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The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?

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THE SECOND AMENDMENT IN THE TWENTIETH CENTURY: HAVE YOU SEEN YOUR MILITIA LATELY?

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I. INTRODUCTION

> 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]

In September of 1989, William Bennett, the Bush Administration's Drug Czar who earlier had single-handedly brought about a ban on the importation of semi-automatic assault rifles, was asked during a Congressional hearing whether he would recommend a ban on the domestic manufacture and distribution of assault weapons.[2] He responded in the negative, stating that such action would create "serious constitutional problems."[3]

The specter of the second amendment was thereby raised yet again as an impediment to stronger gun laws. The argument is not that Congress *should* not, as a matter of policy, enact such laws; rather, it is that Congress *cannot* do so because the hands of our elected representatives are tied by the Bill of Rights. Thus, the National Rifle Association has testified against a national seven day waiting period for handgun sales because it would require citizens "to ask police for permission to exercise a constitutional right."[4]

The argument that the constitution is a barrier to stronger gun laws has received support in recent years from articles appearing in various legal publications which conclude that the second amendment guarantees a broad, individual right to own firearms for lawful private purposes in the same way that the first amendment guarantees individual rights of free speech, religion, and assembly.[5] These articles, relying primarily on historical analyses of the origins of the second amendment, generally have asserted either that the "militia" clause of the amendment does not function to limit the "right to keep and bear arms," or that the "militia" concept itself expresses the right of the

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1. U.S. CONST. amend II.

2. *Hearings of the Senate Comm. on the Judiciary on Drugs and Drug Abuse*, 101st Cong., 1st Sess. (1989) [hereinafter *Judiciary Hearings*] (testimony of William Bennett).

3. *Id.*

4. *S. 1236-Brady Handgun Violence Prevention Act, Hearings Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 101st Cong., 1st Sess. (1989) [hereinafter *Constitution Hearings*] (testimony of James Jay Baker, NRA Director of Federal Affairs).

5. *See, e.g.*, Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31 (1976); Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65 (1983); Gardiner, *To Preserve Liberty—A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63 (1982); Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559 (1986); Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987).

citizenry at large to be armed.[6] One recent writer has suggested that the second amendment may be "profoundly embarrassing" to persons who support the regulation of private ownership of firearms, while maintaining their allegiance to the Bill of Rights generally.[7]

The thesis of this article is that supporters of government regulation of private firearms have no reason to be "embarrassed" by the second amendment. Not only does the amendment erect no real barrier to federal or state laws affecting firearms, but the best evidence of this is found in the amendment's historical origins.

Section II of this discussion reviews the historical material bearing on the original intent of the Framers. This historical analysis reveals that the purpose of the second amendment was to assure the states that, under the constitution, they would retain the right to maintain an effective, organized, citizen-based militia. There is no evidence that the Framers discussed, much less intended, that the amendment provide a guarantee to individuals of a right to be armed for purposes unrelated to militia service. Section I also demonstrates that because of historical changes in the state militia system since colonial times, federal regulation of private firearms ownership poses no threat to the state militia today, and therefore raises no serious constitutional issue. Furthermore, the second amendment poses no obstacle to any state or local gun control legislation. The second amendment was intended only as a restraint on the *federal* government—not as a restraint on the states.

Section III of this article, a review of how the courts have treated the second amendment, finds that the judiciary has consistently interpreted the amendment exactly as described in Section II. The courts have repeatedly held to the original intent of the Framers, stressing the "militia" aspect of the amendment and rejecting the idea that the amendment created a broad individual right to firearms.

II. HISTORICAL ANALYSIS OF THE SECOND AMENDMENT

A. English Historical Background

1. The Common Law

A central thesis of opponents of strong firearms regulations is that the old common law of England supports a fundamental, personal right to be armed.[8] There is no dispute that the common law of England was in large part adopted by the American colonies, or that it was at least

6. *See* Dowlut, *supra* note 5, at 90; Gardiner, *supra* note 5, at 75; Hardy, *supra* note 5, at 602; Kates, *supra* note 5, at 213; Lund, *supra* note 5, at 106–07.

7. Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989).

8. *See* Caplan, *supra* note 5, at 32–36; Caplan, *Handgun Control: A Reply to Mayor Jackson*, 10 N.C. CENT. L.J. 53, 54 (1978).

highly influential.[9] Numerous commentators have confirmed this transportation of common law rights and liberties across the Atlantic.[10] It is highly doubtful, however, that an absolute right to have arms was one of those rights or liberties. The predominant, and better view, is that there was no such common law right.[11]

Those asserting the existence of the right inevitably begin their argument with the "Assize of Arms," a decree issued by Henry II in 1181, which stated that every freeman must keep arms suited to his station in life, in order to aid in the defense of the kingdom.[12] Then, in 1285, Edward I passed the Statute of Winchester, which specified the military obligations of English freemen.[13] These laws marked the beginning of the militia system, as they required that every freeman not only have arms, but also that he train periodically and be prepared to bring his own weapons if called upon to defend the country.[14]

The possession of arms, however, was regulated from early times. In 1328, the Statute of Northhampton[15] was passed, and it is commonly cited as proof that a common law right to "keep and bear arms" never existed.[16] The statute provided that no man should "go nor ride armed by night or by day, in Fairs, Markets, nor in the presence of Justices or other Ministers, nor in no part elsewhere."[17]

Several other laws further undercut the claim that such a common law right existed. First, James I repealed the Statute of Winchester in 1603,[18] thus eliminating the special obligations to possess arms, and simultaneously enacted a requirement that magazines of arms and provisions should be collected in one place in each county.[19] More signifi-

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9. Evidence of this can be found in numerous places, including the Declaration of Resolves of the First Continental Congress and the various state constitutions and declarations of the 1770s and 1780s. For example, the Maryland Declaration of Rights of 1776 specifically states in Article III that "the inhabitants of Maryland are entitled to the common law of England." 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 217, 280 (1971).

10. *See, e.g.*, RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 4 (1955); *see also* FRIEDMAN, A HISTORY OF AMERICAN LAW (1973).

11. United States v. Tot, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 462 (1943); Commonwealth v. Davis, 369 Mass. 886, 343 N.E.2d 847 (1976); Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 475–76 (1915); Note, *Constitutional Limitations on Firearm Regulation*, 1969 DUKE L.J. 773, 794–98 (1969).

12. *See The Assize of Arms*, in 2 ENGLISH HISTORICAL DOCUMENTS 416 (Douglas ed. 1953); Weatherup, *Standing Armies and Armed Citizens: A Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 964 (1975).

13. SCHWOERR, NO STANDING ARMIES 14 (1974).

14. *Id.* at 25–28.

15. Statute of Northhampton, 1938, 2 Edw. 3, ch. 3.

16. Weatherup, *supra* note 12, at 965.

17. 2 Edw. 3, ch. 3.

18. Statute of Winchester, 1603, 1 Jac. 1, ch. 25.

19. 4 TRAILL, SOCIAL ENGLAND 42 (1895).

cant, a law passed under Charles II in 1670 restricted the class of persons who could even possess arms.[20] The law provided that only noblemen and those who owned lands worth 100 pounds could keep guns.[21]

Even the famous English Bill of Rights of 1689 clearly established that the right to have guns could be regulated by the government. It provided that "the subjects which are Protestants, may have arms for their defense suitable to their conditions and as allowed by law."[22]

As shown above, the law at the time greatly circumscribed who could possess arms.[23] In addition, as discussed in detail below,[24] there is little historical support for the idea that the English Bill of Rights was attempting to ensure some absolute right of individuals to have arms. Instead, the focus of this section of the Bill of Rights was a conflict between Protestants and Catholics over respective roles in the militia and the army.

Furthermore, the English have not hesitated since 1689 to pass heavily restrictive gun control laws. Indeed, the British have gone far beyond the Americans in limiting access to firearms, despite the supposed "common law right" to have guns.[25] Thus, "to whatever extent we look to the English experience for the source of our right to 'keep and bear arms' as a constitutional principle, we must also see that some people had long established a measure of control on the 'right' to weapons."[26]

Finally, Blackstone is frequently cited to support the theory that there was a broad common law right in England to bear arms. For

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20. 1670, 22 Car. 2, ch. 25, § 3.

21. *Id.*

22. 1 B. SCHWARTZ, *supra* note 9, at 43.

23. Opponents of strong gun laws have asserted that there is a difference between simply possessing arms and publicly "bearing" them. *See* Caplan, *supra* note 5, at 54; Dowlut, *supra* note 5, at 66. They argue that laws such as the Statute of Northhampton might prohibit the public bearing of arms, but that the right to keep them is unqualified. However, this argument ignores the fact that the 1670 law restricts the class of persons who were entitled to keep guns.

24. *See infra* notes 51–64 and accompanying text.

25. *See, e.g.*, The Firearms Act, 1937, 1 Edw. 8 & 1 Geo. 6, ch. 12; The Firearms Act, 1920, 10 & 11 Geo. 5, ch. 43; The Pistols Act, 1903, 3 Edw. 7, ch. 18; The Gun License Act, 1870, 33 & 34 Vict. ch. 57. The 1937 Act prohibits the purchase or possession of firearms or ammunition by ordinary citizens unless the individual has been issued a firearm certificate by the local chief of police. Such certificates may only be granted for compelling reasons, and may be revoked at any time. Furthermore, the Act provides that all firearms manufacturers and dealers must be registered, and can only sell to citizens who have obtained a police certificate. And, all firearms transactions must be registered. 1 Edw. 8 & 1 Geo. 6, ch. 12. For a detailed discussion of the 1920 Firearms Act, see Brabner-Smith, *Firearm Regulation*, 1 LAW & CONTEMP. PROBS. 400, 403 (1934).

26. Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U.L. REV. 53, 63 (1966).

example, one commentator states that Blackstone listed the right of having and using arms for self-preservation and defense among the "absolute rights of individuals."[27]

This statement, however, badly distorts what Blackstone said in his *Commentaries on the Laws of England.* Although Blackstone included the right of having arms in his chapter on absolute rights, the right of having arms is *not* listed among the absolute rights, but instead among the lesser *auxiliary* rights.[28] More importantly, Blackstone qualified the right by stating it in the following terms: "the fifth and last auxiliary right . . . is that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute, 1 W. & M. st. 2 c.2."[29]

The statute noted by Blackstone is the English Bill of Rights of 1689.[30] As discussed above, the "right" listed in the English Bill is not absolute.

2. The Militia and the Army

Beginning with the Assize of Arms in 1181, the militia system was the dominant military force in England, and remained so until the mid-1600s.[31] There simply had been no real standing army in England until that time.[32] The Assize of Arms and the Statute of Winchester had translated into law the customary obligations of each freeman between fifteen and sixty years-old to help defend his country.[33] The militia system had worked quite effectively, defeating the professional armies of Europe on numerous occasions.

With the rise of the Stuart kings during the 1600s, the conflict between the absolutist, divine right theories of the kings and the republican tendencies of Parliament and the citizens' was often over the proper roles of standing armies and the militia.[34] The 1600s were marked by the assertion of vast royal powers by the king, together with the use of large standing armies to enforce the crown's dictates.[35] The

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27. Caplan, *supra* note 5, at 39; *see also* Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments,* 4 GEO. MASON U. L. Rev. 1, 7 (1981).

28. 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 139 (1979).

29. *Id.*

30. The English Bill of Rights of 1689, 1689, 1 W. & M. 2, ch. 2.

31. *See generally,* Weatherup, *Standing Armies and Armed Citizens: A Historical Analysis of the Second amendment,* 2 HASTINGS CONST. L.Q. 961, 964-69 (1975).

32. *Id.* For purposes of this article, the terms "army" or "standing army" refer to a professional army consisting of full-time soldiers. The term "militia" refers to a military or police force drawn from the citizenry at large, and called upon only as needed to meet specific emergency events.

33. *Id.* at 964.

34. D. WILLSON, A HISTORY OF ENGLAND 385–441 (1967).

35. *Id.*

kings of the 1600s felt that the militia was not a fully competent military body, and often took little interest in mustering and training the militia.[36] Instead, these kings focused on strengthening the army.

The English people, however, had come to view the militia, composed of common citizens, as the proper form of defense of a free country.[37] A standing army was seen as a sign of tyranny, a tool used by an absolutist ruler.[38] The standing army was disfavored for other, more practical reasons: the cost was enormous,[39] resulting in higher taxes;[40] soldiers were often quartered in private homes;[41] and soldiers tended to be ruffians and troublemakers, wreaking havoc when they came into contact with the citizenry.[42]

In the struggle for supremacy between the King and Parliament, the fight for control over the militia—the key to military power in the country—was crucial. The King had traditionally exercised this control, but in the early 1640s, Parliament attempted to take it away.[43] Civil war broke out in the 1640s, and by 1645, Oliver Cromwell had formed a massive army and used it to seize power.[44] His army was even larger than that of Charles I in the 1620s, and Cromwell assumed the role of a military dictator, overpowering Parliament.[45]

This period of military rule intensified the English people's distrust and hatred of standing armies. After Charles II took the throne in 1660, the army was disbanded and the militia system was fully restored. The King, however, retained command of the militia,[46] and he gradually began increasing the size of the militia until it reached 16,000 men by 1685.[47] Charles claimed he needed the militia for his foreign wars, but Parliament became uneasy, particularly as Catholics began trickling into the army.

In 1685, James II ascended to the throne. Almost immediately, he increased he size of the army, until it reached 30,000. Simultaneously,

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36. 1 MACAULAY, HISTORY OF ENGLAND 268 (1980).

37. *Id.* at 269; *see also* SCHWOERR, *supra* note 13, at 17.

38. MACAULAY, *supra* note 36, at 268–70; 1 W. STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND 470–71, 633–35 (6th ed. 1873); 2 W. STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND 290–94 (4th ed. 1896).

39. MACAULAY, *supra* note 36, at 268.

40. *Id.*

41. *Id.* at 268–69.

42. 1 W. STUBBS, *supra* note 38, at 470–71.

43. *Id.*

44. *Id.; see also* Weatherup, *supra* note 33, at 968–69.

45. D. WILLSON *supra* note 34, at 385–91. The soldiers supported Cromwell largely because Parliament proposed to disband the army, thus depriving them of their livelihood.

46. *Id.;* First Militia Act, 1661, 13 Car. 2, ch. 6; *see also* Second Militia Act, 1662, 14 Car. 2, ch. 3.

