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Symposium: The Bill of Rights Yesterday and Today: A Bicentennial Celebration

Arms, Anarchy and the Second Amendment

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ARMS, ANARCHY AND THE SECOND AMENDMENT*

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I. INTRODUCTION

An enduring feature of the contemporary debate over gun control is the effort to give the debate a constitutional dimension. Opponents of strict government regulation of private firearms invariably claim that regulation cannot be reconciled with the Second Amendment: "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."[1] This constitutional argument has been a recurring theme of those in Congress opposed to a national waiting period for handgun sales[2] and of those opposed to restraints on private ownership of military-style assault weapons.[3]

While the Second Amendment has acquired significance as a source of political rhetoric opposing gun control, it has been devoid of importance as a constitutional barrier to gun control laws. Federal and state courts in this century have reached a consensus interpretation of the Amendment that permits government at all levels broad power to limit private access to firearms. The nation's strictest gun control laws have been upheld against Second Amendment challenge,[4] including a local ban on private possession of handguns.[5]

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1. U.S. CONST. amend. II.

2. *See, e.g.*, 137 CONG. REC. H2823 (daily ed. May 8, 1991) (statements of Reps. Unsoeld and Quillen).

3. *See, e.g.*, 136 CONG. REC. S6743 (daily ed. May 22, 1990) (statement of Sen. Hatch); 136 CONG. REC. S6748-49 (daily ed. May 22, 1990) (statement of Sen. Heflin).

4. *See, e.g.*, Sandidge v. United States, 520 A.2d 1057 (D.C. 1987), *cert. denied*, 484 U.S. 868 (1987); Burton v. Sills, 248 A.2d 521 (N.J. 1968), *appeal dismissed*, 394 U.S. 812 (1969).

5. Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983). The Morton Grove ban included several exemptions, including police, the military, licensed gun collectors and licensed gun clubs. 695 F.2d at 263-64, n.1.

According to the judicial consensus, the scope of the people's right to keep and bear arms is limited by the introductory phrase of the Amendment about the necessity of a "well regulated Militia" to the "security of a free State." Over fifty years ago, the Supreme Court held in *United States v. Miller*,[6] that the "obvious purpose" of the Amendment was "to assure the continuation and render possible the effectiveness of . . ." the state militias and cautioned that the Amendment "must be interpreted and applied with that end in view."[7] The militia, composed of ordinary citizens, was seen by the Framers as a check on the power of the federal standing army, composed of professional soldiers. As the Court wrote in *Miller*, "[t]he 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."[8]

Following the Court's guidance, lower federal courts and state courts since *Miller* have unanimously held that regulation of the private ownership of firearms offends the Second Amendment only if it interferes with the arming of the state militia.[9] Since the Supreme Court also has held that the modern

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6. 307 U.S. 174 (1939).

7. *Id.* at 178.

8. *Id.* at 179.

9. As the U.S. Court of Appeals for the Eighth Circuit wrote in United States v. Nelsen, 859 F.2d 1318, 1320 (8th Cir. 1988), courts "have analyzed the Second Amendment purely in terms of protecting state militias, rather than individual rights." The lower court decisions endorsing the militia interpretation include Quilici v. Village of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); United States v. Graves, 554 F.2d 65, 66-67, n.2 (3d Cir. 1977); United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976); United States v. Johnson, 497 F.2d 548, 550 (4th Cir. 1974); United States v. Day, 476 F.2d 562, 568 (6th Cir. 1973); Cody v. United States, 460 F.2d 34, 36-37 (8th Cir. 1972), *cert. denied*, 409 U.S. 1010 (1972); Stevens v. United States, 440 F.2d 144, 149 (6th Cir. 1971); United States v. McCutcheon, 446 F.2d 133, 135-36 (7th Cir. 1971); United States v. Johnson, 441 F.2d 1134, 1136 (5th Cir. 1971); United States v. Tot, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943); Cases v. United States, 131 F.2d 916, 922-23 (1st Cir. 1942), *cert. denied sub nom* Velazquez v. United States, 319 U.S. 770 (1943); Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 210 (S.D. Tex. 1982); Thompson v. Dereta, 549 F. Supp. 297, 299 (D. Utah 1982); Sandidge v. United States, 520 A.2d 1057 (D.C. 1987), *cert. denied*, 484 U.S. 868 (1987); Kalodimos v. Village of Morton Grove, 470 N.E.2d 266 (Ill. 1984); Commonwealth v. Davis, 343 N.E.2d 847, 850 (Mass. 1976); *In re* Atkinson, 291 N.W.2d 396, 398, n.1 (Minn. 1980); State v. Fennell, 382 S.E.2d 231, 232 (N.C. Ct. App. 1989); Harris v. State, 432 P.2d 929, 930 (Nev. 1967); Burton v. Sills, 248 A.2d 521, 525-29 (N.J. 1968), *appeal dismissed*, 394 U.S. 812 (1969); City of East Cleveland v. Scales, 460 N.E.2d 1126, 1130 (Ohio App. 1983); Masters v. State, 653 S.W.2d 944 (Tex. Ct. App. 1983); State v. Vlacil, 645 P.2d 677, 679 (Utah 1982).

embodiment of the "well regulated militia" is the National Guard,[10] which does not use privately owned guns at all, gun control laws are regularly upheld.

In recent years, various articles have appeared in academic journals which offer an interpretation of the Amendment quite at odds with the consensus judicial view.[11] These writers contend that the right to keep and bear arms can be a broad personal right of all citizens *even if* it is tied to the necessity for a militia.[12] This claim rests upon two distinct, but related, theses: (1) that the constitutionally protected "militia" is not an organized military force of the

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10. *See* Maryland v. United States, 381 U.S. 41, 46 (1965) ("The National Guard is the modern Militia . . . ."); Perpich v. Department of Defense, 110 S. Ct. 2418, 2426 (1990). ("Notwithstanding the brief periods of federal service, the members of the state Guard unit continue to satisfy [the] description of a militia.") In *Perpich*, the Court held that Congress may authorize the President to order members of the state National Guard to engage in training exercises outside the United States without the governor's consent or a declaration of a national emergency. Such power, the Court determined, "is not inconsistent with the Militia Clauses . . ." of the Constitution, which divide authority over the militia between the state and federal government. 110 S. Ct. at 2430. *See* discussion *infra* at 8-9. That the Court analyzed the issue before it under the Militia Clauses itself establishes that it regards the National Guard as the modern militia. *Perpich* is especially interesting because the Court had before it an *amicus* brief filed by the "Firearms Civil Rights Legal Defense Fund," an arm of the National Rifle Association, urging it to find that the National Guard is not the militia, but rather is a component of the U.S. Army. Brief of *Amicus Curiae* Firearms Civil Rights Legal Defense Fund in Support of Appellees, *Perpich* (No. 89-542) (on file with author).

