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"The Right to Bear Arms": Two Views

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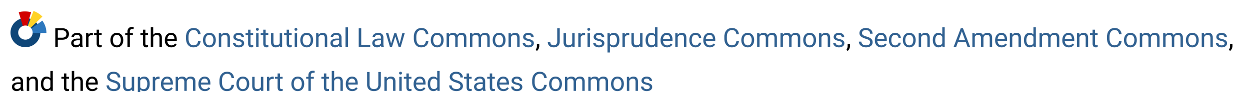

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"The Right to Bear Arms": Two Views

"If one considers the three most critical modes of interpretation of the Second Amendment — its language, its history and the intent of its founders, and its consistent interpretation by the courts — it is quite evident that the Second Amendment does not guarantee an individual's right to bear arms."

"The Bill of Rights was adopted to protect individual rights. The Second Amendment is no exception. It guarantees the individual right to keep and bear arms . . . The Supreme Court's rulings have always been consistent with this intent and this interpretation . . . "

By LEE FISHER
Attorney General,
State of Ohio

As Ohio's attorney general, I am frequently called upon to address certain controversial issues from both subjective policy and formal legal viewpoints. As the state's chief law enforcement officer, I have a vested interest in effective crime control measures.

Handgun control and, more specifically, the interpretation of the Second Amendment with regard to an individual's right to bear arms is certainly an area where my statutory legal responsibility and policy agenda merge. From a policy perspective, I support the right of law-abiding citizens to own a gun.

However, with regard to the interpretation of the Second Amendment, I firmly believe that there are few constitutional questions with such a clear-cut, definitive answer. If one considers the three most critical modes of interpretation of the Second Amendment – its language, its history and the intent of its founders, and its consistent interpretation by the courts – it is quite evident that the Second Amendment does not guarantee an *individual's* right to bear

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By DAVID C. TRYON
Porter, Wright, Morris & Arthur

The Bill of Rights was adopted to protect individual rights. The Second Amendment is no exception. It guarantees the individual right to keep and bear arms.

The framers considered this a pre-existing fundamental right, essential to our freedom. The Supreme Court's rulings have always been consistent with this intent and this interpretation. Unfortunately, some lower courts and the media have chosen to ignore both the intent of the framers and the Supreme Court's rulings and have claimed it preserves only some nebulous "collective" right belonging to everyone, but no one.

The right to bear arms has its roots in 12th century England. At that time all freemen not only had the *right* but also had the *duty* to own and possess arms. However, as with all other "rights" given to subjects of a monarchy, this right was periodically taken away and restored, depending on the disposition of the king.

Whatever the status of the right in England, the colonies clearly considered the right to bear arms an inalienable in-

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arms.

The Second Amendment reads: "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Most Americans are familiar with only part of its language, the abridged version emblazoned on the edifice of the National Rifle Association's Washington, D.C., headquarters: "The right of the people to keep and bear arms shall not be infringed." The conspicuous omission of the first 13 words of the amendment — the most important 13 contextually — speaks volumes.

It is precisely that language that expresses the purpose and the limit of the right to keep and bear arms. This right exists solely in its relation to the maintenance of a well regulated militia and is not a constitutional safeguard of an individual's right to keep and bear arms.

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A review of the historical context which led the framers of the Bill of Rights to adopt the Second Amendment in its present form provides compelling evidence regarding their intent.

Certain events that preceded the Revolutionary War — namely the indiscriminate use of British troops by King George III to collect taxes and "maintain order" in the colonies — left the colonists with a strong aversion to standing armies. Instead, they favored state militias, composed of ordinary citizens who would presumably be more responsive to the will of the people.

When the new Constitution was submitted to the states for ratification, the battle lines were drawn between the Federalists and the Anti-Federalists — the latter believing that a bill of rights was necessary to properly restrain the power of the central government.

The Second Amendment specifically addressed concerns articulated by individuals like George Mason at the Virginia ratification convention:

> "The militia may here be destroyed by that method which has been practiced in other parts of the world before; that is, by rendering them useless — by disarming them. Under various pretences, 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 . . ." 3 J. Elliot, "The Debates in the Several State Conventions of the Adoption of the Federal Constitution" (2d ed. 1836, at 379 [hereinafter cited as "Elliot's Debates"].

