1992

Beyond the Second Amendment: An Individual Right to Arms Viewed through the Ninth Amendment

Nicholas J. Johnson
Fordham University School of Law, njohnson@law.fordham.edu

RUTGERS
LAW JOURNAL

Volume 24 Fall 1992 Number 1

BEYOND THE SECOND AMENDMENT: AN INDIVIDUAL RIGHT TO ARMS VIEWED THROUGH THE NINTH AMENDMENT

*Nicholas J. Johnson**

* Professor of Legal Studies in Business and Taxation, Franklin and Marshall College. Of Counsel, Kirkpatrick and Lockhart. J.D. 1984, Harvard Law School, B.S.B.A. 1981, *Magna Cum Laude,* West Virginia University. I would like to acknowledge the comments and helpful criticisms of David Caplan, Professor Robert Cottrol, Professor Raymond Diamond, Robert Dowlut and Don Kates. All the views expressed are my own and are in no way attributable to or endorsed by the organizations with which I am affiliated.

I. INTRODUCTION

Traditionally, the debate over the individual right to possess firearms has focused on the origins and meaning of the Second Amendment.[1] Some constitutional scholars have dismissed the idea that the Second Amendment protects an individual right to arms. They argue that it only prevents the federal government from disarming states.[2] Other scholars,

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

2. *See*, Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 206 (1983) [hereinafter Kates, *Original Meaning*]. Kates cites a number of articles written in the past several years endorsing the

focusing on the language of the amendment and its historical context, conclude that it does indeed establish an individual right to firearms. This article examines whether, even absent the Second Amendment, the Constitution restrains government from taking away what may be individuals' best tools of self-defense. The foothold for the analysis is the controversial Ninth Amendment.[3]

Predominantly, I will use principles that can be gleaned from the models offered for invigorating the Ninth Amendment to expose the array of difficult questions we must face before disarming citizens. In exploring these questions I will suggest that we can indeed derive an individual right to arms from the Ninth Amendment and are required to abandon some basic beliefs about our Constitution and the role of government if we deny the existence of that right. I also will suggest that abandoning those principles here makes advocacy of other Ninth Amendment rights highly problematic.[4] In a smaller way, I hope to respond to the call to open the debate over individual firearms to frequently discounted voices.[5] I will assume as an opposing position the alternative to general disarmament.[6]

---

idea that the Second Amendment was designed to protect states' rights to arms against infringement by the federal government. *Id.* at 207 n.13.

In a subsequent article, Kates notes that there may be more articles favoring the individual right view of the Amendment, but the states' right view has dominated legal circles because of its adoption by organizations like the American Bar Association and the American Civil Liberties Union. Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 L. & CONTEMP. PROBS. 143, 144 n.7 (1986) [hereinafter Kates, *Dialogue*].

Professor Sanford Levinson comments, "[t]o put it mildly, the Second Amendment is not at the forefront of constitutional discussion, at least as registered in what the academy regards as the venues for such discussions . . . . [One leading constitutional scholar] has recently written 'the Second Amendment is not taken seriously by most scholars.'" Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 639 (1989).

3. "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

4. For instance, the Ninth Amendment has been suggested as a basis for a right to welfare benefits from the state. *See infra* note 249 and accompanying text.

5. *See* Levinson, *supra* note 2.

6. It might be argued that this aim is not taken seriously in the current debate. Whether that is true or not, there plainly are large numbers of individuals in our society who believe that is the aim. *See, e.g.*, *Brady Bill Vote In House Emboldens Anti-Gunners*, AM. RIFLEMAN, July 1991, at 61 (Reporting "Brady Bill" sponsor Edward Feighan's statement on ABC T.V.'s "Nightline" that his camp was "forced to overstate what we can get from the Brady bill," which was only as "first step" to be followed by action on "other dimensions" of the gun problem. Also citing Rep. William Clay, who stated that the

II. THE NINTH AMENDMENT AS A MEANINGFUL CONSTITUTIONAL GUIDEPOST

Recent Ninth Amendment literature yields two notable models for understanding and construing it.[7] The predominant one, which I have labeled the "deep structures" model, focuses on broad constitutional values and the fundamental structure of our constitutional democracy. The second model, used on a more limited basis, stems from a framework of "natural rights."[8]

The deep structures model contains an array of approaches, whose nebulous and flexible standards are similar to those the Supreme Court has used both in incorporating parts of the Bill of Rights as restrictions on state action and in establishing unenumerated rights without explicitly invoking the Ninth Amendment.[9] These approaches suggest that unenumerated rights arise on their own merits through an examination of their fit with, and necessity to, the functioning of our constitutional structure.

One rendition of the deep structures model posits that the Supreme Court might derive specific rights from the Ninth Amendment by starting "with the strong historical argument that [the amendment was] intended to apply in a situation where the asserted right appears to the

---

Brady Bill was a "minimum step. We need much stricter gun control, and eventually we should bar the ownership of handguns except in a few cases."); Larry Pratt, *America's Top Ten Gun Grabbers*, GUNS & AMMO, July 1991, at 24 (Pete Shields, Chairman Emeritus, Handgun Control Inc., stated, "[w]e are going to have to take one step at a time, and the first step is—given the political realities—going to be very modest . . . . The final problem is to make the possession of all handguns [with limited exceptions] totally illegal."). *See also* H.R.J. Res. 438, 102d Cong., 2d Sess. (1992) (proposing repeal of the Second Amendment); S. 2913, 102d Cong., 2d Sess. (1992) (banning the possession of handguns).

7. Notwithstanding its underutilization, the Ninth Amendment periodically has been construed to establish substantive individual rights. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 237 (1971) (Douglas, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (Goldberg, J., concurring).

8. See *infra* notes 199-213 for a discussion of the second model.

9. *See* Benton v. Maryland, 395 U.S. 784 (1969) (describing the standard for incorporating provisions of the Bill of Rights through the Fourteenth Amendment as a limit on state action); Randy E. Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI.-KENT L. REV. 37, 57-58 (1988) (citing the Court's list of 13 unenumerated rights.)

Court as fundamental to a free society. . . . [T]he textual standard should be the entire Constitution."[10]

One commentator offers an open-ended test of "reasonableness":

> [Other commentators] err in thinking constitutional theory should look for ways to close the ninth amendment and other open-ended provisions by identifying "sources" to which judges and others can go to locate rights for application in concrete cases . . . .
>
> . . . .
>
> Applying some meaningful test of reasonableness would find judges and others conducting case-by-case review of legislation in changing circumstances. For the reasonableness of measures is a contextual matter. Because we cannot control the future, we cannot know in advance of particular circumstances where the harm visited by government on some individual or minority would be justified by a credible view of the common good within the system's capacities. Thus, a reasonableness test is incorrigibly open-ended. And the right to be harmed only by governmental acts that are reasonable by some honest test is the least of the protections we could expect under the ninth amendment.[11]

Another approach is less supportive of the direct substantive value of the Ninth Amendment, relying instead on the historical context of the Bill of Rights.

> With or without the Ninth Amendment, we would have to approach the task of constitutional interpretation with some basic understanding of the sources from which the document derives (i.e., both the history of the American Revolution and the liberal and republican philosophies which had inspired the founders), its overall purpose and design (i.e., the political philosophy of the founding generation), and its views of the relation of the government to the individual (i.e., a more general philosophical view of the meaning of life and the place of the political community within it).[12]

Sanford Levinson suggests that our understanding of the Ninth Amendment might grow from:

---

10. Norman Redlich, *Are There "Certain Rights . . . Retained By the People"?* 37 N.Y.U. L. REV. 787, 808, 810 (1962).

11. Sotirios A. Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?*, 64 CHI.-KENT L. REV. 67, 80-81 (1988).

12. Andrzej Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 CHI.-KENT L. REV. 177, 204 (1988).

> close attention to the narratives by which we constitute our own particularistic way of life. Such listening—and the careful interpretation of what we hear will enable us to grasp the deep structures that constitute our political order and to understand as well that some transitory political notions, even when embodied in legislation, could be in serious conflict with these structures.[13]

Justice Goldberg's concurring opinion in *Griswold v. Connecticut*[14] offers one of the most extensive treatments of the Ninth Amendment in a Supreme Court case. It suggests that judges might derive rights from the Ninth Amendment by looking to "the traditions and conscience of our people [to determine whether a principle is so rooted] as to be ranked as fundamental."[15] Such a fundamental right, which cannot be denied, is one which "lie[s] at the base of all our civil and political institutions."[16]

Taken together, these approaches prompt us to question whether our beliefs and convictions about core constitutional concerns permit us to take the steps we must take and believe the things we must believe in order to prohibit individual possession of firearms for self-defense.

III. A FOCUS ON INDIVIDUAL SELF-DEFENSE

The central question in this article is whether the interest of individual citizens in protecting their own lives from physical threats, collective and political implications aside, establishes a right to possess weapons that are useful in repelling those threats.[17] The search for an

---

13. Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131 (1988).

14. 381 U.S. 479 (1965).

15. *Id.* at 487 (citation omitted).

16. *Id.* (citation omitted).

17. One might resist the idea that gun ownership is an essential aspect of human existence; however, no one in the debate has suggested that those to whom many would exclusively delegate the function of providing security, police and other government agents, should proceed disarmed. We generally agree that guns in their hands are useful and necessary for protecting against and deterring aggression. Once this is conceded, it is no long stretch to conclude that the essential human interest in physical security includes an individual interest in possessing mechanisms that are highly useful in resisting or repelling violent threats. Guns must be central on any such list. The traditional debate over the place of collective use of privately held arms as instruments affecting collective interests and the operation of government, together with the arcane image of militia men drilling in the village green, is largely removed from this analysis.

answer can begin with the suggestion by positivists that the sum total of individual rights lies in the language of selected parts of the Bill of Rights.[18] There are at least two difficulties with the positivists' approach. First, the Supreme Court already has established unenumerated rights through strenuous manipulation of the enumerated guarantees.[19] Second, there plainly are numerous simple acts of individual autonomy that we undertake daily which are not explicitly protected by the Bill of Rights. It is troubling to conclude that these acts are protected only by creative extrapolation of the meager provisions of the explicit guarantees. It is this range of acts that the Ninth Amendment might necessarily protect. By comparison, we gain some insight into whether the Ninth Amendment might accommodate a right to firearms ownership for individual self-defense.

In the debates over ratification of the Bill of Rights, delegates commonly objected that it was impossible to list the rights of free men. Speakers made reference to various common activities, questioning whether the right to wear the hat of one's choosing would be guaranteed, whether one could eat at the time one chooses, or whether one could undertake various other individual activities without interference from or regulation by government.[20]

Ownership of firearms was commonplace during the revolutionary period. Their use and ownership for many purposes was considered essential and completely noncontroversial.[21] "Throughout the Colonies, no implements were more abundant than firearms; none was more in use, more used up, more in demand. Gunsmiths of Europe flocked to

---

18. *See, e.g.*, Barber, *supra* note 11, at 69. Barber's description of Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971), is instructive.

See also Sotirios A. Barber, *The New Right Assault on Moral Inquiry in Constitutional Law*, 54 GEO. WASH. L. REV. 253 (1986) (critiquing Bork's constitutionalism).

19. Barnett, *supra* note 9, at 53, 54.

20. *See, e.g., infra* notes 29, 30. In modern jurisprudence, it seems much of our activity is constitutionally protected only after being forced into the box of speech or expression, or shoehorned into one of the other explicit guarantees of the Bill of Rights. One by-product of this effort, aside from the pulling and stretching of the limited language of the explicit guarantees, is the danger that the individual decisions we take for granted as protected may be vulnerable to future restrictions. This danger may be very substantial as we move into an age where the cumulative impact of virtually any individual activity may stimulate the cry that the activity must be banned or regulated.

21. CHARLES W. SAWYER, FIREARMS IN AMERICAN HISTORY 29 (1990).

the Colonies, sure of steady employment at repairing , and making and selling."[22] While the concept may be difficult to digest today, "it was considered normal for eighteenth century civilians to carry pocket pistols for protection while traveling."[23] "The sense of group self-preservation and self-defense was strong."[24] Firearms were not only commonplace, but also they were, at times, required to be kept.[25]

Our common law supports an individual right to arms for self-defense, unimpaired by governmental restrictions. Fourteenth century English weapons restrictions included explicit exceptions for both self defense and the defense of one's dwelling.[26] In a detailed examination of the 1780 Opinion of the Recorder of London on the Scope of the Right to Have Arms in England, David Caplan shows the Recorder endorsing unequivocally an individual right to arms for self-defense

---

22. *Id.* at 29.

23. GEORGE C. NEUMANN, THE HISTORY OF WEAPONS OF THE AMERICAN REVOLUTION, 150-51 (1967).

24. Stuart R. Hays, *The Right to Bear Arms, A Study In Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381, 388 (1960).

25. *See* THE RIGHT TO KEEP AND BEAR ARMS: REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE ON THE JUDICIARY, S. DOC. NO. 2807, 97th Cong., 2d Sess. 3 (1982). The report stated:

> In the colonies, availability of hunting and need for defense led to armament statutes comparable to those of the early Saxon times. In 1623, Virginia forbade its colonists to travel unless they were "well armed"; in 1631 it required colonists to engage in target practice on Sunday and to 'bring their pieces to church.' In 1658, it required every householder to have a functioning firearm within his house and in 1673 its laws provided that a citizen who claimed he was too poor to purchase a firearm would have one purchased for him by the government, which would then require him to pay a reasonable price when able to do so. In Massachusetts, the first session of the legislature ordered that not only freemen, but also indentured servants own firearms and, in 1644, it imposed a stern 6 shilling fine upon any citizen who was not armed.

Id.

26. David T. Hardy, *Armed Citizens, Citizens Armies: Toward A Jurisprudence of the Second Amendment*, 9 HARV. J.L. PUB. POL'Y 559, 566-67 (1986) [hereinafter Hardy, *Armed Citizens*]. Hardy argues in a separate article that the common law recognized an individual right to arms that was separate from the concept that a militia was an especially appropriate way of defending a free republic. David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1, 23 (1987), [hereinafter Hardy, *Historiography*].

"where there is no time to invoke the aid of established authority," but distinguishing unauthorized exercises by assemblies of armed men.[27]

At least one modern writer has moved toward acknowledging this dichotomy:

> The framers do not appear to have distinguished sharply between the "personal safety" reasons for possessing weapons and the "political safety" reasons that were at the forefront of the debate that led to the adoption of the Second Amendment. One likely explanation is that, at the time of the Amendment's adoption, America retained a predominantly rural culture with a frontier ethos, and no one had any reason to expect that a popularly elected government would have any motive to interfere with its citizens' ability to defend themselves against the hazards of everyday life.[28]

From this perspective, even if we accept the Second Amendment as protecting only a collective right, it remains possible that an individual right to arms to repel immediate and proximate threats was considered by the framers as basic as the right to dress warmly against the cold.

Justice Holmes implicitly accepted some element of this sentiment in one of the Court's early decisions in this century, *Patsone v. Pennsylvania*.[29] He concluded that a ban on aliens' possession of long arms was permissible as a hunting control measure, because the ban did not extend to handguns, which might be needed "occasionally for self-defense." This passage appears to recognize some level of individual interest in arms for self-defense, but it does not explicitly invoke the Second Amendment.

There was serious debate over whether listing some of the more abstract constitutional rights was descending into minutia. A good example is the House debate in the First Congress over the necessity of a constitutional amendment protecting the right of peaceable assembly. Ninth Amendment commentator, Charles Cooper, notes the objection of Congressman Sedgwick of Massachusetts that the right to assembly was too "self-evident" and "inalienable" to ever be called into question.

---

27. David I. Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 4 DET. C.L. REV. 789, 803 (1982).

28. Nelson Lund, *The Second Amendment, Political Liberty and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 117 (1987).

29. 232 U.S. 138, 143 (1914).

Sedgwick contended that a descent into such "minutiae" would lead to a trivial and lengthy enumeration of other obvious rights.[30]

A connection exists between individual Americans and arms that goes deeper than the mere utility of firearms. It appears to be an almost spiritual attachment.[31] Historically, ownership and proficient, responsible use of firearms were connected directly to the development of the character and self-discipline that were considered necessary characteristics of citizens in a free society.[32]

Plainly, the framers' attitude about firearms was drastically different from some we find today. Guns were not considered the embodiment

---

30. Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J.L. & POL. 63 (1987) (quoting 1 ANNALS OF CONGRESS 759 (n.p., J. Gales & W. Seaton eds., 1834)). Cooper has written:

> [T]hey might have gone into a very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper; but [I] would ask the gentleman whether he thought it necessary to enter these trifles in a declaration of rights, in a Government where none of them were intended to be infringed.

Id. at 72.

See also Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1162-63 (1987). Professor Sherry describes the position of many of the original opponents of a Bill of Rights. Madison entertained the possibility that "an enumeration which was not complete was not safe." Others argued that it would be impossible to enumerate every right that citizens held against the federal government. She cites James Iredell from the North Carolina ratifying convention: "[l]et anyone make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it." *Id.* (citing 4 The Debates in the Several Conventions on the Adoption of the Federal Constitution, As Recommended By the General Convention at Philadelphia, in 1787 167 (Jonathan Elliot ed., 1836)).

31. Don Kates cites historical support for the idea that the founding fathers expressed "an almost religious quality about the relationship between men and arms." Kates, *Original Meaning, supra* note 2, at 229 (citing Ashbury, The Right to Keep and Bear Arms in America: The Origin and Application of the Second Amendment to the Constitution (1989) (unpublished Ph.D. dissertation, University of Michigan)).

32. *See infra* text accompanying notes 118-28. One relevant and often cited declaration from Jefferson illustrates the point. In a letter to his fifteen year old nephew Jefferson advised:

> A strong body makes the mind strong. As to the species of exercises, I advise the gun. While this gives a moderate exercise to the Body, it gives boldness, enterprise and independence to the mind. Games played with the ball, and others of that nature, are too violent for the body and stamp no character on the mind. Let your gun therefore be the constant companion of your walks.

Kates, *Original Meaning, supra* note 2, at 229 (citing THE JEFFERSON CYCLOPEDIA 318 (Foley ed., 1967)).

of evil with "little, if any, compensating social advantage."[33] They were useful, vital tools as common as any other item manufactured by craftsmen of the period. Once we recognize this and appreciate that for many Americans, firearms still are commonplace, useful tools with unmatched utility for self-defense, we might view possession of arms for individual defense to be as basic as the right to choose a heavy coat against the cold.[34] Characterized this way, a right to arms for self defense might be retrieved from the Ninth Amendment along with the right to engage in a myriad of other basic human activities.

As a byproduct, this individual defense focus offers a principled basis for prohibiting access to highly destructive weapons. Prohibitions might focus on whether the weapon can be discharged in close proximity without injuring the user and whether it can be operated by a single individual. If the focus is direct and immediate individual defense, then we might sensibly differentiate between long-range or remote delivery weapons of destruction and personal weaponry suitable for individual self-defense.

It is also possible that a purely self-defense based right to arms would achieve some of the arguably noble goals of a citizens' militia. The presence of scores of millions of individual Americans protecting their private interests undoubtedly would be a daunting prospect for an

---

33. *See* Levinson, *supra* note 2, at 655.

34. Under particularly taxing situations, like the combination of war, natural disaster, and civic unrest, reasonable people might disagree whether arms in the hands only of government and acknowledged or aspiring criminals is an advantage or not. General disarmament could make the maintenance of order by government officials easier, but such circumstances will yield many victims who pay with their lives for reliance on a collective security system that under the circumstances is inadequate. *See also* 10 U.S.C. § 311 (1988) (designating able-bodied citizens as members of the militia, which the statute considers the only substitute for national defense purposes in the event that organized armed forces are deployed).

Under the present circumstances, police simply cannot preempt threats to individuals. A variety of factors, including the size of the jurisdiction, the resources put into the local police, and, some charge, the socio/economic or racial category of the victim, influence the amount of time it takes for public security forces to arrive. In a disarmed society where only criminals and government have guns, peaceable citizens may encounter more threats, because the aggressors will expect to strike with impunity, knowing that most of their victims are defenseless. In some portion of those instances, the defenseless victim will lose his life before he is able to call for help. Even assuming the police arrive in time, the scenario ignores those in the rural population, whose neighbors live far enough away that they would not hear cries for help.

invader or emerging despot to contemplate, especially as compared to the deterrent value of a disarmed populace.