11. *See e.g.*, Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989) [hereinafter Levinson]; Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y, 559 (1986) [hereinafter Hardy]; Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983) [hereinafter Kates]; Stephen P. Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791*, 10 N. KY. L. REV. 13 (1982) [hereinafter Halbrook].

12. These articles also typically contend that the right to keep and bear arms is not qualified or limited by the reference to the militia, and thereby assert a right to be armed for other purposes, such as personal self-defense. This claim is flatly contradicted by the Supreme Court's opinion in United States v. Miller, 307 U.S. 174 (1939). The issue in *Miller* was whether the Second Amendment barred the prosecution of two individuals for transporting in interstate commerce a sawed-off shotgun without first registering the weapon as required by the National Firearms Act of 1934. The Court refused to hold that the Second Amendment guarantees the right to keep and bear the gun because no showing had been made that it "has some reasonable relationship to the preservation or efficiency of a well regulated militia." *Id.* at 178. The Court declined to take judicial notice that "this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." *Id.* Thus, the Court saw the issue as turning entirely on the connection between possession of the weapon and the viability of the militia. At no point did the Court even raise the question whether a sawed-off shotgun could have a legitimate non-military use, such as self-defense. For a historical defense of the view that the concern of the Second Amendment is solely the distribution of military power between the states and the federal government, see 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 (1989) [hereinafter Ehrman and Henigan].

states, but is rather the armed citizenry at large; and (2) that the right of the people to keep and bear arms was intended by the Framers as a fundamental check on the power of both state and federal government, by ensuring the means for armed resistance to tyranny.

In defense of the consensus judicial interpretation, this essay contends that the alternative view of the Second Amendment is contradicted by the text of the Constitution itself, as well as by key historical materials bearing on the original intent of the Framers. In addition, this discussion will expose the implications of the alternative view for the fundamental relationship between citizens and their government. As explained below, the alternative view amounts to the startling assertion of a generalized constitutional right of all citizens to engage in armed insurrection against their government. This "insurrectionist theory" of the Second Amendment, in the judgment of this writer, represents a profoundly dangerous doctrine of unrestrained individual rights which, if adopted by the courts, would threaten the rule of law itself.

II. THE INSURRECTIONIST THEORY OF THE SECOND AMENDMENT

Professor Sanford Levinson's article *The Embarrassing Second Amendment*[13] will be used here as representative of the articles advancing one form or another of the insurrectionist theory. Levinson's essay has been chosen both because its arguments (and supporting material) are typical of the genre and because it has received far more attention than other similar articles, particularly from the popular press.[14]

The selection of Levinson's piece as a foil should acknowledge his own disclaimer that it is not his "style to offer 'correct' or 'incorrect' interpretations of the Constitution."[15] Nevertheless, it clearly is his purpose to convince those inclined to give a broad reading to other guarantees in the Bill of Rights to seriously consider a similarly broad view of the right to keep and bear arms.[16]

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13. *See* Levinson, *supra* note 11.

14. Richard Bernstein, *The Right to Bear Arms: A Working Definition*, N.Y. TIMES, Jan. 28, 1990, at 6E; Michael Kinsley, *Second Thoughts*, THE NEW REPUBLIC, Feb. 26, 1990, at 4; George F. Will, *America's Crisis of Gunfire*, THE WASHINGTON POST, March 21, 1991, at A21.

15. Levinson, *supra* note 11, at 642. In light of this statement, Levinson may be surprised to learn of the use of his article by anti-gun control partisans. His article, along with others advocating the insurrectionist theory, is cited by the National Rifle Association (NRA) in proclaiming "Victory in the Law Journals" for the NRA's view that the Second Amendment guarantees a broad, individual right to own guns. *See* 5 NRA ACTION No. 10, at 7 (Oct. 19, 1991).

16. The title of Levinson's piece expresses his view that the Second Amendment "may be profoundly embarrassing to many who both support [prohibitory] regulation [of firearms] and view themselves as committed to zealous adherence to the Bill of Rights . . . ." Levinson, *supra* note 11, at 642.

In this writer's view, Levinson pursues this purpose by manipulating his supporting material so as to exclude that which would cast doubt on the existence of a broad, individual right.[17] As a result, the Levinson essay is certainly fair game for criticism, in spite of its effort to avoid the appearance of dogma.

The two central theses of the insurrectionist theory are stated throughout the Levinson piece. About the meaning of the "militia," Levinson recommends that "we should make some effort to find out what the term 'militia' meant to eighteenth century readers and writers, rather than assume that it refers only to Dan Quayle's Indiana National Guard and the like."[18] He then concludes that "[t]here is strong evidence that 'militia' refers to all of the people, or at least all of those treated as full citizens of the community."[19] As to the ultimate constitutional importance of the armed citizenry, Levinson relies on the theory of checks and balances:

> [O]ne aspect of the structure of checks and balances within the purview of 18th century thought was the armed citizen. That is, those who would limit the meaning of the Second Amendment to the constitutional protection of state-controlled militias agree that such protection rests on the perception that militarily competent states were viewed as potential protection against a tyrannical national government . . . . But this argument assumes that there are only two basic components in the vertical structure of the American polity -- the national government and the states. It ignores the implication that might be drawn from the Second, Ninth and Tenth Amendments: that the citizenry itself can be viewed as an important third component of republican governance insofar as it stands ready to defend republican liberty against the depredations of the other two structures, however futile that might appear as a practical matter.[20]

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17. One conspicuous example of Levinson's manipulation is his discussion of the existing law review literature on the Second Amendment. Levinson, *supra* note 11, at 639, n.13. He cites several law review articles, all of which are critical of the consensus judicial interpretation, but omits mention of the following articles which support it: Peter Feller and Karl Gotting, *The Second Amendment, A Second Look*, 61 NW. U. L. REV. 46 (1966); John Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI.-KENT L. REV. (1971); Ralph Rohner, *The Right to Bear Arms*, 16 CATH. U. L. REV. 53 (1966); Roy Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961 (1972). Levinson complains that most of the articles on the Second Amendment have been written by lawyers, not academics, and yet two of the articles he omitted (John Levin and Ralph Rohner) were written by law professors.