The Anti-Federalist concern, therefore, was that Congress might allow the state militias to die simply by failing to arm them.

The Virginia Convention proposed 20 amendments to the text of the Constitution, including that "each state respectively shall have the power to provide for organizing, arming and disciplining its own militias, wheresoever Congress shall omit or neglect to provide for the same." "Elliot's Debates," *supra*, at 663. There is no suggestion in the Virginia debates that the delegates were concerned with an individual's right to possess weapons outside the militia context.

In order to avoid a new Constitutional Convention that might reconsider the entire document, Federalist James Madison drafted a bill of rights for presentation at the First Congress. His draft of the provision that became the Second Amendment read:

> "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." E. Dumbauld, "The Bill of Rights and What It Means Today," 207 (1957) [hereinafter cited as "Dumbauld"].

Thus, the "right to keep and bear arms" was introduced into the language of the proposed amendment (it had been omitted from the Virginia Convention proposal) but *only* as part of a provision dealing with military matters.

There is no indication from the history of the Second Amendment that the founders were seeking a broad guarantee of the individual right to own firearms for any purpose. On the contrary, the expressed intention of the framers was to guarantee that state militias remained armed and viable, and the "right to keep and bear arms" must be understood as implementing that purpose.

The implication of this intention is that constitutionality of a statute regulating firearms should turn on whether the statute affects firearms in such a way as to adversely affect a state's ability to raise and maintain an armed "well regulated militia."

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The judicial interpretation of the Second Amendment has consistently reinforced this view of the framers' intent and the context in which the language was drafted.

With the exception of one 1902 ruling of the Idaho Supreme Court, **In re Brickey**, 70 P. 609 (1902), the courts have been unanimous in refusing to apply the Second Amendment to state regulation of firearms.

See, *e.g.*, **Quilici v. Village of Morton Grove**, 695 F.2d 261, 270 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983); **Application of Atkinson**, 291 N.W.2d 996, 398 n. 1 (Minn. 1980); **State v. Amos**, 343 So.2d 166, 168 (La. 1977); **Commonwealth v. Davis**, 343 N.E.2d 847, 850 (Mass. 1976); **Cases v. United States**, 131 F.2d 916, 921-22 (1st Cir. 1942), cert. denied, 319 U.S. 770 (1943).

In **United States v. Miller**, 307 U.S. 174 (1939), the

Supreme Court directly addressed the scope of the Second Amendment and its impact on federal gun laws. The issue was whether the National Firearms Act of 1934 violated the Second Amendment insofar as the statute barred the interstate transportation of an unregistered shotgun having a barrel length of less than 18 inches.

As noted previously, the court held that the amendment must be applied in light of its "obvious purpose" to assure the continuation of state militias. **Miller** at 178. The court upheld the statute because no showing had been made that private ownership of sawed-off shotguns had any relation to preservation of a well regulated militia. **Miller,** at 178.

Miller, however, is not the Supreme Court's last word on the subject.

In **Lewis v. United States,** 445 U.S. 55 (1980), the court upheld the federal statute barring convicted felons from possessing firearms against equal protection attack. Significantly, the court determined that the statute needed only a "rational basis" to survive constitutional attack because "[t]hese legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties." **Lewis,** at 65, n. 8 (emphasis added). **Miller** is cited in support of this proposition.

Following **Miller's** direction that a firearms statute is unconstitutional only if it adversely affects a state's ability to maintain a militia, the lower federal courts consistently have upheld laws regulating the private ownership of firearms. These cases reject the existence of a broad right to bear arms for purposes other than in a state militia.

See, *e.g.,* **Eckert v. City of Philadelphia,** 477 F.2d 610 (3d Cir. 1973) ("... the right to keep and bear arms is not a right given by the United States Constitution"); **United States v. Johnson,** 497 F.2d 548, 550 (4th Cir. 1974) (statute barring felons from transporting firearms in interstate commerce is constitutional because there is no evidence that it "...in any way affects the maintenance of a well regulated militia").

