 76 CHI.-KENT L. REV. 167 (2000) (arguing originalists are not only wrong about how judges should read Constitution, but are wrong about very nature of Constitution itself).

\textsuperscript{376} Emerson, 46 F. Supp. 2d at 601; \textit{see also Resnick, supra note 41, at 12 (stating that despite lack of evidence that "the people" as used in Second Amendment has different meaning than "the people" as used in Preamble, First and Fourth Amendments, collective rights theorists claim "the people" does something different as used in Second Amendment). \textit{See generally} Robert Spoo, \textit{Commentary on Akhil Reed Amar's The Bill of Rights: Creation and Reconstruction "No Word Is An Island": Textualism and Aesthetics in Akhil Reed Amar's The Bill Of Rights}, 33 U. RICH. L. REV. 537 (May 1999) (examining nature and validity of interaction between aesthetic and historical argument in Bill of Rights).

\textsuperscript{377} \textit{See Emerson, 46 F. Supp. 2d at 601 (stating right to bear arms exists independent of existence of militia because without individual right to bear arms, existence of militia and security of state would be jeopardized); \textit{see also Eugene Voloch, The Commonplace Second Amendment}, 73 N.Y.U. L. REV. 793, 806 (June 1998) (arguing Framers may have intended right to bear arms as means of maintaining militia and ensuring security of state but they sought to further such purposes through specific means - right of people to keep and bear arms). But see David C. Williams, \textit{The Unitary Second Amendment}, 73 N.Y.U. L. REV. 822, 822 (June 1998) (arguing operative and purposes clauses of Second Amendment should be read together to produce unitary provision).

\textsuperscript{378} Emerson, 46 F. Supp. 2d at 601; \textit{see also}, Kevin J. Worthen, \textit{supra} note 132, at 146 (stating Second Amendment does not focus on right of individuals to protect themselves but on right of people to maintain freedom of state). But see Nicholas J. Johnson, \textit{Principles and Passions: The Intersection of Abortion and Gun Rights}, 50 RUTGERS L. REV. 97, 100 (Fall 1997) (arguing gun right theory that intersects abortion right theories is right to own or use gun for personal self defense).
suffers from the basic flaw of the justification interpretation, for it fails to demonstrate that the militia clause is part of the justification and not part of the operative right.\textsuperscript{379} There is no qualm with the argument that the need for state security is the justification for the right. But it is difficult to perceive that the militia is also part of the justification when a militia is not an end in itself. When broken into its operative and justification clauses, the right of individuals in militias should be seen as the operative right, and state security should be seen as the justification. When the militia clause is seen as part of the operative right, there is no basis for the view that individuals not in a militia have any Second Amendment right. Had the drafters intended a broad right, the subordinate clause would have been omitted. This would have allowed arms for militias and would have protected access for all other individual purposes. It would seem that the militia clause would only have been added to the amendment if it was intended as a qualification of the right.

The judge makes an additional curious argument. He asserts that "[t]he right exists independent of the existence of the militia. If this right were not protected, the existence of the militia, and consequently the security of the state, would be jeopardized."\textsuperscript{380} Obviously, if the right of militia members to access firearms were not protected, the existence of the militia would be threatened. But the point of the Second Amendment is to protect access to arms when a militia is called. Thus, when the security of a state is threatened, the members have a constitutionally guaranteed right to arm themselves. But when state security is not jeopardized, there would be no need for a militia and no constitutionally protected access to arms. Contrary to the judge's assertion, the existence of the right is dependent on the existence of a militia. If the individual possession of arms is constitutionally justified only by state security, there is no right to possess arms broader than participation in a militia.

\textsuperscript{379} See supra text accompanying notes 256-266 (discussing justification interpretation of Amendment). See generally, McAfee & Quinlan, supra note 92, at 787 (discussing media presentations of Second Amendment); David Williams, The Constitutional Right To ‘Conservative’ Revolution, 32 HARV. C.R.-C.L. L. REV. 413, 443 (Summer 1997) (discussing role of Second Amendment in modern militia movement).

\textsuperscript{380} Emerson, 46 F. Supp.2d at 601. See generally, Barnett & Kates, supra note 142, 1141 (embracing individual right to bear arms); Lund, supra note 99 (arguing that individual right to bear arms is not limited or qualified by prefatory militia language of Second Amendment).
2. Right to Bear Arms in English and Colonial History

The judge makes the argument that the rights of the American colonists were the same as the rights of the English people. But in the Bill of Rights, the people's right to arms is subject to "their conditions and as allowed by law." The facial reading of the provision is that there is no right to bear arms that is beyond the power of Parliament to regulate. Moreover, the historic English right to arms was no broader than participation in the common defense. Lastly, the judge does not address the argument that the purpose of the provision was not to secure a right to arms but to transfer control of the militia from the crown to the Parliament. The mere recitation of the English Bill of Rights does little to advance the judge's argument. There are compelling reasons to believe that this history is not compatible with the ruling that the Second Amendment recognizes a broad individual right to bear arms.

381 See Emerson, 46 F. Supp. 2d at 602-3 (discussing historical laws regarding militia and right to bear arms). See generally, Stephen Halbrook, Second-Class Citizenship And The Second Amendment In The District Of Columbia, 5 GEO. MASON U. CIV. RTS. L.J. 105, 112 (Summer 1995) (discussing application of Second Amendment in Washington, D.C.); Herz, supra note 17, at 64 (highlighting distinction between collective and individual right to bear arms).

382 See Emerson, 46 F. Supp. 2d at 602 (noting that American colonists had right to bear arms under English Bill of Rights). See generally, Rodriguez, supra note 35, at 799 (characterizing Second Amendment as legacy of English Bill of Rights); Schwoerer, supra note 88, at 29 (commenting on Malcom's interpretation of Second Amendment as legacy of English Bill of Rights).

383 See Blakely, supra note 113 (quoting text of English Bill of Rights). See generally, Heyman, supra note 179, at 253 (arguing that English Bill of Rights is plausible precedent to Second Amendment); Gordon Wood, The Origins Of Vested Rights In The Early Republic, 85 VA. L. REV. 1421, 1425 (October 1999) (noting that English Bill of Rights protected right to bear arms from restriction by king not from restriction by Parliament).

384 See supra text accompanying notes 127-137 (discussing Parliament's power to regulate right to bear arms). See generally, Gallia, supra note 192, at 146; Olson & Kopel, supra note 100, at 401.


386 See supra text accompanying notes 118-121 (discussing Parliament's power over right to bear arms). See generally, Bogus, supra note 36, at 377 (mentioning Parliament's restrictions on English right); Brandon Denning, Gun Shy: The Second Amendment as an 'Unenforced Constitutional Norm', 21 HARV. J. L. & PUB. POL. 719, 760 (Summer 1998) (noting power Parliament had to restrict right to bear arms).

387 See United States v. Emerson, 46 F. Supp. 2d 598, 603 (Tex. 1999), rev'd, 270 F.3d 203 (5th Cir. 2001) (describing events leading up to Revolutionary War and militia's role in war); Gun Control in America: Interview with Michael Barnes, President Handgun
3. Ratification, Drafting, and Structural Analysis

The judge's ratification analysis revolves around his belief that the Second Amendment was a guarantee to "the personal right to bear arms as a potential check against tyranny." His proof of this point is a smattering of quotes that cannot possibly bear the weight the judge assigns to them. Among the quoted figures are those not heretofore known to be major figures in the founding (Theodore Sedgwick and Zachariah Johnson), those who, according to Jefferson, should not be used to interpret the Constitution (Richard Lee Henry and Patrick Henry), one who was explicitly referring to the militia (George Mason), and those whose thoughts are taken out of context (Patrick Henry and James Madison). Stripped of these sources, the

---

Control, Inc., 6 GEO. PUBLIC POL'Y REV. 31, 34 (2000) (stating Second Amendment relates to "well-regulated militia[s]" and not individual right to own weapons). But see Gun Control in America: Interview with Larry Pratt, Executive Director, Gun Owners of America, 6 GEO. PUBLIC POL’Y REV. 37, 42 (2000) (stating Second Amendment protect individual ". . .right of the people to keep and bear arms."). See Emerson, 46 F. Supp 2d at 605-6 (discussing proposed amendments to Constitution); see also Dennis, supra note 81, at 91 (suggesting Framers of Constitution and Bill of Rights intended Second Amendment guarantee individual right to carry and posses arms); Lara L. Overton, Permit to Carry Legislation: Has the Time come for change in Minnesota's Firearm Legislation and Policy? 21 HAMLINE J. PUB. L. & POL’Y 95,122-23 (1999) (noting some advocates argue Second Amendment affords individual right to bear arms).

---

389 See id. at 603 (stating that Theodore Sedgwick of Massachusetts felt that although it is hard to imagine that our country could ever be enslaved, it is possible that army can be raised).

390 See id. at 604 (noting, that Zachariah Johnson told Virginia Convention that liberties will be safe because "the people are not to be disarmed of their weapons"). See id. at 604 (stating that Richard Lee Henry's view of well regulated militia being entire armed populace rather than select body of men was reiterated by proponents to bill of rights).

391 See id. at 604-5 (quoting Patrick Henry as arguing for right to arms); see also Wills, supra note 207 (noting Jefferson's argument that only words of those who voted in favor of Constitution should be used to interpret it).

392 See Emerson, 46 F. Supp 2d at 603-4 (quoting George Mason). Mason is quoted first as to the necessity of maintaining the militia. Id. at 604. He is then quoted as saying that the militia "consist now of the whole people." Id. at 603. The judge takes this to mean that "[b]ecause all were members of the militia, all enjoyed the right to individually bear arms to serve therein." Id. at 604. Of course, the militia did not and never has "consisted of the whole people." See Bogus, supra note 36 (discussing structure of militia). As the modifying phrase "well regulated" would suggest, the militia has always meant a state administered organization. See Feller & Gotting, supra note 55 (discussing need for militia to be state-administered).

393 See Emerson, 46 F. Supp. 2d at 605 (referring to Henry's quote that "the great object is that every man be armed." When put in context, Henry was obviously referring to the need to arms militias. See supra text accompanying notes 215-217 (discussing need to arm militias).