18. Levinson, *supra* note 11, at 646.

19. *Id.* at 646-47.

20. *Id.* at 651.

Thus, in Levinson's words, it may be "a privilege and immunity of United States citizenship' -- of membership in a liberty-enhancing political order -- to keep arms that could be taken up against tyranny wherever found, including, obviously, state government."[21] In Levinson's theory, therefore, the constitutional militia -- properly understood as the collection of armed citizens -- is not an instrument of state government authority. The militia is rather a potential revolutionary force poised to use violence against the excesses of government at all levels.

Of course, the right to keep arms for that purpose would hardly be an effective check on tyranny if the right did not also extend to the *use* of those arms against a tyrannical government. To Levinson, an armed population is constitutionally important because it creates the potential for armed uprising: "[A] state facing a totally disarmed population is in a far better position, for good or for ill, to suppress popular demonstrations and uprisings than is one that must calculate the possibilities of its soldiers and officials being injured or killed."[22] What is really being asserted by Professor Levinson is a constitutional right to engage in armed insurrection against tyrannical governmental authority, whether state or federal.

III. THE INSURRECTIONIST THEORY AND THE LANGUAGE OF THE CONSTITUTION

The most obvious problem with Levinson's theory is reconciling it with the language of the Second Amendment itself. By its words, the constitutional value protected by the Amendment is "the security of a free State." Presumably, the term "free State" is a reference to the states as entities of governmental authority. Moreover, the reference to the "security" of a free State must have something to do with the need to defend the state as an entity of government. How, then, can the Amendment that purports to express distrust of state governmental power, and to create a right to be armed against abuses of that power, also elevate the defense of state government to a constitutionally protected value?[23] The inclusion of this phrase in the Second Amendment

21. *Id.*

22. Levinson, *supra* note 11, at 657.

23. The Second Amendment is, of course, the only provision in the Bill of Rights proclaiming "the security of a free State" as its object. This is surely relevant to the issue whether the Second Amendment should be regarded as "incorporated" through the Fourteenth Amendment as a limitation on the states. Levinson, *supra* note 11, at 652-53, correctly notes that although the nineteenth century Supreme Court decisions on the Second Amendment, United States v. Cruikshank, 92 U.S. 542, 553 (1875) and Presser v. Illinois, 116 U.S. 252 (1886), found the Amendment to be a limit on only the federal government, these cases were decided during an era when the entire Bill of Rights was held inapplicable to the states. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). Levinson argues that these decisions should be reconsidered in light of the modern "selective

makes Levinson's theory immediately implausible. Nowhere in Levinson's analysis does he offer an explanation of its meaning that is consistent with the insurrectionist theory.

The words of the Amendment also pose a problem for Levinson's view that the term "militia" as used in the Amendment refers simply to the collection of citizens who are armed. The insurrectionist theory has difficulty accounting for the modifier "well regulated" which precedes "militia." In what sense is the "militia," as defined by Levinson, "well regulated"? The use of "well regulated" in the Amendment certainly implies that the militia is subject to a set of legal rules and obligations, which suggests that the militia is an organized military force, not an ad hoc group of armed individuals.

The meaning of "well regulated" is illuminated by examining the nature of the militia as it existed in colonial times. It is true that the *membership* of the militia of the several states was broad-based; it generally consisted of white males between the ages of eighteen to forty-five or sixty years.[24] However,

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incorporation" doctrine, but never addresses the unique implications of the Second Amendment's language. If the security of state government is the object of the people's right to be armed, would it not be paradoxical to apply the Amendment to limit the power of state government? At the very least, it is illogical to argue that the Second Amendment should be applied to the states *by the same reasoning* that has led the Supreme Court to incorporate other provisions of the Bill of Rights that do not expressly protect the security of the states. It remains the law of the land that the Second Amendment does not apply to the states, Malloy v. Hogan, 378 U.S. 1, 4 n.2 (1964), and therefore is no restraint on state regulation of firearms. *See, e.g.*, Justice v. Elrod, 832 F.2d 1048, 1051 (7th Cir. 1987); Quilici v. Village of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); Cases v. United States, 131 F.2d 916, 921-22 (1st Cir. 1942), *cert. denied sub nom.* Velazquez v. United States, 319 U.S. 770 (1943); Fresno Rifle & Pistol Club, Inc. v. Van de Kamp, 746 F. Supp. 1415, 1419 (E.D. Cal. 1990), *appeal docketed*, No. 91-15466 (9th Cir.); Krisko v. Oswald, 655 F. Supp. 147, 149 (E.D. Pa. 1987); Engblom v. Carey, 522 F. Supp. 57, 71 (S.D.N.Y. 1981), *aff'd in part and rev'd in part and remanded in part*, 677 F.2d 957 (2d Cir. 1982); Eckert v. City of Philadelphia, 329 F. Supp. 845, 846 (E.D. Pa. 1971), *aff'd*, 477 F.2d 610 (3d Cir.), *cert. denied*, 414 U.S. 839 (1973); Kellogg v. City of Gary, 562 N.E.2d 685, 692 (Ind. 1990); State v. Swanton, 629 P.2d 98, 99 (Ariz. App. 1981); State v. Amos, 343 So. 2d 166, 168 (La. 1977); Commonwealth v. Davis, 343 N.E.2d 847, 850 (Mass. 1976); Application of Atkinson, 291 N.W.2d 396, 398 n.1 (Minn. 1980); Harris v. State, 432 P.2d 929, 930 (Nev. 1967); State v. Sanne, 364 A.2d 630 (N.H. 1976); State v. Goodno, 511 A.2d 456, 457 (Me. 1986); Masters v. State, 685 S.W.2d 654, 655 (Tex. Ct. App. 1985), *cert. denied*, 474 U.S. 853 (1985).