47. Weatherup, *supra* note 33, at 970.

James II asked Parliament to abandon completely the militia in favor of a standing army claiming that the militia system was too inefficient to rely upon.[48] Worst of all, James actively fostered Catholicism by rapidly replacing Protestant army officers and soldiers with Catholics, in clear contravention of the Test Acts.[49] From 1686–88, as the army grew to 53,000, it became a highly visible and irritating symbol of the monarch's power and his Catholic bent, and it created widespread fear among Parliament, the gentry, and the common citizens.[50]

3. The English Bill of Rights

In 1688, the country revolted at James' political and religious programs. As a result, James II fled. Parliament drafted a declaration—the Bill of Rights—which embodied its understanding of the proper relationship between the Parliament, the King, and the people.[51] The Bill also listed fundamental grievances and rights.

The English Bill of Rights is commonly viewed as one of the predecessors of the American Bill of Rights.[52] The Bill reads in part:

> Whereas the late King James II did endeavor to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom by . . . raising and keeping a standing army within this kingdom without the consent of Parliament and quartering soldiers contrary to law, by causing several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law . . . and . . . [therefore] for the vindicating and asserting [our] ancient rights and liberties . . .[we] declare . . . that the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against the law; that the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law.[53]

The opponents of gun regulation commonly claim that Parliament was asserting the absolute right of English citizens to carry arms.[54] Some commentators state that James II "disarmed" the Protestants, and that the right to bear arms was inserted to ensure that a tyrannical

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48. *Id.* at 971. SCHWOERR, supra note 13, at 146. These words would be echoed a century later as the Framers of the United States Constitution debated the merits of a professional army versus a militia.

49. *Id.; see also* The Test Act of 1678, 1678, 30 Car. 2, ch. 2; The Test Act of 1673, 1673, 25 Car. 2, ch. 2.

50. *See* Weatherup, *supra* note 33, at 971.

51. Bill of Rights, 1688, 1 W. & M. 2, ch. 2; *see also* Weatherup, *supra* note 33, at 974.

52. *See* Halbrook, *supra* note 27, at 7.

53. 1 B. SCHWARTZ, *supra* note 9, at 42–43.

54. *See* Caplan, *supra* note 5, at 34; Halbrook, *supra* note 27, at 7.

monarch would never again be able to render the citizenry helpless.[55]

Although the Bill of Rights itself states that James II had "disarmed Protestants," it is not clear that James II took arms away from the Protestants. What this phrase was intended to mean is unclear.[56]

Several commentators have argued that the English Bill of Rights language does not mean that James disarmed the Protestants in any literal sense, but instead referred to his practice of replacing Protestants with Catholics at important military posts and his desire to abandon the militia in favor of a standing army.[57] These actions "disarmed" Protestants in the sense that Protestants were excluded from participation and influence in the military. The failure to utilize the militia was crucial to the Protestants because it was the one organized force that could resist James II's Catholic standing army.

Other commentators have stated that Parliament was not establishing an absolute right to bear arms, but was responding to the discriminatory handling of the military.[58] Catholics were being given numerous military posts, while Protestants were being pushed aside in their army and militia duties. The complaint was not that James II was violating a "right to bear arms," but that he was restricting arms in a discriminatory manner.[59]

Still other writers have argued that Parliament was not claiming for the people some absolute, individual right of self-defense, but instead the right of Protestants to rise up as a body to defend their rights as citizens.[60] The Bill was set out to assert the right of the Protestants to protect themselves from persecution by their Catholic enemies.

Regardless of the validity of any of these particular interpretations, any claim that the English Bill of Rights established an absolute, individual right to bear arms is completely undercut by the qualification placed on the right: "suitable to their conditions, and as allowed by law."[61] These words show that arms-carrying is subject to governmental regulation. Indeed, such regulation existed at the time of the Bill of Rights[62] and has occurred frequently in England since 1689.[63]

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55. Halbrook, *supra* note 27, at 7.

56. One commentator claims that there is, in fact, historical evidence that James II literally took weapons away from Protestants. Kates, *supra* note 5, at 236.

57. *See* Weatherup, *supra* note 12 at 971–73.

58. *See* Feller & Gotting, *The Second Amendment: A Second Look*, 61 NW. U.L. REV. 46 (1966); Rohner, *supra* note 26, at 63.

59. Feller & Gotting, *supra* note 58, at 48–49.

60. *Id.; see also* Note, *supra* note 11, at 795 n.78.

61. *See* Feller & Gotting, *supra* note 58, at 48.

62. *See supra* text accompanying notes 18–21.

63. *See supra* note 25 and accompanying text; *see also* Burton v. Sills, 53 N.J. 86, 96, 248 A.2d 521, 526 (1968) *appeal dismissed*, 394 U.S. 812 (1969) (citing the English Bill of Rights as

The English Bill of Rights had a strong influence upon the American colonists, and it is unfortunate that the meaning of the "right of Protestants to have arms" is so unsettled. The historical evidence does not suggest, however, that the English Bill of Rights established an individual right to use arms for any lawful purpose.[64] In light of the historical context of the Bill, and the absence of a broad common law right to carry arms before 1688, the most supportable interpretation is that the Bill constituted a restatement of the preference for militias over standing armies, and of the rights of Protestants to participate as military members.

B. The Colonial Experience

English law traditions and political thinking were passed on to the American colonists. A part of this carryover included the preference for a militia system and the dislike of standing armies.[65] Events in England in the seventeenth century had fostered the belief that standing armies went hand-in-hand with oppressive government, and that a militia was the proper defense for a free state.[66]

When George III sent British troops to America in the 1760s, they were the first professional troops to be stationed in the colonies.[67] As George III and Parliament began imposing the burdensome taxes and laws which would eventually lead to the American Revolution, the King sought to compel obedience to his dictates by means of the army.[68] The colonists found the presence of these troops during peacetime disturbing and were outraged by the use of these troops to enforce George III's oppressive laws.[69]

Numerous objections sprang from the use of a standing army and

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support for the view that the common law did not recognize any absolute right to keep or bear arms).

64. *See* Rohner, *supra* note 26, at 59.

65. Until the Revolutionary War, the American colonists never had a standing army. Instead, by the 1760's, each colony had adopted a militia law modeled on the English system. The laws required that every male of military age (either 18–45 or 18–60) be enrolled in service and provide and keep at his own expense specified arms and equipment. Training usually took up four to eight days each year, and attendance was enforced by heavy fines. W. RIKER, SOLDIERS OF THE STATES: THE ROLE OF THE NATIONAL GUARD IN AMERICAN DEMOCRACY 11–12 (1957).

66. Rohner, *supra* note 26, at 56–57. Other, more practical reasons made the militia system appealing to the colonies. The colonies were very short of revenue and did not want to pay for an expensive professional army. In addition, frontier life and the need for self-sufficiency created a climate in which almost everyone had guns, whether to hunt food or to fight off bandits and Indians. The populace was already well trained in the use of weapons and generally had their own, making the militia much cheaper and more effective. Note, *supra* note 11, at 796.

67. Feller & Gotting, *supra* note 58, at 49–50.

68. Rohner, *supra* note 26, at 56 n.18.

69. Feller & Gotting, *supra* note 58, at 50; *see also* THE COMPLETE JEFFERSON 23 (1943); 1 B. SCHWARTZ, *supra* note 9, at 217.

military rule: the quartering of troops in private homes; the court-martialing of citizens; the independence and superiority of military power over civil power; and the seizure by British troops of colonial militia arms and ammunition.[70] The tactic of disarming the militia, in fact, led directly to the first real battle of the Revolutionary War, when British troops attempted to seize militia arms stored in Lexington in 1775.[71]

The colonists' English heritage had taught them that standing armies were the instruments of tyranny and were acceptable only under extraordinary circumstances; the *militia* was the proper body to provide for the defense and safety of the people in a free society. As the Revolutionary War grew near, the actions of George III simply reinforced this view.[72]

C. *State Declarations and Constitutions Prior to 1787*

As war with England started, the colonies held conventions in order to establish new state governments. State constitutions were drawn in twelve colonies.[73] Eight of these included a Bill or Declaration of Rights as a part of the constitution, while the other three contained textual guarantees.[74] The Declarations were aimed at restricting governmental power in the same way that the English Bill of Rights restricted the King and Parliament.[75]

These state constitutions, adopted before the federal Constitution of 1787, had an important influence on both the 1787 Constitution and the federal Bill of Rights.[76] This is evident from a comparison of the language in each.[77]

Each of the original twelve state constitutions discussed some as-

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70. THE COMPLETE JEFFERSON, *supra* note 69, at 23.

71. Rohner, *supra* note 26, at 56.

72. The colonists' dismay with George III's army is reflected in the Declaration of Independence, where one of the grievances listed is that George III "has kept among us, in time of peace, standing armies, without the consent of our legislatures . . . [and] is at this time transporting large armies . . . to complete the works of death, desolation, and tyranny." *See* 1 B. SCHWARTZ, supra note 9, at 251, 253 ("keeping a standing army in these colonies, in times of peace, without the consent of the legislature of that colony . . . is against the law."). In addition, the colonists reasoned that they were entitled to the same rights as Englishmen, and since the English Bill of Rights provided that no standing army could be maintained without Parliament's consent, they reasoned that no standing army should be maintained in America without the consent of the colonial legislatures. Feller & Gotting, *supra* note 58, at 49–51. George III, of course dismissed this point, asserting that the colonies were under his absolute rule. *Id.*

73. 1 B. SCHWARTZ, *supra* note 9, at 251.

74. *Id.*

75. *See supra* notes 51–64 and accompanying text.

76. 1 B. SCHWARTZ, *supra* note 9, at 231.

77. Unfortunately, records of the state conventions consist mostly of "unrevealing formal entries," and it is virtually impossible to learn anything about the discussions or intentions of the drafters. *Id.* at 232.

pect of the military. Four included a right to bear arms,[78] though only one provided for a right to keep arms. Several state Declarations stressed, among other things, the role of a militia as the proper and safest defense of a free state; the dislike of a standing army; and that the military power should be subordinate to the civil power.[79]

The Virginia Declaration of Rights,[80] adopted as a part of the Virginia Constitution in June 1776,[81] was the most influential of the Declarations.[82] There were several reasons. Most importantly, the Virginia Declaration of Rights was the first one adopted, and it served as a model for the other states, many of which used Virginia's language verbatim.

The influence of the Virginia Declaration of Rights on the eventual federal Bill of Rights is apparent in other respects. Though George Mason drafted almost the entire Virginia Declaration of Rights, James Madison, the eventual author of the federal Bill, was a member of the Virginia Convention and the proceedings there served as a training ground.[83] Moreover, all or part of six amendments in the federal Bill of Rights are to some extent expressed in the Virginia Declaration of Rights.

Article 13 of the Virginia Declaration of Rights provides:

> That a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural and safe defence of a free State; that Standing Armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to and governed by the civil power.[84]

There is no mention of a right to bear arms. The focus of the article is on the role of the militia versus a standing army. Nor was there any such mention of a right to bear arms in New Jersey's Constitution, the next state to adopt a constitution.[85]

The first state to adopt an arms provision was Pennsylvania in August 1776. The Pennsylvania Declaration was influenced by the Virginia model; much of it is taken almost verbatim, though there are

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78. The four were: Pennsylvania, North Carolina, Vermont, and Massachusetts. Feller & Gotting, *supra* note 58, at 54–56.

79. 1 B. SCHWARTZ, *supra* note 9, at 234–35.

80. *Id.* at 231.

81. *Id.*

82. *Id.* It was the "first true Bill of Rights in the modern American sense, since it is the first protection for the rights of the individual to be contained in a Constitution adopted by the people acting through an elected convention." *Id.*

83. *Id.* at 236–41.

84. *Id.* at 239.

85. *Id.* at 256–61.

some important additions.[86] For purposes of the second amendment, the relevant articles are VIII, which provides:

> [t]hat every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service when necessary, or an equivalent thereto . . . [n]or can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent.

and XIII which provides:

> That the people have a right to bear arms for the defense of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.[87]

The Virginia and Pennsylvania military articles were the models for almost every other state; the remaining state constitutions usually contained the language of one or both.[88]

The New York Constitution discussed the militia and granted a religious exemption to Quakers, but did not mention any right to bear arms.[89] Interestingly, the New York Constitution provides that the state, at its own expense, supply military equipment.[90] Thus, it was considered quite appropriate for the government to provide the militia with its arms, rather than having individuals provide their own. New York did not include any "right to bear arms" language.

The remaining states followed the pattern of borrowing language from either Virginia or Pennsylvania.[91] Only four states listed a right to bear arms. Only two of those states phrased the right in terms of "defense for themselves," a clause whose meaning is ambiguous.[92]

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86. *Id.* at 262.

87. *Id.* at 265–66.

88. *Id.* at 265–75. The Delaware Declaration combined Virginia's Article XIII and Pennsylvania's Article VIII, but did not mention any right to bear arms. The Maryland Declaration repeated Virginia's phrasing, with no mention of arms-bearing. *Id.* North Carolina borrowed heavily from Pennsylvania's Article VIII, and included a right to bear arms, though it only listed a right to bear arms in the defense of the state, deleting Pennsylvania's reference to "themselves." *Id.*

89. *Id.* at 301–13.

90. *Id.* at 312.

91. *Id.* at 342–44. The Vermont Declaration of Rights includes articles taken verbatim from Articles VIII and XIII of the Pennsylvania Declaration, thus asserting the right to bear arms. Massachusetts adopted most of Pennsylvania's Article XIII, except that it uniquely provided for a right to *keep*, as well as bear arms, though the right was granted "for the common defense" only. *Id.* at 342–43. New Hampshire's Bill of Rights repeated much of the language of Pennsylvania's Article VIII and Virginia's Article XIII. No right to bear arms is mentioned. *Id.* at 376–78.

92. *See supra* note 91 and accompanying text.

The four states with "right to bear arms" language are almost the only states without a reference to the militia being the proper defense for a free state. A comparison of Article XIII in the Virginia Declaration of Rights with Article XIII in the Pennsylvania Declaration of Rights shows that the arms clause was, in effect, a substitute for the militia clause. The remainder of each article is almost identical. It seems logical to conclude that the two clauses were conceptually similar. Some states chose to use the Virginia version, with the militia-clause; the other states opted for the Pennsylvania version, with the arms-clause.

In either case, the militia was considered to be preferable to a standing army as the defense for each state. The Declarations were attempting to ensure supremacy of the militia, not establish individual rights. The military orientation of the arms-clause is reflected in the surrounding language: references to standing armies, duty to serve in the militia, exemption for religious objectors who were "scrupulous of bearing arms," and so on. In no sense can it be confidently stated that these state Declarations were concerned with an individual right to bear arms for anything other than militia-related purposes.