IV. CONFLICTING CONSITUTIONAL VISIONS: LOCKEAN AND CLASSICAL REPUBLICAN

At one level, the controversy over constitutional protection of individual firearms is a product of conflict between the two primary views of the roots and purposes of our Constitution and the relationship between government and individuals. The Classical Republican vision emphasizes a strong state with a focus on order. The Lockean vision, influenced by Enlightenment thought, emphasizes individual liberty and the subordination of the state.[35] Some argue that the Lockean vision predominantly influenced the framers' views of constitutional democracy.[36]

Nonetheless, much of the traditional Second Amendment debate presumes that Classical Republicanism was the driving force behind the framers' constitutional vision.[37] Despite the disregard of the Lockean

---

35. Hardy, *Historiography*, *supra* note 26, at 2. These competing visions are illustrated by David Hardy's notation of the divergent views of John Adams, who was obsessed with the risk of mob rule, and Thomas Jefferson, who lightly praised the virtues of frequent revolutions. *Id.*

36. *See* Terrence J. Moore, *The Ninth Amendment: Its Origins and Meaning*, 7 NEW ENG. L. REV. 215 (1972). Professor Moore draws from the works of a significant number of constitutional historians, who agree that Locke's political theories formed the background and foundation for the United States Constitution. *Id.* at 237-46. This list includes: CARL BECKER, THE DECLARATION OF INDEPENDENCE (1922); HUNTINGTON CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL (1949); EDWARD S. CORWIN, THE HIGHER LAW BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1961); CHARLES PELHAM CURTIS, LAW AS LARGE AS LIFE: A NATURAL LAW FOR TODAY IN THE SUPREME COURT AS ITS PROPHET (1959); Russell Kirk, *Introduction* to JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT (Gateway Press 1964) (1690); Thomas P. Reardon, *INTRODUCTION* to JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT (Thomas P. Reardon ed., 1952) (1690); DAVID GEORGE RITCHIE, NATURAL RIGHTS: A CRITICISM OF SOME POLITICAL AND ETHICAL CONCEPTIONS (London, Unwin Ltd. 1894). *See also* Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of and Understanding of Republicanism in American Historiography*, 29 WM. & MARY Q. 50 (1972).

37. The exchange between Professors Levinson and Brown is a model of this approach. *See* Wendy Brown, *Guns, Cowboys, Philadelphia Mayors and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 YALE L.J. 661 (1989); Levinson, *supra* note 2. Professor Levinson lends some credence to the idea that an armed citizens' militia can be considered a deterrent to internal despotism or

vision in Second Amendment debate, it figures prominently in efforts to revive the Ninth Amendment[38] and sets one on the path to determining whether individual Americans have the right to own and use guns for their personal defense and security.

A Lockean focus substantially affects our view about the allocation and control of tools useful in exercising and resisting power. There is an inherent tension between the ideas of individual liberty and order through a strong state. The coexistence of these two forces at the root of our constitutional system suggests they must exist in some sort of equilibrium.[39] We should, therefore, be reluctant to eliminate instruments necessary to the vitality of either of these competing forces. The question is whether guns in the hands of individual citizens can be classified among those important instruments.

In addressing this question, one must consider the importance of force as a factor in conflict resolution. The ability to exert force may

---

tyranny. Professor Brown responds that it is arcane to believe, in this age of weapons of mass destruction, that individual arms in the hands of citizens can play any useful role in thwarting threats. She adds that the vision of an armed community, collectively resisting the excesses of state power, is dangerously naive and even sexist.

38. *See, e.g.*, Russell Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 230 (1983) ("The colonists premised their fight for independence, when the time came, on the natural law-social contract theory expounded by numerous writers, foremost among them John Locke."); Randy E. Barnett, *Are Enumerated Constitutional Rights the Only Rights We Have? A Case of Associational Freedom*, 10 HARV. J.L. PUB. POL'Y 101, 102-04 (1987)

> [A]ccording to a Lockean political and moral analysis: "Individuals have rights, and there are things no person or group may do to them (without violating their rights)" . . . . Fascinating though such intellectual history might be, what could it possibly have to do with contemporary constitutional jurisprudence . . . . The connection lies in the fact that the authors of our Constitution were very much influenced by the Lockean philosophy of "rights first-government second." The Founders saw that the creation of government requires constitutional limits on the power of government.

Id.

39. Professor Barnett, addressing the difficulty of deriving individual rights from the Ninth Amendment, argues that derivation of unenumerated individual rights is in harmony with the Declaration of Independence: that [all men] are endowed . . . with certain inalienable rights, [including] Life [and] Liberty." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Barnett argues further that "[s]uch a declaration of rights need not be religiously based. Instead it may rest in part on a view that the respect for certain individual rights is a prerequisite for achieving the common good; that no matter how desirable its appearance, a measure that violated a proper conception of these rights would invariably detract from the common good . . . ." Barnett, *supra* note 9, at 54.

impact the degree to which individual liberty succumbs to the collective will.[40] Assuming the goal of a balance between individual liberty and collective interests, there is something unattractive about placing all of the most effective tools of violence where they are likely only to be used to further collective interests.[41]

If we reject this conclusion, then we should examine the degree to which our doing so is a result of making one of three assumptions: 1) the constitutional importance of the Lockean vision of individual rights must yield to the Classical Republican vision; 2) the concept of Lockean individualism must depend on the benevolence and goodwill of the collective in its exercise of a monopoly on the tools of violence; or 3) there is something inherent in our constitutional structure that will restrain the collective's monopoly on force and prevent it from bending individual interests utterly in the direction of the collective will. To the degree we rely particularly on the last two of these assumptions we may have cause for concern.

The problem is illustrated by turning the issue on its head. The question then would be whether the Classical Republican vision of liberty through a strong state could survive if *government* were prevented from possessing and using arms. Could government successfully rely on the goodwill of armed citizens? Would unilaterally armed citizens conform both to the decisions reached in the democratic process and to the authority exercised by their representatives? Given such an imbalance in the ability to use force, we might expect that collective interests would readily succumb to individual interests in instances of serious conflict. An imbalance in the opposite direction, then, could have an equivalent impact. In instances of significant conflict, the unrestrained government power resulting from a disarmed citizenry could permit collective interests to utterly dominate individual interests. Under such circumstances, the Lockean vision of government's role seems to evaporate.[42]

---

40. *See infra* text accompanying notes 189-97.

41. This argument is similar to the Second Amendment concept of an armed militia resisting internal despotism. Here, the focus is on the cumulative impact of actual or potential individual acts of resistance to collective power.

42. Arguably, given the extraordinary scope of collective efforts in numerous areas and the corresponding infringements on individual liberty, this imbalance already has occurred, and the elimination of one more barrier against collective intrusion into the core of individual interests will make no difference.

There is an unacknowledged kinship between Second and Ninth Amendment scholars. Each has produced Lockean support for armed self defense.[43] Professor Barnett uses Locke to advocate a Ninth Amendment right to associational freedom.[44] Particularly pertinent for these purposes, Professor Barnett notes:

> A Lockean approach proceeds to identify more fundamental background rights that do not evaporate upon the creation of a government or the expression of a majority will. Locke called these rights "property rights;" that is, rights to acquire, use and transfer ownership of resources in the world. Such rights are the principal means by which life, liberty, and the pursuit of happiness are facilitated in the social context. Such rights include not only the right to external resources but also the right to one's person.[45]

Taking a natural rights view of the Ninth Amendment, Professor Moore draws substantially on Locke, citing many passages, which simultaneously support an invigorated Ninth Amendment and, though it was not Moore's intent, lay a foundation for or directly support an individual right to arms. Notably he quotes Locke's observation that:

> [G]overnment is the product of free contract, that the governors of a people hold their authority only in trust, that when such trust is violated, a people can rightly exercise their strength—though only under the greatest provocation—to undo tyranny.[46]

His selection from Locke's chapter entitled "Of Slavery" in the *Second Treatise on Civil Government* is also noteworthy:

> This freedom from absolute arbitrary power is so necessary to, and closely joined with, a man's preservation, that he cannot part with it but by what forfeits his preservation and life together. For a man not having

---

43. *See, e.g.*, Rapaczynski, *supra* note 12, at 184 n.17. (citing Locke to illustrate that under one view of the Ninth Amendment it is quite plausible to derive a right to rebel against an unjust government even though such a right might not be judicially enforceable).

44. Barnett, *supra* note 38, at 109-10.

45. *Id.* at 109.

46. Moore, *supra* note 36, at 228. Several of Moore's other selections are similarly supportive. Quoting from the *Second Treatise on Civil Government*, Moore cites Locke's admonition that "every one as he is bound to preserve himself . . . by like reason . . . is not, unless it be to do justice on an offender, take away or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another." *Id.* at 231.

> the power of his own life cannot be compact, for his own consent enslaves himself to anyone, nor put himself under the absolute arbitrary power of another to take away his life when he pleases.[47]

Lockean support has figured prominently in Second Amendment commentators' work. Stephen Halbrook, for example, cites Locke's *Second Treatise on Civil Government* as direct support for a right to individual self-defense: "[i]t being reasonable and just that I should have the right to destroy that which threatens me with destruction."[48] Halbrook argues that Locke strongly opposed a disarmed populace:

> It cannot be supposed that they should intend, had they a power so to do, to give to any one, or more, an absolute arbitrary power over their persons and estates, and put a force into the magistrate's hand to execute his unlimited will arbitrarily upon them. This were [sic] to put themselves into a worse condition than in the state of nature, wherein they had a liberty to defend their right against the injuries of others and were upon equal terms of force to maintain it, whether invaded by a single man or many in combination. Whereas, by supposing they have given up themselves to the absolute power and will of a legislator, they have disarmed themselves, and armed him, to make prey of them when he pleases. [49]

The Lockean view that core individual rights exist without being created by the state offers a comfortable pathway to a meaningful Ninth Amendment. It is not surprising that Locke endorsed an individual right to security against physical threats. Any effort to invigorate the Ninth Amendment through John Locke's political philosophy must either acknowledge that an individual right to arms stands high among protected rights or find efforts to exclude it troublesome.

---

47. *Id.* at 231.

48. STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED 28 (citing LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT 14 (Chicago 1955)).

49. *Id.* at 29 (citing LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT 14 (Chicago 1955)).

V. CONSTITUTIONAL STRUCTURE AND ASSUMPTIONS ABOUT THE ROLE OF GOVERNMENT: DO THEY SQUARE WITH DISARMAMENT?

A. Fear of Government.

The idea that the framers feared and distrusted the power sited in the federal government specifically, and perhaps collective power generally, is vital to giving meaning to the Ninth Amendment.[50] Acknowledging this should engender difficulty with disarmament, for disarming means entrusting exclusively to government some of the most important tools for maintaining individual security. It means trusting government to use its *exclusive* power to benevolently and competently protect its citizenry.[51] Our political history shows that placing blind trust in government may be dangerous.[52] Another choice, wholly abandoning

---

50. *See, e.g.*, Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980).

> [T]here was widespread distrust of the remote newcomer, a federal government removed by vast distances from the governed, wherein large states might outvote the small, and in which there could be clashing sectional interests . . . . As Jefferson said, "[i]t is jealousy and not confidence which prescribes limited constitutions to bind down those whom we are obliged to trust with power."

Id. at 3-4.

See also Duncan v. Louisiana, 391 U.S. 145 (1968); Randy E. Barnett, *Two Conceptions of the Ninth Amendment*, 12 HARV. J.L. & PUB POL'Y 29; Levinson, *supra* note 2, at 648 ("surely one of the foundations of American political thought of the period was the well-justified concern about political corruption and consequential governmental tyranny").

Describing this fear while explaining the Sixth Amendment right to jury trial, the Duncan Court notes:

> Providing the accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge . . . Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Id. at 156.

51. Such trust is problematic, because there is no reciprocal duty to guarantee adequate distribution of collective security resources. *See, e.g.*, Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (stating that "there is no constitutional right to be protected by the state against being murdered by criminals or madmen.").

52. In his autobiography, Claude Pepper reveals a darker side to the political world. CLAUDE D. PEPPER, PEPPER: EYEWITNESS TO A CENTURY (1987).

> [E]very Senator was aware that the colleague whose elbow he brushed against, or the one sitting across the aisle with the opposition party, could well be the next president of the United States. When my eyes fell on certain senators, this was an unsettling thought, for the Senate is peopled by charlatans and mediocrities as well as by men (and too rarely women) of unquestioned integrity and uncommon intelligence.

Id. at 127

As another example, Pepper recalls the following: "In a talk with an ignorant, albeit typical Southern sheriff named Bill Towles, I was appalled to hear him say that he had promised to resign his office if a single Negro voted during his term. He even asked me if I had ever shaken hands with a Negro." *Id.* at 227-28.

In conversations with Bill Moyers, captured in his reflective book, several notable contemporary figures fuel the perception that blind trust in government is not only repugnant to the ideas embraced by the framers, but also, on a practical level, risky. BILL MOYERS, A WORLD OF IDEAS, CONVERSATIONS WITH THOUGHTFUL MEN AND WOMEN ABOUT AMERICAN LIFE TODAY AND THE IDEAS SHAPING OUR FUTURE (Doubleday 1989).

Norm Chomsky suggests:

> We've been extremely lucky in the United States that we've never really had a charismatic leader who was capable of organizing people around power and its use. There were people who came close, but most of them didn't make it. Joe McCarthy was too much of a thug, and Richard Nixon nobody could trust, and Ronald Reagan people regard as basically a clown. There has not been a figure who could do that. But it could happen. In a depoliticized society with few mechanisms for people to express their fears and needs and to participate constructively in managing the affairs of life, someone could come along who was interested not in personal gain, but in power. That could be very dangerous.

Id. at 55.

Political Philosopher Sheldon Wolin argues:

> I think we don't [have a democracy now]. The idea of democracy and the idea of a strong centralized state, inherently bureaucratic and administrative in its structure and orientation, are not compatible notions. Democracy implies involvement, shared power, and, above all, a significant equality. State power means the opposite of those things.

Id. at 99.

Historian Forrest McDonald expresses an idea that harkens back directly to the framers' expressed fears. The founding fathers designed the government to be incompetent, because they did not trust power. *Id.* at 117.

> The way they rigged the institutions to express this distrust of power is based upon the assumption that men in public life are ruled by their passions, their love of power and money. So what you do, in the words of James Madison, is to make ambition check ambition and interest check interest. You rig the government in such a way that all parts of it are working at cross-purposes. Hopefully, on the average, it won't be able to do very much, and therefore, it won't cause much mischief.

Id.

McDonald further stated:

the idea that distrust of government is necessary and proper, seems equally ill-advised. This distrust is, after all, independently important to invigorating the Ninth Amendment.[53]

B. Forced Reliance on Government

Disarmament may push us to the unprecedented step of forcing individuals to rely solely on government to protect a fundamental human concern. Traditionally, we have believed that the Constitution gives government certain options to exert power and restricts the ways that power can be exercised. It is highly controversial to say that anything in the Constitution guarantees citizens benefits from government, including individual protection. Disarmament would have us take the more troublesome leap past guaranteed benefits directly to forced dependency. While we may be at a point where such dependency is encouraged by many and would be forced by some, we should acknowledge that such dependency is a major departure from the framers' design.

When we consider the imposition of the same limitations on other basic human concerns or currently perceived constitutional rights, the problem is exposed. Would it satisfy us to be forced to rely on government for our economic security in the form of a dole check, a system where the accumulation of private wealth was prohibited in favor of collective measures? Should the government directly control the engines of commerce, forcing us to trust our representatives to administer those engines effectively and benevolently? Would it satisfy

---

> The continental Congress had no executive arm, and they went along for a dozen years or so, convinced that executive power is the root of all evil . . . . [T]hey were scared of it . . . . The only reason they were willing to have a one-man executive was because George Washington was there . . . . [They would be] horrified [at what has happened to the office]. They wouldn't be surprised though. They would say, "Yep."

Id.

53. *See, e.g.*, Barnett, *supra* note 9, at 37.

> The only question that remains is whether the enumerated rights standing alone are adequate to either of these power constraining tasks. The answer is as obvious today as it was to the Framers. There is no telling in advance exactly how extensively the powers authorized by the Necessary and Proper Clause may be used or abused, and once the scheme of delegated powers is eroded, there is no telling what rights the national government may violate. Trying to preserve limited government without recourse to unenumerated rights retained by the people is a project doomed to failure.

us to have only government outlets as the forums for exercise of our First Amendment rights? Would we be satisfied if government owned the media, but was firmly committed, through the best rhetorical guarantees we could imagine, to administering it in our best interests? Would we consider forced exclusive reliance on public education, public housing, or public food distribution acceptable?

Given the less than perfect track record of collective attempts to solve individual problems, and the viable arguments that government involvement has exacerbated those problems, it may be a severe mistake for individuals to rely completely on collective measures to satisfy their basic needs and repugnant that they be forced to do so.[54] We may find it difficult to explain how forced reliance on government for individual security is constitutionally more palatable than forced reliance for less substantial human concerns. The difficulty is magnified when we consider that the collective commitment to protecting individuals from physical threats is only discretionary.[55]

Several writers have taken a natural rights view of the Ninth Amendment, arguing that the founders conceived of a host of indefeasible natural rights that could not be taken away even by an exercise of majority will "without violating [them]."[56] From at least one notable perspective, forcing individuals to rely on government to preserve their lives violates one of the fundamental natural rights of man.[57] Proceeding from a natural rights view, the Ninth Amendment

---

54. The plight of unpensioned retirees reliant on social security and medicare, families reliant on food stamps and AFDC payments, and families without healthcare or life insurance all illustrate the subpar consequences of centralized administration of generic services aimed at fulfilling individual human needs. This is not to disparage the collective efforts in these areas; rather, the examples are meant to acknowledge the likely impossibility of providing totally satisfactory individual services through a collectively administered vehicle. In a free society, individuals need to supplement collective efforts that attempt to provide for human needs and desires. It is curious that we would depart from this position when evaluating the preeminent human concern of self-preservation.

55. *See* Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982); Warren v. District of Colombia, 444 A.2d 1 (D.C. 1981); Joseph T. Bockrath, Annotation, *Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection*, 46 A.L.R.3d 1084 (1972).

56. Barnett, *supra* note 50, at 103. See discussion of the natural rights perspective, *infra* notes 199-213 and accompanying text.

57. THOMAS HOBBES, LEVIATHAN 116 (E.P. Dutton ed., 1950) (*cited in* Hardy, *Historiography*, *supra* note 26, at 130).

> The second, the sum of the right of nature [is] by all means we can to defend ourselves . . . A Covenant not to defend my self from force, by force is always

supports not only an individual right to arms, but also the argument that the right cannot be restricted by collective action even in the form of a prohibitive constitutional amendment.[58]

Alternatively, Dr. Lund contends that "the basic postulate of liberal theory [is] that citizens only surrender their natural rights to the extent that they are recompensed with more effective political rights."[59] If this sentiment influences our view of when individual options can be restricted, then disarmament may be inappropriate so long as there is no constitutional right to protection by the state from violent threats.[60]

Even if a constitutional right to protection by the state were established as a counterweight to an individual right to arms, we would have to consider the effectiveness of such a guarantee. Experience shows that in virtually any large-scale, collective effort, there are jagged edges around the mold causing many people, often the unpopular or powerless, to fall away as dross. Certainly, particular individuals and communities have experienced an allocation of collective resources that disfavors them. In many instances, the tacit response might be that they already take more than they put into the collective pot and they ought to do more for themselves.

In this analysis, that response changes and raises with it the problem of inevitably limited public resources. We should expect those individuals at the end of the line for allocation of other government resources also to be the last in line for security services.[61] Moreover, in

---

vod. For (as if have shewd before) no man can transfer, or lay down his Right to save himselfe from Death.

Id.

58. There may be a common theme connecting Hobbes's position and that of contemporary American gun owners. One doubts that the majority of them have read Hobbes, but Hobbes's perception that the right to defend against violence with violence is indefeasible is plainly reflected in the views of some gun owners. One of the better bumper sticker slogans is "Make all the laws you want. You ain't gettin mine." *See also infra* notes 243-48 and accompanying text.

59. Lund, *supra* note 28, at 123.

60. For a more thorough discussion of this issue, see *infra* notes 237-47 and accompanying text.

61. One historic example of this phenomenon that may have modern parallels is the experience of black freemen during and after reconstruction. One scholar has documented in sometimes gruesome detail the circumstances of unarmed freemen, reliant on collective security mechanisms during that period. Barry Crouch, *A Spirit of Lawlessness: White Violence, Texas Blacks 1865-1868*, 18 J. SOC. HIST. 217 (1984). According to Crouch:

The question of protecting blacks from white violence did arise in the state legislature. According to both Generals Sheridan and Reynolds, white Texans were

any grand design to protect a disarmed citizenry, the system simply will breakdown. When that occurs, even a constitutional guarantee of protection by the state will be meaningless.[62]

---

more concerned about Indians killing whites on the frontier than whites murdering blacks in the interior. The movement of troops from the frontier to the interior, Reynolds reported, would weaken the former posts "but the bold, wholesale murdering in the interior of the State seems at present a more urgent demand for the troops than Indian depredations." Sheridan wrote: It is strange that over a white man killed by Indians on an extensive frontier, the greatest excitement will take place; but over the killing of many freedmen in the settlements, nothing is done.

Id. at 230 n.17 (citations omitted).

One can argue that more recently during the turmoil of the civil rights movement something similar occurred. *See, e.g.*, DAVID J. GARROW, THE FBI AND MARTIN LUTHER KING JR. (1981). In a telegram to J. Edgar Hoover, King wrote:

I have sincerely questioned the effectiveness of the FBI in racial incidents, particularly where bombings and brutalities against Negroes are at issue . . . . This is part of the broader question of federal involvement in the protection of Negroes in the South and the seeming inability to gain convictions in even the most heinous crimes perpetrated against civil rights workers . . . . FBI agents inevitably work with local law enforcement officers in car thefts, bank robberies and other interstate violations. This makes it difficult for them to function effectively in cases where the rights and safety of Negro citizens are being threatened by these same law enforcement officers . . . . I have always made myself available to all FBI agents of the Atlanta office and encouraged our staff and affiliates to cooperate with them in spite of the fact that many of our people have suspicions and distrust of the FBI as a result of the slow pace of justice in the South.