24. WILLIAM RIKER, SOLDIERS OF THE STATES: THE ROLE OF THE NATIONAL GUARD IN AMERICAN DEMOCRACY 12 (1957) [hereinafter RIKER]. Levinson's claim that "militia" refers to "all of the people, or at least all of those treated as full citizens of the community" (Levinson, *supra* note 11, at 646-47) does not appear to be historically accurate. Older white males were certainly considered citizens and yet were exempt from militia service. The restriction of membership to a defined age group supports the idea of the militia as a *military* force; membership was restricted to those perceived by the colonial governments to be best able to engage in military activity. As the Supreme Court noted in United States v. Miller, 307 U.S. 174, 179, (1939), "the Militia comprised all males physically capable of acting in concert for the common defense . . . ."

it is also true that, by virtue of their membership in the colonial militia, persons were subject to various legal requirements imposed by the colonial governments. Colonial legislatures early on had enacted general draft laws modelled after the English militia system.[25] Militiamen "were required to muster for training, usually four to eight days per year, two to four days in the spring (usually a company parade), and two to four days in the autumn (usually a battalion parade)."[26] They also were required to furnish their own equipment, including muskets, powder and shot for the infantry, and horses for the cavalry.[27] Fines were levied and collected for failure to attend musters and adequately maintain equipment.[28] Militia service away from one's home community also was required, although it generally was limited in time.[29] Although some classes of persons were exempt from militia requirements (usually ministers and teachers),[30] the existence of these specified exemptions itself underscores the nature of the colonial militia as an organized military force subject to rules and regulations imposed by colonial governments. As the Supreme Court wrote in *United States v. Miller*, the militia was a "body of citizens enrolled for military discipline."[31]

A fundamental flaw in the insurrectionist theory is its confusion of the *membership* of the colonial militia with the *definition* of the colonial militia. Simply because the militia was composed of all white males of a certain age group does not mean that the term "militia" as used by the Framers *means* all white males of a certain age group. Rather, the colonial militia was an organized military force governed by rules and regulations. It was, in short, a form of compulsory military service imposed on much of the male population. "White males between the ages of 18 and 45" does not *define* the colonial militia any more than "nations of the world" *defines* the United Nations.[32]

The Second Amendment, however, is not the only provision of the Constitution that addresses the militia. The nature of the militia, as understood by the Framers, also is revealed by two clauses of Article I -- Clauses 15 and

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25. RIKER, *supra* note 24, at 11.

26. *Id.*

27. *Id.*

28. LAWRENCE CRESS, CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812, at 4 (1982).

29. *Id.*

30. RIKER, *supra* note 24, at 12.

31. United States v. Miller, 307 U.S. 174, 179 (1939).

32. Although the Militia Act of 1792 required every male citizen between the ages of eighteen and forty-five to be enrolled in the militia and equip himself with specific military weaponry, 1 Stat. 271, this broad-based citizen militia proved over time to be unworkable. The evolution of the early militia to the National Guard of today is briefly described in Perpich v. Department of Defense, 110 S. Ct. 2418, 2423 (1990). *See also* Ehrman and Henigan, *supra* note 12, at 34-39.

16 of Section 8 -- commonly known as the "Militia Clauses":

> The Congress shall have Power...
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To 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, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.[33]

It is transparent from these provisions that the Framers understood the militia to be *an instrument of governmental authority*. Clause 15 gives Congress the power to call out the militia for various purposes. Clause 16 divides authority over the militia between the federal government and the states, giving Congress the power to organize, arm and discipline the militia while reserving to the states the power to appoint its officers and to train it "according to the discipline prescribed by Congress." Levinson's theory, however, is that the militia is to function as a *check* on the power of government, both federal and state, which must mean that the militia must exist *apart from* government. This idea simply cannot be reconciled with the Militia Clauses, which are ignored in Levinson's essay.

The insurrectionist theory also has difficulty explaining the function of the militia as set forth in the Militia Clauses. How can the militia be a collection of citizens with the constitutionally guaranteed right to engage in armed resistance against their government if the Constitution itself grants Congress the power to call out the militia "to execute the Laws of the Union [and] suppress Insurrections. . . ."? 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.

Before leaving the text of the Constitution, one additional point is worth noting. Given the self-evident importance to our constitutional scheme of an individual right to engage in armed revolution, is it not curious that this right is not more explicitly stated in the text? Whatever else may be said in defense of the insurrectionist theory, surely it must be admitted that the Second Amendment is hardly a model of clarity as a declaration of the right to overthrow the

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33. U.S. CONST. art. I, § 8, cls. 15, 16.

government. Yet other parts of the Constitutional text affirm, without ambiguity, the power of the government to preserve itself against insurrection. This is true not only in the Militia Clauses, but throughout the document. For example, the crime of treason receives special treatment in the Constitution. The entirety of Article III, Section 3, is devoted to defining the crime, specifying the proof sufficient for a conviction and giving Congress the power to declare its punishment.[34] Treason also is, of course, listed as an impeachable offense for federal officers.[35] In addition, Article IV, Section 4, requires the federal government, on request of a state, to defend the state "against domestic Violence."[36]

According to the insurrectionist theory, the "right to keep and bear Arms" is to be taken to create an individual right to engage in armed insurrection, even though the Framers left intact various provisions which strongly affirm the power of government to punish conduct disloyal to government and to preserve order. Acceptance of the insurrectionist theory leaves us with a Constitution very much at war with itself, a conclusion that suggests a profound weakness in the theory itself.

Of course, it must be acknowledged that the Second Amendment did effect some change in the Constitutional scheme; presumably the Framers did not adopt the Bill of Rights in 1791 with the intent to leave things as they were in 1787. What, then, was the nature of the change brought about by the Second Amendment? The answer is contained in various key historical materials, which are themselves inconsistent with the insurrectionist theory.

IV. THE INSURRECTIONIST THEORY AND THE HISTORY OF THE SECOND AMENDMENT

Following the conclusion of the Constitutional Convention in 1787, the states began to debate the issue of ratification. A battle of pamphlets and newspaper articles commenced between the Antifederalists, who opposed ratification, and the Federalists, who supported it.[37] The Bill of Rights was the outgrowth of the Antifederalist critique.