394 See Emerson, 46 F. Supp. 2d at 603-5 (discussing propositions advanced by Theodore Sedgwick, Zachariah Johnson, Richard Henry Lee, Patrick Henry, George Mason and
The judge's case comes down to the proposed amendments offered by Pennsylvania, Massachusetts, and New Hampshire, and James Monroe, who included the right to bear arms in a list of basic human rights. What the judge fails to demonstrate is that any of these thoughts were incorporated into the meaning of the Second Amendment. The fact that someone in American history once suggested a right to the private uses of arms is hardly proof that this right was constitutionally codified. The real meaning of the Amendment is demonstrated by the ratification debates in which the obvious concern was how militias could be assured a source of weapons. Quotes that are out of context or from those who opposed ratification do nothing to undermine this conclusion. Given that the judge uses such sources, his analysis can legitimately be described as a "linguistic wild-hare chase."

The judge also considers the argument that the original James Madison); see also Finkelman, supra note 190, at 216 (stating in 1978 Richard Henry Lee urged Virginia to defeat Bill of Rights and hold out for more sweeping amendments). See generally, James Gray Pope, Republican Moments: The Role of Direct Popular Power in the American Constitutional Order, 139 U. Pa. L. Rev. 287, 342 (1990) (noting conservative federalist Theodore Sedgewick motioned to delete assembly clause considering it redundant appendage to free speech guarantee).

See Emerson, 46 F. Supp. 2d at 605-6 (discussing proposed amendments to Constitution); see also Michael A. Bellesiles, Symposium, Fresh Looks: The Second Amendment in Action, 76 Chi.-Kent. L. Rev. 61, 70 (2000) (noting gun ownership in Pennsylvania "was premised on notion that individual would use that weapon in state's defense when called upon"); Kates, supra note 42, at 273 n.91 (stating "Adams proposed to the Massachusetts ratification convention an amendment guaranteeing the right to bear arms").

See Emerson, 46 F. Supp. 2d at 605 (quoting James Monroe). Given that Monroe used the phrase "bear arms" it is questionable that he was speaking of a non-military possession of weapons. See supra text accompanying note 217 (discussing Monroe's Second Amendment proposal).

See Heyman, supra note 179, at 271 (confirming that in late 18th century America, right to bear arms was understood as collective right, exercised through formation of state militias); Kopel, supra note 110, at 1414 (asserting that Founders saw state militias as protection against federal standing army and therefore Second Amendment only guarantees state governments and not individual right to form a militia); Joelle E. Polesky, The Rise of the Private Militia: A First and Second Amendment Analysis of the Right to Organize and the Right to Train, 144 U. Pa. L. Rev. 1593, 1630 (1996) (stating that militia clause was intended to balance potential threat of tyranny by federal government's power to establish standing army).

See WILLS, supra note 5 (asserting that such argument appears to be extremely dubious, not least because of its schizophrenic logic). See generally, Christopher Chrisman, Constitutional Structure of the Second Amendment: A Defense of the Individual Right to Keep and Bear Arms, 43 Ariz. L. Rev. 439, 440 (2001) (noting that Emerson was first time in nearly sixty-years that federal court struck down law passed by Congress as violation of Second Amendment, going against clear weight of authority in other jurisdictions and making reversal likely); Spitzer, supra note 226, at 370 (stating that federal courts have been uniform in their interpretation of Second Amendment, with exception of Emerson).
placement of the proposal and its alteration demonstrates a broad Second Amendment right. The suggested interlineation of the right in the body of the Constitution reflect[s] recognition of an individual right, rather than a right dependent upon the existence of a militia. But the judge does nothing to demonstrate why this would be the case. It is reasonable to suggest that this proposed placement reflects an individual right that can be asserted upon satisfaction of the condition precedent of belonging to a militia. It is also maintained that listing the right in the Bill of Rights proves the individual nature of the right because "this is a bill of rights retained by the people." First, it is not argued that the Second Amendment embraces a state's right. Second, this argument is historically false on its own terms. The original proposed Bill of Rights included several states rights at the beginning of the list. Moreover, the fact that these beginning amendments were not ratified, placing the right to bear arms as the Second Amendment, was strictly coincidental. The judge recites the changes that were made to

400 See Emerson, 46 F. Supp. 2d. at 606 (alleging that Madison envisioned personal right to bear arms with his original plan being to insert amendments between specific sections in existing Constitution and not to add them to end of document); see also Edward Harnett, A "Uniform and Entire" Constitution; Or, What If Madison Had Won, 15 CONST. COMMENTARY 251, 252 (1998) (reiterating that Madison wanted to preserve entire uniform system and proposed to integrate amendments into body of Constitution); Herd, supra note 37, at 207 (stating that right to bear arms was not submitted as separate Bill of Rights but was proposed as amendment by interlineations to be inserted in Article 1, Section 9 between clauses 3 and 4).

401 Emerson, 46 F. Supp. 2d. at 606.

402 See David Harmer, Securing a Free State: Why the Second Amendment Matters, 1998 BYU L. REV. 55, 60 (1998). See generally Henderson, supra note 257, at 181 (pointing out that text of Second Amendment is unique from rest of amendments composing Bill of Rights in that its opening clause indicates a purpose); David E. Johnson, Taking a Second Look at the Second Amendment and Modern Gun Control Laws, 86 KY. L.J. 197, 204 (1998) (stating it was Founders' intention that the Bill of Rights be interpreted consistently).

403 See Akhil Reed Amar, A Tale of Three Wars: Tinker in Constitutional Context, 48 DRAKE L. REV. 507, 510 (2000) (affirming that original Bill of Rights was designed not only to protect individual rights but also to protect state's right against federal government); see also Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 YALE L.J. 1193, 1283 (1992) (noting that original Bill of Rights mirrored the body of Constitution in that it included both state and individual rights and stating that states' rights are not limited to the Ninth and Tenth Amendments); Michael Kent Curtis, A Story For All Seasons: Akhil Reed Amar On the Bill of Rights, 8 WM. & MARY BILL OF RTS. J. 437, 440-41 (2000) (suggesting that original Bill of Rights was about localism and state's rights).

404 See Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right 84 (University of New Mexico Press 1984) (stating, "a purely logical analysis of the words of the Second Amendment and its relation to the Bill of Rights in its entirety demonstrates consistently with the historical context and the intent
the wording: from "best security" to "necessary to the security"; omitting "composed of the body of the people" as a description of the militia; dropping the religious exemption clause; rejecting the phrase "for the common defense." The judge barely pretends to describe how these changes support his argument, only asserting without rationale that "necessary to the security" is "an even stronger endorsement than Madison's original description." In fact, each of these changes are either irrelevant or support the militia centric vision of the Amendment. The judge again fails to present a single convincing argument that the Second Amendment embraces any right to possession of a gun not related to military use.

III. PUBLIC POLICY

In comparison to other industrialized countries, American suffers from a high degree of lethal gun violence. Guns further contribute to tens of thousands of deaths a year by way of accidents and suicides. America's rate of gun ownership is higher than most other industrialized countries. The homicide rate in America is staggering. From 1990 through 1994, over 23,000 people a year were victims of homicide annually in the United States. By the early 1990s, the homicide rate was 9.4 per 100,000 people, among the highest in the world, and is a leading cause of death. Italy, Canada, and the United Kingdom had homicide rates in 1990 of 2.6, 2.1 and .7, of the framers.); see also MALCOLM, supra note 76, at 164 (asserting, "the position of this amendment, second among the ten amendments added to the Constitution as a Bill of Rights.").

405 Emerson, 46 F. Supp. 2d at 606.

406 Id.

407 See Barnett & Kates, supra note 142, at 1205 (noting that militia system required every household to have gun because state required individuals to have guns as part of militia and concluding that it is still seen as collective right); see also Dennis, supra note 81, at 90 (stating that state rights theorists use "militia-centric" nature of Supreme Court to advance their views); Kopel, supra note 110, at 1500 (stating militia-centric explanation of Second Amendment refers to an organization of state militia).


409 See FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 54 (Oxford University Press, 1977); see also Peter Stone, Lethal Weapons, THE AMERICAN PROSPECT, May 7, 2001 at 46 (stating that US has arsenal of nearly 200 million guns, making their homicide rate far in excess of any other developed nation); People and Places, LLOYD'S LIST, March 15, 1991, at 5 (reporting that US homicide rate in 1990 was more than double that of Northern Ireland, four times that of Italy, nine times that of Britain, and eleven times rate in Japan).
respectively. Japan, which has an extremely violent history and culture, but which has learned to control its violence by strict gun laws, had just .6 homicides per 100,000, has one of the lowest homicide rates in the world.\textsuperscript{410} This glaring disparity demands a search for causative factors of America's extraordinarily high homicide rate.

Overwhelmingly, the weapon of choice used in homicide is the firearm. Nearly two-thirds of all homicides in the U.S. are committed with firearms.\textsuperscript{411} The numbers become more disturbing when firearm related accidents, suicides, and unintentional gunshot injuries are taken into account. Under this measure, the total number of lives taken in the U.S. alone by guns of all kinds is 38,000.\textsuperscript{412} Indeed, firearms are the eighth leading cause of death in the country.\textsuperscript{413} The number of lives taken by firearms from 1963 to 1982 (900,000) is greater than the number of American soldiers who died in all wars from the Civil War through Vietnam (747,000).\textsuperscript{414} Clearly, "[f]irearm violence has reached epidemic proportions in this country, and is now a public health emergency."

The consequences of firearm violence are suffered disproportionately by a few demographic groups. Children and teenagers in the U.S. are particularly susceptible to death by guns. In 1993, these age groups accounted for 5,751 gun deaths, and 957 of these were under 15 years of age.\textsuperscript{416} Fifteen children a day died from gunfire the same year.\textsuperscript{417} In 1994, among twenty states, more people between the ages of 15 to 20 died from gunfire than from car accidents.\textsuperscript{418} Between 75\% - 80\% of all

\textsuperscript{410} See Zimring & Hawkins, supra note 403, at 54.

\textsuperscript{411} See Richard Aborn, The Battle over the Brady Bill and the Future of Gun Control Advocacy, 22 Fordham Urb. L.J. 417, 417-18 (1995) (asserting that firearms are leading cause of death and if trends continue they will surpass deaths by automobile by 2003); see also Dorf, supra note 260, at 342 (asserting handguns are responsible for over one half of all homicides); Bryan A. Liang, Shortcuts to "Truth": The Legal Mythology of Dying Declarations, 35 Am. Crim. L. Rev. 229, 239 (1998) (reporting that two-thirds of homicides involve firearms).

