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Securing a Free State: Why the Second Amendment Matters

David Harmer

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I. INTRODUCTION

The printed program for the symposium[1] at which I presented the paper giving rise to this article mistakenly entitled my remarks, "Serving a Free State." When asked my title some weeks earlier, what I had replied was something quite different: "*Securing* a Free State"—a phrase suggested by the Second Amendment itself, and one much more in harmony with its purpose. Although the announced title directly contradicted the thrust of my remarks, the error was serendipitous; it gave symposium participants the opportunity to reconsider the debate over Second Amendment jurisprudence in light of first principles. If one believes that the people are to serve the state, that the rights of the people are created or granted by the state, or that the security of the state itself is of paramount importance, then the right to keep and bear arms is a dangerous vehicle for subversion that must be eliminated;[2] and eliminated it has rou-

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1. On March 22, 1997, the Brigham Young University chapter of the Federalist Society for Law and Public Policy Studies hosted a symposium concerning the interpretation of the Second Amendment to the Constitution of the United States. I thank Michael Lee, the chapter president, and Adam Kunz, the events director, for inviting me to participate.

2. Could an authoritarian or totalitarian state arise or endure if its subjects enjoyed the individual right to keep and bear arms? The founders of the American Republic thought not.

> [A] crucial point for understanding the second amendment is that it emerged

tinely been in totalitarian countries.[3] If one believes the opposite—that neither the people nor their rights were meant to serve the state, but that the people were endowed by their Creator with certain inalienable rights, and that the state was created to secure those rights[4]—then the Second Amendment assumes awesome importance, not only recognizing one among many particular rights of the people, but also providing an independent means of preserving and enforcing those rights.[5]

> from a tradition which viewed general possession of arms as a positive social good, as well as an indispensable adjunct to the individual right of self-defense. Moreover, arms were deemed to protect against every species of criminal usurpation, including "political crime," a phrase which the Founders would have understood in its most literal sense. Whether murder, rape, and theft be committed by gangs of assassins, tyrannous officials and judges or pillaging soldiery was a mere detail; the criminality of the "invader and plunderer" lay in his violation of natural law and rights, regardless of the guise in which he violated them. The right to resist and to possess arms therefore remained the same, as did the community benefit.

Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87, 93 (1992) (quoting 1 THOMAS PAINE, THE WRITINGS OF THOMAS PAINE 56 (Moncure D. Conway ed., G.P. Putnam Sons 1894)).

3. In 1989, the Chinese students demonstrating for democracy and freedom in Tiananmen Square,

> having found nonviolence futile, tore up the sidewalks and trees for ammunition and barricades. The point is not that the demonstrators should have confronted the army with weapons but that if all Chinese citizens kept arms, their rulers would hardly have dared to massacre the demonstrators, to say nothing of the continuing purges and executions taking place now.
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> Once a population is disarmed, any calamity is possible. The contrived Ukrainian 'Harvest of Sorrow' famine of 1932-1933 was preceded by the confiscation of civilian-owned rifles. Strict registration requirements, introduced in 1926, provided convenient lists of rifle owners and streamlined seizures by the police.

Sue Wimmershoff-Caplan, Editorial, *The Founders and the AK-47*, WASH. POST, July 6, 1989, at A18.

4. *See* THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

5. Stephen P. Halbrook observes:

> During the ratification period the view prevailed that the armed citizenry would prevent tyranny. Theodorick Bland wrote Patrick Henry that "I have founded my hopes to the single object of securing (in terrorem) the great and essential rights of freemen from the encroachments of Power—so far as to authorize resistance when they should be either openly attacked or insidiously undermined." While the proposed amendments [in the Bill of Rights] continued to be criticized for the lack of a provision on standing armies, no one questioned the right-to-bear-arms amendment. . . .
>
> As more and more states adopted the amendments and as the great debate began to dwindle, even the opponents of a standing-army provision conceded that an armed citizenry, constituted as a well-regulated militia, would prevent oppression from that quarter.

STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A

The rights of the people are threatened by the surfeit of government as surely as by its absence. In the Constitution's ingenious mechanism of checks and balances, the Second Amendment provides an extragovernmental check on governmental power. The right of the people to keep and bear arms is the ultimate guarantor of all their other constitutionally recognized rights.