One consistent Antifederalist theme was that the Constitution had created an excessively powerful central authority, which would lead to the destruction of the states. For example, the Antifederalists feared that the Militia Clauses of

34. U.S. CONST. art. III, § 3.
35. U.S. CONST. art. II, § 4.
36. U.S. CONST. art. IV, § 4.
37. *See* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 468-69 (1971) [hereinafter B. SCHWARTZ].

the Constitution had given the central government excessive control over the state militia, which was regarded as the guardian of the states' integrity. Luther Martin stated the argument before the Maryland legislature:

> [Through] this extraordinary provision, by which the militia, the only defence and protection which the State can have for the security of their rights against arbitrary encroachments of the general government, is taken entirely out of the power of the respective States, and placed under the power of Congress . . . . It was urged [at the Constitutional convention] that, if after having retained to the general government the great powers already granted, and among those, that of raising and keeping up regular troops, without limitations, the power over the Militia should be taken away from the States, and also given to the general government, it ought to be considered as the last coup de grace to the State governments; that it must be the most convincing proof, the advocates of this system design the destruction of the State governments, and that no professions to the contrary ought to be trusted; and that every State in the Union ought to reject such a system with indignation, since, if the general government should attempt to oppress and enslave them, they could not have any possible means of self-defense . . . and, by placing the militia under [Congress'] power, enable it to leave the militia totally unorganized, undisciplined, and even to disarm them . . . .[38]

Implicit in this argument is the idea that the militia was an instrument of state government. Martin's argument was not that the Constitution deprived the people of a right to be armed against the power of state and federal government, but rather that it gave the federal government excessive power over the military force which state governments relied upon for their security.

Of particular interest on this issue are the debates in the Virginia ratification convention, both because this was the convention in which the militia issue was most extensively discussed and because it no doubt had a profound influence on the Virginian James Madison, who authored the Second Amendment. The Virginia debate is replete with expressions of fear that federal control over the militias would destroy them.

George Mason argued that the power given Congress to "organize, arm and discipline" the militia would allow Congress to destroy the militia by "rendering them useless -- by disarming them . . . Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for

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38. 3 RECORDS OF THE FEDERAL CONVENTION 208-09 (Max Farrand ed., 1974).

Congress has an exclusive right to arm them. . . ."[39] Patrick Henry also was concerned about the arming of the state militia. He stated that "necessary as it is to have arms, and though our Assembly has, by a succession of laws for many years, endeavored to have the militia completely armed, it is still far from being the case. When this power is given up to Congress . . . how will your militia be armed?"[40] Mason and Henry proposed that, "if Congress should refuse to find arms for [the militia], this country may lay out their own money to purchase them."[41] Federalist James Madison countered this argument by maintaining that the Congressional power to arm the militia was not exclusive, and thus Congress lacked the power to paralyze the state militia.[42] Similarly, John Marshall asked: "If Congress neglect our militia, we can arm them ourselves. Cannot Virginia import arms? Cannot she put them into the hands of her militia-men?"[43] Significantly, there is not a word in the Virginia debates about the need to ensure that the people are armed to ensure the potential for revolution against state or federal governmental excesses.

These speakers took it for granted that the arming of the militia was a governmental function; the issue being debated is the need to affirm the states' concurrent power with the federal government to furnish arms to the militia.[44] It is difficult for the insurrectionist theory to account for this debate at all. If the militia is simply the collection of citizens with their own arms, why all the concern about whether the central government's power to arm the militia is exclusive, or rather concurrent with the states' power? More fundamentally, if the function of the militia is to check the excesses of state and federal government by ensuring the potential for armed revolt by the people, how could the militia also be dependent on those same governments for its arms?

The Virginia debates, ignored in Levinson's account, make it clear that the

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39. 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 379 (1836) [hereinafter J. ELLIOT].

40. *Id.* at 386.

41. 2 B. SCHWARTZ, *supra* note 37, at 831.

42. 3 J. ELLIOT, *supra* note 39, at 382-83.

43. *Id.* at 421.

44. Even though colonial militiamen were generally expected to supply their own arms for militia service, there is little doubt that these privately-owned weapons were supplemented by state-provided arms. The Articles of Confederation had provided that "every State shall always keep a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and have constantly ready for use, *in public stores*, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage." (*Quoted in* John K. Mahon, THE AMERICAN MILITIA, DECADE OF DECISION, 1789-1800, at 4 (U. Fla. Monographs, Spring 1960) (emphasis added)). This provision suggests that some militia arms were regarded as public property. It also underscores the colonial understanding of the militia as a military force maintained by the states, a concept totally alien to the insurrectionist view of the militia.

Second Amendment arose from a concern by the Antifederalists that the Constitution had made the existence of an armed militia a matter of federal preference, rather than a right of the people of the several states. The purpose of the Amendment was to affirm the people's right to keep and bear arms *as a state militia*, against the possibility of the federal government's hostility, or apathy, toward the militia.

Levinson's review of the historical material places heavy reliance on quotations by certain historical figures and early Constitutional commentators extolling the importance of the armed individual to the defense of liberty. However, scrutinizing the most dramatic of these quotations reveals that Levinson is able to use them to support his argument only by stripping away their context. Once the context is restored, they turn out not to support the insurrectionist theory, but to defeat it.

One example is Levinson's use of Justice Joseph Story's *Commentaries on the Constitution of the United States*.[45] Levinson lifts the following quotation from Story:

> The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.[46]

Levinson omits the sentences which immediately follow:

> And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised that, among the American people, there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How it is practicable to keep the people duly armed, without some organization, it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of

45. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833) [hereinafter STORY].

46. *Id.* at 677. This quotation is relied upon by other insurrectionist theorists, *see* Kates, *supra* note 11, at 242 and Hardy, *supra* note 11, at 614, and is prominently featured in the literature of the National Rifle Association. *See, e.g.*, NRA INSTITUTE FOR LEGISLATIVE ACTION, *The Right to Keep and Bear Arms...An Analysis of the Second Amendment* 9 (1985).

our national bill of rights.[47]

What was the protection intended by the Second Amendment? Levinson also omits the footnote to the above quoted passage, which contains the following passage from Tacitus: "Is there any escape from a large standing army, but in a well-disciplined militia?"[48]

Story believed the armed citizenry to be essential to liberty only insofar as it was subject to "a system of militia discipline." To the extent that the people were armed "without some organization" or "rid of all regulations," he saw the Second Amendment as unable to accomplish its purpose to protect liberty against the power of the standing army. Presumably, the regulations he was referring to were those imposed on the early militia by state governmental authority.

Story's discussion therefore is consistent with the theory that the Second Amendment guarantees a right of the people to be armed only in service to an organized militia. If he saw the armed citizenry per se as the protector of liberty (the foundation of the insurrectionist theory), why would he express such dismay at the people's lack of enthusiasm for militia discipline? Moreover, Levinson himself quotes Story's reference to the militia as the natural defense "against . . . domestic insurrections," which is itself inconsistent with the notion that the militia is the armed citizenry poised to engage in domestic insurrection.