Id. at 122-23.

Even if we dismiss these concerns to history, they illustrate that there is nothing inherent in our national character or the structure of our government that eliminates the dangers of biased allocation of collective security resources. The prerequisites to a recurrence of this type of situation seem to be only a shift in national mood. *See also infra* text accompanying notes 163-88.

62. Consider the consequences of Hurricane Hugo, the San Francisco earthquake, and a war in the Persian Gulf that generate acts of war on American soil occurring simultaneously. This might easily overtax our collective security and emergency response mechanisms. A disarmed citizenry would be helpless against the threats that could arise. One scenario illustrates the point.

Given the Iraqis' discernable aim to whittle away the popular support for the Gulf War by making the suffering real to Americans, attacks on undefended neighborhoods or remote towns might have been effective. Against terrorists using small arms, armed individuals could be expected to fare better than their unarmed neighbors. The option to resist such a threat would be valued by all but the most committed pacifists.

Some of us are comfortable with forcing individuals to cede firearms exclusively to collective control. This stance forces an array of uncomfortable assumptions. It implies that an individual's interest in self-preservation is not so important that it cannot be ignored in the interest of order or making governing easier. It assumes that unarmed individuals are at no disadvantage against armed aggressors. It demands that agents of government can and will be summoned and arrive the instant a violent threat arises. It presumes that only agents of government can be qualified to resist violent aggression in kind and must do so on behalf of citizens who cannot defend themselves. It relies on government's competence and benevolence, and on the future's predictability, ensuring that collective measures will be sufficient to resist the threats that arise. Perhaps more troubling than all of these is the assumption that the most effective mode of self defense permitted under a constitution written by revolutionaries, who distrusted government and believed in innumerable individual rights, is the First Amendment right to scream 911.

C. The Impossibility of Trusting Collective Security Mechanisms

Simply as a matter of logistics, it may be impossible for citizens confidently to put their trust in collective security resources. Exclusive reliance on collective security mechanisms exacerbates an inherent problem: violent threats to individuals do not come pre-announced. Consequently, collective security resources cannot be present at the instant needed.[63] The situation would be much like telling a climber that all ropes will be collectively controlled. If he begins to fall, then he need only call, and an agent of government will be dispatched to bring the rope that will prevent his injury or death. Unfortunately, once the need for the resource arises, assistance will in many instances be too late.

---

63. Attitudes about the wisdom of relying on collective security resources to arrive in time may be impacted by whether one's perspective is urban or rural. For those who live in rural areas with small police forces and distant neighbors, a collectively administered security force only a phone call away is a fantasy. This fiction might be easier to accept if one lives in an urban area.

Studies in the social sciences show "an inverse relationship between gun ownership and confidence in the ability of police to provide adequate protection." *See* Robert L. Young, *Perceptions of Crime, Racial Attitudes, and Firearms Ownership*, 64 SOC. FORCES 473, 476 (1985). This might explain a trend in the views of rural inhabitants on gun issues.

Taking the analogy further to incorporate the additional problem of limited resources by assuming that there are at any one time one hundred actual climbers, thousands of potential climbers and only five rope administrators, together with the acute nature of the need, we should question the wisdom of the decision which prohibited self-help and individual ownership of ropes.

D. A Core Vision of America

We might also consider whether the type of society that would justify and benefit from disarmament was the type anticipated by the founders. The question does not suggest that we should develop precisely in accordance with the framers' vision or that the Constitution is inflexible, but, to the degree that changes in our society precipitate a movement toward greater reliance on government, we may begin to break away qualitatively from sentiments that are at the core of our constitutional design. Against this backdrop we can evaluate whether the vision of America that drives disarmament advocacy conflicts with vital constitutional principles.

By many accounts the framers envisioned a rural agrarian based America. Central to their vision was the conviction that one significant threat to liberty was the decay and decadence brought on by the urban centers' focus on luxury and commerce. Indeed, one rationalization for westward expansion was to satiate the growing need for land to support this vision.[64] Adopting Jefferson's view that urbanization would lead inexorably to the diminution of liberty and a decay of the core values that the Constitution preserves,[65] we can usefully ask whether disarmament advocacy is driven by an urban vision that exalts luxury at the expense of individual liberty. To the degree it is, it may be in conflict with our core constitutional values.[66]

---

64. "Jefferson, in his jubilation, declared that the [Louisiana] purchase would enable the United States to remain a nation of farmers and land developers—and thus to avoid the evil of urbanization that had corrupted Europe—'for a thousand years.'" FORREST MCDONALD, THE PRESIDENCY OF THOMAS JEFFERSON 69 (1987).

65. *Id.*

66. This structure of analysis is appropriate not only for examining an individual right to arms, but also for informing our debates about the desirable level of dependence on government, its size and proper functions, and the degree to which collective power ought to impact individuals.

More than one commentator has observed that the conflicting positions on the gun issue are a consequence of two conflicting views of the ideal American society:

> The first is probably predominantly urban. Their view takes bourgeois Europe as a model of civilized society[,] a just, equitable and democratic [society]. . . . [They view] personal violence [as] shameful . . . and uncontrolled gun ownership as a blot upon civilization. [The alternative vision is held by a group that is predominantly rural. They] do not tend to be especially articulate or literate, and [their] world view is rarely expressed in print. Their model is that of the independent frontiersman who takes care of himself and his family with no interference from the state. They are "conservative" in the sense that they cling to America's unique pre-modern tradition—a non-feudal society with a sort of medieval liberty at large for every man. To these people . . . [L]ife is tough and competitive. Manhood means responsibility and caring for your own.[67]

An individual right to arms fits very comfortably within the vision of rural Americans. Because rural life is not glorified in our society, the rural vision may not be popular.[68] Nonetheless, it remains reasonable to believe that vision of America is more in accordance with that of the

---

67. Kates, *Original Meaning*, *supra* note 2, at 227 (citing Bruce Briggs, *The Great American Gun War*, PUBLIC INTEREST 37, 61 (1976)).

Conflicting world views emphasizing self-sufficiency and independence on one hand and interdependence and community cooperation on the other fuel the gun debate. The way we strike the balance is influenced by where we are. We err in favor of order if our immediate circumstances would suffer substantially from diminution of order. On the other hand, where individual liberty can be exercised without much damage, we are prone to choose a greater measure of individual liberty.

In rural America, people have space to be more self-sufficient. We can thrive longer without being affected by another human or spending a dime for the services of another person. We may be more prone to seek individual solutions to everyday problems. Probably less of what we do, what we need, and what we want is affected by community decisions.

Disarmament advocacy implicitly centers on urban society, where any significant exercise of individual autonomy can significantly impact the community. Urban citizens have become dependent, embracing the expectation that many things will and should be taken care of without individual effort or individual thought. Cooperation and order may be more important than liberty.

68. *See* Levinson, *supra* note 2, at 637. Professor Levinson touches on this phenomenon while describing how the political views of different groups are informed by their immediate surroundings. He suggests that Second Amendment debate is affected substantially by the political ideology of the viewer. *Id.* at 639.

framers than is the urban based view that may be the predominant influence on our popular culture.[69]

Historian Robert Shalhope argues that James Harrington's work was of preeminent importance in developing the libertarian idea that the popular possession of arms was indispensable to democratic government. Harrington argued that democratic institutions depended on a "'virtuous' citizenry,"[70] requiring the dual attributes of land ownership and possession of arms. "From Harrington, libertarians came to conceptualize civic virtue in terms of the armed freeholder: upstanding, courageous, self-reliant, individually able to repulse outlaws and oppressive officials . . . ."[71] Shalhope draws additional support from eighteenth century libertarians James Burgh and Richard Price.[72] He enlists Burgh to emphasize that:

> [t]he very character of the people—the cornerstone and strength of a republican society—was related to the individual's ability and desire to arm and defend himself against threats to his person . . . . An integral relationship existed between the possession of arms and the spirit and character of the people. For this reason Burgh lamented the state to which English society had fallen. Having become a people interested only in luxury and commerce, Englishmen had surrendered their arms . . . . Burgh's distress over the loss of virility and virtue in English society echoed that of his fellow libertarians . . . . These men related the down-fall of English society to an increasingly luxury-loving people . . . . True virtue sprang from the agrarian world of self sufficient warriors . . . .

---

69. Kates, *Original Meaning*, *supra* note 2, at 227.

70. JAMES HARRINGTON, THE POLITICAL WORKS OF JAMES HARRINGTON (J. Pocock ed., 1977); Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125, 128 (1986) (citing J. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975)).

71. *Id.*

72. Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982).

Price drew the clearest contrast between the perceived decadence of England and the virtuous strength of America, arguing that

> . . . [t]he happiest state of man is the middle state between the savage and the refined or between the wild and the luxurious state. Such is the state of society in . . . the American provinces; where the inhabitants consist, if I am rightly informed, of an independent and hardy yeomanry, all nearly on a level —trained to arms—instructed in their rights—cloaked in homespun—of simple manners—strangers to luxury —drawing plenty from the ground—and plenty gathered easily by the hand of industry.

Id. at 605.

> There was, however, still some hope in the libertarians' minds: America was an agrarian society of self-sufficient husbandmen trained in arms. There the lamp of liberty might still burn brightly.[73]

This conception of the American citizenry "became common in pamphlet literature on both sides of the Atlantic . . . [and] permeated the writings of Americans during and after the Revolution."[74] The vision of an America in which individual arms are an integral part seems more consistent with the framers' conception of the democratic society than is the amalgam of concerns that makes up our popular culture.[75]

We can reasonably believe that an appropriate conception of the unenumerated rights protected by the Ninth Amendment are those rights deemed to be fundamental by the framers.[76] Embracing a vision of America which is fundamentally at odds with that held by the framers—one which implicitly rejects guarantees vital to individuals functioning within that original vision—might require something more explicit and formal than a slow evolution of constitutional doctrine and legislation implementing the modern vision. The only appropriate course may be the protracted battle of constitutional amendment.[77]

---

73. *Id.* at 604-05.

74. *Id.*

75. It is not difficult to appreciate the conclusion that weapons ownership and shooting build responsibility or character of a type considered indispensable by the framers. Armed individuals must face the knowledge that abuse means disaster. It is not government or societal rules that avert such disaster but individual self control, discipline, and attention to safety. Arms are power in the hand, and their use offers an opportunity to know what it is to exercise power responsibly.

76. Barnett, *supra* note 38, at 104.

77. The similarities between the debate over extending constitutional rights to black people through the Fourteenth Amendment and the likely components of a national debate over individual disarmament are substantial. In both instances, the question of the natural or fundamental principles arises. In both cases constitutional adjustment substantially impacts conflicting interests. Both episodes generate a deep split in fundamental assumptions and beliefs about individuals and society. In both instances the national catharsis of proposed constitutional amendment may be the most appropriate treatment.

Even in the face of a confiscatory amendment, some would argue the right to arms still exists. For those who adopt a natural rights view, even a constitutional amendment might not compel individual disarmament. *See infra* notes 199-213 and accompanying text.

E. The Danger of Purely Abstract Controls on Collective Power

A commitment to disarmament may require an unsustainable conviction that there are sufficient systemic controls on collective instruments of violence. We fear guns in the hands of individuals because we perceive an inadequacy in the restraints to prevent their abuse. The same fear should exist with guns exclusively in the hands of government.[78] In both cases, the predominant deterrent to abuse is conceptual.

The restraint on individuals arises from the possibility that some actual physical sanction will follow episodes of abuse. In comparison, assuming successful citizen disarmament, there would be no capacity for resistance to collective abuse of force. The only protections against that abuse would be systemic internal checks and the rhetoric that accompanies them. Before we reject an individual right to arms, we should scrutinize the notion that the rhetoric which ostensibly controls collective power is effective enough to justify ceding all of our significant instruments of violence to government.[79]

Apprehension about the effectiveness of rhetoric to restrain the collective power is not new. James Madison, the "chief sponsor and drafter of the Bill of Rights,"[80] referred to state bills of rights as "parchment barriers [that had been violated] by overbearing majorities in every state."[81] Blackstone's commentaries reflect the same apprehension that arms in the hands of individuals are essential to the protection of individual rights.[82] The same apprehension, although not

---

78. One difficulty with the idea of armed conflict between citizens and government is that it seems grounded on the antiquated concept of trial by fire, the conviction that right ultimately will prevail. It hinges on the faith that the outcome of a citizen's confrontation with government will be just, but the willingness to disarm the population similarly hinges on the faith that democracy will withstand all manner of pressures on its own as if divinely protected, and it never will require solid physical intervention to protect it against despotism or other systemic threats.

79. *See* discussion *infra* notes 237-47 and accompanying text.

80. Hardy, *Armed Citizens, supra* note 26, at 605.

81. *Id.* (citing 11 JAMES MADISON, PAPERS OF JAMES MADISON 297 (R. Ruthland & C. Hobson eds., 1977)).

82. Describing the primary rights of Englishmen as personal security, personal liberty, and private property, Blackstone declared that "in vain would these rights be declared, ascertained and protected by the dead letter of the laws, if the Constitution had provided no other method to secure their actual enjoyment." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *140 *quoted in* John Levin, *The Right to Bear*

always connected to individual arms ownership, is reflected in the work of modern commentators from various fields.[83]

Collective power restrained by rhetoric alone was one of the concerns of the antifederalists. A particular concern was that the federal government would use a monopoly on arms to "extort the enormous sums that will be necessary to support the civil list—to maintain the

---

Arms: The Development of the American Experience, 48 CHI.-KENT L. REV. 148, 153 (1971). In addition to these primary rights, Blackstone described a group of auxiliary rights that allowed for protection of the primary rights beyond the dead letter of the law. He included among these the right of "having arms for their defense . . . . [w]hich . . . is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation when the sanctions of society and laws are found insufficient to restrain the violence of oppression." *Id.* at 153-54 (*citing* BLACKSTONE, *supra*, at *143-44).

A similar sentiment is reflected in the reaction to efforts by Charles I to confiscate citizens' arms:

> Wails of dispair were heard from city after city as the royal Army confiscated public magazines and disarmed local residents. "The best of it is" a distraught and disarmed townsman of Nantwich wrote, "if we stay at home, we are now their slaves. Being naked, they will have of us what they list, and do with us what they list." Forewarned was forearmed, and from 1642 Englishmen learned to hide their firearms and stockpile weapons.

Joyce Lee Malcom, *Disarmed: The Loss of the Right to Bear Arms in Restoration England* 8 (Bunting Institute of Radcliffe College 1980).

83. *See, e.g.*, Levinson, *supra* note 2, at 656. Levinson stated:

> I do not want to argue that the state is necessarily tyrannical; I am not an anarchist. But it seems foolhardy to assume that the armed state will necessarily be benevolent. The American political tradition is for good or ill based in large measure on a healthy mistrust of the state. The development of widespread suffrage and greater majoritarianism in our polity is itself no sure protection, at least within republican theory . . . . In any event, it is hard for me to see how one can argue that circumstances have so changed as to make mass disarmament constitutionally unproblematic.

Id.

See also Commentary, *From the Bastille to Tienanmen Square*, 60 POL. Q. 259, 261 (1989) ("[I]f the chips were down and a future western government really determined to smash an inconvenient mass movement, what use are all the charters, laws, customs when the troops march in?"); PRESTON KING, FEAR OF POWER 2 (1967).

> Tocqueville's virtue was to understand, and for the first time really effectively to argue, that the designation of a ruler or a body of rulers could not, either in theory or practice, defend against unjust rule. For kings, aristocrats and democrats may rule wisely or foolishly, fairly or tyrannically, while all power is subject to abuse. Tocqueville affirmed that no government, simply because it established a particular type of sovereign, could be assumed, through this, to afford a cast-iron guarantee against injustice and intolerance.

Id.

regalia of power—and the splendor of the most useless part of the community, or they may be sent into foreign countries for the fulfillment of treaties."[84] We may have reached a level of collective fund raising[85] where it is possible to conclude that something like this type of coercion actually has occurred. Judge Arnold begins his analysis of the utility and necessity of an enlivened Ninth Amendment by stating that we currently face massive coercion, which supports a liberal social vision based on income redistribution and collective interference with private contracts.[86] However, with revenue collection having progressed to this stage with at least an ostensibly armed citizenry, we should consider what further reaches could occur were there not some minor

---

84. ELBRIDGE GERRY, OBSERVATIONS ON THE NEW CONSTITUTION AND ON THE FEDERAL AND STATE CONVENTIONS, *in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 56 (Paul L. Ford ed., 1888). *See also* ANDREW FLETCHER, THE POLITICAL WORKS OF ANDREW FLETCHER 9 (London 1737) ("[H]e that is armed, is always master of the purse of him that is unarmed"), *cited in* Shalhope, *supra* note 72, at 603.

85. If one totals the federal, state and local income taxes, sales taxes, real estate taxes, *ad valorem taxes*, and social security taxes, together with the powerful enforcement mechanisms developed to police payment of them, it becomes rather easy to be sympathetic to the argument that payment of these demands is not consensual.

86. Morris S. Arnold, *Doing More than Remembering the Ninth Amendment*, 64 CHI.-KENT L. REV. 265 (1988). In his opening paragraph, Judge Arnold argues that:

> [t]he recent revival of interest in the Ninth Amendment is partly due to dissatisfaction with the intrusive bureaucratic state created in this country over the last fifty years. The Ninth Amendment is, of course, a fairly obvious place to look for protection from the ravages of positivism, for it holds out at least a modicum of hope to those who value liberty and autonomy—those, that is, who would like to locate in the Constitution something like a general right to be left alone. Such people used to be called liberals, but that label has ironically been appropriated by persons with a social vision which requires massive coercion to effect and maintain it. This coercion appears in a large number of forms, but most frequently it manifests itself in two ways: first, in interventionist statutes that prohibit the enforcement of some contracts or compel the creation of others; and second, in takings and redistributions of wealth that have rendered the promise of just compensation held out in the Fifth and Fourteenth Amendments a virtual dead letter. Since the possibility of enforcement is what often, though by no means always, induces obedience to law, guns and jails lurk behind these laws, however subtle may be the camouflage, and however worthy their progenitors think them to be. Much recent Ninth Amendment scholarship is generated by a desire to find some sanctuary from what is perceived as majoritarian tyranny.

Id. at 265.

fear of a serious and meaningful tax revolt or the cumulative effect of numerous individual acts of resistance.[87]

Abstract rhetorical limitations on collective power seem to be weak barriers to abuse. Abstract codes cannot deter individuals intent on breaching them or those who have rationalized their breach. It is difficult to conclude, once even the nominal capability[88] to resist collective violence is surrendered, that we may rest easy in the belief that collective power is effectively restrained.[89]

F. Consent of the Governed

Constitutionally valid disarmament is difficult to square with the idea that government exists subject to the consent of the governed. That our representatives serve rather than rule is one of the fundamental structural supports of our constitutional system. It usefully informs our views of the substantive rights that may be derived from the Ninth Amendment,[90] and it generates direct support for an individual right to arms.

---

87. Given that we may now face the type of overreaching exertion of power that was feared by the antifederalists we might conclude one of two things. We might say that disarmament now is a non-issue because the gap between the abilities of individuals and government to use force is so wide that arms in the hands of individual citizens are virtually meaningless. Alternatively, we might conclude that the current balance compels preservation of existing levels of individual access to arms; so long as this level is maintained, the imbalance might be adjusted to a point where resistance to coercion becomes real enough to act as a counterweight against government action.

88. *See also infra* notes 118-88 and accompanying text.

89. One can conjure up images of massive passive resistance and noble sacrifices in the vein of Tiananmen Square; however, these images ignore the power of bluff. The threat of force and its moderate implementation against unarmed groups is a highly effective and relatively low-cost tactic. Contrast this with the type of government violence against citizens that would be necessary to truly overwhelm an armed populace. True, government will have a monopoly on weapons of mass destruction, but the decision to use those on a domestic civilian population is much less likely than the decision simply to show and threaten force.

90. Our system of government may have become something less than democratic and consensual. Political philosopher Sheldon Wolin argues that contemporary American society is not a democracy. "The idea of democracy and the idea of a strong centralized state, inherently bureaucratic and administrative in its structure and orientation, are not compatible notions. Democracy implies involvement, shared power . . . ." MOYERS, *supra* note 52, at 99.

In Federalist 28, Hamilton tied the right to arms to the idea that government exists through the consent of the governed. "If the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self-defense, which is paramount to all positive forms of government . . . ."[91] Here at once is a right to arms, tied directly to the belief that government must be consensual, and the conviction that armed self-defense is a freedom which citizens cannot properly cede and government cannot validly impair.