D. Adoption of the Constitution and Bill of Rights

1. Drafting of the Constitution

By the 1780s, "the concept of a bill of Rights had been fully developed in the American system."[93] Twelve of the state constitutions made some provision for guaranteeing the most important individual rights.[94] However, the first national instrument of union, the Articles of Confederation, contained no listing of the various rights so commonly espoused in the state documents.[95]

The Articles of Confederation provided that each state would retain "its sovereignty, freedom, and independence."[96] Article VI provided that "every state shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutred."[97] In contrast, Congress' military power was limited. No standing army could be maintained without the consent of nine of the thirteen states.

By 1787, however, it had become obvious that the government was

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93. 1 B. SCHWARTZ, *supra* note 9, at 383.

94. *Id.*

95. This absence can only be explained by the weakness of the central government established by the Articles. Since the central government was one of strictly limited powers, people did not view it as a threat to individual liberties. Since these liberties were clearly protected by the states, there was no need for a federal Bill.

96. ARTICLES OF CONFEDERATION art. II.

97. *Id.* art. IV.

simply too weak to be effective. The chief purpose for calling the Constitutional Convention in 1787 was to draft "a liberal, and energetic Constitution."[98] But the method for erecting a stronger national government was a point of great dispute. While many delegates, including George Washington, Alexander Hamilton, John Jay, and General Henry Knox, wished to have a powerful central government,[99] other delegates, including Luther Martin, Elbridge Gerry and George Mason, feared an oppressive central government that would undercut the power of the states. This latter group became known as the "Anti-Federalists," as they fought to maintain the states' authority.

The key focus of the Convention was this struggle over the proper roles of the federal government and the states. In the process, the rights of individual citizens rarely became an issue. Indeed, it was not until the end of the Convention that a proposal for a Bill of Rights was introduced.[100]

By that time, several of the Anti-Federalists had become alarmed at the possibility that the newly powerful federal government might encroach on individual liberties. George Mason and Elbridge Gerry made a motion to prepare a Bill of Rights, but this was not until September 12, 1787,[101] only five days before the end of the Convention and four months after the start.

In response to Gerry's proposal, the Federalists argued that the state declarations and constitutions would be sufficient guarantees of liberty because they were not being repealed by the federal Constitution.[102] At this point, with the end of the Convention in sight, the Federalists' counter-arguments were sufficiently persuasive to result in a unanimous[103] defeat of the proposal.[104]

Despite the Convention's lack of focus on individual rights, many delegates were convinced that the federal government was becoming

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98. Rutland, *supra* note 10, at 108 (letter from George Washington to James Madison, November 5, 1786); *see also* 1 FARRAND, RECORDS OF THE FEDERAL CONVENTION 23–26 (1974) (remarks of Governor Randolph).

99. Rutland, *supra* note 10, at 108–09.

100. *Id.* at 108. Apparently, "neither Mason nor his colleagues . . . found it necessary to come into the convention hall ready to serve as watchdogs for civil liberty." *Id.* The public was satisfied with the well-established rights laid out in the state constitutions, and the Convention was concerned with the broader question of strengthening the central government.

101. 3 FARRAND, *supra* note 98, at 588.

102. *Id.* at 588.

103. Voting was done by state, not by individual delegates.

104. Rutland, *supra* note 10, at 112. Apparently, there was rather widespread agreement among the delegates that the new government would not infringe the state bill of rights. *Id.* Mason's response, that the laws of the United States were to be paramount to any state laws or bill, fell on deaf ears. In any event, the Anti-Federalists' delay cost them any chance at getting the exhausted, impatient delegates to support a Bill of Rights.

too powerful.[105] Mason, Gerry, and Martin repeatedly declared that they disliked seeing the state governments, the traditional guarantors of personal liberty, undermined.[106] Mason declared that he never "would agree to abolish the state governments, or render them absolutely insignificant."[107] Martin attacked the generosity with which the delegates were heaping powers upon the central government, contending that "the general government was meant merely to preserve the state governments, not to govern individuals . . . its powers ought to be kept within narrow limits."[108]

While Martin and the Anti-Federalists defended the role of the states,[109] the Federalists stressed how desperately the country needed a strong central government.[110]

Nowhere in the Constitutional debates was there a discussion of a right to keep or bear arms. The delegates at the Convention, however, did spend a good deal of time debating the roles of the army and militia, and these discussions are vital in understanding the second amendment. Most critically, it is within the context of the overarching "federal versus state" debate that the military clauses of the Constitution must be considered.[111]

Many people, including George Washington, believed that the militia had performed poorly during the war; they were determined to establish either a professional standing army or a small, highly trained, select militia.[112] The United States, however, disbanded the Continental Army after the Revolutionary War, except for a small number to guard some posts and stores.[113] Thus, military affairs had been put back in the hands of the states.[114]

When the proponents of a strong national government pushed for a professional army, they simultaneously asked for extensive central au-

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105. *Id.*

106. 5 J. 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 217 (1836); *see also* 1 FARRAND, *supra* note 98, at 492.

107. 5 J. ELLIOT, *supra* note 106, at 217.

108. *Id.* at 248.

109. Rutland, *supra* note 10, at 111.

110. 5 J. ELLIOT, *supra* note 106, at 250–59, 269. The arguments ranged from Hamilton's blasts, claiming that the state governments were "so much unnecessary furniture" whose weakness threatened the existence of the nation, to less strident claims that a stronger central government did not mean an oppressive government and that the states would still have an important role to play. *Id.*

111. U.S. CONST. art. I, § 8, cl. 12, 15, 16, art. II, § 2, cl. 1.

112. Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 183 (1940) (reprinting a September 24, 1776 letter of George Washington).

113. *Id.* at 183.

114. *Id.*

thority over the state militias.[115] The only way to establish an effective militia, the Federalists argued, was to provide more national uniformity in arms, discipline, and training; the various states were simply not capable of providing a sufficient national military force.[116]

The Anti-Federalists voiced not only the traditional fear of a standing army, but also the anger over the proposed transfer of state authority over the militia.[117] The Anti-Federalists saw the states being stripped of power in yet another crucial area—the military.[118] They viewed the militias as the means for defending themselves from an oppressive federal government, particularly one which was providing itself with means to establish an army.[119] Having just fought a war against a powerful ruler who used the military as his tool of enforcement, many delegates were not anxious to give their militias to the new central government.[120]

Luther Martin and Elbridge Gerry attacked the plan, which seemed to go against the popular notion that standing armies in time of peace were dangerous. Gerry proposed that there be a limit on the number of troops allowed.[121] His plan was defeated, the prevalent view being that it was foolish to have to wait until the country was attacked before raising a substantial number of forces.[122] Most of the delegates were convinced that at least a small professional army was necessary for America's defense. They were willing to trust Congress with the responsibility.[123]

Yet even among many Federalists, the dislike and distrust of standing armies was still evident.[124] Indeed, the Federalists frequently tried to turn Anti-Federalist fears about the army around, arguing that by strengthening national control of the militia, and by maintaining a well-disciplined, uniformly trained, and effective militia, Congress

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115. *Id.* at 184–85.

116. 5 J. ELLIOT, *supra* note 106, at 440.

117. *Id.* at 445.

118. 2 FARRAND, *supra* note 98, at 384–88.

119. *Id.*

120. *See id.* The Articles of Confederation had made it extremely difficult to organize an army at all, and the country had been relying on the militia system as the core of the country's defense. Now, Congress was being given the power to raise and maintain a substantial army. U.S. CONST. art. I, § 8, cl. 2.

121. 2 FARRAND, *supra* note 98, at 329–30.

122. *See id.* at 330.

123. *Id.* Indeed, the delegates defeated a proposal by George Mason to preface the militia clause of the Constitution with a warning against the danger of standing armies, arguing that doing so would set "a dishonorable mark of distinction on the military class of citizens." *Id.* at 617.

124. *Id.* at 617.

would have less need to raise a large standing army.[125]

But the Anti-Federalists were still hostile to the thought of the central government taking control of the state militias.[126] The Anti-Federalist theme had been that a powerful central government would abuse its powers, rendering the states impotent.[127] Congress was already being provided with an army—now it wanted control of the militia as well.[128]

The Anti-Federalists had three major arguments. First, the central government might take total control of the militias and use them as a tool of oppression against the states, either in combination with the army or alone.[129]

Second, if the federal government were given the authority to arm, discipline, and organize the militia,[130] Congress might completely neglect the militia, leaving it untrained and useless to the states.[131] The states would lose the only means of defense, and the central government would be able to do whatever it wished through the army.

Third, it was unclear to many delegates whether the power to arm and discipline the militia was within the exclusive province of Congress, or whether the states had concurrent authority.[132] If the Congress failed to arm and train the militia, could the states do so?[133] The Anti-Federalists were unsure and worried about the possibility of Congress "disarming" the state militias by ignoring them.[134] If Congress did have exclusive power, the states would lose all control to maintain their militias.

In response to the "militia versus army" debates, the delegates struck two major compromises at the convention. The first was between men like General Pinckney, who wanted a fully nationalized militia, and those like Elbridge Gerry, who bitterly opposed even partial transfer of control away from the states.[135] The second compromise was between the more moderate elements, who recognized that the viability of both the states and the central government was at stake and that

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125. 5 J. ELLIOT, *supra* note 106, at 440; *see also* A. PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION 517 (1968).

126. 5 J. ELLIOT, *supra* note 106, at 445.

127. *See id.*

128. 3 J. ELLIOT, *supra* note 106, at 384–88.

129. *Id.* One of the fears was that the government would march the militia of one state into other states, not only suppressing fellow states, but also dragging militiamen far away from their homes. *Id.* at 378.

130. U.S. CONST. art. I, § 8, cl. 15.

131. 3 J. ELLIOT, *supra* note 106, at 379.

132. *Id.*

133. *Id.* at 382; 2 FARRAND, *supra* note 98, at 384–88.

134. 3 J. ELLIOT, *supra* note 106, at 379.

135. 2 FARRAND, *supra* note 98, at 384–88.

neither could be totally excluded.[136]

Excessive central authority over the militia would jeopardize the integrity of the states and would thus jeopardize the possibility of ratification. The states would want the militias not only for their own defense, as a means of fending off a dictatorial central government, but also for handling internal police matters, enforcing obedience to their laws, quelling insurrections, and so on.[137] There was a strong feeling that the "whole authority over the Militia ought by no means to be taken away from the states—whose consequence would pine away to nothing after such a sacrifice of power."[138]

The final distribution of power over the militia gave the states the power to appoint officers and train the militia, while granting the federal government the power to organize, arm, discipline, and govern the militia.[139] Congress was given the authority to call the militia to repel invasions, suppress insurrections, and execute national laws.[140] The President was made Commander-in-Chief of the militia of the states when the militias were in the service of the federal government.[141]

Thus, the states still had certain authority over the militias, particularly when the militias were not in the national service. Also, the "right to exist" of the state militias was recognized by the creation of a separate national army.[142]

One critical point, however, was left unsettled at the end of the Convention. It was unclear whether the power of arming and disciplining the militia was *exclusively* federal. As the debates in the Virginia Ratifying Convention reveal, this point concerned many.[143]

The power of "arming" the militias received only cursory mention at the Convention. The key passage involves a confused discussion whether "arming" extends to furnishing arms, specifying the kind and size of arms, or regulating the mode of furnishing arms, either by the militia themselves, the state governments, or the national treasury.[144] Unfortunately, the discussion was interrupted and not resumed. From the debates in the Virginia Ratifying Convention, however, it is evident that by "arming" the militia, many had in mind actually providing

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136. W. RIKER, *supra* note 65, at 15–16.

137. 5 J. ELLIOT, *supra* note 106, at 445; *see also* W. RIKER, *supra* note 65, at 15–16.

138. 2 FARRAND, *supra* note 98, at 331.

139. U.S. CONST. art. I, § 8, cl. 16.

140. *See id.* art. I, §8, cl. 15.

141. *See id.* art. II, § 2, cl. 15.

142. *See id.* art. I, § 8, cl. 12.

143. *See infra* notes 179–92 and accompanying text; *see also* 3 J. ELLIOT, *supra* note 106, at 37–87.

144. 2 FARRAND, *supra* note 98, at 385.

weapons to the militiamen.[145]

This is significant, because it shows that the Drafters contemplated the possibility that the government would supply the militia arms.[146] By the same token, "disarming" was also used in the sense of "neglecting to arm and train the militia," rendering them useless to the states.[147]

These points are significant because they show that in the context of the Constitution, the militia was viewed as a state-organized, state-run body; it was not simply a term for the citizenry at large. Indeed, even though the militias were composed of a large body of male citizens, the militias were seen as state units which could be armed by the government, and which could be called out by the states to quash rebellions, enforce laws, and defend the state from invasion.[148]

Thus, it was plausible to view such a militia as being destroyed if the federal, or state, government neglected to provide them with training—and arms. If the militia was viewed as nothing more than the citizenry at large, there would be no problem with "training" and "arming" them because citizens could use their own guns and organize themselves.

This distinction between the militia as a state-organized body and as the entire citizenry at large is important in understanding the second amendment because one of the central claims of those who oppose government efforts to regulate firearms is that the "militia" referred to in the Constitution simply means an armed citizenry at large. Underlying this concept is the notion that the second amendment is aimed at ensuring that all private citizens would be armed, and thus able to rise up in revolt against any government action perceived by the masses as "tyrannical."[149]

But as discussed above, the records of the Convention reveal no clear discussion of an individual right to possess arms. Moreover, the records reveal no discussion of a fear of state governments. The states were repeatedly viewed as the protectors of the citizens' liberties, and the shield for the populace from the evils of the national government.[150] This is significant for the second amendment. If the right to bear arms was granted in order to stave off state government tyranny, as well as

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145. 3 J. ELLIOT, *supra* note 106, at 378–87.

146. 1 B. SCHWARTZ, *supra* note 9, at 301–13 (containing the New York Constitution of 1777).

147. 3 J. ELLIOT, *supra* note 106, at 379.

148. 5 J. ELLIOT, *supra* note 106, at 445.

149. Halbrook, *supra* note 27, at 9; *see also* Caplan, *supra* note 5, at 34; Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125, 133 (1986).

150. 5 J. ELLIOT, *supra* note 106, at 269.

federal government tyranny, it is plausible to argue that all citizens should have the right to keep arms because a state-organized body such as militia could not be the proper shield for citizens to rise against an oppressive state government. But there is no discussion to support such an argument. The discussions of the Constitutional Convention, the Bill of Rights, and the state ratifying conventions focus on the need for the states and citizens to protect themselves from an oppressive *federal* government. In the debates over the Constitution and the Bill of Rights, the state governments were never viewed as a threat.