Of the modern federal court decisions, the most far-reaching is the Seventh Circuit's in **Morton Grove** in which the court upheld a local ban on the possession of handguns against a Second Amendment challenge, not only because the amendment does not apply to the state but also because "... the right to bear arms is inextricably connected to the preservation of a militia ... the right to keep and bear handguns is not guaranteed by the second amendment." **Morton Grove,** at 270.

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I am sure the debate about how best to keep guns out of the hands of criminals will continue for many years to come.

But those who rely on the Second Amendment as justification for an individual's right to bear arms are misconstruing the language, the intent of the framers, and judicial precedent regarding this amendment. •

Author's Note: Portions of this article were borrowed from "The Second Amendment: What It Really Means" by Sarah Brady and "The Right To Be Armed: A Constitutional Illusion" by Dennis A. Hengan with their permission.

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dividual right. (In fact, it was more firmly entrenched as a civil right than the right of free speech, which was frequently severely restricted if it did not comport with the majority opinion.)

As early as 1632, the Plymouth Colony not only allowed but required the inhabitants to each own a musket and ammunition therefor. In 1677, it required them to own the much more modern and effective flintlocks (while the English Army was still using the older matchlocks).

Other colonies had similar laws. In fact, in 1644, Massachusetts passed a law actually fining those who were not armed!

Throughout the 17th and 18th centuries, gun ownership and public carrying of firearms was a commonly accepted practice, even in the established cities which were no longer threatened by Indians and wild animals.

In fact, when British Government troops landed in the New England city of Boston, its citizens were enraged and proceeded to arm themselves to defend their liberties and properties from the soldiers. When some loyalists objected, other citizens pointed out that this was nothing more than an exercise of their rights as British subjects pursuant to the British Declaration of Rights.

Subsequently, in 1774 and 1775, the British conducted several raids on colony militia arsenals. These attempts to disarm American citizens were one of the causes of the American Revolution. Finally, one such raid resulted in a skirmish killing several colonists and many British soldiers — and thus began the American Revolution.

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After the Revolution, when several states began to discuss the Constitution, the framers rejected the British concept that British subjects had the rights which the parlia-

ment and the king gave them. Under the Constitution, the people had "inalienable rights" and the government had only the powers which the people gave it in the Constitution.

One of the reasons the Constitution was so controversial was because the states distrusted central governments supported by standing armies and *select* militias (such as the modern day National Guard). Therefore, they gave the government very limited powers for such military groups in the Constitution.

However, this was not enough for some who demanded a Bill of Rights containing guarantees of individual rights, including the right to bear arms, such as that contained in the English Declaration of Rights. This would prevent governmental oppression of the people and prevent the government from taking away other rights.

When New Hampshire cast the last vote adopting the Constitution in 1789, it included a recommendation for a Bill of Rights with this provision: "Congress shall never disarm any citizen unless such as are or have been in actual rebellion."

(Most states had already adopted their own Bill of Rights, the majority of which included the right to keep and bear arms. Pennsylvania's was the first, and it included "the right of the citizens to bear arms in defense of themselves and the State . . ." Ohio adopted the same provision in 1803.)

This view — that individuals had the right to bear arms, and that their bearing those arms was good for the country — seems to have been universal among the members of the First Continental Congress and other early patriots:

- **Richard Henry Lee:** "To preserve liberty, it is essential that the whole body of the people always possess arms."
- **Patrick Henry:** "The great object is that every man be armed."
- **Tench Cox** (a prominent Federalist): "Implements of war are the 'birthright of an American' . . ."
- **Thomas Jefferson:** "No free man shall ever be debarred the use of arms."
- **Alexander Hamilton:** "The best we can hope for concerning the people at large is that they be properly armed."
- **George Washington:** "[Firearms are] next in importance to the Constitution itself," they are the "American people's liberty teeth" and "they deserve a place of honor with all that's good."
- **William Blackstone** (legal commentator): "The right of having and using arms for self-preservation and defense" is a "liberty of Englishmen " (1803 commentary).

Indeed, none of them ever asserted the idea that the states or the military, rather than individual citizens, have the "right" to be armed.