\textsuperscript{412} See Aborn, supra note 405, at 417-18.

\textsuperscript{413} See Aborn, supra note 405, at 417-18.

\textsuperscript{414} See Herd, supra note 37, at 232.


\textsuperscript{417} See id. at 548.

\textsuperscript{418} See id. at 550 n.15 (stating also that in same year, nationwide deaths from guns
murder victims aged 24 and less are killed by guns. One measure of lost life is the number of people killed times the loss of life expectancy of each victim. Taking into account this measure, homicide by firearms is the fourth leading cause of potential life lost before age 65. The loss of potential life from firearms in the U.S. is more than one-third of the loss of potential life from all forms of cancer.

The overwhelming burden of gun violence is borne by the black community. Out of every 100,000 black males between the ages of 15 and 19, 105.3 are victims of firearm murder. This compares to a figure of 9.7 for white males in the same age group. Incredibly, the American inner city is more than twice as violent as the most violent country on earth. These data are sufficient to support the finding that "[y]oung black men are being shot and killed at an alarming rate." However, the problem is not limited to the inner city. The homicide rate for whites alone is between two to six times higher the rates of other industrialized countries.

The total cost of gun violence cannot be measured only by counting the corpses accumulating on the American street. Non-fatal injuries impose huge costs on both the victims as well as on society at large. A survey of 91 hospitals nationwide has estimated a ratio of non-fatal to fatal firearm incidents of 2.6:1. Another sampling of three cities collectively thought to be ethnically representative of the nation, Seattle, Galveston, and

totaled 38,505 while car accidents were only slightly more deadly, killing 42,542).

See Jeffrey A. Roth, Nat’l Inst. of Justice, Firearms and Violence, RES. IN BRIEF, Feb. 1994 at 1, 1.


ZIMRING & HAWKINS, supra note 403, at 57.

Id. at 54 (stating Columbia, at 49 homicides per 100,000, has the highest rate in the world).

Arthur L. Kellermann et al., Injuries Due to Firearms in Three Cities, 335 NEW ENG. J. MED. 1438, 1443 (1996).

See Kevin R. Reitz, Lethal Violence in America: An Overview of the Colorado Law Symposium, 69 U. COLO. L. REV. 891, 894 (1998) (stating when African-American homicides are removed from statistics U.S. homicide is still more than twice that of Canada, more than four times rates in France and Germany, and more than six times rates in United Kingdom and Japan).

Memphis, concluded that the ratio was 4.2:1.\textsuperscript{427} Extrapolated to
the country as a whole, and assuming a total death rate by
firearms from all causes to be about 38,000, total non-fatal uses
of firearms total between 99,000 to 160,000 incidents annually.
Some estimates are significantly higher. One study placed the
total number of fatal and non-fatal instances of gun use at one
million.\textsuperscript{428}

Given the magnitude of the problem, it can come as no surprise
that the social cost from firearm use is enormous. A study of San
Francisco General Hospital indicated that the average non-fatal
gun injury costs $6,915. Because 85% of this is paid by public
sources, taxpayers nationwide pay over $1 billion annually for
gun injuries.\textsuperscript{429} One study estimated total costs for medical care,
long-term disability, and premature death at $14 billion.\textsuperscript{430}
Another indicated that, excluding medical costs, the firearm-
related economic burden is $19 billion.\textsuperscript{431} The Center for Disease
Control also estimates an economic cost of $20 billion.\textsuperscript{432}
Problems that have not yet been, and perhaps cannot be,
monetized are the psychological ills sown by growing up in

\textsuperscript{427} Kellermann et. al., supra note 418, at 1443 (determining ratio for nonfatal to fatal
injuries).

\textsuperscript{428} See Herd, supra note 7, at 232 ("When non-fatal gun-related accidents are
counted with the fatalities, the total firearm incidents reach about one million each year in the
United States.").

\textsuperscript{429} See Michael J. Martin et al., The Cost of Hospitalization for Firearm
Injuries, 260 JAMA 3048, 3048 (1988) (stating legislators should be aware issue is not just one of
individual rights but one of cost to taxpayers of $1 billion); see also Carl W. Chamberlin,
Johnny Can't Read 'Cause Jane's Got A Gun: The Effects Of Guns In Schools, and Options
included in determining average medical costs per gunshot victim in 1986 to more modern
times while maintaining exclusion of professional fees); Dan Bischoff, A Preventable
Epidemic: Providers Back Nationwide Protest Against Violence, MODERN HEALTHCARE,
Apr. 20, 1998, at 58 (citing Handgun Epidemic Lowering Plan's 1997 estimates of average
medical costs of $145,000 per gunshot survivor).

\textsuperscript{430} See Roth, supra note 413, at 1; see also Charlotte M. Hendricks & Ann Reichert,
Parents' Self-Reported Behaviors Related to Health and Safety of Very Young Children,
66 J. SCH. HEALTH 247, 247 (1996) (suggesting that approximately $3.4 billion would be
saved by reducing infant handgun accidents with parents' injury prevention counseling);
Philip J. Hilts, Annual Costs of Treating Gunshot Wounds Put at $2.3 Billion, N.Y.
TIMES, Aug. 4, 1999, at A12 (reporting that JAMA study discovered average of $14,600 for
emergency care and $35,400 for lifetime medical care per gunshot victim).

\textsuperscript{431} See Commentary, supra note 409, at 1281 ("Firearm related injuries imposed an
estimated $19 billion economic burden on the United States in 1990 in addition to the
direct health care costs.").

\textsuperscript{432} See Herd, supra note 7, at 232 (stating costs at $20 billion for gunshot violence and
rationalizing many physicians' argument for tighter gun restrictions based on increasing
victims and costs); see also Susan Headden, Guns, Money and Medicine, U.S. News &
WORLD REPORT, Jul. 1, 1996, at 31 (stating that only fraction of Center for Disease
Control's handgun costs are apportioned to medical bills).
communities in which gun violence is a daily occurrence.\footnote{See Commentary, supra note 409, at 1281 (indicating links between witnessing violence and emotional disturbances in children); see also Trends & Timelines, Violence: JAMA Looks at Issue, AM. HEALTH LINE, Aug. 5, 1999 (noting majority of California physicians' failure to screen for victims of violence); James Garbarino et al., \textit{Children in Danger: Coping With the Consequences of Community Violence} 13, 25-26, 56-57, 67-99 (1992), cited in Chamberlin, supra note 423, at 294 n.92 (enumerating intangible Symptoms of children exposed to violence to include sleep disturbances, day dreaming, recreating trauma in play, emotional numbing, diminished expectations for future, and biochemical changes in child's brain that impair social and academic behavior).}

In recognition of this enormous expense, cities are awakening to their right to demand recompense. Chicago, for instance, is suing gun manufacturers for $433 million. This amount recognizes costs for hiring extra police, medical expenses, welfare expenditures, and the costs to clean up after a shooting in a public area.\footnote{See Fox Butterfield, \textit{Chicago is Suing Over Guns From Suburbs}, N.Y. TIMES, Nov. 13, 1998, at A18 (describing $433 million suit and explaining violence-related "excess costs" facing Chicago's police, fire departments and public hospitals); see also Vandall, supra note 410, at 549 (describing Chicago's claimed losses due to firearm violence).} Atlanta, Bridgeport, New Orleans, and Miami have also brought similar lawsuits.\footnote{Vandall, supra note 410, at 548 (stating Atlanta, Bridgeport, New Orleans, and Miami as having brought suit against gun manufacturers). See H. Sterling Burnett, \textit{Suing Gun Manufacturers: Hazardous to Our Health}, 5 TEX. REV. L. & POL. 433, 436 n. 5 & 6 (2001) (enumerating total number of cities that have already filed suit against gun manufacturers and illustrating that many more are considering filing based on other cities' success rate). \textit{See generally} City of Philadelphia v. Beretta U.S.A., Corp., 126 F. Supp. 2d 882 (E.D. Pa 2000) (dismissing city plaintiffs' claim against gun manufacturers for failure to state cause of action).}

Some have asserted that America's higher homicide rate is a function of a generally more violent society. It is indeed true that America is a violent society and that firearms play a role in this unfortunate fact. But, in their well-regarded work, Zimring and Hawkins demonstrate that the level of crime in America is not disproportionate to the level of crime in other industrialized countries. One commentator, summarizing their analysis, has offered that measurements of violent crime "place the United States comfortably in the pack along with places like the Netherlands, West Germany, Canada, New Zealand and Australia. Indeed, one recent assault victimization survey ranked America as being only slightly more dangerous than England and Sweden and noticeably more placid than Canada, New Zealand, and Australia."\footnote{Reitz, supra note 419, at 893. \textit{See ZIMRING & HAWKINS, supra note 403; Franklin E. Zimring, \textit{Gun Control}, DEPT JUST. NAT'L INST. JUST., CRIME FILE STUDY GUIDE 1, 1 (1998) (noting that majority of killings in large cities are committed with handguns).} Instead, it is the significantly greater likelihood that the crimes will take a deadly turn that is
"the tragic aberration of American lethal violence." Thus, it seems clear that the high U.S. homicide rate is not due to a greater penchant for violence among U.S. citizens, but rather the means available to U.S. citizens for manifesting that violence.