2. The Ratification Struggle

As soon as the Convention had broken up, the ratification controversy began in the states.[151] The Federalists, urging support for the Constitution, engaged the Anti-Federalists in a war of pamphlets, newspaper articles, and debates on the merits of ratification.[152] The fear of an overbearing central authority, which would lead to the "destruction of the states," was the foremost theme of the Anti-Federalists.[153] They claimed that if the central government were given such powers, it might easily become an "aristocracy," under the Senate's control, or a "monarchy," under the President's.[154]

A subsidiary concern was that the proposed Constitution was inadequate to protect individual rights and liberties.[155] The absence of a Bill of Rights soon proved to be the most vulnerable aspect of the Constitution, and popular outcry over the lack of such a bill grew.[156] The Anti-Federalists soon focused their attack on this aspect and its appeal was natural.[157] After all, the state constitutions had all contained declarations of fundamental rights. A powerful central government was being established and its Constitution contained nothing about individual rights.[158]

The Federalists usually responded that this government was one of limited powers, and so there was no need for such a Bill of Rights.[159] The populace was not convinced and asked, what harm could be done by including a Bill of Rights? Pressure on the Federalists mounted and it eventually became evident that amendments would be needed to en-

151. 1 B. SCHWARTZ, *supra* note 9, at 468–69.
152. *Id.*
153. 3 FARRAND, *supra* note 98, at 207–09, 260.
154. 1 B. SCHWARTZ, *supra* note 9, at 444–46.
155. *Id.*
156. *Id.* at 505.
157. *Id.*
158. *Id.* at 506.
159. *Id.* at 528; *see also* THE FEDERALIST NO. 84 (A. Hamilton) (Wright ed. 1961).

sure ratification.[160]

The Anti-Federalists directed much of their venom at the army and militia provisions of the Constitution. In his writings,[161] Richard Henry Lee urged that the people strive to give the state governments the greatest amount of power.[162] The state governments were the true representatives of the people, he said, in a familiar Anti-Federalist theme.[163] Powers touching on internal state affairs, such as taxes and the militia, were now being lodged in the central government. Similar attacks took place on the creation of a standing army, the "nursery of vice and . . . bane of liberty," and the transfer of authority over the militia, "the bulwark of defence [sic]," to the central government.[164]

Luther Martin envisioned Congress taking control of the militias and marching them all over the country.[165] He stated that the Constitution was taking away from the states,

> [the] only defense and protection which the State can have for the security of their rights against arbitrary encroachments of the general government . . . it ought to be considered as the last coup de grace to the state governments . . . and, by placing the militia under [Congress's] power, enable it to leave the militia totally unorganized, undisciplined, and even to disarm them.[166]

The Federalists responded that a strong army was necessary;[167] that a strong militia would alleviate the need for a large army;[168] that the states still had concurrent control over the militia;[169] and that the states had little to fear from any national forces, since the people's loyalties lay with the state government and the citizens would always side with and defend their state government against any oppressive federal actions.[170] But as the state conventions met, there was still concern over both the lack of a Bill of Rights and the assumption of military power by the new central government.

The arguments of the Federalists seem to have allayed at least some fears, for the early state conventions were solid victories for ratifi-

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160. 1 B. SCHWARTZ, *supra* note 9, at 466. The focus then shifted to whether the amendments should be adopted prior to ratification, or whether the states would ratify the Constitution, with the assurance that amendments would be quickly adopted by the new Congress.

161. *Id.* at 468–69.

162. *Id.* at 468.

163. *Id.*

164. *Id.* at 487.

165. 1 FARRAND, *supra* note 98, at 207–08.

166. *Id.* at 207–09, 285.

167. 1 B. SCHWARTZ, *supra* note 9, at 530.

168. 3 J. ELLIOT, *supra* note 65, at 381.

169. *Id.* at 382.

170. 2 B. SCHWARTZ, *supra* note 9, at 527–28.

cation. Delaware ratified first, shortly after the Philadelphia Convention disbanded.[171] Pennsylvania was next to ratify.[172] Fifteen amendments were proposed but all were voted down.[173]

A vocal Pennsylvania minority, upset with the large power being given to the central government, and believing that no control was being left with the state governments, had proposed the amendments.[174] This group felt that the combination of a national standing army and a militia over which Congress had "absolute unqualified command" would lead to the destruction of liberty.[175]

The Pennsylvania proposals included eight of the ten amendments eventually put into the Bill of Rights.[176] Among the proposed amendments was one declaring that standing armies were dangerous to liberty. Other amendments asserted the right of the people to bear arms and directed that the power of organizing, arming, and disciplining the militia remained with the individual states.

Though neither adopted by the Pennsylvania convention nor sent to Congress as recommendations, the Pennsylvania amendments were widely circulated and served as a model for the other states. The states soon adopted a system of ratifying the Constitution, but then sending a list of proposed amendments (a "Bill of Rights") along as "recommendations." Even the Federalist supporters of the Constitution came to see that the Pennsylvania minority method was a means of defusing opposition to ratification.

By the time of the Virginia convention, nine states had ratified, ensuring that the Constitution would go into effect.[177] But it was commonly believed that permanent union was impossible without Virginia, the wealthiest, most prestigious, and most populous state.

The Virginia convention was important in regard to the second amendment for several reasons. First, Virginia was the only state to discuss extensively the military clauses of the Constitution. Second, the Bill of Rights proposed by Virginia had an article concerning the right to bear arms and the militia. This article resembles Madison's second amendment. Third, Madison was a member of the Virginia convention and thus was influenced by the military debates there, and probably felt a duty as a Virginian to consider the desires of the people of his

171. *Id.* at 627.

172. *Id.*

173. *Id.* The Pennsylvania delegates had earlier decided to vote on the amendments as a group, and not one-by-one.

174. *Id.* at 670.

175. *Id.* at 670–72.

176. *Id.* at 628.

177. *Id.* at 758, 762.

state. Finally, the overall impact of the Virginia proposals is self-evident, since every specific right listed in the Virginia proposals was presented by Madison in his proposed federal amendments, and all but one became a part of the Bill of Rights.[178]

The major object of Anti-Federalist concern about the military was article I, section 8, clause 16 of the Constitution, which gave Congress the power to "organize, arm and discipline the militia."[179] The Anti-Federalists believed that this clause gave Congress *exclusive* power to provide for arming the militia, and thus prevented the states from doing so themselves.[180] According to George Mason, this exclusive power 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 Congress has an exclusive right to arm them, etc."[181]

By "disarming," Mason meant two things: not providing arms for the militia, and not using the militia. Neither Mason nor anybody else at the Virginia convention expressed concern that the federal government would physically take the arms of individual militiamen. Mason proposed an amendment, subsequently adopted, that would declare the right of the state governments to arm and discipline the militia, should the general government neglect to arm and discipline them. Mason feared that by neglecting the militia, Congress would have an excuse to raise that great evil, a large standing army.[182]

Madison responded with the traditional Federalist argument that a strong, uniform, and disciplined militia was the best way to avoid the need for a large army.[183] Madison next answered the other major Anti-Federalist concern by declaring again that the states had *concurrent* power to arm and govern the militia. According to Madison, the Congressional power was not exclusive, and hence the states need not worry that their militias would be paralyzed.[184]

Patrick Henry continued Mason's line of argument, contending that if the militia clause did give the states concurrent power to arm

178. *Id.* at 446–50. Virginia's extensive debate over a Bill of Rights is not surprising, since Virginia had been the first state to place a Declaration of Rights in its state constitution. In addition, the Virginia Convention included many influential Anti-Federalists, including George Mason, Patrick Henry, and Richard Henry Lee.

179. 1 B. SCHWARTZ, *supra* note 9, at 446; U.S. CONST. art. I, § 8, cl. 16.

180. 3 J. ELLIOT, *supra* note 106, at 378–79.

181. *Id.* at 379.

182. *Id.* at 380. The army, in turn, would be used, as it traditionally had been in English/American history, to destroy people's liberties, and dominate a weak citizenry. *Id.*

183. *Id.* at 381.

184. *Id.* at 382–83, 419.

the militia, it did so only by implication.[185] Already apprehensive about the powers of the federal government, the Anti-Federalists demanded an *express* declaration of the states' right to arm the militias.[186]

Considering that each militiaman was generally supposed to supply his own arms, it seems odd that there was so much discussion about which government would provide the arms. The answer can only be that the states at this time actually *did* provide some portion of the militia's arms. Thus, Patrick Henry 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?"[187] Similarly, John Marshall stated: "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?"[188]

From these statements, it is clear that the Virginia delegates envisioned that the government would provide not only training for the militia, but also arms.[189] More important, the Virginia debates show that the militias were viewed as state-organized bodies, and the "militia" of the second amendment was not simply viewed as the armed citizenry at large. The states', or Congress', failure to train, organize, and arm the militias could only have such a devastating impact if the government was largely responsible for them. Thus, while the term "militia" may have referred in some contexts to the citizenry as a whole, in the context of the Bill of Rights debate, it referred to organized, trained, and government-supplied militias.

The Virginia debates reveal that the delegates were not concerned with an individual right to carry weapons, outside the context of militia service. The Anti-Federalists expressed the traditional fears of a standing army,[190] but were equally concerned with the states' apparent loss of power over the militias. The Anti-Federalists could not see why they should allow Congress to take charge of the state militias and then neglect them—disarm them. "Why should we not provide against the danger of having our militia, our real and natural strength, destroyed?"[191] Thus, Mason and Henry proposed that, "if Congress

185. *Id.* at 384–88.

186. *Id.*

187. *Id.* at 386.

188. *Id.* at 421.

189. 1 B. SCHWARTZ, *supra* note 9, at 312. The New York Constitution of 1777 had also provided that the state was to supply arms for the militia. *Id.*

190. 3 J. ELLIOT, *supra* note 106, at 379.

191. *Id.* at 380.

should refuse to find arms for [the militia], this country may lay out their own money to purchase them."[192] As Luther Martin and Elbridge Gerry had repeatedly stressed, the militias were the states' only means of self-preservation.

These debates reveal the key meaning of the Virginia proposals. The new federal government could keep much of its broad military power, but it would be forbidden from disarming the state militias. The central government must give to the states the right to keep their militias armed and trained, in order for the states to have them as an effective means of defense. The "right to bear arms" concerned the ability of the states to maintain an effective militia, not an individual right to keep weapons for any purpose whatsoever. This interpretation of the Virginia proposals is consistent with those State declarations and constitutions of the 1770s which had "right to bear arms" provisions.

The Virginia Convention adopted a Declaration of Rights containing 20 articles and 20 proposed amendments to the text of the Constitution.[193] Article XVII stated:

> [t]hat the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defense of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil power.[194]

Article XIX stated "[t]hat any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead."[195]

These two articles neatly encapsulated the prevalent American view on the merits of standing armies and militias. Amendments IX and XI proposed by Virginia protected these principles. The ninth amendment provided, "[t]hat no standing army, or regular troops, shall be raised, or kept up, in time of peace, without the consent of two thirds of the members present in both houses."[196] The eleventh amendment provided, "[t]hat each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same. That the militia shall not be subject to martial law, except when in actual ser-

192. 2 B. SCHWARTZ, *supra* note 9, at 831.
193. *Id.* at 765.
194. *Id.* at 842.
195. *Id.*
196. *Id.* at 843.

vice . . . ."[197]

The eleventh amendment reflects the Anti-Federalist concern over the federal government's neglecting and disarming the militia.[198] The seventeenth article in the proposed Bill of Rights is almost identical with the thirteenth article of the Virginia Declaration of Rights of 1776, except that the "right to keep and bear arms" is included.[199] This addition is understandable in the context of the Virginia debates: the Anti-Federalists wanted explicit assurances that the states would be able to arm and discipline the militias. There is no mention in the Virginia debates of individuals carrying weapons, or of the need to assure individuals that the federal government would not confiscate their arms. The debate was solely in the context of whether the government would affirmatively provide arms for the militia.

Following the Virginia ratifying convention, the New York and North Carolina conventions added to the pressure on Congress to act quickly in adopting a Bill of Rights.[200] New York had an extremely close vote on ratification, with the convention narrowly voting down a proposal to refuse ratification until its proposed amendments were adopted.[201] North Carolina, however, refused to ratify the Constitution until a Bill of Rights was added.[202]

3. Adoption of the Bill of Rights

The close vote in New York and the refusal of North Carolina to ratify, with the flood of recommended amendments proposed by the states, gave the Bill of Rights movement virtually irresistible momentum. The Federalists knew they would have to propose a Bill of Rights when the new Congress assembled in 1791.[203]

Madison introduced a proposed Bill of Rights early in the first session to alleviate any suspicion that the new government was dragging its heels.[204] His draft was based on the numerous amendments proposed by the state ratifying conventions, particularly Virginia's.[205] Madison's initial effort covered all the articles eventually found in the

197. *Id.*

198. *Id.*

199. *Id.* at 842.

200. *Id.* at 933.

201. *Id.* at 852. Its amendments were modeled on Virginia's and included very similar language regarding the militia, standing armies and the right to bear arms.

202. *Id.* at 932–33. In fact, North Carolina only joined the Union after Congress had passed the Bill of Rights in 1789. Its proposed amendments were taken verbatim from Virginia's.

203. *Id.*

204. *Id.* at 1019–20.

205. *Id.* at 840–45.

Bill of Rights, and included much of the specific language adopted.[206]

Madison's draft of the second amendment provided: "[t]he right of the people to keep and bear arms shall not be infringed; a well armed but well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."[207]

As is obvious from the language, the focus of this amendment was on the military. There was almost no debate in the House over this proposal. Debate did occur over the religious scruples clause. Elbridge Gerry, still suspicious of the army and federal control over the militia, moved to strike the religious scruples clause.[208]

Gerry's proposal, however, failed as did Burke's proposal to add a clause forbidding standing armies in peacetime without the consent of two-thirds of Congress.[209] The amendment was passed by the House without any substantial alteration, though "free country" was changed to "free state."[210] No reason is given for this change, although it may indicate that the second amendment was aimed at preserving the security of the individual states by ensuring their right to maintain effective militias.

The Senate was content to tighten the House's language in most of the amendments. The Senate essentially adopted the House version of the second amendment, though it dropped the religious exemption. The Senate rearranged the language, placing more stress on the militia aspect of keeping and bearing arms: "[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."[211]

The background of the second amendment indicates that Congress did not intend to confer a broad "individual" right to carry arms, outside of the military context.[212] Obviously, if Madison and Congress had intended to create some broad individual right to weapons, they could have chosen language which clearly did so. The Senate did reject a proposal to insert the phrase "for the common defense" after the

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206. *Id.* at 1008.