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Congress reconvened to prepare a Bill of Rights, Madison prepared the initial draft of the Bill of Rights. His intent of its meaning was evidenced by his statement that "Americans have the right and advantage of being armed — unlike the citizens of other countries whose governments are afraid to trust the people with arms." While some amendments were heavily debated and others removed entirely, there was very little controversy on this amendment.

The two main debates on the wording were, first, to limit the right to use "for the common defense." This was rejected, indicating the right was personal and did not apply only to a *select* militia repulsing a foreign invader.

Second, there was a debate as to whether to include a clause preventing the government from forcing conscientious objectors to bear arms. That provision was also rejected.

(Consequently, the Second Congress enacted the Militia Act of 1792 which defined the Militia as all able-bodied free males, and *required them* to own firearms and ammunition to be used if they were called into action.)

As adopted, the Second Amendment consists of two concepts. First, the framers recognized that "A well regulated Militia" is "necessary to the security of a free State," and, without that, the state would not long remain secure or free. The militia referred to therein was not a select militia (such as the modern-day National Guard) but rather all able-bodied freemen who were to supply their own weapons.

Thus, the second element consisted of a guarantee of the right to keep and bear arms to at least all who constitute such a militia. In fact, it went further than the Fourth Amendment (which allows *reasonable* searches) and prohibited *any infringement* on the right to keep and bear arms.

But if a state fails to maintain a well regulated militia, that does not destroy the right; it only means that the security of that state may be in jeopardy. The *right* which was guaranteed and which "shall not be infringed" is the right of the people (not the state or a *select* militia) to "keep and bear arms." If it is infringed, a well regulated militia cannot be maintained and the security of the free state may be in danger.

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The early judicial discussions of the right to bear arms are consistent with the intent behind the Second Amendment.

- Kentucky's high court voided a concealed weapon statute as conflicting with Kentucky's Bill of Rights provision "that the right of the citizens to bear arms in defense of themselves and the state shall not be questioned." **Bliss v. Commonwealth,** 12 Ky. 90 (1822).
- The Louisiana high court stated that the "right to carry arms . . . is a right guaranteed by the Constitution of the United States . . ." **State v. Chandler,** 5 La. App. 489, 52 Am. Dec. 599 (1850).
- The Alabama Supreme Court determined that the Alabama Constitution protected the individual's "right to bear arms in defense of himself and the state" but allowed the Legislature to regulate "the manner in which arms shall be borne." **State v. Reid,** 1 Ala. 612 (1840).

• In 1846, the Georgia Supreme Court recognized the right to bear arms as a fundamental inalienable right. While it recognized that the U.S. Bill of Rights did not restrict state action (**Barron v. Baltimore,** 32 U.S. 243 (1833)), it struck down a handgun ban based on that right, which it determined existed with or without the U.S. Constitution. **Nunn v. State,** 1 Ga. 243 (1846).

Thus, the earliest interpretations considered it an individual right.

The first U.S. Supreme Court comment on the Second Amendment was in 1857. The court clearly stated (albeit in dicta) that individual citizens had the right to "keep and carry arms wherever they went." **Dred Scott v. Sanford,** 60 U.S. (19 How.) 393 (1857).

The first Supreme Court case actually ruling on the Second Amendment was **U.S. v. Cruikshank,** 92 U.S. 542 (1876). The court stated that the First and Second Amendments restricted only *federal* action; but those rights were not *created* by the Bill of Rights but existed prior to the adoption thereof:

> "The right there [Second Amendment] specified is that of 'bearing arms for lawful purpose'. This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." 92 U.S. at 553.

This case was followed in 1886 by a criminal prosecution of a group of civilians 'parading with arms' as a military company. (**Presser v. Illinois,** 116 U.S. 252 (1886).) The 14th Amendment still hadn't been interpreted to extend the Bill of Rights to state action, and therefore the court found the state law did not conflict with the Second Amendment. In dicta the court made clear its views as to the meaning of the Second Amendment:

> "It is undoubtedly true that all citizens capable of bearing arms constitute the reserve military force or reserve militia of the United States as well as of the states; and ... [therefore] *the states cannot,* even laying the constitutional provision in question out of view, *prohibit the people from keeping and bearing arms,* so as to deprive the United States of their rightful resource while maintaining the public security, and disable the people from performing their duty to the general government." (Emphasis added.) 116 U.S. at 265.