Federalist 28 is merely one indication that the framers considered an individual right to arms to be an essential element of consensual government. Aristotle wrote that where "the farmers have no arms, the workers have neither land nor arms; this makes them virtually the servants of those who do possess arms."[92] This classical source is particularly relevant because it is invoked directly by thinkers and writers of the revolutionary period. John Adams, for example, in *A Defence of the Constitutions of Government of the United States of America,*[93] enlists similar writings by Aristotle through quotations from Marchamont Nedham's *The Right Constitution of a Commonwealth:*[94]

> One consequence of [armed citizens] was "that nothing could at any time be imposed upon the people but by their consent . . . As Aristotle tells us, in his fourth book on Politics, the Grecian states ever had special care to place the use and exercise of arms in the people, because the

---

91. THE FEDERALIST No. 28, at 227 (James Madison) (Random House, Inc. 1964).

92. ARISTOTLE, POLITICS 71 (Sinclair trans., 1962), *cited in* Richard Gardiner, *To Preserve Liberty-A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63, at 74 n. 53 (1982). This classical source is particularly relevant because it is invoked directly by thinkers and writers of the revolutionary period. In his work, *A Defence of the Constitutions of Government of the United States of America*, John Adams enlisted similar writings by Aristotle:

> One consequence [of armed citizens was] . . . "that nothing could at any time be imposed upon the people but by their consent. . . ." As Aristotle tells us, in his fourth book on Politics, the Grecian states ever had special care to place the use and exercise of arms in the people, because the commonwealth is theirs who hold the arms: the sword and sovereignty ever walk hand in hand together.

3 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 471-72 (London, 1787-88), *cited in* Halbrook, *supra* note 48, at 66.

93. (London 1787-88), *cited in* HALBROOK, *supra* note 48, at 14.

94. (1656), *cited in* HALBROOK, *supra* note 48, at 14.

> commonwealth is theirs who hold the arms: the sword and sovereignty ever walk hand in hand together."[95]

English libertarian writers, who strongly influenced the political views of colonial Americans, reflected the same sentiment.[96] Andrew Fletcher, writing several decades before the American revolution, warned: "he that is armed, is always master of the purse of him that is unarmed."[97]

The theoretical alternative to government,[98] Locke's state of nature, suggests that citizens really do have and should continue to have a choice about the structure of government or its very existence. We could envision a phase where collective controls and security mechanisms would be dismantled by choice.[99] In the event this course is chosen, the absence of some of the essential tools for defense, necessary for proceeding into the subsequent period, might at least temporarily impede the decision to move forward.[100]

G. Should Government Fear the Citizenry?

While the answer is unclear, we might ask whether our constitutional structure includes a presumption that those with direct control of collective power should have a healthy respect for and fear of the citizens who placed them in that position. It might be systemically healthy and necessary that our representatives fear not only being voted out of office, but also that some exercises of the power entrusted to them will be resisted by individuals with the will and the means to do so.

This idea does not rely heavily on the progression into violent conflict. Instead, it focuses on the restraining effect of the fear that certain intrusions on individual rights might trigger opposition by force. Absent this deterrent, intrusions on individual liberty might occur more

---

95. 3 JOHN ADAMS, A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT IN THE UNITED STATES OF AMERICA 471-72 (London 1787-88), *cited in* HALBROOK, *supra* note 48, at 14.

96. *See* Shalhope, *supra* note 72, at 601.

97. ANDREW FLETCHER, THE POLITICAL WORKS OF ANDREW FLETCHER, ESQ. 9 (London 1737) at 9, *cited in* Shalhope, *supra* note 72, at 603.

98. *See* LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT 5-6 (Gateway 1964).

99. *See infra* text accompanying notes 244-45.

100. Although it is difficult to imagine the political path that would lead to the withdrawal of that consent, one would expect a consensual model to allow the retention of tools essential in the wake of such a massive structural change.

easily, particularly where there is a strong conviction that the intrusion is necessary to make governing easier.

It has been argued that the vision of government servants being fearful of overstepping their power was an element of the framers' vision. James Burgh, in a work very popular in pre-revolutionary America, argued that the impending conflict was a product of ignoring the principles that support an armed population. He urged that "there is no end to observations on the difference between the measures likely to be pursued by a minister backed by a standing army and those of a court awed by the fear of an armed people."[101] Libertarian writers John Trenchard and Thomas Gordon also considered fear of the armed citizen to be an important check on intrusive government. In language representative of this commentary, they posit: "men that are above all Fear, soon grow above all Shame."[102]

Absent the some real fear of the citizenry, limitations on the exercise of the power delegated to government are mainly rhetorical.[103] These limitations may be cold comfort, particularly to individuals or groups that have been ill-served by them in the past.

H. The Framers' View of Individual Arms

A large body of literature, distilled primarily by Second Amendment scholars, reflects and seems to have influenced the

---

101. *See* Hardy, *Armed Citizens, supra* note 26, at 586 (citing 2 JAMES BURGH, POLITICAL DISQUISITIONS: AN ENQUIREY INTO PUBLIC ERRORS, DEFECTS AND ABUSES 475-76 (London 1971) (1774)).

102. *See* Shalhope, *supra* note 72, at 603 (citing JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS OR ESSAYS ON LIBERTY, CIVIL & RELIGIOUS AND OTHER IMPORTANT SUBJECTS 189, 255 (London 1755)).

103. *See* Hardy, *Armed Citizens, supra* note 26, at 586.

Compare Stephen Halbrook, *To Keep and Bear Their Private Arms: The Adoptions of the Second Amendment 1787-1791*, 10 N. KY. L. REV. 13 (1982). Halbrook writes:

> Another source of power in government is a military force . . . . Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States.

Id. at 16-17 (quoting Noah Webster, *An Examination into the Leading Principles of the Federal Constitution*, PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 56 (P. Ford ed., 1888)).

framers' perceptions about the role of individual arms in the American constitutional system.[104] It conspicuously includes the writings of John Locke,[105] and Locke is in remarkable company.

The Federalist Papers directly support derivation of an individual right to arms for self-defense from the Ninth Amendment. Federalist No. 28 describes an "original right to self-defense which is paramount to all positive forms of government."[106] Several commentators have urged that certain rights predate government, and the Ninth Amendment preserves them.[107] The difficulty is in determining which preexisting rights are so preserved. Hamilton offers at least one indication that a right to possess arms for self-defense was considered among such inalienable rights even if it did not find its way explicitly into the Bill of Rights.

Blackstone's commentaries are particularly relevant given their influence on the Supreme Court's incorporation of provisions of the Bill of Rights through the Fourteenth Amendment. In *Benton v. Maryland*,[108] the Court explained its test for incorporation. The Court noted that the provision at issue, the prohibition of double jeopardy "as with many other elements of the common law, . . . was carried into the jurisprudence of this country through the medium of Blackstone, who codified the doctrine in his Commentaries."[109]

Blackstone viewed the right to bear arms as pre-existing government. He declared that "self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society."[110] He described a right to arms as both statutory and natural.[111]

---

104. One Second Amendment scholar offers a notable list of political philosophers and thinkers, who appear to have considered the right to arms for individual defense essential. The list includes: Aristotle, Machiavelli, Sir Thomas Moore, Hobbes, James Harrington, Cicero, Sidney, Trenchard, Tousseau, Sir Walter Raleigh, Blackstone, Nedham, Montesquieu, and Becacaria. Kates, *Original Meaning*, *supra* note 2, at 232-33.

105. *See supra* notes 63-64 and accompanying text.

106. THE FEDERALIST NO. 28, at 127 (Alexander Hamilton) (George Macy Co. ed., 1945).

107. *See supra* notes 7-16 and accompanying text.

108. 395 U.S. 784 (1969).

109. *Id.* at 795.

110. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 4 ((U. Chi. Press photo. reprint 1979) (1st ed. 1765-69).

111. 1 BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *143-44 (1766), *cited in* HALBROOK, *supra* note 48, at 54.

John Adams's position on the right to bear arms is also notable, because he opposed the establishment of a right to bear arms collectively to achieve political ends. One commentator proposes that it was natural for Adams, an aristocrat, to oppose the concept of a citizens' militia;[112] however, even Adams endorsed individual arms ownership for private self-defense.[113]

Thomas Hobbes's work is frequently cited by Second Amendment commentators to support an individual right interpretation. Because Hobbes is generally viewed as laying a foundation for absolute monarchy, it is telling that even he advocated an individual right to self-defense: "A Covenant not to defend my selfe from force, by force, is alwayes voyd. For (as I have shewed before) no man can transferre, or lay down his Right to save himselfe from Death."[114]

The impact of these sources in explaining the Second Amendment may be diverted by the fact that there is explicit text to interpret. Even if we are not convinced by Second Amendment scholars' arguments, the evidence they have gathered will not disappear. The support these sources offer takes on greater significance when the individual right to arms is viewed through the Ninth Amendment. The plethora of historical support suggests that deriving an individual right to arms from the Ninth Amendment may be substantially easier than deriving other popularly advocated rights.[115] If we take the Ninth Amendment seriously, and we believe we can derive rights from it in an objective,

---

> The fifth and last auxiliary right of the subjects, that I shall at present mention, is that of having arms for their defence suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute . . . *and it is indeed, a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.*
>
> In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen . . . . [T]o vindicate these rights, when actually violated or attacked, the subjects of England are entitled . . . to the right of having and using arms for self-preservation and defense.

Id. (emphasis added).

112. HALBROOK, *supra* note 48, at 66.

113. "To suppose arms in the hands of citizens, to be used at individual discretion, *except in private self-defence* . . . is a dissolution of the government." *Id.* (quoting ADAMS, *supra* note 92, at 475).

114. Hardy, *Historiography*, *supra* note 26, at 31 (citing HOBBES, *supra* note 57, at 116).

115. *See infra* notes 251-54 and accompanying text.

apolitical fashion, then we must thoughtfully consider the implications of endorsing more trendy unenumerated rights while denying that there is a principled basis for establishing an individual right to arms.[116]

I. The Implications of a Decision that the Citizenry Cannot be Trusted with Personal Weapons.

A practical rationale supporting disarmament is that some citizens cannot be trusted to act wisely or prudently in their use of firearms. This justification, though, raises the related question: can such a population be entrusted to make informed democratic decisions? Once we reach the stage where we advocate individual disarmament, we may have departed substantially from the framers' design—so substantially that, perhaps, we will no longer seriously be able to contend that government is either controlled by and serves citizens in a way that is responsive and accountable, or that citizens possess the capacity to meet their responsibility as masters of their agents in government.[117]

VI. PERSONAL SECURITY, UTILITY OF FIREARMS AND THREATS

In this section, I will examine the case for individual arms by pursuing a more fundamental and less controversial issue: whether we at least can derive a constitutionally protected interest in personal security from the Ninth Amendment. I will then examine the utility of firearms in protecting such an interest and the threats to individual security that might justify the perception that a meaningful right to personal security may require individual access to firearms.

---

116. The American Civil Liberties Union's opinion on the meaning of the Second Amendment is that "[e]xcept for lawful police and military purposes, the possession of weapons by individuals is not constitutionally protected." Levinson, *supra* note 2, at 644 (citing ACLU, POLICY ON GUN CONTROL #47 (1989)). It is not clear whether such a policy would translate as well into a position that the Ninth Amendment protects unenumerated rights, but an individual right to arms for self defense is not among them.

117. *See* Kates *Original Meaning*, *supra* note 2, at 233. Kates notes that the Founders believed that if the population ever were unfit to possess arms, it would be only because they would have been degraded by exploitation and oppression. The people we seem most intent on disarming may fit well into this category.

A. *Personal Security as a Fundamental Interest*

A predominant reason to protect a right to self-defense and personal security is that such an interest may be a prerequisite to exercising and enjoying those rights that are explicitly enumerated. The dead probably have very little use for the First, Fourth and Fifth Amendments.

Writings that have contributed to our political and constitutional tradition confirm the idea that individual security and self-defense are basic and natural human concerns.[118] American colonists viewed self-defense not just as a right but as an obligation.[119] St. George Tucker, whose supplemented edition of Blackstone's *Commentaries* compared the American Constitution and law to British common law,[120] observed that "[t]he right of self defence is the first law of nature."[121] The corresponding right to arms in the English tradition was expanded in American law.[122]

Other modern writers find support in the work of early nineteenth century commentators[123] and an array of state court decisions.[124]

---

118. *E.g.*, CICERO, *In Defence of Titus Annius Milo, reprinted in* SELECTED POLITICAL SPEECHES OF CICERO 213 (Michael Grant trans., 1969). Cicero noted:

> [T]here exists a law, not written down anywhere but inborn in our hearts . . . . I refer to the law which lays it down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. When weapons reduce them to silence, the laws no longer expect one to await their pronouncements. For people who decide to wait for these will have to wait for justice too—and meanwhile they must suffer injustice first.

Id. at 222.

119. Kates, *Original Meaning*, *supra* note 2, at 229-30. Kates offers the following quotation from a 1747 Philadelphia sermon in support:

> He that suffers his life to be taken from him by one that hath no authority for that purpose, when he might preserve it by defense, incurs the Guilt of self murder since God hath enjoined him to seek the continuance of his life, and Nature itself teaches every creature to defend himself . . . .

Id. at 230 n.109 (citation omitted).

120. Hardy, *Armed Citizens*, *supra* note 26, at 612 (citing WILLIAM BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS 300 (St. George Tucker ed., 1803)).

121. *Id.* at 613 n.263.

122. *Id.*

123. *See* Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177, 183 (1982). The authors write:

> The right of self-defence in these cases is founded in the law of nature, and is not, nor can be, superseded by any law of society. For before societies were

Nelson Lund argues: "[i]n liberal theory, the right to self-defense is the most fundamental of all rights—far more basic than the guarantees of free speech, freedom of religion, jury trial, and due process of law."[125] David Caplan presents a selection of early English common law endorsements including some drawing on biblical passages and others derived from the self-defense doctrine in criminal law.[126]

Early Supreme Court jurisprudence provides another endorsement of the constitutional right to individual security. In one case, the Court ruled that "constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance."[127] Some forty years later, in a widely noted dissenting opinion, Justice Brandeis argued passionately in support of an unenumerated, but fundamental, right to privacy that encompassed a right to personal security.[128]

At least one modern commentator has considered several human rights principles incorporated into international law as relevant to determining those rights that the Ninth Amendment protects.[129] The

---

formed, . . . the right of self-defence resided in individuals; it could not reside elsewhere, and since in cases of necessity, individuals incorporated into society cannot resort for protection to the law of the society, that law with great propriety and strict justice considereth them, as still, in that instance, under the protection of the law of nature.

Id. (citation omitted).

124. *Id.* at 210 (listing a number of recent state court cases recognizing a natural or fundamental right to self preservation).

125. Nelson Lund, *The Second Amendment, Political Liberty and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 118 (1987).

126. Caplan, *supra* note 27, at 803-11. *See also* Dowlut & Knoop, *supra* note 123, at 183.

127. Boyd v. United States, 116 U.S. 616, 635 (1886) (holding seizure or compulsory production of private papers to be violative of personal security and, hence, the Fourth and Fifth Amendments).

128. Olmstead v. United States, 277 U.S. 438, 474 (1928) (remembered as a plea for constitutional recognition of a "right to be left alone").

129. *See* Moore, *supra* note 36, at 301. Moore notes:

Perhaps the most viable area to which we can look for guidance in determining what are the natural rights of man protected by the Ninth Amendment to the Federal Constitution is to the International Community of Nations and to what generally has been admitted to be, by the International Community of Nations, fundamental rights of men. Certainly, when many different countries from all areas of the world, with representatives of all different religious, social and

United Nations Charter declares that "nothing in the charter shall impair the inherent right of individual or collective self-defense . . . ."[130] The United Nations Universal Declaration of Human Rights also explicitly endorses the right of individual security, stating that "[e]veryone has the right to life, liberty and security of person."[131]

Similar writings considering the inherent right of self-defense abound,[132] bolstered by an array of non-traditional sources. Work in the

---

> political persuasions, can agree on a proclamation as to what are certain fundamental rights of all human beings, this would be a strong indication that these are fundamental natural rights that all men possess by their very nature . . . . The most single centralized recognized source of what the International Community of Nations believes to be the fundamental natural rights of man is the Universal Declaration of Human rights proclaimed by the United Nations.

Id.

130. U.N. CHARTER art. 51.

131. *Universal Declaration of Human Rights,* art. 3, G.A. Res. 217A (III) U.N. Doc. A/810, at 71 (1948), *discussed in* James B. Whisker, *Historical Development and Subsequent Erosion of the Right to Keep and Bear Arms*, 78 W. VA. L. REV. 171 n.52 (1976). *See also* Proclamation of Teheran U.N. GAOR, 23d Sess., U.N. Doc. A/Conf. 32/41 (1968). The Proclamation was adopted unanimously by a group of sovereign nations, including the United States, at the conclusion of the 1968 International Conference on Human Rights. It binds the endorsing nations to the implementation of the provisions of the International Covenant on Civil and Political Rights. *Id.* Article 9 of that Covenant states that "[e]veryone has the right to security of person." International Covenant on Civil and Political Rights, art. 9, G.A. Res 2200, U.N. GAOR, 21st Sess., supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

132. Various other sources, predating and contemporaneous with the drafting of the Constitution, recognize that the basic human interest in personal security (sometimes expressed generally and other times in direct connection with a right to arms) must fall within the first of their rights that are fundamental attributes of free people. *See, e.g.*, CICERO, *supra* note 118, at 222; GEORG JELLINEK, THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS 49 (M. Farrand trans., 1901) (The only individual rights contained in the English Bill of Rights were the right to petition and the right to bear arms.); GEORGE C. NEUMANN, THE HISTORY OF WEAPONS OF THE AMERICAN REVOLUTION 150-51 (1967) ("In America it was considered normal for eighteenth century civilians to carry pocket pistols for protection while traveling."); Dowlut and Knoop, *supra* note 123, at 163 ("The foundation of an Englishman's security, 'the security without which every other would have been insufficient' was neither Magna Carta nor Parliament but 'the power of the sword.'"); Gardiner, supra note 92, at 67 (The right and positive duty of self-defense existed in English law prior to the formation of the American Republic: "This duty is illustrated by the manumission ceremonies in which the former master of a liberated serf would place in his hands the weapons of a freeman as a symbol of his new stature."); Alan Gottlieb, *Gun Ownership: A Constitutional Right*, 10 N. KY. L. REV. 113, 127 (1982) ("[C]olonial Americans depended primarily upon the great commentators for their

social sciences presents formally what may drive attitudes about self-defense. It has been observed as a rather natural phenomenon that people take steps to protect themselves when their faith in the ability of agencies such as the police to protect them diminishes.[133] Acknowledging the premise that our constitutional structure is grounded in the distrust of government, we might expect citizens to exhibit a continuing interest in acquiring instruments of self-protection. While constitutional questions will not turn on such observations, they partially confirm the proposition that disarmament requires taking a political step—trusting in the competence and benevolence of government—that should make us uncomfortable.

It is useful in comparison to examine some representative statements regarding macro security issues. Oscar Schachter's *Self-Defense and the Rule of Law*[134] offers a useful point of departure. Schachter describes two schools of thought regarding views of the right of self-defense in the international sphere. The first parallels what I have presented as support for the individual right of self-defense, that self-

---

knowledge of fundamental common law principles. From Sir Edward Coke they learned that one of those fundamental principles was the individual's right to possess arms for defense of his home and family."); Halbrook, *supra* note 103, at 22 ("The government is only just and perfectly free . . . where there is also a dernier resort, or real power left in the community to defend themselves against any attack on their liberties."); Stephen P. Halbrook, *The Right to Bear Arms in the First State Bills of Rights*, 10 VT. L. REV. 225, 270 (1985) (quoting an article from the Pa. Evening Post 1776: "The inhibition of bearing Arms has ever been deemed, through all the Nations of the World, the most flagitious Characteristic of abject Slavery!"); Hardy, *Historiography*, *supra* note 26, at 18 ("Most of our Bill of Rights are, in short, of quite recent vintage . . . . Conversely, a specifically individual right to arms, separate and apart from the militia system, was one of the earliest of the individual civil rights to gain acceptance . . . . In fact, the origins of the concept of an individual right to arms lies not in the eighteenth century Enlightenment, but in the turmoil of the seventeenth century."); Hardy, *Armed Citizens*, *supra* note 26, at 586. "The possession of arms is the distinction between a freeman and a slave.") (citation omitted); Stuart Hays, *The Right to Bear Arms: A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381, 383 (1960) ("From the very beginnings of early 'England' the Saxons, Angles, Picts, Jutes, and other tribal factions possessed weapons for . . . self-defense."); Levin, *supra* note 82, at 161 ("Most state courts have never spoken of the right to bear arms in the sophisticated terms of political balance, but rather treated the right as synonymous with the right of self defense.").

133. David McDowall and Colin Loftin, *Collective Security and the Demand for Legal Handguns*, 88 AM. J. SOC., 1146-61 (1983).

134. Oscar Schachter, *Self Defense & The Rule of Law*, 83 AM. J. INT'L L. 259 (1989).

preservation "is a natural right of the state, as of individuals, that could not be abrogated or limited by positive law."[135]

The second is rather remarkable when considered against contemporary American views of the individual right to self-defense. It is the belief in the subordination of law to power when national security is threatened.[136] Schachter presents the remarks of Dean Acheson, former Secretary of State, in a discussion of the legality of the U.S. quarantine of Cuba during the 1962 missile crisis: "[t]he action taken by the United States was, in [Acheson's] view, 'essential to the continuation of [its] preeminent power.' Law, he declared, simply does not deal with such questions of ultimate power . . . . The survival of states is not a matter of law.'"[137] Although when it has been in our national interest we have endorsed the opposite view,[138] the United States has argued before the International Court of Justice that "the United States alone was in a position to determine the necessity of the 'defense' measures it had taken against Nicaragua . . . ."[139]

On a macro level, issues of security and survival of the state are considered qualitatively different from other issues that might more easily be submitted to the consensus of the community. What is obscured in the analysis of individual interests in security and self-defense is boldly apparent when it is the security of the state itself at issue: an autonomous state's interest in its continued existence is preeminent among its concerns, and measures it takes to ensure its survival will not be subordinated to community limitations.