207. *Id.* at 1026.

208. *Id.* at 1107. He claimed it would allow Congress to declare who was religiously exempt from militia service and thereby prevent people from bearing arms as militiamen. Having thus weakened the militia, Congress would have an excuse to raise a standing army. "Whenever Governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins." *Id.*

209. *Id.* at 1009–10.

210. U.S. CONST. amend. II.

211. 2 B. SCHWARTZ, *supra* note 9, at 1150. Unfortunately, the Senate's debates were closed to the public and not well-recorded.

212. *Id.* at 1153–54.

"right to bear arms" clause.[213] Some have claimed that this rejection indicates that the second amendment was aimed at a broad individual right to have weapons, and not just a military-related right. But the Senate's reason for rejecting this proposal is unknown, since there is no record of the discussion. Because the Senate had agreed to the substance of the amendment, it seems more likely that the phrase was rejected because it was redundant. It was already understood that the amendment meant the right of the people to bear arms for the security and defense of their state.[214]

More significantly, in none of the conventions, writings, or debates preceding the second amendment was there *any* discussion of a right to have weapons for hunting, target shooting, self-defense, or any other non-militia purpose. No such discussion appears in the Constitutional Convention records, the Anti-Federalist writings, Virginia's ratifying debates, state constitutions or declarations of the 1770s, or Congressional debates on the Bill of Rights. Considering the immediate political context of the second amendment, as well as the historical background, the amendment's meaning is apparent. A traditional fear of standing armies in the hands of a powerful central government had instilled in Americans a belief that a militia was the proper form of defense. The proposed Constitution authorized standing armies and granted Congress sweeping power over the militia. Many saw the possibility of Congress failing to maintain the militias effectively and were unsure if the states retained the authority to do so. From the viewpoint of the individual citizen, the concern was simply to be able to keep and bear arms in his capacity as a state militiaman.

From either the state or individual perspective, the thrust of the amendment was to ensure the existence of an effective state militia. In neither case was there an intent to confer a broad individual right to have arms for other lawful purposes. There is simply no evidence that the second amendment was to prevent oppressive state governments from tyrannizing the citizens—this was simply never considered. The amendment was to protect the states' ability to maintain effective militias, and to protect against an oppressive federal government. Indeed, the Senate rejected the amendment, which Madison regarded as most important and which prohibited state violation of the personal liberties guaranteed in the Bill of Rights.[215] Thus, there is no support for the

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213. *Id.*

214. *Id.* Another possible reason for rejecting the proposed language is that the phrase "for the common defense" might have implied that the amendment was concerned with the defense of the nation as a whole, rather than with the defense of the states. The Anti-Federalists certainly would not have wanted such an interpretation read into the amendment.

215. Rutland, *supra*, note 10, at 212; *see also* 2 B. SCHWARTZ, *supra* note 9, at 1145–46.

view that the second amendment was intended as a limitation on the states.[216]

The focus of the Bill of Rights was the limitation of the federal government's power; the Bill of Rights ensured the citizenry that the newly powerful central government would not trample on their traditional liberties. The Framers were concerned with preserving the states' authority over some part of the military system. Hence, we have the militia clause of the Constitution. The Anti-Federalists, too, were concerned with preserving a role for the states. Hence we have the second amendment.

E. The Militia in America

1. The History of the Militia Since 1789

As the preceding historical analysis has shown, and as the courts have repeatedly held,[217] the right of an individual to keep and carry arms only exists in the context of contributing to a "well-regulated militia." Thus, to understand the constitutional implications of gun legislation today, it is important to understand how the role and organization of the "militia" have evolved since colonial times.

As discussed above, the colonies had no standing army until the Revolutionary War. Each colony had its own militia, modeled on the English militia system.[218] The militias of the states were organized on one basic system:[219] white males between the ages of eighteen and forty-five or eighteen and sixty were required to muster for training four to eight days per year; militiamen were generally required to furnish their own basic equipment, including arms and ammunition.[220]

Though many felt that the militia performed poorly during the war, and wanted to do away with the militia as the defense of the country,[221] the United States largely disbanded the Continental Army after the war. Military affairs were placed again in the hands of the state governments and their militias.

The militia of the late 1700s served several functions. First and most important, it eliminated much of the need for a large standing

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216. *See infra* notes 352–56 and accompanying text.

217. *See infra* notes 256–369 and accompanying text.

218. J. MAHON, THE AMERICA MILITIA: DECADE OF DECISION, 1789–1800, at 2 (1960).

219. W. RIKER, *supra* note 65, at 11.

220. *Id.*

221. *Id.* at 12. Though not wholly inadequate, the militias were undisciplined and during the Revolution had often been mutinous. Washington and other military leaders were frequently exasperated by the irresponsibility of the militia. In short, the militia of the states, which was in the 1780's the only military force in the nation, was only partially trained and quite unreliable. *Id.*

army, by providing the main source of defense for the country.[222] Second, it enabled the states to maintain their own military forces and thus ensured that the federal government would not become overly oppressive.[223] Third, it gave the states a source of internal police power, available for such tasks as suppressing insurrections.[224] Fourth, it ensured the states that they would have substantial authority in the new federalist scheme.[225]

Laws at the time generally required militiamen to bring their own equipment—including firearms. But, it is evident that the states did supply, at least in part, some of the arms and ammunition for militiamen. It is also clear that the federal government had been given the power to provide both training and arms to the state militia. This is evident from the state ratifying debates and the subsequent actions of the federal government.[226] Thus, contrary to what some pro-gun writers have argued,[227] today's practice of having the federal government supply militia arms would not "shock" those who wrote the second amendment, nor does it "violate" the amendment's spirit.

In 1792, Congress passed the Militia Act.[228] This was Congress' first attempt to organize the militia system under the power given to it in the Constitution. Before the Militia Act, numerous proposals had been made by Secretary of War Knox and by George Washington to set up a "select corps" of militiamen.[229] But these efforts failed. The Militia Act of 1792 ignored the idea of a select militia, and stated that all able-bodied white male citizens ages eighteen to forty-five were to be enrolled and that each militiaman was required to furnish his own

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222. J. MAHON, *supra* note 218, at 5.

223. *Id.* at 6.

224. *Id.* Several members of the Constitutional Convention noted that the states would want to have their own militias available for such a purpose. *See supra* note 137. Furthermore, article I, section 8, clause 15 of the Constitution specifically provides that Congress may call forth the militia for the purpose of suppressing insurrections. U.S. CONST. art. I, § 8, cl. 15.

225. J. MAHON, *supra* note 218, at 6. Some pro-gun commentators have argued that a further purpose of the militia was to assure an armed citizenry which could rise up in revolt against any sort of oppressive government. Caplan, *supra* note 5, at 50–52; Halbrook, *supra* note 27, at 9. This would imply that the second amendment was designed to allow individuals to have arms in order to fight off oppressive state governments. But as we have seen, there was simply no discussion whatsoever of this possibility during the writing of the Constitution or the second amendment. Furthermore, the desire to use the state militias for internal police control seems to contradict this concept.

226. *See supra* notes 151–216 and accompanying text.

227. Caplan, *supra* note 5, at 50–52.

228. Militia Act, ch. 33, 1 Stat. 271 (1792).

229. W. RIKER, *supra* note 65, at 18. Under this plan, the key to the militia would be a corps of very young men, who would train extensively each year. Everyone else up to the age of 60 would train only 3 or 4 days per year.

equipment.[230] The Militia Act set out a system comparable with the seventeenth and eighteenth century versions of the militia.[231] By incorporating the principles of the state militia laws of the time, the Militia Act bill simply asked the states to continue what they had been doing.

The states, however, were not up to the task. The history of the state militias between 1800 and the 1870s is one of total abandonment, disorganization, and degeneration.[232] The states were responsible for funding and organizing the militias because Congress had made no provision for helping them. Despite occasional inducements by Congress to spur the states to arm and organize their militias, the states chose to do virtually nothing.[233] The militias became typified by infrequent training and mustering, and a growing list of exemptions. States repealed the laws that had set fines for non-attendance. People laughed at the "patriots" who attended. The problem with the 1792 Act was that it was unselective and imposed a duty on everyone. States were not rich enough to organize militias properly. Citizens became impatient with having to spend days attending militia duties. New states joining the Union had no revolutionary tradition and no special attachment to the militia system. Parades and mustering were financially burdensome to the worker; and when so many received exemptions, it created resentment and pressure to abandon the whole system.

The provisions of the 1792 Act were unworkable and worthless for the national defense.[234] Those still involved in the militia had turned them largely into social and entertainment clubs, featuring a once-a-year mustering akin to a festive celebration.[235] By 1900, the militia as the whole body of the people had virtually ceased to exist. President Roosevelt, in his annual message to Congress in 1901, stated the obvious: the old militia law was "obsolete and worthless."[236]

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230. 1 Stat. 271.

231. J. MAHON, *supra* note 218, at 19–20 (discussing framework of the militia under the Militia Act).

232. W. RIKER, *supra* note 65, at 18. For an excellent discussion of the history of the militia during the 1800s see Wiener, *supra* note 112, at 183.

233. W. RIKER, *supra* note 65, at 22. The first step taken by the national government to help the states was a 1798 act permitting the states to purchase muskets at national arsenals. When the states largely ignored the offer, Congress in 1808 enacted a permanent annual appropriation of $200,000 to buy muskets for distribution among the states in proportion to their militia enrollment. Act of April 23, 1808, ch. 55, 2 Stat. 490 (1808). This grant provided more money than that spent by all of the states annually on the equipment, organization and maintenance of the militia. *Id.* Although the states were given grants in proportionate amounts and thus had large inducements to fully report their annual muster counts after 1808, they allowed their militias to completely run down.

234. W. GANOE, THE HISTORY OF THE UNITED STATES ARMY 122–24 (1924).

235. Weiner, *supra* note 112, at 187. As one commentator noted, "Mars was less in evidence than Bacchus." *Id.*

236. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 346 (1904) (reprinting the

In 1903, Congress passed the Militia Act, commonly known as the "Dick Act."[237] The Dick Act was an effort to provide for organizing, training, and equipping the militia. The Dick Act was an effort to restore the militia to a status in which it would be useful as a means of defense.

The legislative history of the Dick Act shows that the purpose of the bill was to improve the efficiency of the "National Guard," as the state militias had become known, and make it a solid second line of defense for the country.[238] The aim was to secure uniformity of instruction, which could only be obtained by uniformity of armament and equipment.[239]

The Committee Reports criticized the old 1792 Militia Act. These reports stated that the terms of the Militia Act were too sweeping and its attempt to include all able-bodied males was practically impossible to execute.[240] One of the key changes made by the Dick Act was to establish two categories of militia, an organized and an "unorganized" or "reserve" militia.[241] All the training, arming, and drilling were to be directed at the "organized" militia, also known as the National Guard. No provision was made for the unorganized militia.[242]

Thus, in the first real exercise of its power to organize the militia, Congress departed from its previous practice in two significant respects. First, in contrast to the militias of colonial times, it created an organized militia consisting of less than all able-bodied men. Second, and again for the purpose of providing for the national defense, the federal government assumed the obligation of supplying and arming the mem-

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annual message to Congress of December 3, 1901).

237. Dick Act, ch. 196, 32 Stat. 775 (1903).

238. *See* H.R. REP. No. 1094, 57th Cong., 1st Sess. (1902); S. REP. No. 2129, 57th Cong., 2d Sess. (1902).

239. *See* H.R. REP. No. 1094, 57th Cong., 1st Sess. (1902); S. REP. No. 2129, 57th Cong., 2d Sess. (1902).

240. S. REP. No. 2129, 57th Cong., 2d Sess. (1902). President Roosevelt and Secretary of War Root both urged passage of the 1903 Act. The President urged that a practical and efficient system be adopted in place of the current obsolete laws. *Id.* The Secretary of War urged that the law be passed, since he felt it absurd that a nation which maintained only a small regular army and depended upon unprofessional citizen soldiery for its defense should run along as the country had done for 110 years, under a militia law which never worked satisfactorily in the beginning and which had become completely obsolete long ago. *Id.*

241. 32 Stat. 775. Today, the "organized" militia consists of the National Guard and the Naval Militia. The "unorganized" militia consists of practically everyone else who is an "able-bodied male" between the ages of 17 and 45. 10 U.S.C. § 311 (1982).

242. 32 Stat. 775. Section 13 of the Act authorized the Secretary of War to issue standard service arms to the National Guard. Although all able-bodied males between 18 and 45 were designated members of the reserve militia, such persons were neither supplied arms by the federal government prior to call to duty with the National Guard, nor were they required to furnish their own arms. 32 Stat. at 777.

bers of the organized militia, and of arming those members of the reserve militia who were called to duty.[243]

The state and federal governments have always had concurrent jurisdiction and control over the militia, and either one has the authority to call out the militia to meet its needs.[244] Congress was asserting its share of control over the militia, in terms of training and equipping them, to make it an efficient arm of the national military. The Dick Act intended for the states to retain the authority to use the militia; the federal government was simply trying to assure that the state militias were armed and organized, and thus useful.

It has been argued that the Dick Act violated the spirit of the second amendment.[245] It is difficult to see the logic of this view. Admittedly, the Dick Act reorganized the militia system. And although the Dick Act's main purpose was to bolster the militia for the purpose of national service, its effect was to revive the state militias and save them from near-extinction. The Dick Act made certain that the state militias were armed and organized and available for both national and state purposes. In this respect, the Dick Act was quite in keeping with the spirit of the second amendment.

In 1908, Congress passed a statute[246] that raised additional money for the militia. Congress further provided that in time of war the militia would be taken into service before any volunteer forces. In 1916, the National Defense Act was passed.[247] This act largely completed the transformation from state to federal control.[248]

Today, the United States supplies most of the material for the Na-

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243. 32 Stat. 775 (1903). Today, these provisions can be found at 32 U.S.C. §§ 701–06 (1982).

244. Act of May 2, 1792, ch. 28, 1 Stat. 264 (1792) (authorizing the President to call up state militia in certain circumstances).