Most estimates place the total number of firearms privately owned at about 210,000,000. Roughly one-third of these, or about 66 million, are handguns. But handguns are clearly the weapon of choice of those who commit homicides and other crimes. Of all killings committed by guns, about three quarters are committed with handguns. Virtually all gun robberies are committed with handguns. As Zimring and Hawkins have concluded in their comprehensive study of gun violence, "[w]e know of no way for the United States to move toward a homicide rate even fifty percent higher than that of Australia or Canada without serious attempts to restrict the availability and use of handguns." Thus, the easy availability of handguns is clearly

437 Reitz, supra note 419, at 894.
438 See Mark Udulutch, Note, The Constitutional Implications of Gun Control and Several Realistic Gun Control Proposals, 17 AM. J. CRIM. L. 19, 23 n.19 (1989) (stating that accurate estimate on handguns is unlikely); see also Gary Fields, 'Gunslinging Culture' Fueled NRA's Comeback Group Tries to Broaden Appeal, Maintain Core, U.S.A. TODAY, May 18, 2000 at 5A (estimating that 230 million guns owned by public constitutes 200% increase over last 30 years, and are concentrated among 65-80 million people); Peter Slevin, Buying Back Safer Streets?: Researchers Say Repurchase Programs Have Little Impact on Crime, WASH. POST, May 19, 2000, at A03 (claiming that community buyback programs for 200 million guns found in 45% of U.S. households have translated into minimal reduction in crime).
440 See Zimring, supra note 430, at, 1 (noting that majority of killings in big city are committed by handguns); see also Wilson, supra note 439 (asserting that over 22,000 Americans are killed by handguns annually); Susan Dryman, Guns the Weapon of Choice, ASHEVILLE CITIZEN-TIMES, Nov. 15, 1999, at A1 (finding that guns are still weapon of choice and that majority of firearm deaths in particular community were caused by handguns).
441 See Gregory Nelson Joseph, Realistic Toy Guns Not Always Harmless, S.D. UNION-TRIB., Sept. 17, 1986, at E1 (claiming that "about half of all robberies are committed with handguns"); Zimring, supra note 430, at 1 (recognizing that small size of handguns makes them easy to conceal); see also Gun Crimes Are Up, Says Justice Dept., FRESNO BEE, July 10, 1995, at A4 (recognizing large percentage of offenders commit crimes, such as robbery, by using handguns).
442 Franklin E. Zimring & Gordon Hawkins, Overall Perspectives on Crime is Not the Problem: Crime is Not the Problem: A Reply, 69 U. COLO. L. REV. 1177, 1198 (1998) (stating American handgun ownership and use restrictions will not always guarantee cost-effective results); see also America and Guns, ECONOMIST, Apr. 4, 1998, at 16
the critical factor in America's distinctively high rates of lethal violence.

An international comparison certainly suggests a strong correlation between ownership of handguns and homicides. As the following chart indicates, the rate of death by handguns increases dramatically as handgun ownership increases.

<table>
<thead>
<tr>
<th>Country</th>
<th>Handgun Homicide / 100,000</th>
<th>Handguns / 100,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>.07</td>
<td>2,301</td>
</tr>
<tr>
<td>Canada</td>
<td>.031</td>
<td></td>
</tr>
<tr>
<td>Great Britain</td>
<td>.012</td>
<td></td>
</tr>
<tr>
<td>Israel</td>
<td>.542</td>
<td>3,716</td>
</tr>
<tr>
<td>Sweden</td>
<td>.228</td>
<td>3,700</td>
</tr>
<tr>
<td>Switzerland</td>
<td>.819</td>
<td></td>
</tr>
<tr>
<td>United States</td>
<td>3.56</td>
<td>22,696</td>
</tr>
</tbody>
</table>

Although there exist differences between countries that may account for some of the differences in lethal violence other than the availability of handguns, "there is no other cause that (discussing substantial number of deaths caused by firearms, including homicide, and recognizing that gun-related violence is highest in states where guns are cherished); Tom Wicker, In the Nation: You, Me and Handguns, N.Y.TIMES, Dec. 12, 1980, at A35 (noting high U.S. death rate caused from handguns and asserting that high crime rate is due to fact that anyone who desires gun can easily obtain ownership). See generally Emily Hancock, More Jail Time for Handgun Offenders, CAP., Nov. 29, 1996, at A1 (asserting availability of handguns calls for stricter measures of enforcement); Wicker, supra note 442, at A35 (finding American demand for handguns is so great that it makes it impossible to prevent illegal supply).

443 See Dixon, supra note 434 at 248-49 (noting chart reflects both legally and illegally owned handguns by civilians in each country); see also America and Guns, ECONOMIST, Apr. 4, 1998, at 16 (discussing substantial number of deaths caused by firearms, including homicide, and recognizing that gun-related violence is highest in states where guns are cherished); Wicker, supra note 436, at A35 (noting high U.S. death rate caused from handguns and asserting that high crime rate is due to fact that anyone who desires gun can easily obtain ownership).
correlates so well with handgun murder" as handgun availability.\textsuperscript{444} Thus, it is surely not coincidental that the U.S. suffers from both the highest rate of homicide and the highest rate of gun ownership.\textsuperscript{445} As Zimring and Hawkins have observed, "[f]irearms use is so prominently associated with the high death rate from violence that starting with any other topic would rightly be characterized as intentionally evasive."\textsuperscript{446}

In response to suggestions that Americans are by nature more violent than Germans, French, or Japanese, and that this explains America's higher rate of handgun death, a recent comprehensive study compared rates of lethal violence in Seattle and Vancouver, British Columbia. The cities were chosen due to similarities in geography, climate, history, unemployment and income, educational levels, cultural and entertainment tastes, and demographics.\textsuperscript{447} The cities experience comparable levels of burglary and robbery; during the first four years of the study, Seattle's rate of simple and aggravated assault were only slightly

\textsuperscript{444} Dixon, \textit{supra} note 433, at 252 (realizing other causal factors play role but that none alone is strong enough to be considered only cause and none disprove author's hypothesis); see also S. Jan Brakel, \textit{The Calamity of Gun Violence}, CHI. TRIB., Oct. 31, 1998 (stating level of gun violence in U.S. is much greater that any other Western industrialized country and that easy availability of guns is one of leading causes of gun violence); Humphrey Taylor, \textit{Americans List Contributors to Violence in Nation}, GANNETT NEWS SERV., Mar. 20, 1994 (noting significant number of majorities believe that easy availability of guns is one of leading causes contributing to violence in U.S.).

\textsuperscript{445} See Dixon \textit{supra} note 433, at 250 (discussing handgun ownership estimates are based on independent inquires to government agencies); see also Andre Cimo Soddy-Daisy, \textit{CDC's Bias}, CHATTANOOGA TIMES, Apr. 21, 1998, at A5 (recognizing U.S. is leader in gun deaths and noting Center for Disease Control hopes that America will adopt socialist gun policy). \textit{See generally} Jeff Muchnick, \textit{Better Yet, Ban All Handguns}, USA TODAY, Dec. 29, 1993, at 11A (finding handguns in home actually increase chances of murder rather than offering protection).

\textsuperscript{446} ZIMRING AND HAWKINS, \textit{supra} note 403, at 106 (supporting connection between firearms and high death rate); see also \textit{Law and Disorder}, SUNDAY TIMES, Oct. 24, 1993 (claiming other countries are horrified at violence caused by guns in America and noting more homicides were committed with firearms in Los Angeles than in England and Wales combined); Bill Lindelof, \textit{Guns May Soon Pass Cars as Top U.S. Killers}, S.F. EXAM'R, Jan. 14, 1995, at A1 (finding gun violence is probably number one killer in nation).

\textsuperscript{447} See John Henry Sloan, Arthur L. Kellermann, Donald T. Reay, James A. Ferris, Thomas Koeppel, Frederick P. Rivara, Charles Rice, Laurel Gray, & James LoGerfo, \textit{Handgun Regulations, Crime, Assaults, and Homicide}, 319 NEW ENG. J. MED. 1256, 1256-57 (1988) (initiating study in order to discover "associations among handgun regulations, assaults, and other crimes, and homicide . . . "); see also Susan Okie, \textit{Impact of Gun Control Indicated in Medical Study; Researchers Say Rate of Handgun Murders in Seattle is 5 Times Greater Than in Vancouver}, WASH. POST, Nov. 8, 1988, at A4 (finding two cities similar except Vancouver has stricter gun control laws); \textit{Canada-U.S.}, FACTS ON FILE WORLD NEWS DIG., Dec. 9, 1988, at 908 B3 (noting the study was conducted between 1980 and 1986).
The greatest difference between the cities is the much higher rate of gun ownership in Seattle (41%) compared to Vancouver (12%). However, Seattle experienced a rate of homicide of 11.3 per 100,000; this was much higher than Vancouver's rate of 6.9 per 100,000. After adjusting for the type of weapon used in homicides, the authors conclude that "[v]irtually all of the increased risk of death from homicide in Seattle was due to a more than fivefold higher rate of homicide by firearms." Non-gun homicides were approximately equal.

Thus, "it is clear that there is no greater proclivity towards violence in Seattle; rather, it is gun violence that is much more prevalent in Seattle than in Vancouver." One commentator concludes from this study that "it will be difficult to deny that the almost fivefold difference in the frequency of homicides committed with firearms is responsible for the substantially

448 See Sloan, et al., supra note 441, at 1257-58 (stating aggravated assaults were categorized by offenders and weapons); see also Allan R. Gold, Gun Curbs Linked to Homicide Rate, N.Y. TIMES, Nov. 9, 1988, at A16 (determining two cities were similar in burglary, robbery and assault rates); Okie, supra note 441, at A4 (claiming study found rates of robbery, burglary and assaults with weapons other than gun were practically identical in two cities).

449 See Sloan, et al., supra note 441, at 1257 (noting one method used in developing study was to determine restricted weapons permits issued in Vancouver and compare number to concealed weapons permits issued in Seattle); see also Guns Do Kill People, N.Y.Times, Nov. 18, 1988 at A34 (finding gun ownership in Seattle is three times greater than that in Vancouver); Okie, supra note 441, at A4 (acknowledging that no direct ownership surveys exist for either Seattle or Vancouver but other information aided in concluding that gun ownership is more common in Seattle).

450 See Sloan, et al., supra note 441, at 1258 (recognizing that during seven year study, total number of homicides in Seattle was 388 whereas Vancouver only experienced 204 homicides); see also The Nation, L.A. TIMES, Nov. 9, 1988, at 2 (asserting there is 63% greater chance of being murdered in Seattle than in Vancouver); Schneider, Wounded Giant Must Compromise, S.D. UNION-TRIB., Nov. 14, 1988, at B6 (finding even though Vancouver is only 140 miles north of Seattle, the risk of getting murdered in Seattle is much higher).

451 Sloan et al., supra note 441, at 1258-59 (discussing some significant caveats to study and acknowledging that other differences such as illegal drug related activity or illicit gun sales may weaken relation between firearm regulations and rate of homicide); see also Dixon, supra note 433, at 261 (understanding disadvantaged racial minorities are more likely to commit murder and noting large portion of murder victims and offenders are within same minority group); Schneider, supra note 444, at B6 (noting lax gun laws heavily increased chances of Seattle residents being murdered by handguns).