I suspect many of us are not yet prepared to say that an individual's interest in security is of less importance than the state's. In order to endorse disarmament, we must face directly the conflict between accepted views of the state's interest in security and self-defense and an

---

135. *Id.* at 259.

136. *Id.* at 260.

137. *Id.* at 259.

138. *Id.* at 261-62. The International Military Tribunal in Nuremberg rejected the argument by Nazi leaders that "Germany had acted in self-defense and that every state must be the judge of whether in a given case it has the right of self-defense." *Id.*

139. Id. at 200. On another level, the United States' potential for violence permits it to comply or not with the rules established by the community of nations. The declarations of international law that the United States has ignored when it is in the national interest to do so give us a contemporary appreciation of the possibility that total reliance on "parchment barriers" to restrain the actions of the state toward individual citizens is unwise.

individual's constitutional right to armed personal security. If we perceive government as a means to an end rather than an end in itself, then we should be troubled by the idea that the government's interest in perpetuating itself is more legitimate than the corresponding interest of individual citizens.[140]

The same observation applies to the special provisions made for the security of individuals who rise to power within government. It is doubtful that disarmament would require all government agents to depend on the same collective security resources as private citizens. Certainly, we could posit reasons for permitting certain agents of government to have armed security personnel at their constant disposal or even personal access to firearms. Indeed, it would be difficult to argue that these measures were not justified and necessary.

What *is* difficult to justify is permitting government agents, whom we ideally characterize as servants, to enjoy a level of security, provided in part by firearms, unavailable to the general population.[141] Such a

---

140. It is useful to compare the treatment by scholars and media of national security issues with their treatment of individual security issues. The most powerful members of our political elite attend to and are involved in the treatment of collective security issues. Such issues attract the energy of some of our best minds. *See, e.g.*, AMERICA'S SECURITY IN THE 1980'S (Christopher Bertram ed., 1982) (including essays from Henry Kissinger and Barbara Tuchman).

Our popular press coverage of weapons of immense destruction demonstrates significant interest in their capabilities and operation, as illustrated by the extensive coverage that familiarized us in detail with the weapons used in Operation Desert Storm. In sharp contrast, despite the fact that individuals in our society consistently are threatened with violence it is difficult to find any serious evaluation of individual defense mechanisms other than in forums that many consider outside the mainstream. *See, e.g.*, GUNS AND AMMO (magazine); HANDGUNS (magazine). One certainly finds few political or intellectual luminaries discussing individual defense tactics using personal firearms.

141. Even if we presume that the collective security resources are administered on an absolutely equal basis, we still have a problem. DeTocqueville urged that there is a fundamental conflict between liberty and equality. *See*, KING, *supra* note 83. We have managed this conflict by attempting only to guarantee equal opportunity to individuals to exercise their liberty to achieve what they choose. Consistent with DeTocqueville's concerns we seem to resist guarantees of equal outcomes; however, general disarmament, even if administered evenly, would equalize not only opportunities, but also outcomes. It would place us, with respect to a fundamental human concern which many approach differently, on absolutely equal ground.

Because disarmament restricts our liberty to make individual decisions about how to defend our own lives, it is in conflict with our rejection of coerced limitations on individual liberty in favor of the interest in equality. In making this decision, we ought to consider how we can so forcefully resist mandated equalization of outcomes where simple

result leads to the conclusion that those in positions of power in government are distinct from servants whose lives are somehow worth more than the lives of citizens. It then follows that our constitutional system is designed to tolerate a tier of elite whose interest in personal security exceeds that of citizens merely because of their positions in government.[142] Our constitutional tradition, based on the concepts of limited government serving the citizenry and legitimate fear of the power vested in government, seems at odds with such conclusions.

It is then possible to view physical security as preeminent among those things necessary to enjoyment of enumerated guarantees, and it is important that we scrutinize the potential role of firearms in protecting that interest.

B. The Utility of Firearms for Personal Security

One might concede that an individual's interest in physical security is recognized generally in the Constitution and particularly by the Ninth Amendment but still resist the idea that it may be pursued by force of arms. One way to justify this position is to deny the utility of firearms as tools for resisting violence.

There is little dispute that firearms, at least in the hands of the police and the military, are useful. When the issue changes to arms in the hands of individual citizens, there is a detectable transformation of

---

economic issues are at stake, and yet embrace it when evaluating an individual's interest in protecting against threats to his life. *See supra* notes 53-62 and accompanying text.

142. Compare the following perspective:

> Only admit the original unalterable truth, *that all men are equal in their rights*, and the foundation of everything is laid; to build the superstructure requires no effort but that of natural deduction. The first necessary deduction will be, that the people will form an equal representative government . . . . Another deduction follows, [t]hat the people will be universally armed . . . . A people that legislate for themselves ought to be in the habit of protecting themselves; or they will lose the spirit of both.

JOEL BERLOW, ADVICE TO THE PRIVILEGED ORDERS IN THE SEVERAL STATES OF EUROPE 46-47 (Great Seal Books 1956) (1792).

It is not unreasonable to expect individual citizens to look skeptically on public officials who enjoy security measures that they would vote to deny individual citizens. *See, e.g., Random Shots*, AM. RIFLEMAN, April 1991, at 20 (identifying Stephen Solarz and Teddy Kennedy as consistently opposing individual arms ownership while their body guards have been arrested on Capital Hill for weapons violations (toting 9mm semiautomatic pistols and sub-machineguns respectively)). *See also* James J. Baker, *Gun Legislation*, SHOOTING TIMES, Feb. 1991, at 6.

perception. Suddenly, there is nothing useful or socially beneficial about them. This sentiment is illustrated by Professor Levinson's observation that "it appears almost crazy to protect as a constitutional right something that so clearly results in extraordinary social costs with little, if any, compensating social advantage."[143]

This extraordinary social cost arises from the fact that guns are effective tools for killing people and are used for that purpose. It is, however, an analytical misstep to assume that every use of firearms is at a social cost. Many of us would count the use of a policeman's gun to stop aggression against an innocent victim as a benefit rather than a cost. Some of us would reach the same conclusion about a victim using a gun directly in self-defense. Given the fairly widespread justified, defensive use of firearms in our country, we can at least argue about whether guns are useful security tools.[144]

Some may be inclined to dismiss the possibility of individuals beneficially using tools of violence. The explanation may lie in the conviction that all violence is simply abhorrent and ought never be

---

143. Levinson, *supra* note 2, at 655. Certainly, it is a powerful indictment that any activity contributes to innocent lives being lost. It would be devastating if we were comparing the utility of only 24,000 guns in our society against the damage of their use in the 24,000 firearms related murders during 1986 and 1987. *Id.*

Since more than 70 million Americans own guns and there are over 165 million of them in private hands, a different result emerges. JAMES WRIGHT ET AL., UNDER THE GUN 85 (1983). One now has to take into consideration eliminating a choice made by millions of citizens. Additionally, given the fractional percentage of these millions of guns that are abused, one might inquire whether the presence of guns in our society is the predominant cause of these murders or the murders would have occurred by other means absent the availability of a firearm.

Objective assessment of the utility of arms seems to require something that we may be uncomfortable doing. It makes us consider that the use of firearms by victims to stop aggressors may indeed be a net benefit, even where the aggressor is killed. In more stark terms, the question is whether a gun in the hands of Goodman, Chaney, the central park jogger, the L.A. trucker or a host of others might have been a positive and useful thing.

144. Gary Kleck, *Crime Control Through Private Use of Armed Force*, 35 SOC. PROBS. 1 (Feb. 1988) (arguing that yearly there are nearly 650,000 protective uses of handguns by civilians). Dr. Paul Blackman places this figure at one million per year for all guns. Paul H. Blackman, *Gun Legislation*, AM. HANDGUNNER, Nov.-Dec. 1990, at 22. *See also The Armed Citizen*, AM. RIFLEMAN, July 1991, at 6; NATIONAL RIFLE ASSOCIATION, THE ARMED CITIZEN (1983). My point is not to rely on the accuracy of these figures, but to indicate that an armed citizen might achieve the same result that we would not criticize if it were the work of an armed government agent.

condoned.[145] James Payne made a similar observation in an analysis of macro security issues in terms that parallel the phenomenon at the micro level:

> In modern Western culture, the two views of war, the negative and the positive, are not given equal weight. What dominates, especially in literary and academic circles, is the view of war as wasteful and repugnant. There have been moments in the life of a country when fighting—that is, war—has been seen as desirable, but these are hardly noticed and never clearly remembered. What prevails, until practically the moment comes to fight again, is the view of war as evil, as something never willfully chosen by right-thinking leaders.
>
> This one-sided perspective has a broad impact on efforts to study military forces and levels of military preparedness. With the "bad" face of war dominating the picture, military forces are not seen as something a nation might usefully have, as it would have agencies devoted to education or to caring for parks. Instead, military forces are treated as a vice, something the nation ought not to have but which, owing to some obscure appetite, it cannot stop itself from acquiring. In this perspective, *all* military forces are deplorable, and there is no such thing as a normal, nonalarming level of military preparations.
>
> A typical expression of this view is found in Salvador de Madariaga's classic *Disarmament*, written in 1929. "Save vice," he declared, "nothing is as wasteful in the world as war and the preparation for it."
>
> . . . .
>
> . . . Military forces *are* productive. In the right circumstances, thoughtful, moral individuals will want to have them and will want to use them on behalf of national purposes. For example, when military forces are needed to combat an aggressor bent on destroying a nation and its people, they are certainly doing something very useful indeed. In fact, they are probably carrying on an activity far more productive than that of school teachers or park wardens, for example, for were they to fail in their mission, neither schools nor parks might remain.[146]

---

145. Gun advocates argue that the firearms debate does not weigh the protective use of firearms against the instances of firearms abuse. *See* Kleck, *supra* note 142; AM. RIFLEMAN, (July 1989), at 6.

Those who would condone police use of deadly force and yet condemn a defensive shooting by a private citizen seem to be saying that it is uncivilized for *citizens* to take such actions directly. But is it a mark of civilization or hypocrisy to delegate distasteful tasks to government? To the degree that we detach ourselves from such things and pretend we are above them, it is probably closer to hypocrisy. One wonders whether we would make better social decisions if we delegated such things less and moved toward sharing rather than abdicating responsibility for unpleasant tasks.

146. JAMES L. PAYNE, WHY NATIONS ARM 9 (1989).

The parallels between Payne's observations[147] and those that can be made about the gun debate are instructive. From the perspective that all violence is abhorrent, we can more easily embrace the assumptions and make the denials required to justify individual disarmament.[148] We can

---

147. What Payne offers as a truth, denied by many contemporary intellectuals, was submitted as uncontroversial by thirteenth century scholar Henry de Bracton:

> But whether it be armed force or unarmed force, all such force is not injurious, because some arms are used for protection; and what a person may do for protection of his own person or of his own right he seems to have done justly. Likewise there are arms of peace and of justice, and arms of disturbance of peace and of injustice. There are likewise arms of usurpation of another's property, and such force may be called ablative, whence it will be allowable to him, who justly possesses, to repel with arms any one coming with arms against the peace [of the realm] to expel him, that by the arms of self-protection and of peace, which are the arms of justice, he may repel injury and unjust violence and arms of injury; but nevertheless with the moderation of such discretion, that he does not cause an injury, for he may not under such pretext kill a man, or wound him, or ill-treat him, if he can in any other way protect his possession. And therefore against him, who wishes to use his strength, he may resist with his utmost strength, with arms or without, according to the saying, when a strong man armed, & c . . . .

4 HENRY DE BRACTON, DE LEGIBUS ET. CONSUETUDINIBUS ANGLIAE f.162b (T. Twiss trans., 1880), *cited in* Caplan, *supra* note 27, at 804.

Perhaps a remarkable idea, at least in some contemporary circles, is the recognition in a Michigan Supreme Court decision that peaceful citizens might not only properly possess weapons for defense, but also for "pleasure." People v. Brown, 235 N.W. 245, 247 (Mich. 1931) (the challenged statute was upheld because it did not ban "ordinary guns, swords, revolvers, or other weapons usually relied upon by good citizens for defense or pleasure.").

Ironically, the use of arms for pleasure instead of protection has been legitimized at the regulatory and legislative level. Recently, enacted and proposed legislation and executive orders have focused on whether particular guns have a legitimate sporting use as a basis for determining their legitimacy for private possession. *See* H.R. 993, 102d Cong., 1st Sess. (1991). It may be this limited and arguably inverted view of the utility of weapons ownership that has led to the conviction that "it appears almost crazy to protect as a constitutional right something that so clearly results in extraordinary social costs with little, if any, compensating social advantage." Levinson, *supra* note 2, at 655.

If we abandon the concept of legitimate sporting use and posit that using guns for fun and sport is subject to less constitutional protection than using them for self-defense, then we close the door on arguments that would ban "military style" weapons while tolerating those considered appropriate for hunting or target shooting.

148. Plainly, all guns have the capability to kill. The basic objection to individual gun ownership is not that guns look scary, but that they can be used to kill people. It is difficult to see how anyone whose analysis stops here would be satisfied just eliminating the scary-looking ones. Because all guns are deadly weapons, it is hard to take seriously

reject the possibility that resistance in kind, a concept at the core of police response to violent aggressors, can be an effective response to violent threats; that the threat of retaliation has some impact on the calculations of potential aggressors (including those ostensibly representing the collective will); that collective security measures cannot quell a threat at the very instant it emerges; and that force or the threat of force works to achieve various collective objectives or has a short term impact on human behavior.

Keeping in mind this possible analytical impairment, it is essential to consider the utility of guns not for sporting use, but for protection against violent threats. Although we may not feel comfortable about it, we regularly sanction the use of deadly force against violent aggressors. That agents of government, to whom many would completely entrust their lives, have access to and use of firearms which citizens cannot lawfully purchase is a testament to this fact.[149]

Historically, violence has been an important tool, substantially impacting conflict resolution.[150] This recognition is reflected in the writings of the framers and the works on which much of their political philosophy was grounded. During the ratification debates, Patrick

---

any commitment to preserving the "good ones," whether for sporting purposes or personal protection.

149. It may surprise some that private citizens may still own machine guns. *See* 27 C.F.R. §§ 178, 179 (1991). There exists a similar exception for ownership of certain prohibited assault rifles by law enforcement agencies and privately acting police officers.

It may not be difficult to determine the type of weapon that should be constitutionally protected. At a minimum, the gauge of usefulness might be those weapons police choose as suitable for protection of officers in confrontations with criminals. Indeed, if one distrusts government or considers an individual's interest in self-preservation to be as important as collective interests, then one might conclude that individual citizens should be permitted to own the same type of weapons carried by the police.

150. Our national boundaries and the history of our encounters with indigenous people attest to this fact. Possibly the final option in every conflict is violence, with the party who is prepared to prevail at that stage holding an advantage in all that precedes it. The advantage looms greater with a larger disparity in the parties' capability and appetite for violence.

A notable illustration of this phenomenon on a macro level is the interaction and negotiations between pre-World War II Germany and Great Britain. In his biography of Winston Churchill, William Manchaster describes in fascinating detail the weakened negotiating posture of the British resulting first from Neville Chamberlin's unwavering appeasement and pacifism and second from the eventual substantial military advantage developed by the Germans. *See* WILLIAM MANCHASTER, WINSTON SPENCER CHURCHILL, THE LAST LION, ALONE (1932-1940) *passim* (Dell 1988).

Henry wrote: "[g]uard with jealous attention the public liberty. Suspect everyone who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are inevitably ruined."[151]

One facet of the contemporary debate is our expectation about the dynamics of violence. One might presume that the likelihood of violence increases when there is an imbalance of power. The imbalance operates as an incentive for the aggressor to use what he considers a prevailing level of force. Therefore, aggressors will victimize those who are weaker than themselves. This idea directly affects our presumptions about the impact of the free availability of guns in our society.

It may be that much of the random, senseless violence we experience is a result not of too many guns, but of too few in the hands of peaceful citizens. Some random, seemingly knee-jerk violence appears to stem from the expectation that the consequences will be insignificant. One reason is that at the instant of the violent criminal act, even in a world where police protection is generally adequate, police cannot always be present to deter the threat. A related expectation of the aggressor may be that his victim will be basically defenseless and therefore a relatively risk-free target.

For the very reason that many fear them—the ease with which they unleash deadly force—guns equalize power relationships. Individuals generally are more equal in their capabilities to point and shoot than they are in physical attributes of strength, girth or speed. This may mean that a victim facing a single aggressor or multiple aggressors is better off armed, even if his attackers also are armed.

Wendy Brown's example, illustrating why she opposes an armed citizenry, is useful. She describes an encounter in a national park with a pornography-reading, beer-guzzling, Winnebago-driving hunter, who assisted her in starting her stalled car, but who she feared might rape her.[152] She argues that had he and his two friends decided to attack, his gun might have made the difference between her resisting with her "hard won self-defense skills"[153] or succumbing to the attack. Changing the scenario only slightly yields a conclusion at odds with Professor Brown's. In the society she argues is preferable, assume that

---

151. 4 ELLIOTT'S DEBATES 167, 380 (July 29, 1788), *cited in* Gottlieb, *supra* note 132, at 124.

152. Brown, *supra* note 37, at 665-66.

153. *Id.*

Professor Brown's attacker, so far as firearm's restrictions go, is law-abiding and disarmed. But assuming where the crime of rape is concerned, he and his two friends are not law-abiding, we might wish that Professor Brown possessed a tool that would equalize the power relationship sufficiently to dissuade or stop the rapists.

Even if some or all of the three aggressors are armed and Professor Brown is armed, applying the principle (common in macro security analysis) that increasing the cost of violence decreases its likelihood, Professor Brown would be better off armed than if she and her attackers all were disarmed. In the disarmed scenario, the disincentive to the three rapists is a potential kick or punch. In the armed scenario each has to contemplate the possibility that he will be killed. This raises the cost of aggression and decreases the probability that the attack will occur.

One is not forced to operate purely in the realm of hypotheticals in evaluating this issue. The Mexican experience offers some basis for anticipating whether disarmament means that candidates for victimization will be better off:

> The Western country with the highest per capita homicide rate is not the United States, but Mexico, where only the wealthy and the influential are permitted handguns. The per capita Mexican knife homicide rate is three times greater than the American rate for all kinds of homicides. Perhaps Mexico would have more homicides if handguns were available, although criminological evidence indicates that a potential murderer is fully as deadly with a knife as with a gun.[154]

The Mexican experience generates several considerations. The first is whether disarmament will suddenly cause those intent on violent aggression to become peaceful citizens. We can fairly expect that the spark which generates violence will not be extinguished by even successful disarmament.[155] Tendencies toward violence might well continue, with the difference being that the effectiveness of tools used depends on the strength, dexterity or ruthlessness of the user. Under

---

154. Don B. Kates, Jr., *Why a Civil Libertarian Opposes Gun Control*, THE CIV. LIBERTIES REV., June/July 1976.

155. If we even suspect that taking individuals' last line of defense against violent threats conflicts with our constitutional principles, then we might appropriately require much more than a transient statistical extrapolation, suggesting that disarmament will reduce deaths. We might subject to greater scrutiny the unfortunately hackneyed justification "if it saves just one life its worth it." That is, after all, a justification that can be applied as easily to arming as to disarming. *See generally* Kleck, *supra* note 144.

those circumstances, the physically weak and the squeamish would be left without tools capable of equalizing the power relationship between them and violent aggressors. This would leave them particularly reliant on government, locked and barred in their homes for their personal security.[156]

I have drawn another example from a conversation sometime ago with a friend. She lives in an affluent area, in a nice home with a sophisticated security system. We discussed her revelation that she was thinking about purchasing a gun. At the core of her concern was "what if some one got in here and got to me before the police arrived."

There were a number of responses: that the probability of such an event was low; that there was a danger that she would shoot someone accidentally; that there was high quality, responsive police protection in the area; and that neighbors were close by. None of the responses answered her question. I suspect that the reason was that an honest answer was very unpleasant. No one was comfortable saying that, absent the means for her resistance, the hypothetical aggressors simply would do whatever they wished until someone came along with the physical means to stop them.

It is possible to consider individual arms useful against threats that range far beyond the robber, rapist or murderer. It is practically *de rigueur* for Second Amendment scholars to refer to the role of citizens armed with their individual weapons during World War II.[157] A

156. The weakest and meekest among us have been worst served by efforts to discourage or delegitimize weapons ownership. They are the most likely victims of violent aggression and may be the least likely to possess the assertiveness to purchase a weapon, to carry it, or to persevere through the process of obtaining a permit for legal carry. *See* David Kopel, *Kopel's Comment,* GUN WORLD, Nov. 1990, at 27 (describing the service provided by ex-policeman Stephen D'Andrilli, assisting citizens through the highly cumbersome process of obtaining a license to carry a concealed weapon in New York City. The license costs 300 dollars. The service costs 2,500 dollars. Among the listed licensees are Arthur O. Sulzberger and Donald Trump). We also might expect these same individuals to be at the very end of the line for allocation of the precious collective security services on which they would be totally reliant.