I said as much in my unsuccessful 1996 congressional campaign,[6] which was one reason I was invited to participate in BYU's symposium. Even in congenitally conservative and heavily Republican Utah, the notion that the Second Amendment not only authorizes an armed populace but implicitly recognizes a right to rebel is considered radical, at least in urban areas. And understandably so. Proponents of gun control, and those in the mass media who report on their efforts, generally ignore the Second Amendment. If they acknowledge it at all, they generally describe it as a quaint technicality which merely authorizes federal or state governments to maintain armed militias.[7] As Daniel D. Polsby writes:

> The theory that is most often encountered by the intelligent lay public reads the words [of the Amendment] to say something like: "In order to make themselves secure, states have a right to have a well regulated militia, and Congress may not restrict state regulation of militia members' weapons." This is approximately the interpretation favored by most major newspapers' editorial writers, by gun control groups, and by a broad swath of conventional public opinion, running the partisan gamut . . . .[8]

CONSTITUTIONAL RIGHT 83 (Independent Inst. 1994) (1984) (footnotes omitted) (quoting 3 PATRICK HENRY 417-18 (1951)).

6. In the race for the U.S. House of Representatives from Utah's Second District, I narrowly lost in the Republican state convention. A swing in the vote of six-tenths of one percent—five delegates out of 797 eligible—would have kept me in the race in lieu of the eventual victor, Merrill Cook.

7. *See* Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737, 1765-68 (1995) ("Although the states' right interpretetion has obtained very little in the way of scholarly support in journals that require footnotes, it has been widely circulated in the popular press, even by respectable scholars who should (and, one suspects, do) know better." (citations omitted)).

8. Daniel D. Polsby, *Second Reading: Treating the Second Amendment as Normal Constitutional Law*, REASON, Mar. 1991, at 32, 34.

Even ostensible proponents of Second Amendment rights sometimes seem to be describing nothing more than a limited right to use firearms for unthreatening recreational purposes or, in extreme circumstances and as a last resort, for self-defense.[9] Far from unconstitutional, circumscribing the right thus characterized in an effort to prevent the senseless carnage of drive-by shootings, juvenile gang warfare, and other high-profile violent crime apparently strikes many citizens as eminently sensible. Federal courts, to the limited extent they have considered the matter, appear to agree. Most of the very few reported decisions mentioning the Second Amendment marginalize and trivialize it, often denying that it confers any individual right at all.[10]

II. NATURE AND MEANING OF THE RIGHT

The judiciary's neglect of the Second Amendment is unfortunate because the individual right to keep and bear arms is a crucial element in the Constitution's mechanism of ordered liberty. With respect to no other constitutional provision has the community of legal scholars come so close to a consensus about original intent that is so utterly ignored by those positioned to adjudicate the provision's effect. In striking contrast to the paucity of judicial treatment of the subject, recent years have seen burgeoning scholarly treatment of the origin and nature of the right to keep and bear arms. In my review of Second Amendment jurisprudence and scholarship, I have observed that, although a few dissenters remain, the great majority of those who have seriously considered the Amendment in peer-reviewed journals and other scholarly settings in recent years have come to agree on the following five points:

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9. See for example, Mark A. Moritz, Editorial, THE AM. SPECTATOR, July 1997, at 74-75, stating that:

> Conservative NRA members traditionally "support our local police and honor our brave men and women in uniform." They are uncomfortable accepting the reality that the Second Amendment is not about target shooting; it is primarily about the right of citizens to shoot back at those police and soldiers if the government ever orders police and soldiers to shoot citizens. Libertarian NRA members view police and soldiers as necessary public servants who require close watching.

10. *See* cases cited *infra* note 16.

A. The Second Amendment recognizes an individual right—not a collective right or a right of the states.[11]

B. The right applies generally; it is not contingent upon service in the armed forces or militia.[12]

C. The right applies to arms one can keep in one's home and bear on one's person; it does not apply to large crew-operated or machine-carried weapons.[13]

D. Among the purposes of the Fourteenth Amendment was to apply the Second Amendment to the states.[14]

E. Opponents of the right to keep and bear arms may properly seek to circumscribe or repeal the Second Amendment only through a new constitutional amendment; judicial or statutory shortcuts to that end are dishonest and dangerous.[15]

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11. *See, e.g.*, HALBROOK, *supra* note 5, at 76-80; Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Randy E. Barnett, *Foreword: Guns, Militias, and Oklahoma City*, 62 TENN. L. REV. 443, 451 (1995); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 257, 267-68 (1983) [hereinafter Kates, *Handgun Prohibition*]; Kates, *supra* note 2; Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Jeremy Rabkin, *Constitutional Firepower: New Light on the Meaning of the Second Amendment*, 86 J. CRIM. L. & CRIMONOLOGY 231 (1995); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 466-71 (1995) (arguing that both the text of the Second Amendment and its historical underpinnings support an *individual* right to keep and bear arms); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1236-43 (1994); David E. Vandercoy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 1007 (1994); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991); Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995 (1995) (book review); David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to Arms*, 93 MICH. L. REV. 1333, 1353-58 (1995) (book review).