452 See Sloan et al., supra note 441, at 1258 (listing that finding); John A. Calhoun, We Can Prevent Jonesboros, NATION'S CITIES WEEKLY, Apr. 13, 1998, at 11 (stating Seattle and Vancouver's crime rates are "identical until guns are factored in [t]hen Seattle leaps ahead"); see also Patty Murray, Guns Kids & Pain: Children's Gunshot Wounds Are a Big Public Expense, SEATTLE POST INTELLIGENCER, May 23, 1993, at E1 (citing same study as showing Seattle's firearm homicide rate was five times higher than Vancouver's and seven times higher for firearm assault, but that "rates for violent crimes were similar").

higher homicide rate in Seattle.\textsuperscript{454} What is true on a local level also appears to be true on a national level. One study asserts that, given their common histories, customs, and constitutional and government structure, the United States and Canada resemble each other more closely than any two countries in the world.\textsuperscript{455} One crucial difference is that twice as many U.S. households own guns compared to Canada.\textsuperscript{456} As a consequence, America's gun related murder rate is 10 times higher than Canada, gun related suicide is four times higher and deaths in the commission of a robbery is three times higher.\textsuperscript{457} This cannot be attributed to a higher rate of violence generally in America. If this were true, the rate of non-firearm related violence would be higher as well; in fact, the two countries have "comparable rates of violent crime when guns are not involved."\textsuperscript{458}

This evidence is strongly suggestive that the availability of guns in this society is causally linked with the extraordinarily high rates of lethal violence. In advancing this argument, Zimring and Hawkins are careful not to assert that guns are the cause of violence. Rather, the existence of guns adds a lethal component to social situations that are likely to result in violence. For instance, the largest single circumstance in which

\textsuperscript{454} See Dixon, supra note 433, at 259 (noting that finding); see also Gary Taubes, Violence Epidemiologists Test the Hazards of Gun Ownership, SCIENCE, Oct. 9, 1992, at 213 (noting similarities in non-gun related crimes between two cities except for 500\% greater gun-related homicide in Seattle, and quoting researchers' conclusion "that restricting access to handguns may reduce the rate of homicide in a community").

\textsuperscript{455} See Jacobs, supra note 447, at 316 (stating this proposition); Cecilia Benoit, Book Review, Parting at the Crossroads: The Emergence of Health Insurance in the United States and Canada, (stating "Canada and U.S. resemble each other more than either resembles any other nation," citing SEYMOUR MARTIN LIPSET, CONTINENTAL DIVIDE: THE VALUES AND INSTITUTIONS OF THE UNITED STATES AND CANADA 212, (1990)).

\textsuperscript{456} See Jacobs, supra note 447, at 331 (stating U.S. data indicates twice as many U.S households own guns than as in Canadian households); see also Gregg Lee Carter, Dueling statistics, F. FOR APPLIED RES. & PUB. POL'Y, Jan 1, 2000, at 6875 (noting 1993 study found 48\% of U.S. households owned guns, three times greater than typical European country); Marc Ouimet, Crime in Canada and in the United States: a Comparative Analysis, CAN REV. SOC. & ANTHROPOLOGY Aug. 1., 1999, at 389 (noting 1990 telephone survey showed 29\% of American households owned guns while less than 5\% of Canadian households did).

\textsuperscript{457} See Jacobs, supra note 447, at 333 (listing statistic); Reuters, Canada Unruffled by Heston Gun Lecture, ORANGE COUNTY (CAL.) REG., Apr. 15, 2000, at A31 (stating Canadian government figures show U.S. gun-related homicide is eight times greater than Canada's); see also L.T. Anderson, Moses Heston in the Land of the Free Canadians Think They Are Free People - and Safer as Well, CHARLESTON DAILY MAIL (WV), Nov. 3, 2000, at P4A (listing result from Seattle-Vancouver study showing Seattle's assault rate involving firearms was seven times greater than Vancouver's while murder rate involving guns was 4.8 time greater).

\textsuperscript{458} Jacobs, supra note 453, at 333.
homicides occur are not criminal acts but "social processes that generate arguments."

Sixteen percent of homicides occur during criminal acts but 32% occur during family or social conflict. But there is no reason to believe that Americans have more argument's over money, jealousy, male honor or have greater strife with their neighbors than residents of other countries. Nor does this country experience atypically higher rates of burglary, robbery, or assault compared to other industrialized countries. America's higher rate of lethal violence is a function of the "combination of the ready availability of guns and the willingness to use maximum force in interpersonal conflict ...." Or, as a commentator in this thesis has said, "the presence of guns is a necessary rather than a sufficient cause; guns interact with cultural factors that give rise to an unusual willingness among some American subpopulations to use maximum force in the settlement of disputes ...."

459 ZIMRING & HAWKINS, supra note 403, at 61; see also Waaland & Keesey, Police Decision Making in Wife Abuse: The Impact of Legal and Extra legal Factors, 9 L. & HUM. BEHAV. 355 (1985) (stating "instances of assault with a deadly weapon or of homicide occur with disproportionate frequency between people who have a domestic relationship, and with whom the police have had prior dealings in responding to complaints of domestic violence").

460 See ZIMRING & HAWKINS, supra note 403, at 61 (listing that statistic); see also Bob Thompson, TRIGGER POINTS; The Evangelists of Injury Control 'Believe That Scientific Knowledge and Public Health Activism Can Break America's Cycle of Firearms Mayhem. But Can They Survive the Treacherous Politics of Gun Control', WASH. POST, Mar. 29, 1998, at W12 (quoting university emergency medicine director: "We've got all these guns in people's homes ... a number of them for protection, but when I hear news stories it's usually about suicide or an accidental shooting or a family homicide").

461 ZIMRING & HAWKINS, supra note 403, at 122-23; see also Mark T. Steele & W. Kendall McNabney, Hospitals, Physicians Express Opposition to Proposition B, KAN. CITY STAR, Apr. 5, 1999, at A5 (characterizing Seattle-Vancouver study and similar studies as conveying message that "in the absence of guns, people do not kill themselves or other people as frequently as they do when guns are readily available"); see also Jim McJunkin, Modern Moses Firearms Major Factor in Youth Violence Rate, CHARLESTON GAZETTE (WV), Nov. 5, 1999, at P5A (noting gun availability is one contributing factor to United States' unusually high gun-related youth suicide rate among industrialized nations).

462 Reitz, supra note 419, at 895. Another article points out that American teenagers are just as likely to lash out violently as teens in other industrialized nations, but that American teens are much more likely to use guns and other weapons in doing so. Erin Texeira, Something New is Raging in Our Schools, TIMES UNION (ALB.), Dec. 22, 1997, at A7. The argument that gun availability necessarily equates with greater lethal violence may be somewhat undermined by the experience of states that have enacted "shall issue" concealed gun laws. A 1994 survey of 14 states with these laws failed to demonstrate a link to an increase in the murder rate after the laws were enacted. Some states may have experienced a decline in murder as a result of the policy. Beau A. Hill, Go Ahead, Make My Day: Revisiting Michigan's Concealed Weapons Law, 76 U. DET. MERCY L. REV. 67, 87 (1998). A more recent study, however, suggests that murder rates in some Florida cities have increased since the passing of its concealed gun law. Vernon Silver, Holes Found in Law on Carrying Hidden Guns, N.Y. TIMES, Nov. 2, 1995, at A16.
Restrictions of gun ownership surely would not affect the level of social conflict and may not affect the number of crimes committed. But in the absence of highly lethal instruments like guns, extraordinary rates of death would no longer attend these events.

The nature of the gun as a contributing cause to America's high murder rates responds to many of the arguments advanced by critics of gun control. For instance, such critics assert that America's higher proportion of socially disadvantaged racial minorities, not the availability of firearms, explains the preponderance of homicide.\(^{463}\) While it is true that social and economic frustration make one more violent, it is the presence of highly lethal instruments that make such impulses deadly. As one commentator notes,

It is among those elements of the population who, by virtue of disadvantages linked to race (discrimination, lack of economic opportunity, poverty, unemployment, and so forth), are more likely to kill that we should expect the homicide increasing influence of handguns to be most profound. It is, as it were, "the straw that breaks the camel's back" in the case of violence prone sectors of society.\(^{464}\)

It should also not be forgotten that the white murder rate in the U.S. is many times higher compared to other industrialized countries.\(^{465}\) Although Vancouver's white murder rate is slightly higher than Seattle's,\(^{466}\) the American white homicide rate is

\(^{463}\) See Carter, supra note 450, at 6875 (citing reports which show that "the rate of homicide due to firearms for black males in their early twenties was more than eight times higher than the rate for all individuals in the same age group: 140.7 per 100,000 for black males as opposed to 17.1 for all males."). But see Ouimet, supra note 450, at 389 (criticizing approach which emphasizes discrimination and social inequalities as the cause of the high homicide rate in America). See generally Cottrol & Diamond, supra note 293, at 359 (discussing race-related aspects of gun control debates).

\(^{464}\) Dixon, supra note 433, at 261.

\(^{465}\) See Reitz, supra note 430, at 893-94 (stating that America's proportions of lethal violence closer resemble Third World nations than other English-speaking nations, Western Europe and Japan); see also Tim Weiner & Ginger Thompson, U.S. Guns Smuggled into Mexico Feed Drug War, N.Y. TIMES, May 19, 2001, at A3 (stating that United States' 6.3 murders per 100,000 people is far shy from countries with worst statistics like Mexico's 10 murders per 100,000 people). See generally Sloan et al., supra note 441, at 1256 (justifying accuracy of Seattle-Vancouver comparison because it isolates handgun control from other socioeconomic, behavioral and crime factors).