An even more telling instance of Levinson's omission of context is his use of James Madison's *Federalist No.* 46, which speaks of "the advantage of being armed, which the Americans possess over the people of almost every other nation."[49] This statement appears in the following passage concerning the dangers of a standing army, which must be quoted at length to understand Madison's meaning:

> Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government: still it would not be going too far to say that *the State governments with the people on their side would be able to repel the danger*. The highest number to which, according to the best computation, a standing army can be carried in any country does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, any army of more than twenty-five or thirty thousand men. To these would be opposed a militia

47. STORY, *supra* note 45, at 678.
48. *Id.* at 678, n.2 (quoting TACITUS, HISTORIES IV, ch. 74).
49. THE FEDERALIST NO. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961).

> 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 governments possessing their affections and confidence*. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the late successful resistance of this country against the British arms will be most inclined to deny the possibility of it. Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, *the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed*, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.[50]

The Federalist Madison is here arguing that the Constitution does not strip the states of their militia, while conceding that a strong, armed militia is necessary as a military counterpoint to the power of the regular standing army. However, as the underscored language indicates, Madison saw the militia as the military instrument of state government, not simply as a 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, which possesses the people's "confidence and affections" and "to which the people are attached."[51] This is hardly an argument for the right of people to be armed against government per se.[52]

This is not to deny that there may well have been some colonial thinkers who believed in the right of individuals to be armed regardless of their connection to an organized militia. There were, indeed, proposals for constitutional language that would have guaranteed a broader right. For instance, Levinson points to the amendment proposed by the New Hampshire ratification convention: "Congress shall never disarm any citizen unless such

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50. *Id.* (emphasis added).

51. Alexander Hamilton also saw the militia as a means by which state government preserved itself against popular insurrection. If the revolt be "a slight commotion in a small part of a State, the militia of the residue would be adequate to its suppression; and the natural presumption is that they would be ready to do their duty. An insurrection, whatever may be its immediate cause, eventually endangers all government." THE FEDERALIST NO. 28, at 178 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

52. The misuse of FEDERALIST NO. 46 is typical of the other insurrectionist theorists. *See, e.g.*, Kates, *supra* note 11, at 228; Halbrook, *supra* note 11, at 16; Hardy, *supra* note 11, at 601-02.

as are or have been in Actual Rebellion."[53] It is surely significant that, even though this formulation of the right was available to those who sought a Bill of Rights, it did not find its way into the Constitution. Levinson also points to the proposal of Sam Adams, guaranteeing to "peaceable citizens" the right of "keeping their own arms."[54] This proposal, however, was defeated by the Massachusetts convention.[55]

Finally, Levinson relies upon the text of 19th century constitutional commentator Thomas Cooley.[56] Levinson quotes from the Third Edition of Cooley's treatise *The General Principles of Constitutional Law in the United States of America*, in which Cooley expressly objects to the idea that the Second Amendment protects only the arms of those actually enrolled in the militia and suggests a general right to form private armies; that is, to "meet for voluntary discipline in arms . . ." for which the people "need no permission or regulation of law for the purpose."[57] Levinson, however, would have been well-advised to read the Fourth Edition of Cooley's text. Although Cooley retains his view on the scope of the right to keep and bear arms, he endorses the proposition that the Second Amendment "is a limitation upon Congress and not upon the legislatures of the several States."[58] This addition was no doubt prompted by the Supreme Court's ruling in *Presser v. Illinois*.[59] *Presser* was cited in Cooley's Fourth Edition, but omitted in the Third, even though it was decided several years before the publication of the Third Edition. Indeed, Cooley's later edition concludes that "the State could prohibit altogether the carrying or selling of arms by private citizens."[60] This view, of course, is utterly inconsistent with Levinson's suggestion that each individual may be guaranteed a right to be armed against the excesses of state, as well as federal, government.

V. THE IMPLICATIONS OF THE INSURRECTIONIST THEORY

As noted, Levinson suggests the possibility that the Second Amendment

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53. *Quoted in* EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 182 (1957) and cited by Levinson, *supra* note 11, at 648. It should be noted that even this broad formulation denied any right to use arms in rebellion against the government.

54. *Quoted in* Levinson, *supra* note 11, at 648.

55. BRANDFORD PIERCE AND CHARLES HALE, DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS 86-87 (1856), *cited in*, Martin C. Ashman, *Handgun Control by Local Government*, 10 N. KY. L. REV. 97, 108 (1982).

56. Levinson, *supra* note 11, at 649.

57. THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 298 (3d ed. 1898). This quotation also is relied upon by Hardy, *supra* note 11, at 64.

58. THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 341 (4th ed. 1931) [hereinafter COOLEY].

59. 116 U.S. 252 (1886).

60. COOLEY, supra note 58, at 341.

may guarantee a right "to keep arms that could be taken up against tyranny wherever found . . . ." Since Levinson is making assertions about constitutional rights which presumably are to be enforced by courts, it is curious that he does not ask the obvious threshold question about the insurrectionist theory. By what standards are the courts to determine whether the government has become sufficiently "tyrannical" so that armed insurrection becomes constitutionally protected? If the right guaranteed by the Second Amendment is an "individual" right, must not the courts defer to the judgment of the individual asserting the right on the question of whether the government has become a tyranny? Surely the right would be an empty one if it permitted governmental authority, in the form of the courts, to substitute its judgment for that of the individual citizen on the issue of whether the government had abused its power.

The logical extension of Levinson's position is that courts are powerless to punish armed insurrection against the government as long as the revolutionaries believe in good faith that the government had become a tyranny. Presumably, this would mean that the government could not constitutionally prosecute persons for shooting public officials, as long as the shooting was motivated by the belief that the official was abusing his/her power. No one could deny that such a doctrine would be a prescription for anarchy. Levinson must have sensed how close he was coming to this view, for he takes pains to state: "I do not want to argue that the state is necessarily tyrannical; I am not an anarchist."[61] He may not regard himself as an anarchist, but if his constitutional theory guarantees to each citizen the right to take up arms against the government if his/her conscience so directs, anarchy appears to be a highly appropriate label for such a state of affairs. Although the proper limit of government power to suppress dissent in our society has always been a matter of robust debate in the courts, the government's constitutional authority to preserve itself against violence has remained unquestioned. As the Supreme Court wrote in *Dennis v. United States*:[62] "We reject any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy."[63]

Were the insurrectionist theory of the Second Amendment to be adopted by the courts, surely much of our accepted First Amendment jurisprudence about the limits of dissent would need radical revision. In *Brandenburg v. Ohio*,[64] the Supreme Court ruled that "the constitutional guarantees of free speech and free press do not permit a State to forbid or prescribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or

61. Levinson, *supra* note 11, at 656.
62. 341 U.S. 494 (1951).
63. *Id.* at 501.
64. 395 U.S. 444 (1969).

producing imminent lawless action and is likely to incite or produce such action."[65] While broadly protecting freedom of expression, *Brandenburg* recognized that First Amendment freedoms do not extend to speech intended to produce, and likely to produce, violent revolution. How can this continue to be a valid limit on First Amendment freedom, if the Second Amendment guarantees each individual the right to engage in armed revolution?[66]

Moreover, if the people are to be an effective armed force against tyranny, then the Second Amendment also must guarantee their right to join together in resisting the government. The insurrectionist theory therefore leads inexorably to the assertion of a constitutional right to form private military forces. To get some sense of the frightening consequences of such a right, the case of *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*,[67] is instructive.