On the other side, it may be the elite among us who would benefit disproportionately from limiting available tools of violence to contact weapons. They may be the best able to monitor and control their personal space.

157. *See, e.g.*, Gardiner, *supra* note 92, at 82-83 (citing OFFICE OF THE ASST. SEC'Y OF DEFENSE, U.S. HOME DEFENSE FORCES STUDY 32, 34 (March 1981)).

> In the Second World War, moreover, unorganized militia proved a successful substitute for the National Guard, which was federalized and activated for overseas duty. Members of the unorganized militia, many of whom belonged to gun clubs

recent district court decision also supports the view that individual marksmanship is an important skill even in the nuclear age.[158]

One commentator has argued that the possession of arms by southern blacks during the civil rights movement gave civil rights workers

> the necessary confidence to overcome the threats, harassment, burning crosses and sniper shots to which they were frequently subjected. In order to survive and to realize a measurable degree of personal dignity the Southern blacks needed the guns. As a protection, it made it easier to organize and to insist on the exercise of their constitutional rights to vote and speak.[159]

One can roundly criticize the presumption, easy to find in modern commentary,[160] that the immense power wielded by the state renders individual arms useless in resisting abuse of collective power.[161] There

---

> and whose ages varied form 16 to 65 served without pay and provided their own arms. In fact, it was necessary for the members of the unorganized militia to provide their own arms since the U.S. government not only could not supply sufficient arms to the militia but 'turned out to be an Indian giver' by recalling rifles. The 15,000 volunteer Maryland Minute Men brought their own rifles, shotguns and pistols to musters. And all over the country individuals armed themselves in anticipation of threatened invasion. Thus a manual distributed en masse by the War Department, recommended the keeping of "weapons which a guerilla in civilian cloths can carry without attracting attention. They must be easily portable and easily concealed. First among these is the pistol."

Id. See also Gottlieb, *supra* note 131, at 138.

158. Gavett v. Alexander, 447 F. Supp. 1035, 1046-48 (D.D.C. 1979).

159. Jonathan A. Weiss, *A Reply to Advocates of Gun Control Law*, 52 J. URB. L. 577, 583 (1974). *See also* Robert J. Cottrol and Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991).

160. *See, e.g.*, Brown, *supra* note 37.

161. Wendy Brown's analysis presumes this. *Id.* This ignores the dynamics of conflict, particularly the use of force by a state against its own citizens. *See, e.g.*, DAVID T. HARDY, THE SECOND AMENDMENT AS A RESTRAINT ON STATE AND FEDERAL FIREARM RESTRICTIONS, RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT 184, 185 (D. Kates ed., 1979).

> A general may have pipe dreams of a sudden and peaceful takeover and a nation moving confidently forward, united under his direction. But the realistic general will remember the actual fruits of civil war—shattered cities like Hue, Beirut, and Belfast, devastated countrysides like the Mekong Delta, Cyprus and southern Lebanon. At such cost, will his officers and men accept it? Moreover, he and they must also evaluate its effect in leaving the country vulnerable to foreign invasion.

are numerous contemporary examples that illustrate the continuing utility of individual arms against such power.[162]

C. *Threats*

Recognizing the flexible and evolving nature of the Constitution, it is important to consider whether real threats now exist against which individual arms properly might be used. It is possible, taking a decidedly urban view of America, to assume that the utility of individual firearms has been eliminated, as the United States no longer shares a frontier with aboriginal inhabitants who are resisting incursions violently. Nonetheless, there are people, particularly in rural areas, who view guns as important tools.[163] This daily practical utility aside, it may

---

> Because it leads any prospective dictator to think through such questions, the individual, anonymous ownership of firearms is still a deterrent today to the despotism it was originally intended to obviate. [While our government has a] quite good record of exerting power without abusing it, the deterrent effect of an armed citizenry is one little recognized factor that may have contributed to this. In the words of the late Senator Hubert Humphrey: "The right of citizens to bear arms is just one more guarantee against arbitrary government, one more safe-guard against a tyranny which now appears remote in America but which historically has proved to be always possible."

Id.

The issue here is not necessarily one of armed citizens' ability to rise up as an organized force to thwart tyranny. The predominant focus is whether individuals who face immediate threats to their lives, which may or may not also jeopardize the well-being of the community or the nation, might usefully employ their individually owned firearms to resist those threats. One difficulty is that our debate is in large part about the future. Structurally, the argument for an armed citizenry is similar to the debate over environmental and other issues—viz., that it is utter foolishness to eliminate assets that may prove useful in the future based on the naive assumption that our needs, opportunities, and problems will remain static. *See, e.g.*, ROBERRT A. FINDLEY AND DANIEL A.FARBER, ENVIRONMENTAL LAW 4-7 (West 1985). We may then have to launch into hypotheticals as a guide to our assessment; however, those hypotheticals require no long stretch from existing fact.

162. *See, e.g.*, ROBERT D. KAPLAN, SOLDIERS OF GOD (1990); Gottlieb, *supra* note 132, at 139 ("Anyone who claims that popular struggles are inevitably doomed to defeat by the military technology of our century must find it literally incredible that France and the United States suffered defeat in Viet Nam; that the Shah no longer rules Iran or Battista, Cuba; that Portugal was expelled from Angola and Mozambique; and France from Algeria.").

163. Many people, whose lives, interests, and views are probably marginalized in the contemporary debate, regard firearms as useful tools, as did eighteenth and nineteenth

be more important to consider whether the individual exposure to violent threats that impacted the eighteenth and nineteenth century view of individual arms ownership exists today.

On the national level, we have elevated the process of predicting future threats to high science.[164] We aim to employ policy makers who have "a vivid sense of the art of the possible."[165] Serious people recognize that "[t]he game of 'what if' is very appropriate"[166] to evaluating "the potentially hostile elements in the world around us"[167] as they affect security issues of national concern.

There is widespread agreement that on a national level we ought to be prepared to repel threats to our security in kind if other options fail. Many people adopt the opposite stance when considering the issue on an individual level. One can find few direct discussion of potential sources of threats and mechanisms for confronting them on an individual level, other than in off-beat publications, such as *American Survival Guide* and specialty gun magazines.[168]

We would be remiss if we endorsed disarmament without considering whether individuals should have the opportunity to employ the same structure of security analysis utilized by government. This is especially true in light of the lack of individual control over collective security measures and the practical impossibility that collective measures will be tailored to the needs of individuals. As Barry Buzan has noted,[169] "people represent, in one sense, the irreducible basic unit to which the concept of security can be applied. Although the traditional emphasis in International Relations has been on the security of collective units, particularly states, individuals can be analyzed in the same way."[170] The wide reaching model of assessing potential threats, central

---

century Americans. Although one might not find such individuals in downtown Manhattan or inside the Washington beltway, their views should not be simply dismissed.

164. *See generally* COLIN S. GRAY, STRATEGIC STUDIES: A CRITICAL ASSESSMENT (1982).

165. BRUCE K. HOLLOWAY ET AL., GRAND STRATEGY FOR THE 1980'S 20 (1978). The flip side of the "art of the possible" may be what James Payne calls the "error of disregarding the latent." PAYNE, *supra* note 146, at 13.

166. HALLOWAY, *supra* note 165, at 25.

167. *Id.* at 76.

168. *E.g.*, Staff Report, *Home Defense Guns: Experts' Tips & Picks*, HANDGUNS FOR SPORT & DEFENSE, Sept. 1991, at 30.

169. BARRY BUZAN, PEOPLE, STATES AND FEAR 18 (1983).

170. *Id.* Applying a similar analysis for individual threats goes a long way toward deflating one argument against individual ownership of arms. Disarmament advocates

to national security analysis, offers the most generous and inclusive options for evaluating threats that might require the use of individual firearms in response.[171]

It is not difficult to set out a fairly long list of circumstances in which the collective security preparations will be incapable of meeting the needs and concerns of individuals.[172] The possibility of conventional warfare on American soil is illustrative. While it is tempting to dismiss this as unlikely, we should wonder whether it is simple arrogance that permits us to believe we can exert force throughout the globe and expect that we are, and somehow always will be, immune from similar efforts by others.

During the Gulf War, Saddam Hussein pledged to make the whole world a battlefield. One may speculate on the exposure of our citizens if efforts were made to bring the war home to America. Surely the federal government made efforts to secure public offices, utility assets and the like, but an effort to bring the conflict home to complacent, comfortable Americans might well have involved more than attacks on well-guarded public assets. It might have focused on individual citizens in the form of random violent attacks, hostage taking or other similar activity. We can at least argue about the usefulness of firearms in the hands of citizens under those circumstances.

Federal lawmakers have recognized the potential inadequacy of organized armed forces. The Militia Act[173] declares a broad category of Americans to be members of the federal militia. These citizens are to operate as a substitute for the army and national guard while those forces are deployed or engaged elsewhere. If nothing else, the Act

---

often propose specific hypothetical threats and argue that in those particular instances an individual weapon would not be useful. It is possible to design just as many hypotheticals in which an individual weapon would be useful. A more thorough analysis, which would be more consistent with the inherently imprecise nature of threat assessment, would consider a wide range of threats rather than narrow the evaluation to the segment where an individual weapon would not be useful.

171. My only purpose is to suggest that circumstances may exist under which innocent individuals might desire weapons with which to defend their lives. I am not suggesting this would be non-disruptive from a community perspective.

172. Large scale collective efforts intended to apply generically to an entire population almost by definition exhibit the weakness of not responding precisely or efficiently to individual needs. In other areas, we have condemned such efforts on the ground that they impair individual freedom, and, in the economic arena, we have complained that they stifle vital individual initiative.

173. 10 U.S.C. § 311 (1988).

validates the possibility of community controlled security forces being inadequate. This makes problematic the argument that individuals ought to rely exclusively on those forces as barriers against violent aggression.

An example from World War II illustrates in detail how individual arms might be useful in thwarting domestic threats while the armed forces are deployed elsewhere. The U.S. Home Defense Forces Study describes instances where militia-men in Maryland and Virginia were mobilized to detect and repel invasion forays, parachute raids and/or sabotage.[174] These examples may relate more directly to the Second Amendment's militia concept. As discussed earlier,[175] this analysis focuses predominantly on individual rather than community interests, but it is still possible that certain of the armed militia's goals may be achieved through the actions of armed individuals confronting threats to their individual and, coincidentally, community interests.[176]

Other threats exist on a more personal level. Considering the high probability women have of being assaulted during their lives,[177] they may want the option of responding forcefully to such attacks. Alternatively, there have been notable instances in our history when the lives of individuals were devastated by collective panic. The internment of Japanese-Americans during World War II is one such instance. Many in the mainstream might consider the alternative of armed resistance by such individuals useless and counterproductive. From the perspective of the victim, the choice between submitting to such grave depredations or fighting, even without the hope of prevailing, might weigh out differently. Certainly, we would expect that any one of the framers who found himself suddenly in the circumstances faced by many Japanese internees would have chosen to fight and die rather than submit his life and property to such an unrestrained exercise of collective power. Indeed, the abuses that were used to rationalize the colonies' revolt against England pale in comparison.

Our popular literature offers examples of a different stripe. In the story of his life as a teamster and confidant of Jimmy Hoffa, Joe Franco stated, "I heard Jimmy telling the members that he would never allow a

---

174. One might argue that such tactics are irrelevant in a nuclear era, however, our recent military activities in the Middle East show that behind the lines parachute raids and other small unit activity remain useful as warfare tactics.

175. *See supra* note 157.

176. *Id.*

177. "[A woman] is raped every six minutes, one out of three times at gunpoint or knifepoint." Brown, *supra* note 37, at 665.

black man on the highways as an over the road driver . . . . If a black man ever went out on the highways in those days pulling an eighteen wheeler, he would probably have got killed somewhere between here and Florida."[178] Former Congressman Claude Pepper recalled in his autobiography a situation in 1944, which provides support for an individual right to armed self defense:[179]

> The race issue is a factor in nearly all elections today, but it is nothing like it was in earlier years, including 1944 . . . . If I needed a reminder of how deep the hatred of many whites toward blacks was in that year, I received one on this trip to Florida . . . . In my diary I noted: "There was [a] feeling against the governor for not letting the Negroes fall into white hands. The local people said there had never been a trial of a Negro for the rape of a white woman (all lynched) and they didn't want a trial now . . . ."[180]

Another example illustrates that society's security apparatus may itself be a threat to individual security. Rodney Stark's *Police Riots*[181]

---

178. JOSEPH FRANCO AND RICHARD HAMMER, HOFFA'S MAN 196 (Prentice Hall Press 1987).

179. PEPPER, *supra* note 52.

180. *Id.* at 122-23.

181. RODNEY STARK, POLICE RIOTS (1972). Early in this work, Stark presents the common defense against police misbehavior, that "police are human. They are supposed to be both lawyers and sociologists, as I said, but they are still human." *Id.* at 58 (quoting J. Edgar Hoover).

This helps to emphasize that the inter-group tensions that may cause conflict or violence between ordinary citizens might also emerge in interactions between citizens and police. Stark cites numerous examples of police officers behaving in ways unbecoming to their position in society. For example, "Los Angeles police greet each other with the old Lucky Strike slogan: LSMFT—which they translate as 'Let's Shoot a Mother-Fucker Tonight.' Many policemen call their night sticks and riot batons 'nigger knockers.' Nor has it been all talk." *Id.* at 98. Stark notes:

> In the Blace and Reiss study one of the things observers recorded were the racial attitudes and opinions of the policemen. They did not solicit such opinions but merely recorded what was incidentally expressed. Their field notes were classified along a continuum. . . . [The authors] reported the following direct quotations to illustrate the meaning of their categories. The following exemplify the "highly prejudiced officer: 'These scums aren't people; they're animals in the jungle'. Hitler had the right idea. We oughta gas these niggers—they're ruining the country,' 'Bastard savages.' 'Maggots.' 'Filthy pigs.' 'They ougta ship them back where they came from.' 'Buffaloes.'"

Id. at 100. He further notes that police officers have been members of the John Birch Society and the Ku Klux Klan. *Id.* at 159.

details various episodes which give some Americans reason to believe they have had and may still have much to fear from those charged with providing collective security. The richly detailed work of Professors Cottrol and Diamond further illustrates how threat assessment by black Americans might yield a result at odds with disarmament.[182]

Claude Pepper suggests another danger: "Roosevelt's first hundred days in office, I am convinced, saved this country from collapse and preserved our form of government."[183] If we consider the collapse of our government as a possibility, then the security measures the government *currently* provides cannot justify disarmament. Self help and self protection have been a cornerstone of our civil defense system:

> Civil defense as presently conceived by Federal planning authorities rests basically upon the principle of self-protection by the individuals, group, and community. The individual should be trained to protect himself when an emergency arises. The family should work together as a unit in meeting its own problems and, in the same manner, the community should care for its needs as far as possible before requesting outside assistance.[184]

In the aftermath of various types of disasters the demands of the surviving population might well outstrip available resources.[185]

See also Police Realize Strides Since Days of KKK Tie, HARRISBURG PATRIOT, June 8, 1992, at 1 "Twelve years ago, when Harrisburg had only eight black policemen, a few white officers wore Ku Klux Klan medallions on duty . . . . 'There is no question we were ready to have open warfare in the police department between whites and blacks.'"

One can argue that the events cited by Stark occurred in the distant past, but recent events in Los Angeles seem to belie that argument. Some black people might argue that the 1970's are not ancient history, that race relations, and their corresponding impact on black interactions with police, have gotten worse.

182. Cottrol & Diamond, *supra* note 159. *See also* David Kopel, *Trust the People: The Case Against Gun Control*, 109 CATO INST. POL'Y ANALYSIS 14-17 (1988).

183. PEPPER, *supra* note 52, at 26. Pepper notes that "[t]o . . . save the country from revolution and collapse, FDR proposed to add a justice to the Court whenever a sitting member reached age seventy and refused to retire."*Id.* at 57. Pepper also notes that "Roosevelt in his third term had not assumed dictatorial powers, nor had he suspended the Constitution, and called off elections, as his opponents had warned . . . ." *Id.* at 123.

184. *Id.* THE ECONOMICS OF NATIONAL SECURITY, PUBLIC SUPPORT, MORALE, SECURITY 55 (Industrial College of the Armed Forces ed., Washington, D.C. 1962).

185. *See* 3 DONALD W. MITCHELL, THE ECONOMICS OF NATIONAL SECURITY, CIVIL DEFENSE: PLANNING FOR SURVIVAL AND RECOVERY (1962). In the best case scenario under these circumstances, we all pitch in and help, sharing our resources with the less fortunate. In the worst case, where the game is zero sum and government is impotent, we fight with

There is in our collective defense analysis an extreme importance placed on protecting the infrastructure.[186] Given this emphasis, we should wonder whether under some circumstances the decision will be made, in a mode not subject to public debate,[187] that the security of individuals must be sacrificed in order to protect the infrastructure. Under such circumstances total reliance on collective mechanisms would be misplaced.

Ultimately, the debate is about the appropriate balance between individual security and the possibility of abuse of the mechanisms that contribute to that security. There can be disagreement about that balance; however, it is a mistake to assume that it should be struck with reference only to the state of the world at this particular moment.[188]

---

one another. Somewhere in the middle is a scenario where we cooperate, but we still encounter individuals bent on violent aggression who must be resisted with force. It is not reasonable to believe that only one scenario is possible. Perhaps, from a communitarian perspective, we might wish for no arms during such a time, but from an individualists' view, and probably a Lockean one, disarmament as a communitarian measure guarding against such a time seems repugnant.

186. *See, e.g.*, WALTER THOMAS, GUERILLA WARFARE, CAUSE AND CONFLICT 54-59 (National Defense University, National Security Essay Series, 1981).

187. Even absent exigent circumstances, decisions about collectively controlled security resources can be removed from public debate. In National League of Cities v. Usury, 426 U.S. 833 (1976), the Court describes one impact of permitting federal intrusion into an area of state sovereignty: "California asserted that it had been forced [by the intrusive federal statute] to reduce its academy training program from 2080 hours to only 960 hours, a compromise undoubtedly of substantial importance to those whose safety and welfare may depend upon the preparedness of the California Highway Patrol." *Id.* at 847.

188. If we need any contemporary proof that "things change," it is provided amply by the recent changes in Eastern Europe and the Soviet Union, which were unthinkable only a few years earlier. Extraordinary changes need not always be positive. Certainly, current street crime would be considered a minor problem when measured against the oppressive cloud that could arise from a malevolent federal government.

Professor Barber summarizes the apprehension: "Because we cannot control the future, we cannot know in advance of particular circumstances where the harm visited by government on some individual or minority would be justified by a credible view of the common good within the system's capacities." Barber, *supra* note 11, at 81. "[A]s the Japanese detention cases illustrate, we cannot underestimate the effect that general fear and perceptions of exigency may have on constitutional jurisprudence." Barnett, *supra* note 50, at 106 (commenting upon Korematsu v. United States, 323 U.S. 214 (1944)).

An unvarnished view of our history shows that when the chips are down, when we are in extraordinary difficulty, when our problems are extreme, or when momentum has developed behind a certain idea, we are capable of doing tremendous damage to individuals. It seems appropriate, therefore, that we balance the current costs of individual arms not

It is not clear whether the threats facing citizens today are more or less substantial than those which faced eighteenth and nineteenth century Americans. It is possible to think the quantum of threats is lesser today. Even so, we might conclude that the threats we currently face are still too great to force the conclusion that individual arms are arcane, useless mechanisms with no proper role in modern America, or that it is acceptable to relegate individuals to spectators in conflicts, where their lives hang in the balance.

VII. ARMED CITIZENS—DISARMED CITIZENS: WHICH DANGER SHOULD WE CHOOSE?

There are costs and dangers attached both to citizen disarmament and to a policy of open access to firearms.[189] The loss of the option of armed self-defense and criminal misuse of firearms can both result in the death of innocent victims. In an armed society, the danger is that guns will be criminally or negligently abused. In a disarmed society, the danger is that criminally possessed firearms or alternative weapons will be used by aggressors against disarmed citizens without fear of recourse or, alternatively, that violent threats to disarmed citizens will more easily

---

just against their benefits during a time of immense luxury and prosperity, but also against their individual benefits during the moments of which we will be most ashamed.

From this view we still can oppose individual ownership of arms, but we cannot do it merely by saying that terrible things will not happen. Honesty requires an affirmative statement that we are willing to take the chance of shameful things happening and of disarmed people suffering, in exchange for the hope of solutions to current problems.

Our collective ability to perform even this analysis is questionable, particularly if we believe James Payne's lament:

> In their ability to make estimates of the future, political leaders may be below the norm. In virtually all political systems around the world, rising to a position of leadership requires a sensitivity to the immediate social and opinion "field". Individuals with this ability to conform to their environment would seem especially unsuited to the task of discounting the present in order to gauge the future accurately.

PAYNE, *supra* note 146, at 93.