\(^{466}\) See Sloan et al., supra note 441, at 1256; see also Murray, supra note 446, at E1 (suggesting that Seattle's comparatively high firearm violence rate can be reduced with proposed Firearm Victims Prevention Act). See generally Kellermann et al., supra note 418, at 1443 (noting that intra-national, three city study of handgun violence that firearm violence cannot be definitively linked to race, despite alarming mortality rates of black
almost three times higher than the Canadian rate.\textsuperscript{467}

Critics of gun control argue that, if deprived of guns, those who commit homicide will simply use other instruments. While restricting access to guns may reduce gun homicides, the overall rate of homicide would not be affected as deaths caused by knives or other easily accessible lethal weapons would increase. But this argument ignores the much greater lethality of guns compared to other weapons. Certainly, it is difficult to imagine the Columbine murderers killing and maiming dozens of school children armed with knives and brass knuckles. Zimring and Hawkins suggest three features of guns that reflect greater killing capacity: "the greater injurious impact of bullets, the longer range of firearms, and the greater capacity of firearms for executing multiple attacks."\textsuperscript{468} Due to these factors, a gun used in an assault is seven times more likely to result in death compared to the use of any other weapon.\textsuperscript{469} In a separate work, Zimring notes other studies which have found that assault committed with a gun is 3 to 5 times more likely to cause death than when committed with a knife, and gun robberies are 3 to 4 times more likely to result in death compared to the use of other weapons.\textsuperscript{470} These results have been approximately corroborated. One study determined that 4 deaths result from every robbery committed with a gun, "about 3 times the rate for knife robbers, 10 times the rate for robberies with other weapons, and 20 times the rate for robberies with unarmed offenders."\textsuperscript{471} Surely, given a choice of being threatened with a gun or some other weapon, victims would choose the latter. Not only is severity of the wound reduced but there is a greater chance of no wound at all because "running away will at least sometimes be an option for the victim, whereas this tactic will be of little use in the face of a loaded gun. A reduction in robberies and their

\textsuperscript{467} See Dixon, supra note 433, at 261 (stating how nationwide, America's homicide rate among whites alone is almost three times higher than in Canada).

\textsuperscript{468} ZIMRING & HAWKINS, supra note 403, at 113 (noting that authors call these instrumentality aspect of gun use that can increase death rates..."as opposed to the features in social setting related to gun use..." that also add to greater killing potential).

\textsuperscript{469} See Id. at 108 (discussing how the use of gun, in assault, is more likely to result in victims death, than is use of any other weapon).

\textsuperscript{470} See ZIMRING & HAWKINS, supra note 403, at 1 (noting that majority of killings in large cities are committed with handguns).

\textsuperscript{471} Roth, supra note 413, at 4.
degree of violence is a likely result of such a substitution."

Such studies suggest that even if the next most lethal weapon is substituted for firearms, the number of deaths resulting from the use of such weapons will be diminished. It is also fair to assume that not every aggressor would substitute the next most lethal weapon in place of guns. Instead, "[i]t is more probable that at least some potential murderers would turn to less lethal weapons or their bare hands, or that some would be deterred from assaults altogether." Gun proponents also argue that substituting other weapons in place of guns would cause an increase in the number of non-fatal injuries suffered. Interestingly, when other weapons are used against victims, there is more often a response to fight back. Conversely, use of a gun reduces the chance of escalation because "robbers with guns are less nervous, or victims confronted with guns are too frightened to resist, or both." Thus, robberies committed with guns result in injuries 17% of the time, but


473 See Alan M. Gottlieb, Gun Ownership: A Constitutional Right, 10 N. KY. L. REV. 113, 118 (1982) (stating similar substitution analysis militates strongly against restricting handguns more severely than long guns and although substitution of long guns for handguns would probably reduce number of assaults, increase of lethality of long guns would increase homicide rates from 25% - 500%); see also Absolute Liability for Ammunition Manufacturers, 108 HARV. L. REV. 1679, 1694 (1995) (suggesting that substitution from guns to knives could prove to lessen negative impact of crime because assault with firearm is five times more deadly than assault with knife); Andrew O. Smith, The Manufacture and Distribution of Handguns as an Abnormally Dangerous Activity, 54 U. CHI. L. REV. 369, 400 n.142 (1987) (citing Frank Zimring, Is Gun Control Likely to Reduce Violent Killings?, 35 U. CHI. L. REV. 721 (1968) (proposing that elimination of guns would result in overall reduction in crime, even after accounting for increased propensity of attack when assailant is armed with knife rather than with gun)).


475 Roth, supra note 413, at 4. But see Dixon, supra note 433, at 269 (dismissing implications of devolved substitution effect whereby victims of handgun robbery are less likely to be injured than victims of other weapons because handguns are highly effective at securing victim compliance); Kopel supra note 468, at 328 n.184 (agreeing with Dixon's dismissal of devolved substitution effect, but on other grounds).
robberies committed with knives result in injuries 32% of the time.\textsuperscript{476} A study by the National Crime Victimization Survey found that injuries resulted from guns 14% of the time, 25% when the offender was armed with a knife, 30% when not armed, and 45% when the aggressor had some other weapon.\textsuperscript{477} Most advocates of gun control seem to accept the possibility of this tradeoff. But even assuming a 100% knives for guns substitution effect, the trade-off seems to militate in favor of gun control. The above data suggests about a two-fold increase in injuries (14% to 25% or 17% to 32%), but at least one-third to one-fifth fewer deaths.\textsuperscript{478} It is difficult to dispute that a smaller increase in non-fatal injuries is outweighed by a greater increase in deaths. As Zimring and Hawkins conclude, "the greater dangerousness of guns when fired more than compensates for the lower number of wounds."\textsuperscript{479}

Some gun proponents argue that the intent of the aggressor, not the instrument used, is the critical factor in homicide. Those who intentionally commit homicide will naturally choose the most lethal means to carry out this intent. But if deprived of guns, they will find some other means with which to carry out the act. When homicidal intent is combined with a knife or some other weapon, it is argued that the result is likely to be as lethal as if a gun were used.\textsuperscript{480} But this argument assumes that most of

\textsuperscript{476} See Dixon, supra note 433, at 269 (discussing how David Hardy and Don Kates reject idea that using knives and clubs as alternatives to guns in robberies, will lead to reduction in robberies and violence associated with them).

\textsuperscript{477} See Roth, supra note 413, at 4 (finding that likelihood of violence is greater when knife or blunt object are used in robbery, rather than when gun is used); Smith, supra note 467 at 400 n.142 (citing federal study showing that 10 percent of cases where criminals were armed with knives resulted in stabbings, while only 4 percent of cases where criminals were armed with guns resulted in shootings); Weapons Used in 37% of Violent Crimes, Federal Study Shows, CHI. TRIB., Jan. 6, 1986, ¶ 1, at 6 (reporting federal study that indicated victims of offenders who are armed only with guns were less likely to suffer injury than those by offenders with knives or other weapons).

\textsuperscript{478} See Smith, supra note 467, at 400 n.142 (asserting that although more injuries were inflicted by criminals with knives than guns, injuries from guns tended to be much more severe). But cf. Victoria Dorfman & Michael Koltonyuk, When the Ends Justify the Reasonable Means: Self-Defense and the Right to Counsel, 3 TEX. REV. LAW & POL. 381, 395-96 (1999) (explaining that potential for long gun substitution for handguns would in fact significantly increase gun fatalities because they are more likely to accidentally discharge and are more deadly when discharged).

\textsuperscript{479} ZIMRING & HAWKINS, supra note 403, at 114; see Roth, supra note 413, at 4 (stating that even though damage inflicted by guns is more serious then injuries caused by knives, less infliction compensates for potential damage caused); Smith, supra note 467, at 400 (asserting that risk of harm presented by knives pales in comparison to guns).

\textsuperscript{480} See Dixon, supra note 433, at 269 n.88 (sighting Gary Kleck, Policy Lessons from Recent Gun Control Research, 49 LAW & CONTEMP. PROBS. 35, 38); see also Kopel, supra
those who commit homicide intend to do so. There are a number of reasons to believe that those who pull the trigger are usually not intending to kill. If most gun murders were intentional, one would expect the aggressor to fire multiple times to assure their goal was realized. However, a study of Chicago victims of gunfire indicated that 80% received a single wound. This suggests that the aggressors "failed to use the full capabilities of their guns to achieve the goal of killing." More directly, in a ten state survey among those who fired a shot in the commission of a crime, 76% said they had no prior intent to do so.

A homicide most typically is an impulsive act of the aggressor. A killer is no more likely to be a hardened criminal than an ordinary citizen who lost control in a temporary fit of rage. In almost half of all homicides, the victim was a relative or acquaintance of the killer. In one study, more than one third of all murders occurred in the course of domestic or other argument. The correlation between anger and homicide may be much higher. One study found that 80% of homicides occurred during arguments or altercations. In such situations, the
aggressor resorts to a gun not because of its lethality but because
it happens to be the weapon most available. The picture that
emerges from the data is that guns are used to express rage, not
as a means to intentionally kill. Homicide in most cases is a
function of both interpersonal conflict and the ready availability
of the most lethal weapons. To excise guns from this equation
and substitute less lethal weapons will almost surely be to reduce
the number of resulting deaths.

The international studies also demonstrate that homicide is an
impulsive act made deadly by the ready availability of guns. The
authors of the Seattle - Vancouver study address the issue of
intent directly. They pose the question as follows:

If the rate of homicide in a community were influenced more by
the strength of intent than by the availability of weapons, we
might have expected the rate of homicides with weapons other
than guns to have been higher in Vancouver than Seattle, in
direct proportion to any decrease in Vancouver's rate of firearm
homicides.

The study determined that weapons substitution does not
result in the same number of deaths. Homicide committed by
weapons other than guns was not significantly higher in
Vancouver than Seattle, "suggesting that few would-be assailants
switched to homicide by other weapons." Analysis of this sort

486 See Gerber, supra note 478, at 342 (noting use of weapon is largely due to its
accessibility); Roth, supra note 413, at 4 (relating gun availability to increased violence in
crimes and arguments when guns are used). But see Kates, supra note 466, at 369
(choosing that gun control efforts are unlikely to reduce gun murder rates because most
gun murders would still occur with other less lethal weapons, illegal guns would continue
to be available and criminals not obey gun control law).

487 See ZIMRING & HAWKINS, supra note 403, at 122; Polsby & Kates, supra note 476, at
969-74 (discussing instrumentality theory and its focus on weapons and their availability,
not on crime or criminal intent of gun user). But cf. Polsby & Kates, supra note 476, at
999 (suggesting one participant typically has history of behavior that increases likelihood
of homicide occurring from arguments).

488 Sloan et al., supra note 441, at 1260. See generally Carl T. Bogus, Pistols, Politics and
Products Liability, 59 U. Cin. L. Rev. 1103, 1117 (1991) (discussing Sloan study and
different policies between cities for obtaining handguns); Hill, supra note 456, at 72
(discussing Sloan study and its conclusion that increased availability of guns results in
higher homicide rate).