The case arose from the Ku Klux Klan's systematic and violent harassment of Vietnamese fishermen along the Gulf Coast of Texas. The plaintiff organization sought to enjoin the activities of the Klan's Texas Emergency Reserve (TER), the military arm of the Klan which operated training camps in the State of Texas. The Court found that the Klan used the Reserve to train individuals to intimidate the Vietnamese, who the Klan felt were unfairly competing commercially with white fishermen.[68]

The Klan alleged that any injunction against its military activities would violate the Second Amendment. It further argued that the Amendment rendered unconstitutional the Texas statute providing that "no body of men, other than the regularly organized state military forces of this State and the troops of the United States, shall associate themselves together as a military company or organization . . . ."[69]

The Court rejected the Klan's argument, finding that "the Second Amendment does not imply any general constitutional right for individuals to bear arms and form private armies."[70] It upheld the state law against private armies by adopting the view that the Second Amendment protects only the keeping and

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65. *Id.* at 447.

66. Indeed, if the insurrectionist theory is accepted, the entire First Amendment debate about the limits of dissent becomes rather quaint. How can we seriously debate the right of an individual to burn the American flag in protest over governmental policies, *see* United States v. Eichman, 110 S. Ct. 2404 (1990), when the Second Amendment gives that individual the right to bear arms against the government?

67. 543 F. Supp. 198 (S.D. Tex. 1982).

68. *Id.* at 206-07.

69. TEX. REV. CIV. STAT. ANN. art. 5780 § 6 (West Supp. 1982), *quoted in* Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 211 (S.D. Tex. 1982).

70. *Vietnamese Fisherman's Ass'n*, 543 F. Supp. at 210.

bearing of arms that have some relationship to a government-sponsored militia, finding that:

> [D]efendants' military operations obviously have absolutely no relationship whatsoever to any state or federal militia. In fact, defendants pride themselves on the fact that the TER is an alternative to Texas' state militia.[71]

The *Vietnamese Fishermen* case poses a difficult question for Levinson: If the Court had been guided by the insurrectionist theory, how could it have enjoined the military activities of the Klan? The definition of the constitutionally-protected "militia" asserted by the Klan is identical to the insurrectionist concept: a group of individuals bearing their private arms. Perhaps Professor Levinson would argue that the Klan's intimidation of the Vietnamese was not resistance against the government, and therefore not entitled to Constitutional protection under his theory. But what if the Klan's military camps were training individuals to threaten government officials charged with implementing school desegregation, a policy which the Klan sincerely believed to be the essence of tyranny? Surely the tolerance of private armies sponsored by extremist groups cannot turn on whether the groups are prepared to use force against government officials, as opposed to private individuals. The *Vietnamese Fishermen* case illustrates the fundamental, real-world problem with the insurrectionist theory. How 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?

In rejecting the constitutional right to raise private armies, the opinion in *Vietnamese Fishermen* relied on the Supreme Court's ruling in *Presser v. Illinois*.[72] Although Levinson notes *Presser*'s holding that the Second Amendment does not apply to the states, he does not seem to recognize that the Court's opinion is wholly inconsistent with the insurrectionist theory. In *Presser* the Court upheld, against Second Amendment challenge, an Illinois statute barring the formation of private armies, which was similar to the Texas law upheld in *Vietnamese Fishermen*. The Supreme Court wrote:

> Military organization and military drill and parade under arms are subjects especially under the control of the government of every country . . . Under our political system they are subject to the regulation and control of the State and Federal governments, acting in due regard to their respective prerogatives and powers.[73]

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71. *Id.* at 216.
72. 116 U.S. 252 (1886).
73. *Id.* at 267.

The Supreme Court's denunciation of private armies was echoed years later by a New York court in *Application of Cassidy*:[74]

> There can be no justification for the organization of such an armed force. Its existence would be incompatible with the fundamental concept of our form of government. The inherent potential danger of any organized private militia, even if never used or even if ultimately placed at the disposal of the government, is obvious. Its existence would be sufficient, without more, to prevent a democratic form of government, such as ours, from functioning freely, without coercion, and in accordance with the constitutional mandate.[75]

The seemingly uncontroversial principle of government control of military forces is impossible to reconcile with the insurrectionist theory.

In addition, if the armed population is to be an effective check on the power of government in this age of weapons of mass destruction, how can there be limits on the kind of arms the people have the constitutional right to keep and bear? If the Second Amendment guarantees the right to form effective private military forces, it should also guarantee that individuals have the right to be armed with weaponry that matches the destructive potential of the government's arms. Indeed, the insurrectionist theory would dictate that the greater the military utility of a weapon, the greater its constitutional protection. The government would have more power to regulate single-shot rifles than to regulate machine guns and bazookas.

One of the most peculiar aspects of Professor Levinson's argument is that he does not appear at all repelled by such a conclusion. In his discussion of the Supreme Court's refusal in *United States v. Miller* to accord constitutional protection to a sawed-off shotgun, he places great emphasis on the Court's finding that "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."[76] Levinson reads this to mean that if a showing had been made of the military utility of the shotgun, the Court might have accorded it constitutional protection.[77] Levinson concludes:

> Ironically, *Miller* can be read to support some of the most extreme anti-gun control arguments, e.g., that the individual citizen has a right to keep and bear bazookas, rocket launchers, and other armaments that

74. 51 N.Y.S.2d 202 (N.Y. App. Div. 1944).
75. *Id.* at 205.
76. United States v. Miller, 307 U.S. 174, 178. *Quoted in* Levinson, *supra* note 11, at 654.
77. Levinson, *supra* note 11, at 654.