Eight years later, the court suggested that the 14th Amendment might make the Second Amendment applicable to state action but declined to so hold since the defendant had failed to raise that issue in the trial court. **Miller v. Texas,** 153 U.S. 536 (1894). (It wasn't until 1897 that the court determined that the 14th Amendment applies certain aspects of the Bill of Rights to state action. Since then, the court hasn't reviewed any cases involving state action infringing on the right to bear arms.)

Then, in 1939, the court faced the meaning of the Second Amendment squarely and formulated a test. Jack Miller was convicted for violation of the National Firearms Act (thus the 14th Amendment was not involved) by virtue of his possession of a sawed-off shotgun. The court stated:

> "In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel less than 18 inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. **Aymett v. State,** 2 Humph. 154, 158." **U.S. v. Miller,** 307 U.S. 174 at 178.

Thus, if a "weapon" is a "militia arm," the Second Amendment guarantees individuals the right to keep and bear such weapon. (Note that **Aymett** stood for the proposition that individual citizens could possess ordinary military weapons.) Had the court believed this to be a collective right rather than an individual one, it would have ignored the issue of the militia usage of the firearms and would have simply stated that Miller had no right to own *any* gun.

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To this point, the federal courts had followed the clear intent of the framers. However, some lower courts soon began to rebel from the original intent and from the holdings of the Supreme Court.

In 1942, the First Circuit interpreted **Miller** to mean that the Second Amendment guarantees individuals the right to bear any 'arms' which can be used by a militia. The court then refused to follow the Supreme Court's test (and so stated) because of the broad range of 'arms' that would be included. Instead, the court required that the 'arms' be in actual use by a militia to gain Second Amendment protection. **Cases v. United States,** 131 F.2d 916, cert. den. 319 U.S. 770 (1st Cir. 1942), rehearing den. 324 U.S. 889 (1945).

In the same year, the Third Circuit invented the "collectivist" theory. **U.S. v. Tot,** 131 F.2d 261 (3d Cir. 1942) rev'd on other grounds 319 U.S. 463 (1943). The court held that

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the right to bear arms is not absolute and therefore felons, maniacs, and children could be prohibited from possession of firearms. While it is true that no rights are absolute, the court then made a monumental leap in logic, misquoted **Miller**, and declared (in dicta and without much analysis) that the Second Amendment did not protect individual rights, only states' rights to maintain a militia organization. The court also adopted the requirement from **Miller** that the 'arms' protected must be related to a 'well regulated militia.'

Thus, one circuit recognized the **Miller** test but refused to follow it, and another mischaracterized it and created its own law.

Since then, most circuit courts facing the issue (usually in connection with a convicted felon owning a firearm and represented by inadequate legal counsel, if any) have continued to ignore the **Miller** test and adopted the **Tot** dicta, holding the Second Amendment inapplicable to individuals.

Some courts and commentators have suggested that this interpretation is mandated by the clause "the right of the *people,*" claiming that "people" means the states. However, the Supreme Court specifically stated in **U.S. v. Verdugo-Urquidez,** 110 S.Ct. 1839 494 ______ (1990), that "people," as used in the Second Amendment, means individual citizens. (Note also that when the framers meant to protect *states* rights, they used the word "states"; to protect individual rights they used the word "people." See Amendment X.)

Others have suggested that the Second Amendment applies only to states because of the initial reference to the militia. They argue that the militia is the National Guard, and the Second Amendment only guarantees to the states the right to arm the National Guard.

However, the Supreme Court made it clear in **Miller** that the "militia" constitutes all male citizens, not just those enrolled in a branch of the military. More recently, the Supreme Court held that the National Guard is under the control of the Federal Government, not the states. **Perpich v. Department of Defense,** 110 S.Ct. 2418, 498 U.S. ______ (1990).