489 Sloan et al., supra note 441, at 1260. See generally Markus Boser, Go Ahead, State,
notion that increased firearm ownership leads to increased homicides). But see Kopel,
supra note 468, at 313 (suggesting Seattle-Vancouver model fails to recognize Canada
lacks substantial oppressed minority population comparable to that of urban areas in
United States).
dovetails with the work of Zimring and Hawkins. They concur
that the single largest category of homicide occurs in the course
of argument or other conflict in social situations. But there is
no reason to believe that social conflict is greater in this country
compared to other industrialized countries. To make the
substitution effect argument, gun proponents must show why
this effect has not occurred in other countries. Lacking any such
demonstration, the most logical conclusion is that the availability
of guns is the critical contributing factor in America's unusually
high homicide rate. As Zimring and Hawkins note,

the very fact that the United States is a high-violence
environment makes the contribution of guns use to the death toll
very much greater. When viewed in the light of the concept of
contributing causation, the United States has both a violence
problem and a gun problem, and each makes the other more
deadly. There are compelling reasons to believe that restricting
gun availability would reduce America's horrific homicide rate.
Put in context, homicide usually occurs either during the
commission of another crime or in situations of social strife. In
neither of these contexts is the homicide typically premeditated;
rather, the killing occurs as an impulsive act in a situation of
inherent danger. The level of danger obviously increases with
the presence of a gun, the most lethal of all readily available
weapons. To deprive the aggressor of the gun logically reduces
the level of lethal violence likely to result from the violent event.
This correlation is most convincingly demonstrated empirically.
Other industrialized countries have the same rates of crime and
social strife as the United States but significantly lower homicide
rates. Diminished access to firearms is the most logically
compelling reason why violent situations in other countries are
less likely to result in death compared to this country. In this
way, the critical link between the high rate of gun ownership and

490 See ZIMRING & HAWKINS, supra note 403, at 61. See generally Gerber, supra note 478,
at 341 (stating homicides often result from domestic disputes and arguments or
robberies); Samuel R. Gross, The Risks of Death: Why Erroneous Convictions Are
Common in Capital Cases, 44 BUFF. L. REV. 469, 477 (1996) (stating most homicides
result from interpersonal conflicts).

491 ZIMRING & HAWKINS, supra note 403, at 61; see Ronald C. Kramer, Poverty, Inequality,
and Youth Violence, 567 ANNALS 123, 134 (2000) (asserting that violent activities are
more likely to turn deadly due to widespread presence and availability of guns in United
States); see also Barnes, supra note 381, at 32-33 (stating that guns greatly contribute to
"the mayhem that's going on out here in the streets everyday").
the high rate of lethal violence has been established.

In addition to a reduced number of homicides, the number of accidental deaths would also result from more restrictive gun availability. This result probably obtains intuitively; fewer guns in private hands would, as a matter of pure probability, reduce the chances of accidental discharge. This has also been the empirical result. Before 1968, accidental deaths from guns varied from about 2,000 to 3,200; in 1967, there were 2,896 of these incidents. In 1968, the Gun Control Act was enacted, restricting the class of permissible gun dealers and buyers to exclude drug addicts and those in mental institutions. Since 1968, accident related death has fallen precipitously to 1,400 in 1992.

Canada has demonstrated the same correlation, as accidental deaths were reduced by 34% after enacting tougher gun control in 1997. These rates evidence the intuitive result that more restrictive gun policies reduce the number of deaths from accidental shootings.

Less intuitively, however, lower suicide rates may also result from more restrictive gun policies. Shooting oneself is the preferred method of suicide; guns now account for as many suicides as all other means combined. In a two county study in


494 See Vernick & Stephen P. Teret, Point/Counterpoint: A Public Health Approach to Regulating Firearms as Consumer Products, 148 U. PA. L. REV. 1193, 1209 (2000) (reporting that there were approximately 1000 accidental gun deaths in 1997 in United States); Jacobs, supra note 447, at 335 (discussing accidental death statistics in United States); see also Southwick, Jr., supra note 466, at 236 (stating that accidental gun deaths continue to fall steadily).

495 See Jacobs, supra note 447, at 335 (discussing Canadian statistics). See generally Barnes, supra 381, at 35-36 (suggesting Canada's gun restrictions result in less gun deaths than United States); Christopher D. Ram, Living Next to the United States: Recent Developments in Canadian Gun Control Policy, Politics, and Law, 15 N.Y.L. SCH. J. INT'L & COMP. L. 279, 302-04 (1995) (discussing difference between Canadian and American public policy with respect to gun control).

496 See Arthur L. Kellermann et al., Suicide in the Home in Relation to Gun Ownership, 327 NEW ENG. J. MED. 467, 467 (1992); see also Rebecca Peters, Gun Control in America:
the New England Journal of Medicine, the authors found that the "ready availability of guns increases the risk of suicide . . ."497 This finding does not seem to accord with intuition because, given the myriad of means available to kill oneself, restricting access to guns would lead to effective substitution of methods. This argument fails to take into account that, among adolescents, suicide tends to be a highly impulsive act.498 Given the easy availability and high lethality of guns, method substitution may be less likely among this age group.499 Thus, firearms in the homes of adolescents "markedly increase their risk for suicide."500 This finding was corroborated by a second Seattle - Vancouver comparison. This revealed that people in Seattle aged 15 to 24 were 1.4 times more likely to commit suicide than their Vancouver counterparts where guns were less accessible.501

Interview with Rebecca Peters, Senior Justice Fellow, Open Society Institute, 6 GEO. PUB. POL'Y REV. 43, 45 (2000) (finding that "The majority of deaths from guns in most Western countries are suicides, even in America."). See generally David Kairys, The Origin and Development of the Governmental Handgun Cases, 32 CONN. L. REV. 1163, 1168 (2000) (discussing demand in gun industry and its incidental effect on facilitating teenage suicides).

497 Kellermann et al., supra note 490, at 470; see also Kairys, supra note 490, at 1168 (noting guns procured for self-defense often become "easy vehicles" for suicidal teenagers to end their life); Andrew J. McClurg, The Public Health Case for the Safe Storage of Firearms: Adolescent Suicides Add One More "Smoking Gun", 51 HASTINGS L.J. 953, 981-82 (2000) (stating that teenage suicide is facilitated by availability of and access to guns).

498 See David A. Brent et al., The Presence and Accessibility of Firearms in the Homes of Adolescent Suicides, 266 JAMA 2989, 2994 (1991) (noting prominent role impulsivity and substance abuse play in youthful suicide); Andrew J. McClurg, Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms, 32 CONN. L. REV. 1198, 1205 (2000) (stating that presence of guns increases risk of suicide for adolescents "because of their impulsivity and shortsightedness"); McClurg, supra note 491, at 958 (describing adolescents as population group "marked by immaturity, impulsiveness, and shortsightedness").

499 See Brent et al., supra note 492, at 2994 (stating that method substitution would not occur among adolescents and young adults); McClurg, supra note 491, at 979 (asserting that "method substitution" argument is unpersuasive because adolescent suicide rate of United States is highest in world). See generally McClurg, supra note 492, at 1203-07 (discussing risk of adolescent suicides).

500 Mark L. Rosenberg et al., Guns and Adolescent Suicides, 266 JAMA 3030, 3030 (1991); see also Kairys, supra note 490, at 1168 (suggesting that guns kept in homes are responsible for large number of teenage suicides); McClurg, supra note 492, at 1204-05 (stating that easy access to guns in home creates high risk of suicide for adolescents).

501 See John H. Sloan et al., Firearm Regulations and Rates of Suicide: A Comparison of Two Metropolitan Areas, 322 NEW ENG. J. MED. 369, 371 (1990) (reporting Seattle-Vancouver study results that Seattle had significantly higher suicide rate for persons aged 15-24 than Vancouver); see also McClurg, supra note 492, at 1205 (noting study has shown that adolescent suicides in United States accounted for 54% of total suicides in children under age of fifteen in twenty-six industrialized countries during one year period); Ram, supra note 489, at 302-04 (discussing cultural and political differences between Canadian and American approaches to gun control).
1998, 1372 adolescents killed themselves with firearms. It is believed that this number may be significantly reduced by restricting the availability of guns in the home.

The last refuge of the gun proponent pertains to the issue of self-defense. This is certainly a major perceived reason for the private ownership of guns. In a 1979 survey, when asked why they possessed a gun, 20% of all gun owners and 40% of handgun owners cited self-defense as the reason. It is unfortunate that these people may be operating under a delusion, having subjected themselves and their families to great danger in the guise of self-protection. One study examined the number of times a gun is used in self-defense against the risk of having a gun in the home in King County, Washington. The risks measured by the authors were the cumulation of "death from unintentional gunshot wounds, homicide during domestic quarrels, and the ready availability of an immediate, highly lethal means of suicide."

The authors conclude that for every instance of a death resulting from defensive use of a gun, there were 43 gun deaths resulting from domestic fights, accidents, or suicides.

See Rosenberg et al., supra note 494, at 3030; see also Susan DeFrancesco, Children and Guns, 19 PACE L. REV. 275, 284 (1999) (discussing risks associated with keeping firearms in homes and noting that "the risk of suicide of a family member is increased by nearly five times in homes with guns; the risk is higher still for adolescents and young adults."); McClurg, supra note 492, at 1205 (stating that guns in home increases risk of suicide for adolescents).

See Rosenberg et al., supra note 494, at 3030 (suggesting safest approach is removing all guns from home). See generally Alfred Blumstein & Daniel Cork, Linking Gun Availability to Youth Gun Violence, 59 LAW & CONTEMP. PROBS. 5, 5 (Winter 1996) (stating that increase in availability of guns to young people has led to dramatic rise in teenage suicide); Joan Nessier, Disclosing Adolescent Suicidal Impulses to Parents: Protecting the Child of the Confidence, 26 IND. L. REV. 433, 447 (1993) (stating that removing guns from home will increase child's safety and reduce likelihood suicide).


See Kellermann & Reay, supra note 479, at 1557 (suggesting keeping of firearms in home must be questioned). See generally Sayoko Blodgett-Ford, Do Battered Women Have a Right to Bear Arms?, 11 YALE L. & POLY REV. 509, 536 (1993) (weighing possibility that gun intended for self defense could be turned on gun-owner by assailant). But see Southwick, Jr., supra note 466, at 236 (stating, conversely, that gun ownership has risen since 1960 and accidental deaths have steadily declined).

Kellermann & Reay, supra note 479, at 1557.