> are clearly relevant to modern warfare, including, of course, assault weapons. Arguments about the constitutional legitimacy of a prohibition by Congress of private ownership of handguns or, what is much more likely, assault rifles, might turn on the usefulness of such guns in military settings.[78]

Thus, instead of concluding that a right to keep and bear bazookas is the *reductio ad absurdum* of the insurrectionist interpretation of *Miller*, Levinson appears to be comfortable with the possibility that this is exactly what the Court meant.[79] If such a bizarre view of the Second Amendment seems divorced from real courts and real cases, consider the fact that the National Rifle Association and its lawyers have made the identical argument, invoking *Miller*, to urge courts to strike down the 1986 federal machine gun ban,[80] and the California law banning possession and sale of semi-automatic military assault weapons.[81]

If it is extremist and dangerous to admit to a generalized right to bear arms

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78. *Id.*

79. There is no basis for reading *Miller* to grant constitutional protection to any weapon with a military use. The issue in *Miller* turned on whether a sawed-off shotgun could be shown to have "some reasonable relationship to the preservation or efficiency of a well regulated militia." *Miller*, 307 U.S. at 178. Simply because the Court held that the absence of evidence suggesting a military utility for the gun precluded constitutional protection does not mean that such evidence would have been sufficient to confer constitutional protection. Because the Court was able to decide the case before it based on the nature of the weapon alone, it did not need to reach the further question whether the circumstances of the weapon's possession by the particular defendant may preclude a finding of its relationship to the well regulated militia. Nothing in *Miller* suggests that the Court would confer constitutional protection on weapons of obvious military utility -- such as machine guns -- insofar as they are possessed for reasons unconnected to service in an organized state militia.

80. In Farmer v. Higgins, 907 F.2d 1041 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 753 (1991), lawyers for the NRA's "Firearms Civil Rights Legal Defense Fund" represented a machine gun manufacturer seeking to overturn the 1986 federal law banning possession and sale of new machine guns. The Circuit Court rejected, without comment, the plaintiff's Second Amendment challenge to the law. Plaintiff's unsuccessful petition for certiorari to the Supreme Court argued that *Miller* grants constitutional protection to machine guns because of their military utility. *Farmer*, 907 F.2d 1041 (11th Cir. 1990), *petition for cert.* (No. 90-600) (Copy on file with author).

81. In Fresno Rifle & Pistol Club v. Van de Kamp, 746 F. Supp. 1415 (E.D. Cal. 1990), *appeal docketed*, No. 91-15466 (9th Cir. 1991), the NRA joined a suit charging that California's Roberti-Roos Assault Weapon Control Act violates the Second Amendment. The district court upheld the law. Plaintiffs' brief to the U.S. Court of Appeals for the Ninth Circuit relies on *Miller* for the proposition that all weapons with a conceivably military use are constitutionally protected. Brief for Appellants, *Fresno Rifle & Pistol Club*, (No. 91-15466) (Copy of brief on file with author). Levinson says that "[i]t is almost impossible to imagine that the judiciary would strike down a determination by Congress that the possession of assault weapons should be denied to private citizens." Levinson, *supra* note 11, at 655. Such a prospect would seem impossible only if the courts are unwilling to take seriously the very theory which Levinson believes to deserve consideration.

against the government, is it not equally troubling to deny any right on the part of the general population to rise up against tyranny? Are we really prepared to deny the individual the right to engage in armed resistance against an authoritarian government? Would we have denied the Jews in Nazi Germany the right to resist their government by force of arms? Levinson himself invokes the brutal suppression of Chinese students in Tianamen Square.[82] Regardless of whether access to assault rifles would have made a practical difference in the outcome of that confrontation, were we ready to deny such freedom-fighters the right to organize themselves as an armed force against the Chinese government?

Regardless of how we answer these questions, we must first understand that they are not questions of constitutional law. Indeed, the questions themselves presuppose the end of constitutional government. Whether the Chinese students had a right to bear arms against their government is not a question about what rights are granted by the United States Constitution. If there is a right to resist totalitarianism through violent resistance, its origin is *extra*-constitutional, whether it be some notion of "natural law" or "moral rights."

Nowhere is the natural right of all persons to resist tyranny more eloquently defended than in Jefferson's Declaration of Independence. To secure the right to "life, liberty and the pursuit of happiness," Jefferson wrote, "governments are instituted among men, deriving their just powers from the consent of the governed" and "whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it . . . ."

Jefferson, however, was not interpreting the Constitution; he was appealing to the natural right of persons to establish constitutional government. It is surely significant that his immortal call to revolution is not duplicated in the text of the Constitution. The constitutional authors realized that were this natural right to become a *constitutional* right, the constitutional system itself would be threatened. A constitutional right in our system is, by definition, a limitation on the power of the democratically elected majority. To the extent that the right to be armed against the government is a constitutional right, it must operate to restrain the power of that majority to prevent armed insurrection. Once democratic government is stripped of that power, it is stripped of the power to protect all of our other liberties. It is as true as it is ironic that, although a natural right to revolution may have been necessary to achieve constitutional government, it cannot be a principle of constitutional government.

In short, the existence of a constitutional right to use arms against tyranny would, itself, create the conditions for tyranny. As Dean Roscoe Pound wrote,

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82. Levinson, *supra* note 11, at 656.

"In the urban industrial society of today a general right to bear efficient arms so as to be enabled to resist oppression by the government would mean that gangs could exercise an extra-legal rule which would defeat the whole Bill of Rights."[83] This is the insurrectionist vision of America.

VI. FINAL THOUGHTS

Unlike the Declaration of Independence, our Constitution is not a charter for revolution; it is a charter for government. The Constitution establishes a system of democratic institutions and instructs us that, if the system is carefully protected, liberty will be ensured. It does not address the question of the individual's rights against tyranny because its only subject matter is the creation of democratic institutions to ensure against tyranny. One can believe in a natural right to resist tyranny by force of arms without conceding that a democratic government is powerless to prevent insurrection or to regulate privately-owned firearms.

As important as the gun control controversy is, there is far more at stake in the Second Amendment debate than whether a waiting period for handguns or a prohibition of assault weapons is constitutional. The insurrectionist theorists like Levinson have upped the ante. They are posing one of the fundamental questions of American government: 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.

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83. ROSCOE POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 91 (1957).