COMMENTARY

Honorable Alfred J. Lechner, Jr.[*]

I am an individual rights advocate.[1] I do not embrace the concept of a collective right under the Second Amendment.[2] The Second Amendment means what it says. To devalue the plain meaning is to devalue the other Amendments to the Constitution. One does not have the right to pick and choose.

The opening words of the Second Amendment are a preamble:[3] "[a] well regulated [m]ilitia, being necessary to the security of a free [s]tate . . . ," but that preamble contains the result—the security of a free state. The purpose of the Second Amendment—the right of the people to keep and bear armsshall not

---

[*] Judge, United States District Court, District of New Jersey.

[1] For an overview of both the individual rights and collective states-rights approaches, *see* R. Barnett & D. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996).

The individual rights approach finds acceptance among most legal scholars. *See e.g.*, LAWRENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 902 n.221 (3d ed. 2000); Barnett & Kates, *supra* note 2, at 1143-45 nn. 12-17; Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Nicholas J. Johnson, *Shots Across No Man's Land: A Response to Handgun Control, Inc.'s Richard Aborn*, 22 FORDHAM URB. L.J. 441 (1995).

[2] Few legal scholars support the collective rights approach. *See e.g.*, George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631, 688-93 (1992); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 61-62 (1995); Richard M. Aborn, *The Battle Over the Brady Bill and the Future of Gun Control Advocacy*, 22 FORDHAM URB. L.J. 417 (1995).

As of 1996, in total, only seven articles supported the collective rights view of the Second Amendment. *See* Barnett & Kates, *supra* note 2, at 1143 n.12, 1145. Of the seven, five were written by "officers or paid employees of anti-gun groups." *Id.* at 1143.

[3] Some scholars describe the opening words of the Second Amendment as the justification clause. *See e.g.*, Volokh, *supra* note 2, at 834 (analyzing state bills of rights with justification clauses to demonstrate such clauses are often drafted in ways that aid not trump the meaning of the operative language).

be infringed—is to achieve that result. Rather than dispute the plain meaning to foster a desired policy objective, perhaps those who ardently favor gun control initiatives should instead recognize the actual meaning and intent of the Second Amendment. Thereafter, reasonable measures concerning the regulation of guns may be more feasible.[4]

Some gun control advocates find support for their states-rights collective approach to the Second Amendment in an article by Chief Justice Warren Burger in Parade Magazine.[5] Although Chief Justice Burger argued against the

---

[4] *See* TRIBE, *supra* note 1, at 902 n.221:

> [T]he most accurate conclusion one can reach is that the core meaning of the Second Amendment is a populist/republican/federalism one: Its central object is to arm "We the People" so that ordinary citizens can participate in the collective defense of their community and their state. But it does so *not through directly protecting a right on the part of* the federal government, to arm the populace as they see fit. Rather, the amendment achieves its central purpose by assuring that the federal government may not disarm *individual citizens* without some unusually strong justification consistent with the authority for the states to organize their own militias. That assurance in turn is provided through recognizing a *right* (admittedly of uncertain scope) *on the part of the individuals to possess and use firearms in the defense* of themselves and their homes—not a right to hunt for game, quite clearly, and certainly not a right to employ firearms to commit aggressive acts against other persons—a right that directly limits action by Congress or by the Executive Branch and may well. In addition, be among the privileges or immunities of the United States citizens protected by [Section] 1 of the Fourteenth Amendment against state or local government action.

Id. (emphasis added)

Professor Tribe has not always espoused this view. *Cf.* LAWRENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 11 (1991):

> The *only* purpose [of the Second Amendment] enacted is the one contained in its text, for only its words are law. And in modern circumstances, those words most plausibly may be read to preserve a power of the state militias against abolition by the federal government, *not the asserted right of individuals* to possess all manner of federal weapons.

Id. (emphasis added).

[5] *See e.g.*, Remarks made by Honorable John Bissell; Warren Burger, *The Right to Bear Arms*, PARADE, Jan. 14, 1990 at 4-6. Such foundation for legal argument is at best questionable.

plain meaning of the Amendment,[6] he nonetheless acknowledged the right of Americans to defend their homes and participate in recreational activities.[7] Chief Justice Burger further advocated licensing measures such as waiting periods and fingerprinting.[8] Implementing such proposals does not mean one must ignore the plain meaning of the Second Amendment. The Second Amendment does not protect the right to keep and bear all arms absolutely.[9] Interestingly, the PARADE MAGAZINE article predated new research which provides an impressive glimpse into the discussion that took place during the debate and adoption of the Second Amendment.

Recent historical research demonstrates the right to bear arms was thought of as an individual right which guaranteed the sovereignty and legitimacy of both the United States and its citizens.[10] Both Federalists and Anti-Federalists espoused beliefs about the possession of weapons.[11] Their statements demon-

---

[6] Chief Justice Burger commented that the Second Amendment should read: "*[B]ecause* a well-regulated militia is necessary to the security of a free-state, the right of the people to keep and bear arms shall not be infringed." Burger, *supra* note 6, at 5 (emphasis added).

[7] *See id.*

[8] *See id.*

[9] Similarly, the First Amendment does not protect free speech absolutely. *See e.g., Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding the state may restrict speech that advocates unlawful conduct in certain circumstances); *R.A.V. v. City of Sta. Paul*, 505 U.S. 377 (1992) (holding that government may regulate "fighting words" so long as it regulates the means of expressing the idea and not show hostility or favoritism toward the underlying message).

[10] *See e.g.*, JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 162 (1994); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1994); Van Alystyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994).