See Kellermann & Reay, supra note 479, at 1560. The authors of the study acknowledge that their research does not account for defensive uses of guns that do not result in death, for instance, cases in which intruders were injured or frightened away by the homeowners gun. Id. at 1559. Critics have seized on this fact as a fatal flaw of the
One researcher, commenting on the study, noted that "the justifiable use of firearms for self-protection is a rare occurrence and carries with it much greater associated risks of the death of someone other than the perpetrator."\(^5\) The same approximate result obtains on a nationwide scale. In 1992, there were 308 justifiable firearm homicides in self-defensive compared to 15,377 total firearm homicides.\(^5\) Surely, no public policy can be sustained when the negative consequences occur 50 times more often than the positive consequences. It should also be noted that self-defense would be less necessary if guns were less available to criminals; "[a] heavily armed citizenry might be a rational response if heavily armed criminals were inevitable; but far more rational would be a society that strives to disarm all private citizens, thus obviating the need to use firearms in self-defense."\(^5\)

study, but the number of non-lethal defensive uses of guns are notoriously difficult to calculate. Estimates range from a low of 80,000 annually (Phillip J. Cook, *The Technology of Personal Violence, 14 Crime and Justice: A Review of Research* 1, 4 (1991)) to a high of 3.6 million (John R. Lott, *More Guns, Less Crime: Understanding Crime and Gun Control Laws* 11 (1998) (quoting various national surveys including Gallup and Los Angeles Times)). The debate regarding the deterrent effect of guns has become more heated since the publication of Professor Lott’s article, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*. This regression analysis, using data from every county in the country, concluded that concealed gun laws, by adding to the number of guns in private hands, reduce the number of murders, rapes, robberies, and aggravated assaults, although property crimes increase. John R. Lott & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. Legal Stud. 1, 1 (1997). This study has been attacked on a number of methodological grounds. See, e.g., Black & Nagin, *supra* note 44, at 218-19. Professor Lott has attempted to respond to the critics of the study in *More Guns, Less Crime*. Unfortunately, a full evaluation of Professor Lott’s findings and the criticisms against them is beyond the scope of this article. As a last resort, one need only read a local newspaper and compare the number of articles about armed robberies, shootings, and murders, with stories about self-defense, although when the latter actually occurs it usually receives generous publicity.


Past experience demonstrates that public policy considerations are not the exclusive province of legislatures. The judiciary, including the Supreme Court, has recognized the need to account for social consequences as a basis of their decisions. In *Brown v. Board of Education*, the Court looked to the psychological ramifications of segregated schools in ruling that integration was constitutionally required. In *Casey v. Pennsylvania*, the Court struck down legal requirements that a woman seeking an abortion must notify their parents or spouse on the ground that the law subjects the woman to abuse. Given this precedent, the judiciary should have no qualm about looking to the extraordinary social costs of broad gun ownership as a factor in their Second Amendment rulings. Whatever individual right is embodied in the Second Amendment, public policy considerations simply recognize the obvious: individual rights cannot be exercised to the detriment of the life or liberty of others. In evaluating the constitutionality of gun laws, courts are faced with a relatively simple balancing decision. The social costs of broad gun ownership are unacceptably high while the individual right to possess a gun is extremely narrow. Courts should have little difficulty upholding restrictive gun laws when the former so clearly outweigh the latter.

IV. CONCLUSION

Gun ownership by responsible and law-abiding citizens should be protected, and can and should rest on sound public policy grounds. As long as guns exist, law-abiding citizens should be

---


514 See *Casey*, 505 U.S. at 852 (stating women's liberty is at stake and, therefore, her suffering is too intimate to be state mandated). See generally Robert D. Goldstein, *Reading Casey: Structuring the Woman's Decisionmaking Process*, 4 WM. & MARY BILL RTS. J. 797, 826 (1996) (stating Casey guarantees that woman's choice must be more than merely formal right); John Christopher Ford, Note, *The Casey Standard for Evaluating Facial Attacks on Abortion Statutes*, 95 Mich. L. Rev. 1443, 1463 (1997) (stating Court weighed data regarding spousal abuse and other sociological studies to reach its decision).
entitled to possess the means for personal self-defense. However, the gun lobby does a great disservice to gun owners by basing their case for gun ownership on dubious and unfounded Second Amendment grounds rather than on legitimate public policy grounds.

Every circuit case ever decided in the United States since the Supreme Court case of *Miller* upholds the collective rights interpretation. The U.S. Supreme Court in *Miller* stated that "The Second Amendment guarantees no rights to keep and bear a firearm that does not have some reasonable relationship to the preservation or efficiency of a well-regulated militia." There are two possible interpretation of this language. The first is that the Second Amendment gives every citizen a right to possess a weapon which might conceivable be used for military purposes. The problem with this interpretation is twofold: first, it leads to the remarkable conclusion that citizens have a right to possess such military weapons as machine-guns; bazookas, and perhaps even suitcase-sized nuclear weapons, but no right to carry a weapon such as a Saturday night special, which no branch of the military has ever issued to its troops. (Even the gun lobby has never suggested that there is no right under the Second Amendment to carry small handguns such as Saturday night specials). The second problem with this interpretation is that every circuit court since *Miller*, without exception, has rejected this interpretation of *Miller*. Not surprisingly, the American Civil Liberties Union, has stated their official position that the Second Amendment states a collective, not an individual right.

This leaves the second interpretation of *Miller*-namely, that the Second Amendment protects only the right to members of a militia to carry weapons needed for carrying out their duties in the militia. This is the interpretation of every circuit court decision since *Miller*. It is true that some members of the gun lobby purport to claim that since every male U.S. citizen between the age of 16 and 55 is technically a member of a theoretical, though non-existent militia (according to an ancient, but never repealed federal statute), and that all such militia members are therefore entitled to carry a gun. The problem with this position, however, is that it excludes males over 55, and all women, and gun lobby has yet to concede that women have no rights under the Second Amendment.
The history of the Second Amendment supports *Miller* and the unanimous decisions of the Circuit Courts. There was never a single mention at the Constitutional convention about an individual right to bear arms. Rather, many representatives of the Southern States expressed great concern about a federal standing army that might supercede the state militias, upon which the Southern states relied to put down slave insurrections. It is true that later during the ratification hearings on the Bill of Rights in Congress, a draft of the Second Amendment was originally introduced which set forth an individual right to bear arms (that is, which did not attach a qualifying militia clause to the clause setting forth the right to bear arms). However, this version, which would clearly have set forth an individual right to bear arms was soundly defeated, and anew version, written by Madison, and which qualified the right to bear arms to its use in the service of a militia, was subsequently adopted and incorporated into the Bill of Rights.

It is, of course, perfectly legitimate for members of the gun lobby to criticize the *Miller* decision, as well as the unanimous circuit court decisions interpreting *Miller*, all of which set forth a collectivist rather than an individual right to bear arms. Even today, there are many who claim that the Supreme Court was wrong in its decision in *Brown vs. Board of Education* that racial segregation was a violation of equal protection. But it is a far different matter to claim, or represent to the American public that existing case law upholds an individual right to bear arms. It simply is not true. Indeed, it is this very misrepresentation which led an exasperated ABA to call upon the bar for help in educating the American public, and the Chief Justice of the United States to assert that this misrepresentation was the greatest fraud ever perpetrated on the American people. The NRA has even gone so far in this misrepresentation to set forth above its door its quotation of the Second Amendment which entirely deletes reference to the qualifying militia clause.

But why should it matter that the gun lobby bases its campaign against responsible gun legislation on the Second Amendment? It matters because gun owners are due for a severe shock when the Supreme Court finally is forced to spell out the existing law. When renegade District Court judge in Texas took it upon himself to disregard not only the *Miller* case, but every
circuit court decision in the land which interpreted *Miller* as setting forth a collectivist interpretation of the Second Amendment. Up to this time, the Supreme Court has had no reason to grant certiorari in a Second Amendment case, since every circuit court has followed *Miller* to the letter, and adopted the collectivist interpretation. Despite law school chant that demands of *certiorari* do not indicate approval of circuit court case, it is inconceivable that the Supreme Court would have let fifty years of circuit court decisions to uncorrected if the Court believed they were wrong. Now that a District Court judge has chosen to ignore all these decisions, the Court may be forced to take the case. This will clearly be bad news for the NRA, which for years has assiduously avoided getting a Second Amendment case to the High Court, for fear that an adverse decision would undercut their publicity and fund-raising campaigns.

Once the Supreme Court is forced to re-affirm the *Miller* case, the moral foundation of those who believe that laws should permit gun ownership may be irremediably undercut. It may become open season on gun owners, and open the door to extreme laws limiting gun ownership. This would not be good news for gun owners. If the gun lobby were to instead base their positions on sound public policy, this would not occur.

A second tactic of the gun lobby which threatens the right of gun owners, it to dispute the indisputable statistical studies showing that countries with strict gun laws have far fewer handgun deaths than the U.S. Howe can one dispute that the 90 handgun deaths in Japan (which has a cultural history of violence at least equal to that of the U.S.) Compared to the 20,000 handgun deaths in the U.S. is explained, at least in part, by Japan's strict gun laws? To dispute such studies only undermines the gun lobby's credibility and moral authority. Why not concede that obviously namely that the more guns there are lying around, the more people will get shot? Why not concede the many deaths in the U.S., and instead argue that this is a price we are willing to pay in order to live in a free society in which everyone should have the right to defend themselves?

It is probably too late in our history to register guns. There are too many, and the likelihood of widespread compliance is now too remote. Were it not too late gun licensing would make sense simply for the reason that a federal gun licensing law which pre-
empted local laws would protect gun owners traveling across state and local boundaries, from being trapped by various random local laws forbidding possession of guns.

For all the reasons hypothesized in the Introduction, the Supreme Court has declined to grant certiorari in a Second Amendment case. In recent years, this failure to grant cert can be explained by the unwillingness of the NRA and other gun lobby groups to appeal lower court cases on Second Amendment grounds. The case of *U.S. v. Emerson*\(^5\text{15}\), however, will yet again test the Supreme Court's resolve in declining to settle the great Second Amendment dispute.

Responsible gun legislation, such as President Bush's plan to require background checks before selling guns would not be legal under the individual rights interpretation of the Second Amendment yet another reason why the American people deserve a straightforward and honest assessment of present state of the law.