245. W. RIKER, *supra* note 65, at 50.

246. Act of May 27, 1908, ch. 204, 35 Stat. 399 (1908); *see* W. RIKER, *supra* note 65, at 61–68.

247. National Defense Act, ch. 134, 39 Stat. 166 (1916).

248. Weiner, *supra* note 112, at 199–02; *see also* W. RIKER, *supra* note 65, at 80–82. Under the 1916 Act, states were required to conform to provisions of the law in order to obtain federal aid. More drills were required and qualifications for National Guard officers were prescribed. Inspections and approvals by the Army were mandated for National Guard units and the President gained more control of the Guard. 39 Stat. 166. The Act gave the National Guard the two things it wanted most: money and recognition. In 1916, the federal government spent about $6.5 million on the National Guard. As a result of the Act nearly $58 million was appropriated for the Guard. The National Guard was also able to gain a clear-cut role in the defense system, an achievement symbolized by the redefinition of the United States Army in 1933. W. RIKER, *supra* note 65, at 80. The Act of June 15, 1933 approved the National Guard as part of the Army. The Act provided for the existence of two military forces composed of the same militiamen. One was the National Guard of the states, (the volunteer militia) and the other was the National Guard of the United States, which consisted of those forces federally recognized, inspected and approved by the Army. Weiner, *supra* note 112, at 207–08.

tional Guard, and the Army supervises instruction of soldiers. The United States does not, however, actually train the National Guard. That duty remains in the states' hands.[249] Most importantly, the National Guard, while viewed today as a "federal entity," is still the state militia during those times when it is not in federal service. This is so despite its federal pay and its federally owned equipment.

2. The Second Amendment as it Relates to the Militia Today

The key developments in the history of the militia have been: the arming of the militias by the federal government; the split between an organized and unorganized militia; the passage of the militias from state authority to largely federal authority; and the rise of the army as the main defense force in the country. What effect have these changes had on the second amendment's current status?

The second amendment was ratified to ensure each state's ability to maintain an effective militia and to arm its militia if the federal government failed to do so. Thus, the right of an individual to possess a firearm is protected by the second amendment only if the individual's possession of the firearm is necessary to ensure a viable state militia.

Under existing federal law, in effect for over 70 years, the federal government is responsible for arming and equipping the present day state militia, the National Guard.[250] No state still requires its citizens to supply weapons for its militia. Consequently, possession of a weapon by an individual no longer bears any relationship to an effective militia. So long as privately owned firearms are not needed to supply the militia, and the National Guard remains armed by the federal government, the guarantee encompassed in the second amendment imposes no restrictions on federal legislation seeking to regulate ownership or possession of arms by individuals.

Some commentators argue that the National Guard should not be viewed as the "militia" envisioned by the second amendment.[251] These commentators claim that the National Guard cannot be the independent state militia contemplated in 1789. Those militias were to be tools largely of the states, ready to fight the federal government. Today, the federal government has ultimate authority and control over the militia.[252] Still other pro-gun commentators urge that the militia is impor-

249. 32 U.S.C. §§ 7014–16 (1982). This is in accordance with the Constitution. U.S. CONST. art I, § 8, cl. 16.

250. 32 U.S.C. § 702 (1982).

251. Hays, *The Right To Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381, 392 (1960).

252. 32 U.S.C. § 702 (1982). Another, related argument is that the federal government may turn the militias against the states. The President may call out the militia in times of civil

tant only in its "idealized" form of common citizens having arms.[253] Without unrestricted access to guns, there is no possibility of an anonymous armed citizenry able to rise against a tyrannical government.[254] These commentators all conclude that the present-day organized militia is not sufficient to guarantee the security of the people, as was intended by the second amendment. The underlying premise of this viewpoint is that citizens should be allowed to keep weapons in order to exercise their "right" to overthrow an oppressive government.

A major problem with these arguments is that they assume the second amendment drafters viewed the militia as an anonymous "armed citizenry at large," rather than as some form of state-organized, state-trained unit. But the second amendment was not designed to ensure that every citizen would have weapons. The second amendment was designed to assure the states and citizens that they could maintain effective state militias. However, the states and citizens demonstrated during the 1800s that they did not want to exercise this prerogative.[255]

Even if the present-day National Guard is not the exact equivalent of the colonial militia, this is so simply because of the passage of time. The militia of the 1700s no longer exists. In the late eighteenth and early nineteenth centuries, the second amendment might well have prevented the federal government from passing extensive legislation affecting private ownership of firearms. Such laws could have seriously impaired the effectiveness of the states to maintain their militias, given the statutes of the time and the poor manner in which the states armed their militias. Today, however, the state militias are well-armed. So long as the federal government continues to provide arms, and so long as privately owned weapons are not needed for militia purposes, gun legislation should raise no constitutional problems.

III. JUDICIAL INTERPRETATION OF THE SECOND AMENDMENT

The second amendment has inspired a remarkable degree of consensus among federal and state courts. Indeed, the proposition that the second amendment does not guarantee each individual a right to keep and bear arms for private, non-militia purposes may be the most firmly established proposition in American constitutional law. As the following discussion demonstrates, this proposition is in accord with the

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strife or insurrection, and put it into the full service of the federal government. *Id.*

253. Hays, *supra* note 251, at 390.

254. This is a central feature of the ideology of the National Rifle Association. *See* Halbrook, *supra* note 27, at 9; *see also* Caplan, *supra* note 5, at 50–52.

255. It should also be remembered that at the time the second amendment was drafted, the states discussed using their militias to put down insurrections. This is certainly not consistent with the idea of encouraging an armed "revolution" by the populace.

teaching of the historical materials reviewed in Section II.

A. The Amendment as a Restraint on Federal Action

1. The Supreme Court's Holding in *United States v. Miller*

The Supreme Court's decision in *United States v. Miller*[256] is the Court's only extensive treatment of the meaning of the second amendment. *Miller* established an analytical framework that, as refined by the lower courts, determines the outcome of second amendment cases to this day.

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 having registered the weapon as required by the National Firearms Act of 1934.[257] In upholding the statute as applied to the weapon at issue, the Supreme Court made it clear that the only purpose of the second amendment was to ensure the effectiveness of state militias.[258] After quoting the militia clause of the Constitution, the Court wrote: "With obvious purpose to assure the continuation and render possible the effectiveness of such [militia] forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."[259] The Court's analysis directly contradicts the argument that the second amendment guarantees a right to bear arms for individual self-defense, sport-shooting, or other purposes unrelated to participation in state militias.[260]

The Supreme Court's extensive discussion of the militia in *Miller*, moreover, reveals that the Court regarded the militia as a government directed and organized military force, not as a term synonymous with the armed citizenry at large. For instance, the Court refers to the militia as a "body of citizens enrolled for military discipline."[261] It also referred to colonial laws intended to insure the possession of arms "by

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256. 307 U.S. 174 (1939).

257. 26 U.S.C. §§ 5801–02 (1986).

258. *Miller*, 307 U.S. at 178.

259. *Id.*

260. The *Miller* opinion made historical curiosities of several nineteenth century state court decisions which had interpreted the second amendment to guarantee a broad, individual right to own arms for private purposes. *See, e.g.*, Nunn v. State, 1 Ga. 243, 251 (1846); State v. Chandler, 5 La. Ann. 489, 490 (1850); Cockrum v. State, 24 Tex. 394, 402 (1859). It also should be noted that these 19th century decisions pre-date the 1905 Dick Act, which began the fundamental transformation of the militia into a publicly-funded citizen force not dependent on firearms supplied by individual militiamen. To the extent that they invalidated state firearms laws on second amendment grounds, these early state decisions also were effectively overruled by the Supreme Court's later holdings that the second amendment does not apply to the states at all. *See infra* notes 361–67 and accompanying text.

261. *Miller*, 307 U.S. at 179.

all who were subject to military service."[262] The Court's description of the colonial militia as an instrument of governmental authority is consistent with the historical materials discussed in section II of the article.

As to the constitutional issue before it, the Court wrote:

> [i]n the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the [s]econd [a]mendment 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.[263]

Thus, the Court was able to decide the constitutional issue by finding an absence of evidence that the weapon in question had a "reasonable relationship to the preservation or efficiency of a well regulated militia." The possible use of the weapon for purposes unrelated to the militia was not discussed.

2. The Meaning of *Miller:* The "Collective Rights" Interpretation of the Second Amendment

Does *Miller* mean that weapons which can be shown to have a military use are protected by the Second Amendment? One commentator has interpreted *Miller* as holding that "the Constitution protects the right to possession or use of arms having a militia utility, e.g., shotguns, rifles, and pistols."[264] This argument seems absurd on its face, because it would accord constitutional protection to machine guns, bazookas, hand grenades, and other military hardware of staggering destructive potential.[265]

The proposition that *Miller* recognizes the protected status of any weapon that could have a military use has been rejected by every court

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262. *Id.* at 180. The Supreme Court's opinion, five years before *Miller*, in Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934), leaves no doubt that the Court regarded the militia as a government-directed body. The Court wrote that, subject to the authority of the national government, "the state is the sole judge of the means to be employed and the amount of training to be exacted for the effective accomplishment" of the ends of the militia, citing the second amendment in support. *Id.* at 260.

263. *Miller*, 307 U.S. at 178.

264. *Dowlut, supra* note 5, at 89.

265. This reading of *Miller* also has obvious implications for pending legislation to ban semi-automatic assault weapons. Indeed, the military-style features of such weapons are cited by supporters of proposals to ban their distribution to the general public. *See Hearing on S. 446 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 24 (1988) (testimony of Philip C. McGuire, former Associate Director, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms).

which has addressed it. For example, the First Circuit Court of Appeals in *Cases v. United States*[266] rejected a second amendment challenge to the defendant's conviction for violating the proscription in the Federal Firearms Act[267] against the transport or receipt of firearms in interstate commerce by fugitives or persons convicted of a crime of violence. Although the Court acknowledged that the weapon in question—a .38 caliber Colt revolver—"may be capable of military use" or at least valuable in training a person to use military weapons, it held that it was not constitutionally protected because its possession by the defendant did not contribute to the maintenance of a militia:

> [t]here is no evidence that the appellant was or even had been a member of any military organization or that his use of the weapon under the circumstances disclosed was in preparation for a military career. In fact, the only inference possible is that the appellant at the time charged in the indictment was in possession of, transporting, and using the firearm and ammunition purely and simply on a frolic of his own and without any thought or intention of contributing to the efficiency of a well regulated militia which the Second Amendment was designed to foster as necessary to the security of a free state.[268]

Whereas *Miller* had decided the second amendment issue by reference to the nature of the weapon alone, the court in *Cases* examined whether the possession of the weapon by the particular defendant had any relationship to a well-regulated militia.[269] The *Cases* opinion sensibly recognized that the military nature of a weapon does not itself determine its relationship to the maintenance of a militia since a weapon suitable for military purposes may be owned and used for purposes unrelated to militia activities.

It may legitimately be argued that the Supreme Court in *Miller* did not need to go beyond the nature of the weapon itself to determine whether a conviction for transporting it in interstate commerce ran afoul of the second amendment. Having found the evidence insufficient to indicate any military use for a sawed-off shotgun, the Court decided the second amendment issue without analyzing the particular circumstances of its possession by the defendant.[270] Thus, although proof of the sawed-off shotgun's military potential was necessary to give it constitutional protection, it may not have been sufficient to confer such protection. The court in *Cases* wrote:

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266. 131 F.2d 916 (1st Cir. 1942), *cert denied sub nom.*, Velazguez v. United States, 319 U.S. 770 (1943).

267. 15 U.S.C. §§ 901–10 (1938) (repealed 1968).

268. *Cases*, 131 F.2d at 923.

269. *Id.*

270. *Id.* at 925.

> we do not feel that the Supreme Court in [the Miller] case was attempting to formulate a general rule applicable to all cases. The rule which it laid down was adequate to dispose of the case before it and that we think was as far as the Supreme Court intended to go.[271]

The court in *Cases* also recognized that since some sort of military use seems to have been found for almost any modern lethal weapon,[272] to read *Miller* to grant constitutional protection to all weapons of military potential would be to empower the federal government to regulate only weapons which can be classed as antiques or curiosities,[273] such as the flintlock musket.[274] The court also was disturbed by the implication that Congress would be prevented from regulating the private use of "distinctly military arms, such as machine guns, trench mortars, antitank or anti-aircraft guns"[275] even though "it would be inconceivable that a private person could have any legitimate reason for having such a weapon."[276]

Later decisions have agreed with this interpretation of *Miller* and have upheld the power of the federal government to regulate military weapons. The Sixth Circuit Court of Appeals in *United States v. Warin*[277] held that the provisions of federal law requiring registration of machine guns[278] did not violate the second amendment. The court noted that the *Miller* Court did not reach the question whether military weapons could be regulated, there being no military weapon before the Court.[279] The *Warin* court concluded that if conferring constitutional protection on the private ownership of military weapons was "inconceivable" in 1942 when *Cases* was decided, "it is completely irrational in this time of nuclear weapons."[280] Thus, the courts have unanimously rejected the notion that *Miller*, either directly or by implication, recognizes a constitutional right to possess military weapons.

In fact, the courts consistently have read *Miller* to mean that federal statutes regulating firearms do not offend the second amendment unless the statutes are shown to interfere with the maintenance of an

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271. *Id.* at 922.
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. 530 F.2d 103 (6th Cir. 1976).
278. 26 U.S.C. §§ 586(d), 5871 (1968).
279. *Warin*, 530 F.2d at 105–06.
280. *Id.* at 106. Similar conclusions were later reached by the District of Columbia Court of Appeals in Sandidge v. United States, 520 A.2d 1057, 1058–59 (D.C.), *cert. denied*, 484 U.S. 868 (1987), and the Supreme Judicial Court of Massachusetts in Commonwealth v. Davis, 369 Mass. 886, 891 n.9, 343 N.E.2d 847, 850 n.9 (1976).

organized state militia. Because privately-owned firearms are no longer used for militia purposes, this analytical framework has meant that, since *Miller*, no federal gun law has been held to violate the second amendment.

This pattern of lower court decisions began with the decision of the Third Circuit in *United States v. Tot*,[281] decided one month before *Cases*. In *Tot*, the court of appeals rejected a second amendment challenge to the identical section of the Federal Firearms Act at issue in *Cases*.[282] The court of appeals' holding was based in part on the failure of the defendant to show a relationship between the weapon at issue—a pistol—and the preservation of a well-regulated militia.[283] It is not clear whether the court of appeals' finding in *Tot* was that there are no military uses for a pistol or that the possession of a pistol by the particular defendant was unrelated to militia activity.

In any event, the court of appeals preferred to rest its holding on a broader basis, namely that there was never any absolute right to bear arms under the common law and that laws restricting the availability of firearms to persons "who have previously . . . been shown to be aggressors against society"[284] surely must be constitutional because such laws do not "infringe upon the preservation of the well-regulated militia protected by the [s]econd [a]mendment."[285] The court in *Tot* expressly rejected the proposition that the second amendment guarantees a broad, individual right to own firearms similar in nature to the guarantees of the first amendment.