Therefore, the National Guard is not in a position to fulfill the purpose of protecting the individual states either from federal or foreign aggression, especially when the federal government sends them abroad for training or combat. (Note also that the plaintiff governors in **Perpich** did not claim that the Second Amendment protected the states' interest in the National Guard.)

This effectively overrules **U.S. v. Tot** and its progeny which claim that the Second Amendment protects state militia organizations from encroachment of federal power.

Thus, the Supreme Court has ruled against the underlying arguments for the "collectivist" theory, leaving the "individual" interpretation and the **Miller** test intact. (Note that **Lewis v. U.S.,** 445 U.S. 55, 65 Fn. 8 (1980), appears to endorse the **Miller** test.)

History makes clear that when the framers of the Bill of Rights referred to the militia in the Second Amendment they meant all able-bodied men. Congress (see 10 U.S.C. Sec. 311) and the Supreme Court (see **Presser, Miller,** and **Perpich**) have continued to endorse that interpretation. While such a force might not be suitable for some military actions, it can be, and has been, used for its intended purpose — protection of the individual states from aggression, both foreign and domestic (such as during World War II, the Civil War, and the Spanish-American War).

While the need for such a militia may not be obvious now, no one knows what the future may bring. The Bill of Rights is meant to protect rights for the future as well as the present.

Nevertheless, similar modern-day usage does exist. Local groups banding together to protect their neighborhoods are essentially modern-day militias, and self-defense efforts also fall within that general concept.

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In view of current Second Amendment Jurisprudence, what "gun control" laws would be constitutional?

Clearly, the government can (and does) prevent felons, children, and mentally disabled individuals from possessing firearms. The Supreme Court has upheld laws registering owners of machine guns. Laws highly regulating possession of explosives and banning possession of bazookas, hand grenades, tanks, howitzers, etc., remain unchallenged and

are probably constitutional.

However, laws banning semi-automatic firearms (carrying the misnomer "assault weapons") clearly violate the **Miller** test. Morgan, "Assault Rifle Legislation: Unwise and Unconstitutional," 17 Am. J. of Crim. Law 143 (Winter 1990). Claims that these firearms are not used for hunting or sporting purposes are irrelevant to the constitutional issues. Waiting periods, whether or not desirable, may well also be deficient (a waiting period on the exercise of a constitutional right is invalid. **Akron v. Akron Center for Reproductive Health,** 462 U.S. 416 (1983)). Thus, much of the current push for "gun control" may need to be refocused on "crime-control."

Like the Third Amendment and the Tenth Amendment, the importance of the Second Amendment is often disparaged by some as having no modern-day relevance. However, 87 percent of Americans believe, and most published law review articles argue, that the Second Amendment guarantees individuals the right to bear arms. ("Decision Making Information, Attitudes of the American Electorate Toward Gun Control" (1978)). The history of the Second Amendment and Supreme Court interpretations thereof support that belief.

Those who argue that it gives no such right must now show how the "collectivist" interpretation squares with the recent Supreme Court holdings in **U.S. v. Verdugo-Urquidez** and **Perpich v. Department of Defense.**

If society deems the **Miller** test too broad, or gun possession too dangerous for individuals, the issues should be given full debate in an attempt to revise or repeal the Second Amendment. Until then, the right to bear arms remains a viable, fundamental, and inalienable right guaranteed by the Constitution and relied upon by millions of Americans.

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Author's Note: For further reading on the subject see:

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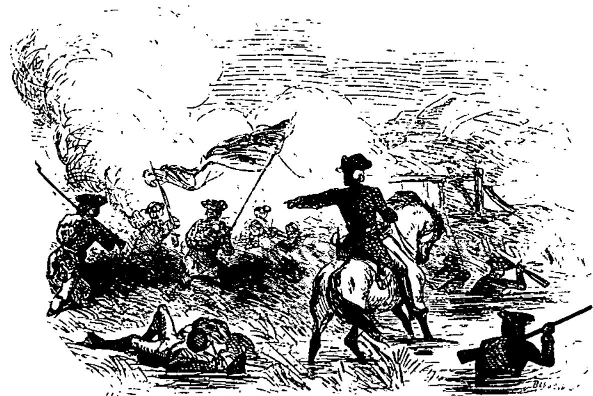

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