189. The latter is proved easily by reference to firearms homicides. The former is less subject to direct evidence, because it requires speculation about what would have occurred if a dead victim had been armed or if a surviving victim had been unarmed. However, justified shootings by police and citizens indicate a societal judgment that the officer or civilian stood to lose his own life if he did not use deadly force. *See* Kleck, *supra* note 144; Dowlut & Knoop, *supra* note 123.

emerge from a unilaterally armed government.[190] The principles at the foundation of a meaningful Ninth Amendment help us choose between the respective dangers of an armed and disarmed society.[191]

Perhaps the essential conflict at the core of the Ninth Amendment is the tension between restricting individual autonomy for the good of the collective and preserving the essential aspects of personal liberty. Professor Barnett's foreword to a recent Ninth Amendment symposium characterizes this conflict well:

> A law that was within the substantive jurisdiction of Congress and employed proper formal means might still be unconstitutional if it violates the "rights of the people." Such a constraint assumes, of course, that "[i]ndividuals have rights, and there are things no person or group may do to them (without violating their rights)," an assumption that is in harmony with the [prescription of the Declaration of Independence that

---

190. It is understandably easy to react in a relative vacuum to the deaths caused by aggressors with guns. The news of death is immediate, and the images of the suffering are graphic. It is probably normal to have difficulty balancing this against the hypothetical threats that might require a violent defensive response. For many, such hypotheticals may be considered un-realistic and highly improbable.

There is, however, another perspective—that of members of the population who have endured things that are generally ignored or, incredibly, forgotten in much of mainstream analysis. We should count the views of Blacks, Native Americans, Asians, and I am sure there are others. Whether we like it or not, we have in this country a fairly substantial history of unpopular minorities suffering at the hands of the community. *See infra* notes 199-213 and accompanying text.

The sentiment is commonly expressed that luckily we have never experienced the type of governmental oppression and abuse that would require resort to armed resistance, but if large numbers of whites had experienced the same treatment experienced by blacks, even after emancipation, the popular view about the wisdom of trusting government and the perceived danger of ceding firearms exclusively to government would be drastically different.

191. It is not my aim here to measure quantitatively which interest is more significant, but in an utterly nonscientific perusal of human history it is easy to conclude that collective violence has caused immensely more human suffering than has anything done by individuals acting solely on their own behalf. One might well believe that because collective action permits retreat from individual accountability and responsibility for actions that damage individual interests, it is inevitable that more individual suffering will result from collective violence than from the accumulated actions of individuals. Even if we assume, however, that individual and collective abuses of firearms are equal in their ability to destroy democracy, we still might decide that apprehension about the threat of collective force is more consistent with the framers constitutional vision—one fueled by fear and distrust of the limited power that was exercised by federal government at that time.

> all men are endowed with certain unalienable rights including Life, Liberty and the pursuit of Happiness]. Such a declaration of rights need not be religiously based. Instead it may rest in part on a view that the respect for certain individual rights is a prerequisite for achieving the common good; that no matter how desirable its appearance, a measure that violated a proper conception of these rights would invariably detract from the common good; that a respect for a proper conception of individual rights is the only way to achieve in practice a good that is truly *common* to all; that enforcing a proper conception of individual rights was within the competence of and particularly appropriate for the judicial branch; and, therefore, that judicial review on this ground would enhance the substantive legitimacy of resulting legislation.[192]

This suggests what may be fundamental in a system of limited government: the Constitution generally and the Ninth Amendment in particular establish that there are some things individuals cannot be required to sacrifice for collective interests.[193] The search for these things might begin with the idea that there is some sort of hierarchy of human concerns that would help identify those interests which are exempt from collective encroachment.

A preeminent human interest is the continuation of one's life. There is a concomitant interest in some mechanism through which threats to one's life will be averted. One can accept these as important interests and still deny that they establish the individual ownership of firearms as a concern of the same magnitude, but doing so requires certain assumptions. First, one might assume that a violent individual threat justifying an in kind response never will be experienced. Second, one might assume that our collective security mechanisms always will be present and effective in deterring threats. Third, one may be willing to accept the costs of disarmament in the form of more successful aggression against disarmed victims as the price of testing whether a disarmed citizenry ultimately will enhance individual security.[194]

---

192. Barnett, *supra* note 9, at 54 (emphasis in original).

193. The Supreme Court has acknowledged that achieving order is not the only goal sought by our Constitution. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ." Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 944 (1983).

194. Defenseless individuals may be required to sacrifice their lives for this experiment.

The first two assumptions have been addressed earlier and seem difficult to support in light of our daily experience.[195] The third seems to be the basis upon which any serious advocacy of individual disarmament must rest; however, if an acceptable balance between individual liberty and collective interests is to be maintained, the validity of the third assumption becomes questionable.

Arguably, disarmament would require that some of us give up our lives to assist in the collective experiment. If we accept this cost, then it is hard to imagine any other circumstances where individual interests could not be sacrificed to further collective concerns. That may be where we stand. If it is, then we should express it openly and admit that we have departed substantially from the rhetoric of sacrosanct personal liberty and inalienable human rights that we project as an example to the rest of the world and resurrect in our self-congratulatory rituals.

We can reach the decision to choose the dangers of an armed society through a slightly different route. Our Constitution was designed less to facilitate solutions to short term political and social problems and more to protect against significant structural threats to our democratic system.[196] If we believe that significant abuse of collective power is more likely to occur against a disarmed citizenry, then the danger of disarmament is a structural constitutional threat. (The valiant but crushed efforts of pro-democracy protesters in Tiananmen Square give us a basis on which to evaluate this question.) On the other side of the balance is our immediate, short-term concern about gun related crime. Considering the full damage capacity of each alternative, a disarmed citizenry looms as much more substantial. If from this balance we still

---

195. *See supra* notes 118-88 and accompanying text.

196. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 326 ("The [Constitution] was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages . . . .").

Firearms abuse by street criminals seems to motivate disarmament advocacy. The relative threat of this problem to our constitutional foundation seems minor. This is particularly true if we believe: (1) that individual arms are of structural constitutional importance; (2) that they serve to preserve the balance between individual and community interests; (3) that individual security is a fundamental right; (4) that government cannot be trusted to secure that right and has refused to affirmatively take on that legal obligation; (5) that government itself may be the source of threat; (6) or that forced reliance on government for personal security is repugnant to our constitutional design.

choose disarmament, then we may be permitting current political exigency to erode a structural constitutional support.[197]

VIII. A NATURAL RIGHTS PERSPECTIVE: THE FUNDAMENTAL NATURE OF ARMS

A more sparsely endorsed view of the Ninth Amendment contends that it protects certain identifiable natural rights that always have and always will exist.[198] Several writers have advocated this view, pointing out that decisions of the Marshall Court and early state courts illustrate that the judiciary was obliged to enforce natural law.[199] Professor Moore has compiled a list of decisions in which, although the Ninth Amendment is not explicitly mentioned, the Court "enunciates that human beings have natural rights and that these natural rights do not emanate from the Constitution but arise from the very nature of mankind."[200]

For those who have suffered at the hands of the government, the sentiment enunciated by the Supreme Court in the latter part of the nineteenth century holds some appeal:

> It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such

---

197. There is nothing new about the idea that individuals may face their greatest dangers from the exercise of collective power. Madison described this concept as follows:

> Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of the private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents . . . .

5 THE WRITINGS OF JAMES MADISON 272 (G. Hunt ed. 1904), *cited in* Gardiner, *supra* note 92, at 95.

198. Professor Barnett argues: "[b]efore the development of positivism . . . scholars began, rather than concluded, their political and legal analysis with the proposition that individuals had rights, often referred to as natural rights." Barnett, *supra* note 50, at 102.

199. *See* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 716 (1975); Sotirios A. Barber, *Whither Moral Realism In Constitutional Theory?: A Reply to Professor McConnell*, 64 CHI.-KENT L. REV. 111, 120 (1988) ("As Robert Faulkner puts it . . . Marshall looked upon Locke's teaching 'as the private law, and the public law, dictated by nature itself.'"). *See also* Sherry, *supra* note 30, at 1157 (describing a view of fundamental law derived from the written constitution, custom, and natural law).

200. Moore, *supra* note 36, at 256.

> rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is nonetheless a despotism.[201]

Modern commentators have criticized the natural rights view as being unworkable. They argue that in our more heterogeneous and complex society, there is much less opportunity for agreement on what these natural rights are,[202] and there is no principled basis on which the judiciary can support its particular selection.[203] The fear is that a whole panoply of "natural rights" might spring from the courts, unrestrained by observable standards in the text of the Constitution. It may be this fear that leads those who do not ignore the Ninth Amendment to endorse what I have called the "deep structures" model.[204]

As a practical matter, some may consider the natural rights vision of the Ninth Amendment unsatisfactory for a separate reason. If construed by examining only what the framers considered to be natural rights, the Ninth Amendment appears limited in its capacity to support rights that impact many of our contemporary debates. Stated more cynically, this view might give little support to emerging rights that veer substantially from our constitutional traditions. Notwithstanding these difficulties, and because of the limited scope of the natural rights vision, it is instructive to evaluate the individual right to arms from this viewpoint.

The intellectuals that influenced the thought of the revolutionary period provide a broad base of support. The works of Locke[205] and

---

201. Loan Ass'n v. Topeka, 87 U.S. (20 Wall) 655, 662 (1874).

202. The gun debate may be the epitome of this type of disagreement and may be generated largely by drastic differences between urban and rural cultures. *See supra* notes 63-67. It is also possible, however, that there is broad consensus about the legitimacy of individual possession of firearms. That consensus probably disintegrates once the issue moves from whether each of us wants the option of owning a gun, to whether we are comfortable with everyone else in society having the same option.

203. *See* Levinson, *supra* note 2, at 155. See also Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) ("[T]here is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights.").

204. *See supra* notes 7-16 and accompanying text.

205. *See* examples cited in Moore, *supra* note 36, at 227-38. Professor Moore lists several noted historians, including Carl Becker, who contend that the political philosophy of John Locke is at the foundation of the Declaration of Independence, the Constitution, and the framers' other expressions of the appropriate relationship between

Blackstone[206] explicitly support the absolute and natural right of freemen to bear arms in self-defense. Although subscribing to a different philosophy,[207] Thomas Hobbes advocated a right to take up arms in self-defense as "the [sum] of the Right of Nature."[208] The vision is also reflected in English common law.[209] These ideas can be traced back to the writings of ancient Roman philosophers, whose work

---

citizens and government. *Id.* at 237-46. Given Locke's direct endorsement of a natural right to arms for self-defense, there is good reason to consider that right one of the natural rights protected by the Ninth Amendment. *See supra* notes 35-49 and accompanying text.

Professor Barnett notes:

> The proper connection between natural rights and constitutional analysis is that the "historical Constitution" that judges are called upon to interpret may be seen most accurately as a product of Lockean philosophy. Even if a contemporary analyst did not believe in natural rights, for the Constitution to be given its historically proper construction, such rights must be hypothesized and assumed to exist.

Barnett, *supra* note 50, at 154. *But see* Arnold, *supra* note 86, at 267.

206. Hardy, *supra* note 110, at 54 (*citing* 1 BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND * 143-44 (1766)). Blackstone describes the individual right to arms as deriving from "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." *Id.* (*citing* 1 BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND * 143-44 (1766)).

207. David Hardy argues that casting Hobbes as an advocate of absolute monarchy is "not entirely fair: Hobbes in fact admits that his sovereign can be a democratic government . . . ." Hardy, *Historiography*, *supra* note 26, at 31.

208. HOBBES, *supra* note 57, at 107.

209. Dowlut and Knoop cite, among others, Sir Michael Foster, Judge of the Court of Kings Bench and Recorder of Bristol who wrote:

> The right of self-defence in these cases is founded in the law of nature, and is not, nor can be, superseded by any law of society. For before societies were formed, (one may conceive of such a state of things though it is difficult to fix the period when civil societies were formed) I say before societies were formed for mutual defence and preservation, the right of self-defence resided in individuals; it could not reside elsewhere, and since in cases of necessity, individuals incorporated into society cannot resort for protection to the law of the society, that law with great propriety and strict justice considereth them, as still, in that instance, under the protection of the law of nature.

Dowlut & Knoop, *supra* note 123, at 183 (citation omitted).

See also Gottlieb, *supra* note 132, at 127. Gottlieb argues that colonial Americans depended on the noted English commentators for their knowledge of fundamental common law principles. "From Sir Edward Coke they learned that one of those fundamental principles was the individuals right to possess arms for defense of his home and family." *Id.* (citing EDWARD COKE, FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 161-62 (5th ed. Oxford, 1671)).

"clearly influenced . . . the architects of the Bill of Rights."[210] One contemporary writer points out that a thirteenth century English scholar grounded a right to arms for self-defense in biblical scripture.[211]

The idea of discernable natural rights is not foreign to modern thinkers. One state court decision describes the right to armed self-defense as existing "[f]rom time immemorial."[212] Perhaps belying the notion that there is no group of natural human rights that we all might agree on, the United Nations Charter declares "nothing in the charter shall impair the inherent right of individual or collective self-defense."[213]

I have included here only a sampling of the support for viewing arms for self-defense as a natural right. The wide range of support in part emanates from a fundamental and universal human interest in self-preservation. One can acknowledge this interest and still, considering the interests of the community as a whole, reject an individual right to arms.

The natural law structure, however, takes an individualist focus and considers there to be no community interest superior to certain natural individual rights. Under a natural rights view of the Ninth Amendment, then, we may find it difficult to reject an individual right to arms and still conclude that the Amendment protects rights derived from human interests less substantial than self-preservation.

IX. WE MAY RECOGNIZE A NINTH AMENDMENT RIGHT ONLY WHEN WE TREAD ON IT: INDICATIONS ABOUT INDIVIDUAL ARMS

The opinions of lawyers, judges, and legal scholars may have only a superficial impact on the ultimate influence of the Ninth Amendment.

---

210. Richard Gardiner offers the work of Cicero. Gardiner, *supra* note 92, at 66 (citing THOMAS JEFFERSON, LIVING THOUGHTS 42 (J. Dewey, ed., 1963) (noting its inclusion in Jefferson's list of "elementary books of public right.")).

211. Caplan, *supra* note 27, at 804-05 n.97. Caplan notes that thirteenth century English scholar Henry de Bracton's endorsement of a fundamental right to bear arms for self-defense is grounded in part on Luke 11:21. *Id.*

212. Levin, *supra* note 82, at 161 (quoting Pierce v. State, 275 P. 393, 397 (Okla. Crim. App. 1929)).

213. UNITED NATIONS CHARTER, *cited in* James Whisker, *Historical Development and Subsequent Erosion of the Right to Keep and Bear Arms*, 78 W. VA. L. REV. 171, 182 (1976). Professor Whisker argues that the United Nations declarations of basic individual rights is an appropriate starting point for a contemporary search for the natural rights of free men.

Because of its open-endedness[214] and arguable natural law foundations,[215] the Ninth Amendment may simply confirm certain truths already presumed by citizens. Perhaps in spite of what Congress decrees, the Supreme Court says, or the tide of popular will dictates, there are certain rights individuals can identify by looking into the core of their being. It may be sufficient if that search tells them that it is ludicrous to rely on government to protect them and to accept the danger of that protection arriving too late as the necessary price for order.

Certain rights, as many commentators have noted, withstand the force of popular and political opposition. Hamilton, in response to the Tory argument that New Yorkers had no charter rights, because they had no charter, declared: "[t]he Sacred Rights of Mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole record of human nature, by the Hand of the Divinity itself, and can never be erased or obscured by mortal power."[216] Some measure of this sentiment has surfaced in contemporary Ninth Amendment commentary. Professor Grey, in his defense of an unwritten constitution, urges that an ideal picture of a republic would not rely on elderly men in black robes or experts but rather on ordinary citizens to make basic decisions about public morality and justice.[217]

Professor Sager assists the argument. He contends that "[t]he unenumerated rights memorialized by the Ninth Amendment might be just what they seem to be—personal constitutional rights which enjoy the status of positive law—yet not be enforceable by the judiciary."[218]

---

214. "[O]pen endedness is part of the very logic of [the Ninth Amendment]." Barber, *supra* note 11, at 80.

215. *See supra* notes 199-213 and accompanying text.

216. CLINTON ROSSITER, THE POLITICAL THOUGHT OF THE AMERICAN REVOLUTION 107 (1963) (quotation in original without citation).

217. Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 237 (1988).

218. Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do With the Ninth Amendment?* 64 CHI.-KENT L. REV. 239, 251 (1988). *See also* Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 100 (1988) (suggesting that we might at once say "that there are principles of natural right [but fail to believe that] judges have the immediate power to enforce them"). Professor McConnell uses the constitutional dilemma of slavery to illustrate his point. He notes that while natural law declared all men equal, the Constitution permitted slavery. He suggests that the resolution of the problem was in the conviction, embodied in the Declaration of Independence, that men were created

Hobbes argued that the right to defense of self cannot be surrendered; it is indefeasible. From this sentiment, one might begin to understand statements by some gun owners concerning increasing restrictions on access to firearms.[219] One doubts that they have read Hobbes extensively. Perhaps his description of arms as a natural right is telling in that people do not have to read Hobbes to conclude that there is something fundamental about owning firearms to defend their lives.

Maybe it is the citizenry itself that must validate unenumerated rights. Perhaps these rights can only be truly identified when their violation generates such resistance that government is forced to stand down. The question may then settle on whether possession of arms is an individual interest that large numbers of ordinary citizens simply will not sacrifice regardless of legislative commands.

There is a small but growing body of information that moves toward answering this question. I hope to avoid the statistical battle that plagues the popular gun debate but the broad implications of available data tells us something about how an individual right to arms fits within an analysis which emphasizes the extrajudicial impact of the Ninth Amendment. The indications are that many gun owners are resisting or refusing to comply with registration and confiscation efforts that apply to firearms already in their possession. Several studies indicate that "the rate of defiance of Chicago's registration law is over two-thirds. In Cleveland the rate of compliance with their handgun registration law is estimated at less than 12 percent."[220] The efforts of several states to ban

---

equal. This was set forth as a *maxim* for a free society—a guide for future decision-making and eventually to correction of the Constitution.

If one accepts Professor Sager's view and also concludes that the Ninth Amendment declares personal rights to be essential and indefeasible, then its very existence might be the only conceptual foundation necessary to justify resistance to legislation that impairs an arguably protected right. This may be precisely what has happened. In instances of wide scale noncompliance with confiscation or registration laws, we are seeing this phenomenon occur. *See* Alan W. Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972); Marbut, *Fully Informed Jury Amendments: the Final Peaceable Barrier to Gun Confiscation*, SOLDIER OF FORTUNE, Jan. 1991, at 76 (arguing that juries might validly ignore what they perceive to be an unjust law and disregard judges' jury instructions.).

219. One T-shirt slogan reads "Make all the Laws You Want. You Ain't Gettin Mine."

220. Dowlut & Knoop, *supra* note 123, at 230 n.247. The authors also cite a report from 1981 that up to 90% of American citizens believed there to be a constitutional right to possess arms. *Id.*

the possession of certain high capacity semiautomatic rifles has produced similar rates of noncompliance.[221] Many people who embrace the bumper sticker sentiment "you can take my gun when you pry my cold dead fingers from around it," are apparently serious. Such visceral oppositional rhetoric and the trend of defiance to confiscatory legislation may be signals of protected Ninth Amendment interests.

X. THE INFLUENCE OF ELITISM AND CULTURAL BIAS ON THE FIREARMS DEBATE

A. Elitism

Although the reality may be otherwise, our political and constitutional rhetoric presumes we proceed on an egalitarian basis. At least in our collective statements and guiding public documents, we express disdain toward elitist currents that may inevitably influence our social and political arrangements. Therefore, fairly or not, I presume that we would be disturbed to find elitism as one of the forces propelling disarmament advocacy.

The starting point is the willingness of some advocates to place the means for exerting force solely in the hands of government. We might ask whether access to weapons by the social/political elite would be greater than that of the average citizen. The politically powerful might be assigned armed security escorts from the public payroll or enjoy the benefit of plans for extravagant measures to be taken in the event of large scale threats.[222] We also should consider whether general

---

221. David Kopel, *Kopel's Komment: Politics & Truth*, GUN WORLD, July 1991, at 32, 33. *See also* AM. RIFLEMAN, Feb. 1991, at 12; David Kopel, *Trust the People: The Case Against Gun Control*, CATO INST.POL'Y ANALYSIS, No. 109, July 11, 1988, at 14-17. One report states that:

> [l]ast year, California passed a ban on so-called semi-automatic assault weapons . . . . Of the approximately 300,000 assault weapon owners in the state, less than ten percent registered . . . . Some of the guns were moved to Nevada . . . . Some of the guns may have been buried . . . And some . . . belong to members of groups [that encourage resistance to gun registration].

Id.

222. As a child, I was fascinated to learn that not far from my home in the West Virginia mountains there was a security shelter designed for the President or other public officials to seek safety during an attack on the United States. Later, I learned that the provisions made for citizens in the town were somewhat less elaborate. *See also The Doomsday Blueprints*, TIME, Aug. 10, 1992, at 32.

disarmament would eliminate access by the wealthy to licensed, armed security services. This type of regulated armed force might stand as an exception to general commands of disarmament. The problem is that celebrity status is not a prerequisite to victimization. The victims of violent aggression are predominantly ordinary citizens who have access only to generic police services. Drawing an inference from the experiences of the less fortunate of us in receiving other publicly administered resources, it is reasonable to expect that those same individuals will receive the very worst of the publicly administered security services.[223]

The general fairness of providing less than superlative public services in the area of public charity might be debated. It is an altogether different matter, and a situation much harder to justify, where individuals are stripped of their best mechanisms of self-protection,[224] forced to rely on collective resources they have reasons to mistrust, and then are relegated to inadequate, inefficient, or malevolent administration of those resources.[225]

Unless we are prepared to administer publicly controlled security resources on a completely equal basis, we may be moving in a direction

---

223. For those people who are the last to see public water and sewer, the last to have their roads paved or their potholes filled, it might be difficult to accept that one of the most important and demanded government services will be provided fairly and equitably.