> It is abundantly clear that from the discussion of the amendment contemporaneous with its proposal and adoption and those of learned writers since that this amendment, unlike those providing for protection of free speech and freedom of religion, was not adopted with individual rights in mind, but as a protection for the states in the maintenance of their militia organizations against possible encroachments by the federal power.[286]

As the discussion in section II shows, the court's conclusion accurately reflects the weight of the historical evidence.

Much of the recent jurisprudence of the second amendment has been created by challenges to the provisions of the Gun Control Act of 1968. In each case, the court considered the key constitutional question to be whether the particular statutory provision at issue had any ad-

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281. 131 F.2d 261 (3d Cir. 1942).
282. *Id.* at 266–67.
283. *Id.* at 266.
284. *Id.*
285. *Id.* at 266–67.
286. *Id.* at 266.

verse impact on a state's ability to maintain a military force. In each case, the court answered no. The federal courts have rejected second amendment challenges to the federal record-keeping requirements imposed on gun dealers;[287] the prohibition of gun possession, transport, or receipt by convicted felons[288] or persons indicted for felonies;[289] the registration requirements as applied to machine guns;[290] the dealer licensing requirements;[291] and the prohibition against making false statements in the course of purchasing firearms.[292]

The courts repeatedly have followed *Tot* in expressly holding that the right guaranteed by the second amendment is not an individual right, but rather a "collective" right. The Sixth Circuit Court of Appeals wrote in *Stevens v. United States*,[293] "[s]ince the [s]econd [a]mendment right to keep and bear arms applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm."[294]

In a later opinion,[295] the Sixth Circuit Court of Appeals, called the second amendment guarantee a "collective rather than an individual right."[296] In *Eckert v. City of Philadelphia*,[297] the Third Circuit Court of Appeals wrote that "the right to keep and bear arms is not a right given by the United States Constitution."[298] The Fourth Circuit Court of Appeals in *United States v. Johnson*[299] held that "the second amendment only confers a collective right of keeping and bearing arms which must bear a reasonable relationship to the preservation or efficiency of a well regulated militia."[300] The Supreme Court of Minnesota wrote in *In Re Atkinson*[301] that "the [s]econd [a]mendment protects not an in-

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287. United States v. Decker, 446 F.2d 164 (8th Cir. 1971).

288. United States v. Johnson, 497 F.2d 548 (4th Cir. 1974); Stevens v. United States, 440 F.2d 144 (6th Cir. 1971); United States v. Synnes 438 F.2d 764 (8th Cir. 1971), *vacated on other grounds*, 404 U.S. 1009 (1972).

289. United States v. Craver, 478 F.2d 1329, 1338 (6th Cir. 1973).

290. United States v. Oakes, 564 F.2d 384 (10th Cir. 1977); *Warin*, 530 F.2d at 103.

291. United States v. Swinton, 521 F.2d 1255 (10th Cir. 1975); United States v. Kraase, 340 F. Supp. 147 (E.D. Wis. 1972); United States v. Gross, 313 F.Supp. 1330 (S.D. Ind. 1970), *aff'd on other grounds*, 451 F.2d 1355 (7th Cir. 1971).

292. Cody v. United States, 470 F.2d 34 (8th Cir. 1972).

293. 440 F.2d 144 (6th Cir. 1971).

294. *Id.* at 149.

295. *Warin*, 530 F.2d 103.

296. *Id.* at 106; *see also* United States v. Kozerski, 518 F. Supp. 1082, 1090 (D. N.H. 1981).

297. 477 F.2d 610 (3d Cir. 1973).

298. *Id.* at 610.

299. 497 F.2d 548 (4th Cir. 1974).

300. *Id.* at 550 (quoting *Miller*, 307 U.S. at 178).

301. 291 N.W.2d 396 (Minn. 1980).

dividual right but a collective right, in the people as a group, to serve as militia."[302] Other state courts have agreed.[303] This line of cases was succinctly summarized by the Court of Appeals for the Eighth Circuit, which wrote in *United States v. Nelson*[304] that the argument for a "fundamental right to keep and bear arms" in the second amendment "has not been the law for at least 100 years."[305] The court of appeals noted that courts "have analyzed the [s]econd [a]mendment purely in terms of protecting state militias, rather than individual rights."[306]

The "collective, not individual rights" interpretation has been criticized on the ground that the language of the second amendment grants no express rights to the states and instead speaks of the right of "the people" to keep and bear arms. These commentators note that when rights are granted to "the people" in other portions of the Bill of Rights, these rights are being granted to individuals, not to states.[307]

This criticism is simply a misreading of what the courts mean when they say that the right granted by the second amendment is "collective," rather than "individual." The courts have not held that the second amendment right belongs to the states in the sense that only the states, not individuals, may assert it.[308] Rather, the courts have held, in accord with *Miller*, that the interest protected by the second amendment is the collective and public interest in a viable state militia, not the private interest of individuals in owning firearms for reasons unrelated to the militia.

The second amendment is thus distinguishable from other parts of the Bill of Rights because it protects a public interest, not a private interest. It may well be that the right to keep and bear arms is individual in the sense that it may be asserted by an individual. But it is a narrow right indeed, for it is violated only by laws that, by regulating

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302. *Id.* at 398 n.1.

303. *See, e.g.*, Sandidge v. United States, 520 A.2d 1057, 1058 (D.C.), *cert. denied*, 108 S. Ct. 193 (1987); Kalodimos v. Village of Morton Grove, 103 Ill. 2d 483, 509, 470 N.E.2d 266, 278 (1984); Salina v. Blakesley, 72 Kan. 230, 232–33, 83 P. 619, 620 (1905); Burton v. Sills, 53 N.J. 86, 97, 248 A.2d 521, 526 (1968), *appeal dismissed*, 394 U.S. 812 (1969); State v. Fennell, 95 N.C. App. 140, 141, 382 S.E.2d 231, 232 (1989); State v. Vlacil, 645 P.2d 677, 679 (Utah 1982).

304. 859 F.2d 1318 (8th Cir. 1988).

305. *Id.* at 1320.

306. *Id.*

307. *See, e.g.*, Kates, *supra* note 5, at 218. For instance, "the right of the people peaceably to assemble" in the first amendment, and the "right of people to be secure . . . against unreasonable searches and seizures," in the fourth amendment, function as guarantees to individuals, not to states. U.S. CONST. amends. I, IV.

308. If the courts regarded the second amendment right as belonging to the states, challenges to firearms statutes based on the amendment would have been rejected on the basis that the party making the challenge was an individual, not a state. No second amendment case has been decided on this ground. As discussed above, the decisive issue has been whether the impact of the challenged statute on the individual's right to own firearms adversely affects the state's militia.

the individual's access to firearms, adversely affect the state's interest in a strong militia. As one court has cogently written in adopting the "collectivist" interpretation: "[t]he right of an individual is dependent upon a role in rendering the militia effective."[309]

As noted above, the possibility that laws affecting privately-owned firearms could also cripple a state's militia was quite real in colonial times when, as the *Miller* Court accurately noted, militiamen often were required to use their own arms in active militia duty. This possibility now seems purely theoretical because American citizens do not own firearms for the purpose of participating in militia activities. For such activities, they use arms supplied by the federal government. This does not imply that the second amendment is without meaning. But the historical changes in the nature of the militia and how it is armed have made it impossible for the second amendment guarantee to be violated by laws affecting the private ownership of firearms.

This conclusion is dramatically illustrated by the most far-reaching of the second amendment decisions, *Quilici v. Village of Morton Grove.*[310] In *Morton Grove,* the Seventh Circuit Court of Appeals upheld, against a second amendment challenge, a local ordinance prohibiting the possession of handguns within the borders of Morton Grove. In addition to finding the amendment inapplicable to the states, the court of appeals held that the scope of its guarantee would not prohibit a handgun ban.[311] The court wrote that according to the plain language of the amendment, "it seems clear that the right to bear arms is inextricably connected to the preservation of a militia."[312] Finding that individually owned handguns are not military weapons at all, the court concluded that under *Miller,* "the right to keep and bear handguns is not guaranteed by the second amendment."[313] The implication of *Morton Grove* is that a prohibition of the private ownership of handguns at the federal level would not offend the second amendment.

Opponents of the collectivist theory argue that, regardless of the historical changes which led to the creation of a publicly-funded citizen force known as the National Guard, the colonial "militia" still survives in the statute books.[314] The opponents rely on Title 10 of the United

309. City of East Cleveland v. Scales, 10 Ohio App. 3d 25, 30, 460 N.E.2d 1126, 1130 (1983); *see also* United States v. Graves, 554 F.2d 65, 67 n.2 (3d Cir. 1977).

310. 695 F.2d 261 (7th Cir. 1982), *cert. denied,* 464 U.S. 863 (1983).

311. *Id.* at 270.

312. *Id.*

313. *Id.* The Court's use of the phrase "individually owned" suggests that, as in *Cases,* it is the circumstances of ownership, not simply the nature of the firearm, that determines its relationship to the militia.

314. See Hardy, *supra* note 5, at 623–24.

States Code section 311,[315] which defines the "militia of the United States" as consisting of

> all able bodied males at least 17 years of age and, [with certain exceptions], under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are commissioned officers of the National Guard.[316]

Section 311 also distinguishes between the "organized militia, which consists of the National Guard and the Naval Militia"[317] and the "unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia."[318] In addition, various state laws have similar broadly-based definitions of the "militia."[319] The argument made by the critics of the "collectivist" approach appears to be that mere membership in the "militia," as it is defined in these statutes, confers an individual right to own firearms under the second amendment.

This argument is flawed in two respects. First, the expressed concern of the second amendment is not simply a "militia," but a "well-regulated militia." Thus the phrase "well-regulated militia" was chosen to refer to an organized military force subject to a set of obligations enforced by the government.[320] Because the viability of that kind of military force is the concern of the second amendment, there is no reason to believe that the private possession of firearms by persons who are not members of that force is constitutionally protected. Certainly the "organized militia" defined in 10 U.S.C. § 311—the National Guard and the Naval Militia—corresponds more closely to a "well-regulated militia" than the "unorganized militia" defined in that statutory section.[321]

Second, the critics of the collectivist theory are at a loss to explain

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315. 10 U.S.C. § 311 (1982).

316. *Id.*

317. *Id.*

318. *Id.*

319. *See* Hardy, *supra* note 5, at 624.

320. *See* Burton v. Sills, 53 N.J. 86, 97, 248 A.2d 521, 526 (1968), *appeal dismissed*, 394 U.S. 812 (1969) (holding that "well-regulated militia" refers to the active, organized militia of each state).

321. 10 U.S.C. § 311. In addition, the modern "unorganized militia," as defined in 10 U.S.C § 311, is entirely unlike the colonial concept of a militia. As the Supreme Court noted in *Miller*, other colonial militiamen were required by law to keep arms for the purpose of participating in militia activities. *Miller*, 307 U.S. at 180. Colonial militiamen also were subject to various training obligations. No such requirements are imposed upon the "unorganized militia" of today. Only the organized militia—the National Guard and the Naval Militia—today bears arms and is trained for militia activity, and those arms are provided by the government.

how the broad-based definition of the "militia" in the statute books—or the colonial model of a militia—supports the assertion of an individual right of gun ownership for all citizens. After all, membership in the statutory "unorganized militia" is restricted to males of a certain age group, as was membership in the colonial militia. Are the theorists who advocate a broad second amendment right willing to pursue their argument to its necessary conclusion that women and older males have no constitutional right to own guns?

The argument that membership in the "sedentary" or "unorganized" militia confers a second amendment right has been consistently rejected by the courts. In upholding the federal machine gun registration law, the Sixth Circuit Court of Appeals in *Warin* stated that "there is absolutely no evidence that a submachine gun in the hands of an individual sedentary or unorganized militia member would have any, much less a reasonable relationship to the preservation or efficiency of a well regulated militia."[322] The Tenth Circuit Court of Appeals upheld the same statute against the identical argument in *United States v. Oakes*.[323] There the court of appeals stated: "[t]o apply the amendment so as to guarantee appellant's right to keep an unregistered firearm which has not been shown to have any connection to the militia merely because he is technically a member of the Kansas militia, would be unjustifiable in terms of either logic or policy."[324]

No court in this century has suggested that private ownership of firearms by members of the "sedentary" or "unorganized" militia is protected by the second amendment. Instead, as the Supreme Court of New Jersey summarized the state of the law in *Burton v. Sills*,[325] "under *Miller*, Congress . . . may regulate interstate firearms so long as the regulation does not impair the maintenance of the active, organized militias of the states."[326]

3. Firearms and Equal Protection

Courts have repeatedly been asked to invalidate various federal statutes barring certain classes of persons from owning guns, on the ground that such laws violate the equal protection clause, as applied to the federal government through the due process clause of the fifth amendment. These cases are significant because the courts, in unanimously rejecting these equal protection challenges, have ruled that there is no fundamental right to gun ownership under the Constitution.

322. *Id.* at 106.
323. 564 F.2d 384 (10th Cir. 1977).
324. *Id.* at 387.
325. 53 N.J. 86, 98, 248 A.2d 521, 527 (1968), *appeal dismissed*, 394 U.S. 812 (1969).
326. *Id.*

Under traditional equal protection analysis, the level of judicial scrutiny of a statutory classification is determined by whether the classification employs inherently suspect criteria, such as race,[327] or affects a fundamental right granted by the Constitution.[328] In either case, the court will scrutinize the statute closely to determine if it is necessary to advance a compelling governmental interest. Statutory classifications affecting firearms have not been held to infringe a fundamental right.

For example, in *United States v. Synnes*,[329] a defendant convicted of violating the federal law against firearm possession by a convicted felon challenged the law on equal protection grounds. The court upheld the statute, deciding that "the right to bear arms is not the type of fundamental right to which the 'compelling state interest' standard attaches."[330] Instead, the court subjected the statute to the much less demanding "rational basis" standard, under which the statute "will not be set aside if any state of facts reasonably may be conceived to justify it."[331]

The Ninth Circuit Court of Appeals rejected application of fundamental rights analysis to gun possession in even stronger terms in *United States v. Karnes*.[332] In upholding the federal law prohibiting gun ownership by those dishonorably discharged from the armed forces, the court wrote:

> none [of the defendants] are engaged in conduct—possession of firearms—that should be fostered, nor protected nor are the rights at issue of the type that could not be constitutionally regulated by any statute, nor is the interest here similar to any of those that are presently considered basic.[333]

Other courts similarly have upheld firearms statutes against equal protection attack by applying "rational basis" scrutiny because no fundamental right was affected.[334]

An equal protection challenge to a federal firearms statute reached

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327. Loving v. Virginia, 388 U.S. 1, 11 (1967).