[11] Prominent Federalist Tench Coxe, wrote eloquently:

> The power of the sword, say the minority of Pennsylvania, is in the hands of Congress. My friends and countrymen, it is not so, for THE POWERS OF THE SWORD ARE IN THE HANDS OF THE YEOMANRY OF AMERICAN FROM SIXTEEN TO SEVENTEEN. The militia of these free commonwealths, entitled and accustomed to their arms, when compared with any possible army, must be *tremendous and irresistible*. Who are the militia? *[A]re they not ourselves*. It is feared, then, that we shall turn our arms *each man against his own bosom*. Congress has no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the *birth-right* of an American . . . [T]he unlimited power of

strate that at the time only Americans had this right, whereas citizens of other countries did not.[12] The beliefs espoused by the Framers of the Bill of Rights afford no other interpretation than the plain reading of the Second Amendment.

Some scholars, nonetheless, analogize the Fourteenth Amendment and the "separate but equal" doctrine to the Second Amendment in order to demonstrate a difficulty in ascertaining the intent of the constitutional drafters.[13] The drafters of the Fourteenth Amendment, however, did not explicitly advocate the separate but equal proposition.[14] Moreover, the Fourteenth Amendment does not directly address the exact ramifications of the Equal Protection Clause.[15] There was latitude for interpretation given the lack of precise draft-

---

the sword is not in the hands of either the federal or state governments, but, where I trust in God it will ever remain, in the hands of the people.

HALBROOK, *supra* note 11, at 68-69 (citing PENNSYLVANIA GAZETTE, 20 Feb. 1788, 2 Docu. Hy. (Mfm. Supp.) at 1778-80 (emphasis in original).

Thomas Jefferson, the most prominent anti-Federalist, inexorably linked the right to bear arms to the preservation of freedom:

> [W]hat country can preserve its liberties, if its rulers are not warned from time to time, that this people preserve the spirit of resistance? Let them take arms . . . The tree of liberty must be refreshed from time to time, with the blood of patriots and tyrants.

Id. at 66-67 (citing JEFFERSON, ON DEMOCRACY 20 (S. Padover ed. 1939)).

[12] Madison noted the Americans possessed an advantage of being armed "over the people of almost every other nation," and "[n]otwithstanding the military establishment in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust people with arms. THE FEDERALIST, No. 46. Madison protested if those people were armed, "the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it." *Id.*

[13] *See* Remarks by David Yassky; *Brown v. Board of Educ.*, 347 U.S. 482 (1954) (overruling the separate but equal jurisprudence).

[14] The legislative history of the Fourteenth Amendment reveals no underlying consensus. *See id.* at 489-90 (the Court requested extensive analysis of the legislative history of the Fourteenth Amendment with no conclusive results).

[15] To illustrate, Justice Holmes once characterized the Equal Protection Clause of the Fourteenth Amendment as "the last resort of constitutional arguments." *Buck v. Bell*, 274 U.S. 200, 208 (1927). Today, however, the Equal Protection Clause may be the most important concept for the protection of individual rights in the Constitution. *See* 3 RONALD D.

ing.[16] The Second Amendment, however, directly addresses the right to keep and bear arms.[17]

Much of this debate derives from the Aristotelian concept of the Republican form of government.[18] The Founders discussed the Republican ideal of the virtuous citizen, who acted for the benefit of the community.[19]Although the proposition is somewhat idealistic, its realization occurred when the Colonists acted in the common good against a corrupt sovereign.

This new historical research, based upon a more complete reading of history, reveals the Second Amendment in a new light. Perhaps now, the Amendment will be appreciated for its plain meaning. Advancing policy initiatives, which contravene the plain meaning of the individual right to bear arms, requires a constitutional amendment. Public disclosure championing, for instance, a complete ban on firearms runs afoul of the Second Amendment. The advocates of a complete ban on firearms would have to effect an amendment to the Constitution rather than conveniently reading the Second Amendment to suit such an objective. To suggest that because of a prudential consideration, one can avoid the Second Amendment or read it out of existence is less than persuasive.[20] Such rationale could subsequently be applied to any consti-

---

ROTUNDA AND JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.1 (3d ed. 1999).

[16] The Equal Protection Clause of the Fourteenth Amendment states, in pertinent part, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[17] Justice Clarence Thomas acknowledged the clear-cut implications of the Second Amendment: "Marshalling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right." *Printz v. United States*, 521 U.S. 898, 938 (1997) (Thomas, J., concurring).

[18] Aristotle equated an armed populace with polity and direct democracy while the essential element of an oligarchy or tyranny is an unarmed populace. *See* ARISTOTLE, POLITICS at 71.

[19] *See* James W. Fox, Jr., *Citizenship, Poverty, and Federalism: 1787-1882*, 60 U. PITT. L. REV. 421, 440 (1999); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787 (1969) at 106. Federalists generally viewed the landed gentry as the likely source of republican virtue. *See* WOOD, *supra*, at 106, 178-79. Anti-Federalists, especially those influenced by Jefferson, believed the common yeoman retained the truest source of republican virtue. *See id.*

[20] *See* Volokh, *supra* note 1, at 812-13. Professor Volokh reasons "if [an interpretative method] reaches the result that some may favor for the Second Amendment only by reaching

tutional provision.[21]

patently unsound results for the other provisions [of the Constitution], we should suspect that the method is flawed." *Id.* at 813.

[21] *See* Eugene Volokh, *The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. REV. 831, 840 (indicating the dangerousness of a right vanishing into the dustbin of constitutional interpretation as "meaningless" or "outdated," which threaten the other liberties protected in the Constitution).