224. Some effort has been made to discount the usefulness of guns by individual citizens. A New York Times editorial has argued that most civilians are likely to lack the training and alertness required to use a gun to stop a criminal. *The Real Politics of Guns*, N.Y. TIMES, May 6, 1983, at A30. The actual instances of civilian use of deadly force belie this claim. *See id.* section E (2). *See also* Kleck, *supra* note 144.

225. The aim here is not to vilify police agencies; rather, it is simply to elicit recognition that the factors which impact personal interactions also creep into the administration of public resources. There may be no way to know for sure whether police resources respond more vigorously to certain types of people. Minorities in many venues certainly have claimed that they receive less efficient service than they perceive is given to those in the majority. Our very recent history broadly confirms the view that many people in this country have good reasons to believe that the collective security resources are as likely to be used unlawfully and violently against them as in their service. *See supra* note 61.

We should not be surprised that some may fear prejudice and bigotry in those entrusted with administering collective security resources. There is nothing special about police that makes them as a group immune from common character warts. Consequently, it is difficult to conclude we have reached the stage where it is viable for the citizenry to believe public security resources will be administered fairly, without malice.

that is repugnant to our social and political rhetoric. Perhaps we really do believe that some lives are more important than others, but if we acknowledge this, then we may cut away at the foundation of our political system. This dilemma exposes the importance of individual access to arms and, concurrently, the latent currents of elitism that should make us uncomfortable when we consider how disarmament would be implemented.

One's willingness to surrender firearms to government probably depends on one's general perception of the accountability and responsiveness of government. The social, political, and economic elite may have realistic expectations of substantially impacting public policy, and they are the least likely to fear collective power turned against them. They might fairly consider government to be trustworthy, benevolent, and directed in the pursuit of their interests. For those with historic and continuing grievances against the government,[226] however, reliance on the good-faith administration of collective security resources may be an unwise leap of faith.

Other elitist or classist currents in the debate are more disparate. Wendy Brown's response to Sanford Levinson is one instance of stereotyping gun owners and dismissing any arguments supporting individual firearms ownership by personifying gun owners or advocates in condescending, pejorative terms.[227] A measure of elitism, or perhaps

---

226. One grievance has been expressed as follows:

> You would think, with a history such as ours, that we [blacks] would have understood two things: first, that the government, while we need it, ultimately cannot be our friend, and also that we don't need it to be our friend, really . . . . Most of our history has been in relationship to a government that has not been very kind . . . . Ironically, although the Civil Rights movement came out of the South, it began to take on the Northern view of the state as being a benevolent institution. It isn't. It can't be, ultimately.

Moyers, *supra* note 52, at 137 (quoting Ann Wortham).

227. Brown states:

> I want to conclude with a story, yet another way of mapping our differences as citizens in relationship to this Amendment [the Second Amendment]. Last summer I came out of a week long trek in the Sierra Nevadas to discover that the car my friends and I had parked at the trailhead would not start. Still deep in the wilderness, thirty miles from a paved road or gas station, I was thrilled to see signs of human life in a nearby Winnebago. These life signs turned out to be a California sportsman making his way through a case of beer, flipping through the pages of a porn magazine, and preparing to survey the area for his hunting club in anticipation of the opening of deer season. Not feeling particularly discriminating, I enlisted his aid. While his buddy and my three looked on,

hypocrisy, is exposed by one Second Amendment commentator who lists notable and influential gun prohibition advocates who themselves have obtained rare New York City permits to carry a handgun.[228]

Another aspect of the phenomenon arises as a corollary to an observation made by Judge Bork in assessing the uneven development of First Amendment jurisprudence as compared with other amendments.[229] Bork argues that the First Amendment has received an inordinate amount of attention because of its predominant importance to the intellectual elite, who shape constitutional jurisprudence and public policy.[230] An individual right to arms probably ranks fairly low among

---

together we began working on getting the car started, a project that consumed our attention and combined sets of tools for the next two hours.

In the course of our work, there was time to reflect upon much in our happenstance partnership. My rescuer was wearing a cap with the words "NRA freedom" inscribed on it. This was, I thought at the time perfectly counterpoised to the injunction "Resist Illegitimate Authority" springing from my tee shirt. The slogans our bodies bore appeared to mark with elegant economy our attachment to opposite ends of the political and cultural universe—he preparing to shoot the wildlife I came to revere, he living out of his satellite-dished Winnebago and me out of my dusty backpack, he sustained by his guns and beer, me by my Nietzsche and trail mix.

Brown, *supra* note 37, at 666

It is not at all clear that the 70 million owners of the approximately 160 million guns in America fit Brown's stereotype. Indeed, it is fair to assume that at least some of these gun owners are women.

228. *See* Kates, *Original Meaning*, *supra* note 2, at 208.

229. Judge Bork argues:

Many observers have suggested that much in the modern political life is explicable by the recent enormous growth in size of the intellectual class—e.g., academics, journalists, lawyers etc., whose jobs center on ideas and words—and the apparent affinity of that class for expansions of the public sector at the expense of the private sector. This hypothesis says more than that intellectuals are indispensable to the making and implementation of policy; it states that intellectuals as a class have distinctive interests and tastes and are disproportionately able to move law in the direction of their interests and tastes.

Their preference for government economic regulation is attributed to a desire to shift power and prestige from the business class to themselves. If this hypothesis were to some degree accurate, one would expect to see the law become less restrictive where it impinges on the intellectual class interest. Freedom of speech is of course the sine qua non of an intellectual class.

ROBERT BORK, THE ANTITRUST PARADOX, 423-24 (1978). *See also* Rapaczynski, *supra* note 12, at 183.

230. *Id.*

the hierarchy of concerns of the intellectual elite.[231] It is, therefore, not surprising to find support for the right coming from outside the mainstream and a paucity of Supreme Court decisions on the issue.

In the mid 1970's, some charged that recommendations made by the Eisenhower Commission were elitist. The commission's recommendation to limit access to individual arms was considered by one critic to "reflect the commission's privileged white intellectual membership and their elitist disregard for those who cannot afford to move to 'safe' neighborhoods or the high security apartment buildings."[232]

If we acknowledge Sheldon Wolin's indictment that every one of our primary institutions is "fundamentally elitist in character,"[233] then we should not be surprised to find currents of elitism influencing the debate over individual arms. If, however, we cling to the mast of egalitarianism, then these currents should give us reason to pause as the debate develops.

B. Cultural bias

A surprisingly unchallenged theme runs throughout the traditional Second Amendment debate. It is illustrated in this observation:

> While our government has quite a good record of exerting power without abusing it, the deterrent effect of an armed citizenry is one little recognized factor that may have contributed to this. The right of citizens to bear arms is just one more guarantee against tyranny which now appears remote in America, but which historically had proved always to be possible.[234]

The experience of minorities in this country offers a broad base for rejecting the sentiment that "our government has had a good record of exerting power without abusing it."[235] It might be difficult for many in the majority to imagine circumstances of governmental abuse of power

---

231. Professor Levinson observes that those who consider the First, Fourth, and Fifth Amendments of preeminent importance, might consider the Second Amendment a blind alley. Interestingly, he also lists the Ninth Amendment as likely to be revered by individuals who would ignore the Second Amendment. Levinson, *supra* note 2, at 638.

232. Kates, *supra* note 154, at 30.

233. Moyers, *supra* note 52, at 101.

234. Gottlieb, *supra* note 132, at 140.

235. *Id.*

so severe as to justify armed resistance. From a minority perspective such abuse of power is much easier to contemplate, and the idea that police agencies make self-help superfluous seems rather quaint.

The point can be made another way. There is now some agreement that slavery and *de jure* racism against blacks and certain collective efforts against native Americans were shameful, but the tragedy and pain of these things has not influenced our national culture as deeply as one might expect. If our dominant culture were shaped less by the conquerors and more by the conquered, American society might have a vastly different view about collective power and the dangers of despotism and oppression within the American constitutional design. From this perspective, it is easier to believe that our society might experience vast changes, including unpleasant ones. For those who still live under the cloud of government-sponsored racism, the proposition that Americans have not experienced substantial abuses of collective power is laughable. A minority perspective may foster a deeper appreciation of the looming possibility of a ruthless exertion of the collective will.[236]

XI. LINGERING CONCERNS ABOUT DISARMAMENT AND FIREARMS REGULATION

A. The Dangers During and Beyond the Period of Vigorous Disarmament Efforts.

Professor Levinson suggested that we should open this debate to different voices, including those whose views might be discounted because of their personal characteristics. It is then appropriate to treat several arguments raised in part in unabashedly pro-gun venues. They directly attack the wisdom of disarmament on the premise that it is unworkable and disadvantages those it is intended to protect. The first argument assumes the effort toward general disarmament is undertaken and argues that the more compliant citizens will be at a dangerous disadvantage until total disarmament (assuming this is possible) has been achieved. The concern within this scenario is a variation on the "only outlaws will have guns" theme. The argument assumes that of the approximately 160 million guns owned by individuals in this

236. For a discussion of the minority perspective, see Cottrol & Diamond, *supra* note 159.

country,[237] some would remain in private hands, and a black market in guns would develop. This might place compliant victims at a disadvantage against non-compliant aggressors, who generally would expect to encounter unarmed targets. This argument has precursors in eighteenth century America. Robert Shalhope notes for example Thomas Paine's comment that "the peaceable part of mankind will be continually overrun by the vile and abandoned, while they neglect the means of self defence."[238]

Don Kates points out Cesare Beccaria's eloquent rendition of the same position.

> False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary ones, which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty—so dear to men, so dear to the enlightened legislator—and subject innocent persons to all the vexations that the guilty alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man. They ought to be designated as laws not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree.[239]

---

237. *See* Senator Edward M. Kennedy, *The Handgun Crime Control Act of 1982*, 10 N. KY. L. REV. 1, 5 n.25 (1982).

238. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125, 129 (1986).

239. Kates, *Original Meaning*, *supra* note 2, at 233-34 (citing CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 145 (1819)). Kates introduces the Beccaria quote this way:

> Although actually aimed at continuing the subordination of the peasantry, the ostensible reason for the French arms prohibition was to reduce homicide and other violent crime, and so was it rationalized by the French Monarchs and their apologists. The Founders gave such arguments short shrift, believing that if a population were actually unfit to possess arms, it was only because of the degradation induced by subjection to the oppression and exploitation of aristocratic and monarchical authoritarianism. For a free and virtuous people, eighteenth-century liberalism's response, as formulated by Montesquieu and

There is a separate aspect to this analysis that rejects a fundamental assumption of disarmament advocacy. It suggests that disarmament simply is not feasible and criticizes the tacit assumption that after some interim period of serious enforcement efforts, a virtually disarmed and safer society will exist. Disarmament advocacy must assume that once legitimate retail sales of guns are prohibited, guns will be available only in limited numbers through illegal importation or as illegal leftovers from the pre-disarmament period. The reality is that banning firearms is more like banning wheels than banning cars.[240] If our target truly is firearms generally, rather than a few chosen models, then we should recognize that the technology literally is centuries old.[241] It may be a misstep to assume that prohibiting legitimate commercial manufacture of such weapons will make them disappear.

B. Dubious Logic: What Criminals Choose

One thing that contributes to perceptions that general disarmament is the ultimate result even of current gun control efforts is the rationale behind them. The primary focus has been on restricting access to the

---

> Beccaria, to the crime control argument was simply an expansive rhetorical rendition of today's slogan "when guns are outlawed, only outlaws will have guns."

Id. (footnotes omitted).

240. The ease with which firearms of even the most notorious reputation can be constructed is illustrated by the Pakistani example where workmen in crude home shops produce copies of the infamous AK-47 and other weapons. KAPLAN, *supra* note 162, at 30-31. For photographs of the manufacturing conditions, *see* K.B. Khrom, *A Visit to Darra, Pakistan: Made to Order Combat Handguns*, GUNS & SURVIVAL, vol. 7, 1992, at 64-65.

We should not be surprised that such weapons can be manufactured with relative ease, given that the technology for them was developed in the very early part of this century. *See generally* EDWARD C. EZELL, THE AK47 STORY 77 (1986).

A manufacturing ban seems sensible only if one approaches it from what we might call an urban mind-set, where specialization is the rule, and where, if an item cannot be purchased, packaged and delivered, the assumption is that it cannot be obtained. In rural America, where individuals provide more for their own needs, the concept of doing some metal work to produce a needed tool is much less daunting.

241. In its simplest form, the firearm requires only a chambered tube and a striker. *See, e.g.*, KAPLAN, *supra* note 162, at 31 (describing the manufacture of .22 caliber pen guns by native Pathans in Pakistan). To ban such rudimentary weapons, we would have to seriously consider banning individual access to metal, sharp objects, and springs. *See also* William Weir, *The Guns of the Philippine Wars*, GUN DIGEST 1992, at 6, 12.

guns supposedly favored by criminals.[242] The difficulty is that there is no reason to believe that criminals will limit themselves to particular types of weapons. It is likely that those intent on aggression will use whatever tools are available and will not be thwarted because their weapon of choice is difficult to obtain.

Without much criticism of the approach, we have started to identify and regulate "bad" guns. The approach seems strained. Ultimately, we are concerned about guns because they can be used to kill people. This capability is inherent in every gun, and it exposes the absurd notion that we are going to ban only the bad ones.[243]

A separate consideration whether certain of our problems stem from the presence or availability of particular objects. In a debate where we consider the elimination of a substance or object, it is proper that we evaluate not just the impact of abuse of that item, but also the level of that abuse relative to its overall presence and appropriate use. It is useful, then, to consider the level of abuse of firearms relative to their total numbers. In a 1982 article describing a legislative effort to control handgun sales, Senator Edward Kennedy offered two statistics that I will presume to be uncontroversial. He noted that there were upwards of 164 million firearms in private hands in America.[244] He also indicated, using information from 1979, that there were roughly 13,000 murders and 147,000 aggravated assaults using firearms. These figures yield a

242. *See* Kates, *Original Meaning*, *supra* note 2, at 247. He notes that the National Firearms Act of 1934 targeted sawed off shotguns and sub machine guns because those were weapons of choice of the criminals of that day. The same logic is now being used to urge an "assault rifle" ban. The touchstone is weapons chosen by criminals. There is nothing to restrain what weapons criminals will choose. If semiautomatics are banned, it is unlikely that criminals will give up crime. They will obtain the same guns on the black market, or they will simply move to more readily available legal firearms. If at some point criminals choose revolvers, or shotguns, or other legitimate sporting firearms, then the logic of past legislation will support banning those as well.

243. Some proposals have identified bad guns as the ones to which one might fix a bayonet. Other than the fact that they make the weapon look more intimidating, the presence of a bayonet, compared with the destructive power of the weapon's projectile, seems trivial; moreover, with an appropriate bracket, any rifle will accept a bayonet.

244. *See* Kennedy, *supra* note 133. Senator Kennedy cites estimates by the Bureau of Alcohol, Tobacco, and Firearms that in 1982 Americans possessed 52 million handguns, 59 million rifles, and 54 million shotguns.

rate of abuse of firearms in committing murder of 0.0000625% and for aggravated assault of 0.0009188%.[245]

It is not my aim to argue that these rates of abuse settle the argument, and one might strongly criticize an effort to relegate the loss of innocent lives to cold statistics. But we can reasonably consider rates of abuse in a debate where one alternative is to deem the mere existence of certain instruments as a predominant cause of a problem. Whether we admit it or not, we often make similar choices about societal costs. We plainly do not move directly from the observation that an object or practice causes death or suffering to the conclusion to ban it. [246] If we believe that all activity has risks and costs, and that some segment of our population will abuse almost anything, then it seems essential that we consider levels of abuse prior to our public decisions to eliminate access to guns, alcohol, tobacco, automobiles or anything else.[247]

---

245. We get more numbers in Sanford Levinson's citation to former Justice Lewis Powell's presentation to the American Bar Association. Levinson, *supra* note 2, at 655. Powell noted that between 1986 and 1987 there were 40,000 murders in the United States. (To the degree that the number of weapons owned by Americans and the level of criminal firearms abuse have increased, it might be instructive to consider whether their rates of increase have been evenly matched, or show some correlation.)

Roughly 60% of the 40,000 murders were committed with firearms. In comparison to the total number of guns, call it 160 million, that is a percentage of abuse (.00015%) we should achieve in other aspects of our public policy. The comparison does absolutely nothing to minimize the deaths, but it does say something about the capability of the population at large to possess and use firearms responsibly. It is still true that the overwhelming majority of the tens of millions of American gun owners are honest, normal people whom we might even like and trust. As we debate disarmament, we ought to consider that it is not one exclusively between the NRA and Handgun Control Inc. It concerns and is impacted by the large number of citizens who have purchased firearms for sport or protection, but who (perhaps because it is not politically correct in some circles to own weapons, let alone advocate their free and open ownership) keep their status as gun owners locked in the closet like a dirty secret. As the debate proceeds, we may understand that a vision of gun owners as poorly educated kooks, sexists and bigots, is contradicted by the diversity within the millions of gun owners who might not even think of joining the NRA.

246. Our debate over abortion shows that we are deeply troubled by eliminating a fetus that depends on its mother for life, but, so far, we still condone the abortions because of countervailing concerns.

247. This justification is weakened when we consider that virtually the entire population of owners of a device have not abused the item.

One wonders whether the social benefit of alcohol is justified by the toll it takes in death, illness and family tragedy. This balance is worth inquiry, given that alcohol

XII. CONCLUSION AND AN INVITATION TO A REVEALING COMPARISON

The Ninth Amendment has been suggested as support for a right to engage in sodomy, a right to wear long hair, protection against imprisonment in maximum security, a right to transport lewd materials in interstate commerce, a right to a healthful environment,[248] and affirmative rights to government services.[249] It will be revealing to examine whether we can comfortably support such rights and at the same time oppose a right to arms for self-defense.

My guess is that in each instance, we will gain something by scrupulously evaluating what allows us to reach divergent conclusions.[250] I suspect that in many instances the honest answer will

---

consumption is an incident of luxury while arms possession may be of utility in preserving both life and liberty.

The unfortunate aspect of this is that one must then get into the statistical game and its inbred dishonesty. I have largely refrained from drawing conclusions based on statistics from any source. I will continue that effort here. My point is not that there is a better basis for banning alcohol than banning guns, but, proceeding rationally, a comparison between the two should be made in contemplation of a ban on the latter.

It is interesting that outside of obscure references in gun magazines, there is no one seriously raising this argument. It seems in the popular press a foregone conclusion that outside the arcane act of hunting, weapons have no utility in modern America.

248. Raoul Berger lists these among other examples where litigants have attempted to invoke the Ninth Amendment to assert inherent rights. Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 1-2 (1980).

249. *See, e.g.*, Barber, *supra* note 11, at 83 n.50. This style of right is representative of other possibilities. It is distinct from "traditional" constitutional rights in that it urges government to act affirmatively rather than refrain from certain other actions.

250. Our current constitutional debate offers a stark example of the difficult questions that arise from a comparison of the unenumerated rights we are willing and unwilling to endorse. I am referring to the abortion debate and suggesting a comparison between that controversial right and a Ninth Amendment individual right to arms.

The right to abortion permits a woman under the rubric of privacy, to eliminate a potential life and, arguably, a life in being. In most cases, the mother bears substantial responsibility for this nascent life, and it generally is not an aggressive or immediate threat to her life. In most cases, it may be very hard to argue that the mother is in any way the victim of the fetus.

A fair comparison certainly might rank the interest in self-defense against violent aggression equally or more highly than the right to avoid a pregnancy that will disrupt or reduce the quality of one's life. Exactly this hierarchy appears in the abortion debate. Even those who would deny a woman's right to an abortion on demand seem to

be that the respective positions are influenced less by objective analysis (to the degree there is such a thing) than by political allegiances and what is considered politically appropriate, enlightened, progressive, or trendy. To the degree that this is so, we probably are the worse for it. More importantly, we are faced with the unfortunate possibility that we cannot implement the Ninth Amendment in a way that is even superficially fair.

---

acknowledge the legitimacy of abortion if required to save the life of the mother. Even this conservative position is arguably more extreme than a right to use deadly force against a wrongful aggressor. By comparison, even in life threatening cases the fetus is wholly innocent and nonaggressive. Arguably, the mother has a greater duty to the fetus than any gun owner has to other members of society who may be killed or injured due to the availability of guns.

Another example stems from the admirable work of Professor Tribe. In Bowers v. Hardwick, 474 U.S. 943 (1985), Professor Tribe argued that the Ninth Amendment should be construed to invalidate Georgia's sodomy law. I would hazard a guess that the natural law support, historical and philosophical arguments, and other support for an individual right to arms are at least as substantial as the support for the right to engage in sodomy. *See also* Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J.L. & POL. 63 (noting that Professor Tribe argued broadly from the textual guarantee of liberty against such a pervasive intrusion on the person). Many of the convictions that would have us believe government's power ought not extend into one's private sexual activity may aid the argument that government cannot legitimately force citizens to rely on collective measures for personal security.