328. Roe v. Wade, 410 U.S. 113, 155–56 (1973); Shapiro v. Thompson, 394 U.S. 618, 627 (1969).

329. 438 F.2d 764 (8th Cir. 1971), *vacated on other grounds*, 404 U.S. 1009 (1972).

330. *Id.* at 771 n.9.

331. *Id.* at 771.

332. 437 F.2d 284 (9th Cir. 1971).

333. *Id.* at 287 (footnoted omitted).

334. *See* United States v. Ranson, 515 F.2d 885, 891 (5th Cir. 1975); United States v. Craven, 478 F.2d 1329, 1339 (6th Cir. 1973); United States v. Day, 476 F.2d 562, 568 (6th Cir. 1973). State and local statutory classifications affecting firearms also have been upheld under the "rational basis" test. *See, e.g.*, Marchese v. California, 545 F.2d 645, 647 (9th Cir. 1976); Fesjian v. Jefferson, 399 A.2d 861, 864 (D.C. 1979).

the Supreme Court in *Lewis v. United States*.[335] The statute in question was the federal prohibition against ownership of firearms by convicted felons.[336] The issue was whether the fifth amendment due process clause barred a conviction under the statute when the defendant's prior felony conviction was obtained in violation of his constitutional right to counsel.[337] In rejecting the constitutional challenge, the Court stated that "[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."[338] The Court cited its decision in *Miller* in support of this proposition. It upheld the statutory scheme under the rational basis test: "Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm."[339]

The Court's statement that a statute denying a class of persons the right to own a gun does not "trench upon any constitutionally protected liberties"[340] is a definitive statement that individual gun ownership for private purposes is not a constitutional right. The *Lewis* decision, although rendered in an equal protection context, strongly validates the lower courts' consensus interpretation of *Miller* as recognizing a constitutional right to own a gun only when such gun ownership is necessary to the functioning of the organized militia.

B. The Amendment as a Restraint on State Action

1. The Early Supreme Court Cases

Because of the absence of federal firearms laws until the 1930s, the early second amendment cases addressed the amendment's applicability to state statutes. Because these pre-*Miller* decisions found that the amendment does not restrain state action, they avoided a detailed discussion of its scope and meaning.

In *United States v. Cruikshank*,[341] the defendants had been indicted for violating the 1870 Act to Enforce the Right of Citizens of the United States, which punished interference with rights secured by the Constitution and laws of the United States.[342] One of the rights alleged to have been interfered with was "the right to keep and bear

335. 445 U.S. 55 (1980).
336. *Id.* at 56.
337. *Id.*
338. *Id.* at 65 n.8.
339. *Id.* at 66.
340. *Id.* at 65 n.8.
341. 92 U.S. 542 (1876).
342. *Id.* at 548. The current version of this Act is at 18 U.S.C. § 241 (1988).

arms for a lawful purpose."[343]

The Court held this count of the indictment defective because the asserted right was not one secured by the Constitution.

> The second and tenth counts are equally defective. The right there specified is that of bearing arms for a lawful purpose. This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government.[344]

The holding of *Cruikshank* that the second amendment is a limitation only on federal, not state power, was reaffirmed by the Supreme Court in *Presser v. Illinois*.[345] *Presser* involved a second amendment challenge to an Illinois statute which prohibited all bodies of men, other than the regularly organized volunteer militia, from associating together as military organizations, or drilling or parading with arms without a license.[346] The defendant had violated the statute by leading a parade of rifle-bearing members of a German nationalist organization without obtaining a permit. Citing *Cruikshank*, the Court held that the second amendment "is a limitation only upon the power of Congress and the National government, and not upon that of the states."[347]

The *Presser* case, moreover, is notable for its treatment of the defendant's asserted right to participate in a private military organization and to be armed for that purpose. In addition to his second amendment challenge, the defendant argued that such rights are guaranteed by the privileges and immunities clause of the fourteenth amendment.[348] The Supreme Court posed the issue as whether a citizen who is not a member of the "organized volunteer militia" has a constitutional right to participate in military activities.[349] The Court ruled that the Constitution grants no such right.

> Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the State and

343. *Cruikshank*, 92 U.S. at 553.
344. *Id.* at 553.
345. 116 U.S. 252, 265 (1886).
346. *Id.* at 256–57.
347. *Id.* at 265.
348. *Id.* at 266 ("No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States.").
349. *Id.* at 266.

> Federal governments, acting in due regard to their respective prerogatives and powers. The Constitution and laws of the United States will be searched in vain for any support to the view that these rights are privileges and immunities of citizens of the United States independent of some specific legislation on the subject.[350]

The Court's rejection of the defendant's privileges and immunities argument in *Presser* is directly responsive to the theory advanced by some proponents of broad individual firearms rights that the Constitution guarantees a fundamental right to bear arms to resist governmental tyranny.[351] Implicit in such a theory is that there is a constitutional right to engage in armed military activity independent of the government's control.[352] That theory was rejected by the *Presser* Court. The *Presser* holding was relied upon by one lower court in rejecting a second amendment challenge to an injunction against the paramilitary operations of the Ku Klux Klan.[353] The court concluded that "the [s]econd [a]mendment does not imply any general constitutional right for individuals to bear arms and form private armies."[354]

Although *Presser* held the second amendment inapplicable to the states, there is dicta in the opinion suggesting that the Constitution does limit the power of the states to interfere with the right to keep and bear arms, at least to the extent that state law may threaten the availability of the militia for federal use.

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the

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350. *Id.* at 267.

351. *See* Kates, *The Second Amendment: A Balanced Approach*, S.F. BARR. B.J. 12, 16 (1989) (arguing for "the desirability of citizens being armed against tyranny . . . . "); *see also* Lund, *supra* note 5, at 112 (second amendment affords "protection against political oppression").

352. Indeed, the individual rights proponents often cite examples of successful guerilla warfare against governmental authority as illustrations of the importance of preserving the constitutional right of armed resistance. *See* Kates, *supra* note 351, at 17.

353. *See* Vietnamese Fishermen's Assoc. v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 210 (S.D. Tex. 1982).

354. *Id.* at 210. The *Vietnamese Fishermen's* case is a dramatic illustration of the danger to our constitutional form of government and to the rule of law from a generalized right of armed resistance against "tyranny." Would such a right not preclude the government from taking measures against the paramilitary activity of the Ku Klux Klan and other extremist groups who regard themselves as in revolt against the "tyranny" of governmental policies with which they disagree? As Dean Roscoe Pound has written:

> "[A] legal right of the citizen to wage war on the government is something that cannot be admitted . . . . 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."

POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 90–91 (1957).

> 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 for maintaining the public security, and disable the people from performing their duty to the general government.[355]

The Court upheld the Illinois statute regulating parading with arms because it did not have the feared effect on federal prerogatives.[356]

At least one commentator has interpreted this passage to mean that the second amendment protects "the right of the Federal Government to have at its disposal a militia, the right of whose members 'to keep and bear arms' may not be infringed by state governments."[357] Whatever the *Presser* dicta means, it surely does not address the second amendment, because the dicta itself makes clear that it is "[l]aying the constitutional provision in question out of view."[358] Moreover, it is doubtful that the passage has any modern significance as a suggestion of a constitutional restraint on state power respecting firearms. The Court's concern clearly was the availability of arms for state militias during the time the militias were in the service of the federal government. Since state militias today are a part of the National Guard—armed by the federal government and not by privately owned arms—the availability of militia forces for federal use is unaffected by laws regulating private gun ownership by individuals.[359]

Finally it is worth noting that the Court's concern in *Presser* was ensuring an effective militia for use by the federal government in "maintaining the public security."[360] This concept of the militia is the polar opposite of the view taken by the critics of the collectivist theory who view the militia as the body of citizens armed to resist governmental tyranny. The Supreme Court in *Presser* wanted to preserve the federal power under the militia clause of the Constitution and "[t]o provide for calling forth the militia to execute the laws of the Union [and] suppress insurrections."[361] *Presser* indicates that the militia must be seen as a military instrument to be used by the government, not as a term describing the armed citizenry standing at the ready to resist gov-

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355. *Presser*, 116 U.S. at 265.

356. *Id.* at 266.

357. Note, *Constitutional Limitations on Firearms Regulation*, 1969 DUKE L.J. 773, 789 (1969).

358. *Presser*, 116 U.S. at 265.

359. That *Presser* imposed no real limitations on the power of the states to regulate firearms is further supported by the Supreme Court's later ruling in Miller v. Texas, 153 U.S. 535 (1894). In that case, the Court sustained a state statute prohibiting the carrying of a dangerous weapon on the person. *Id.* at 538. The Court again held that the second amendment functions as a restraint on federal, not state, action. *Id.*

360. *Presser*, 116 U.S. at 265.

361. *Id.*

ernment by force of arms.

2. The Second Amendment and the Modern Incorporation Doctrine

Cruikshank, Presser, and Miller v. Texas[362] were decided during the era when the prevailing view, as articulated by Chief Justice Marshall in *Baron v. Mayor of Baltimore*,[363] was that the Bill of Rights does not apply to and restrain the states. Since that time, constitutional jurisprudence has seen the selective application to the states of most of the first ten amendments through the due process clause of the fourteenth amendment.[364] Because no second amendment case involving a challenge to a state or local statute has reached the Supreme Court since 1894, the question arises whether the Supreme Court would find the second amendment right to be an element of due process under the fourteenth amendment and thereby applicable as a restraint on state action.

For the Court to do so would be difficult to reconcile with the rationale of the *Miller* decision. The *Miller* opinion made it clear that the central concern of the second amendment is to protect an important state prerogative against federal encroachment—specifically, the availability of state militia forces.[365] As the historical account in section II shows, the amendment was intended to protect state interests against federal power, not individual rights against state power. If the amendment's purpose is to protect an important state interest, it would be paradoxical to interpret it also as a restraint on state power. As one court has written, "[t]he chances appear remote that this amendment will ultimately be read to control the States, for unlike some other provisions of the Bill of Rights, this is not directed to guaranteeing the rights of individuals, but rather . . . to assuring some freedom of State forces from national interference."[366]

With the exception of one pre-*Miller* ruling of the Idaho Supreme Court,[367] since *Cruikshank*, the courts have unanimously held the second amendment inapplicable as a restraint on state power.[368]

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362. 153 U.S. 535.

363. 32 U.S. 243 (1883).

364. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel); Mapp. v. Ohio, 367 U.S. 643 (1961) (fourth amendment right against unreasonable searches and seizures).

365. 153 U.S. at 538.

366. Commonwealth v. Davis, 369 Mass. 886, 890, 343 N.E.2d 847, 850 (1976).

367. In re Brickey, 8 Idaho 597, 70 P. 609 (1902).

368. *See* Justice v. Elrod, 832 F.2d 1048, 1051 (7th Cir. 1987); *Quilici*, 695 F.2d at 270; *Cases*, 131 F.2d at 921–22; Krisko v. Oswald, 655 F. Supp. 147, 149 (E.D. Pa. 1987); State v. Amos, 343 So. 2d 166, 168 (La. 1977); Application of Atkinson, 291 N.W.2d 396, 398 n.1 (Minn. 1980); State v. Sanne, 116 N.H. 583, 364 A.2d 630 (1976); Burton v. Sills, 53 N.J. 86, 97, 248

As a result, all successful challenges to state or local firearms statutes since *Miller* have been brought under "right to keep and bear arms" provisions of state constitutions. The state constitutional provisions which have invalidated these laws use language which is far broader than the language of the second amendment and which divorces the right to keep and bear arms from the state's interest in an effective militia.[369]

IV. CONCLUSION

The preceding analysis yields a number of conclusions about the second amendment which are repeatedly recognized by the courts, but frequently go unmentioned in the debate over gun control.

First, the second amendment was passed as an assurance to the states that they would have the right to maintain their own militias. Such militias were to be used as the centerpiece of the nation's military power, as an alternative to a large standing army, as a tool for the states to ensure public order, and as a means for the states to defend against the encroachment of federal power. Second, the second amendment does not operate as a restraint on the states. It acts as a restraint on the federal government. Third, there is no substantial historical evidence for the claim that the second amendment guarantees an individual right to have arms for any purpose other than participation in a state-regulated militia. Fourth, as long as federal gun laws do not adversely affect the organized state militias, these laws should encounter no second amendment problems. Fifth, because the state militias no longer rely on the use of privately-owned firearms by their active members, federal regulation of private gun ownership poses no threat to state militias, and therefore raises no constitutional issue. This is demonstrated by the remarkable unanimity of federal and state courts in upholding the constitutional validity of firearms laws against second amendment challenges.

In the light of the historical evidence and the consistent rulings of

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A.2d 521, 528 (1968); *appeal dismissed*, 394 U.S. 812 (1969); Masters v. State, 685 S.W.2d 654, 655 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 853 (1985).

369. *See, e.g.*, City of Lakewood v. Pillow, 180 Colo. 35, 42, 501 P.2d 744, 751 (1972) (local ordinance barring possession of a deadly weapon unconstitutionally overbroad; state constitution provides that "[t]he right of no person to keep and bear arms in defense of his home, person and property . . . shall be called into question . . . ."); State v. Rupe, 101 Wash. 2d 664, 669, 683 P.2d 571, 576 (1984) (defendant's lawful possession of assault weapons inadmissible as evidence in criminal sentencing proceeding because possession of firearms a constitutional right under provision stating that "[t]he right of an individual citizen to bear arms in defense of himself, or the state, shall not be impaired . . . ."); City of Princeton v. Buckner 377 S.E.2d 139, 152 (W. Va. 1988) (state statute requiring license to carry firearms violates constitutional provision stating that "[a] person has the right to keep and bear arms for the defense of self, family, home and state and for lawful hunting and recreational use.").

the courts rejecting the existence of a constitutional barrier to strong gun laws, perhaps the time has come for our elected representatives and their appointees to resist the temptation to invoke the second amendment as the all-purpose excuse for opposition to such laws. If they are unwilling to support proposals such as a mandatory waiting period for handgun purchases or a prohibition of assault weapons, perhaps it is time they explain their opposition on policy grounds. Perhaps they should explain why such proposals should not be enacted, not pretend that they *cannot* become law because of the second amendment.

Who has cause to be embarrassed by the second amendment? Actually, no one. The second amendment was simply an effort to address the proper distribution of military power in our society. It did so in a manner that made sense in the historical context of colonial America, but which has lost its resonance for modern-day America because of changes in the nature and role of the citizen army the amendment was intended to protect. This does not mean that the amendment is "embarrassing." It means that its importance has eroded over time. It is not the second amendment itself that is the occasion for embarrassment. It is, rather, the misuse of the second amendment by so many of those who oppose new government initiatives against gun violence.