12. *See, e.g.*, JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 162-63 (Harvard University Press, 1994); Kates, *supra* note 2; Reynolds, *supra* note 11, at 474-78; Van Alstyne, *supra* note 11, at 1241-44.

13. *See, e.g.*, Kates, *Handgun Prohibition*, *supra* note 11, at 258-61; Reynolds, *supra* note 11, at 478-80.

14. *See, e.g.*, HALBROOK, *supra* note 5, at 109-23; Kates, *Handgun Prohibition*, *supra* note 11, at 252-57; Van Alstyne, *supra* note 11, at 1251-53.

15. *See, e.g.*, Kates, *Handgun Prohibition*, *supra* note 11, at 272-73; Reynolds & Kates, *supra* note 7, at 1767-68.

This article aims to explain why the Second Amendment mattered to the framers of the Constitution and why it ought to matter to us. Prerequisite, however, to a precise and constructive discussion of the Amendment's purpose and intended effect is a clear understanding of the meaning and nature of the right to which it refers. Thus, let us begin by considering each of the above five points, in each case first acknowledging contrary case law, where it exists.

A. The Second Amendment Recognizes an Individual Right—Not a Collective Right or a Right of the States

Several federal courts have held that the Second Amendment does not establish an individual right to keep and bear arms, but rather a "collective" right, whatever that is, or a right held by the states.[16] These decisions are nonsensical. The very inclusion of the right to keep and bear arms in the Bill of Rights indicates that the framers of the Constitution considered it an individual right. After all, the Bill of Rights is not a bill of states' rights, but the bill of the rights retained by the people. Of the first ten amendments to the Constitution, only the Tenth concerns itself at all with the rights of the states—and it refers to such rights in addition to, not instead of, individual rights.[17]

The text of the Second Amendment likewise indicates that the Framers considered the keeping and bearing of arms an individual right. The Second Amendment refers to "*the right of the people* to keep and bear arms"[18]—just as the First Amendment refers to "*the right of the people* peaceably to assemble,"[19] and the Fourth Amendment refers to "*the right of the people* to

16. *See, e.g.*, Hickman v. Block, 81 F.3d 98, 100-01 (9th Cir. 1996) (holding that plaintiff lacked standing to sue for denial of concealed weapons permit, because Second Amendment does not protect possession of weapon by private citizen; right to bear arms is held by the states); Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995) (holding that Second Amendment does not confer absolute individual right); United States v. Warin, 530 F.2d 103, 106-07 (6th Cir. 1976) (holding that Second Amendment guarantees a collective rather than an individual right; fact that an individual citizen, like all others, may enroll in state militia does not confer right to possess submachine gun); Cases v. United States, 131 F.2d 916, 920-23 (1st Cir. 1942) (holding that federal government may limit the keeping and bearing of arms by a single individual); Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1318 (E.D.N.Y. 1996) (holding that Second Amendment right to bear arms establishes a collective rather than an individual or private right).

17. *See* U.S. CONST. amend. X.

18. U.S. CONST. amend. II (emphasis added).

19. U.S. CONST. amend. I (emphasis added).

be secure . . . against unreasonable searches and seizures."[20] The repeated use of the phrase "the right of the people" can hardly be dismissed as haphazard or coincidental; in each case it indicates acknowledgement of an individual right. As the Supreme Court noted in *United States v. Verdugo-Urquidez*:

> The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. The language of these Amendments contrasts with the words "person" and "accused" used in the Fifth and Sixth Amendments regulating procedure in criminal cases.[21]

The Ninth and Tenth Amendments reinforce the status of the right to keep and bear arms as an individual right. The Ninth Amendment states, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,"[22] indicating that the previously enumerated rights, including the right to keep and bear arms, were retained not by the states, but by the people. When those who drafted the Bill of Rights wished to refer to the states, they did so explicitly. The Tenth Amendment clearly distinguishes powers reserved "to the States" from those reserved "to the people."[23] The Supreme Court has held that, given their contemporaneous proposal and passage, the amendments constituting the Bill of Rights which contain similar language should be construed in similar fashion.[24]

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20. U.S. CONST. amend. IV (emphasis added).

21. United States v. Verdugo-Urquidez, 494 U.S. 259, 265-66 (1990) (citations omitted); *see also* Roe v. Wade, 410 U.S. 113, 169 (1973) (Stewart, J., concurring) (listing the right to keep and bear arms among other individual liberties in discussing scope of liberty guaranteed by the Due Process Clause).

22. U.S. CONST. amend. IX.

23. U.S. CONST. amend. X.

24. *See* Patton v. United States, 281 U.S. 276, 298 (1930).

James Madison, the Father of the Constitution and the principal author of the Bill of Rights, chose his words carefully. Many of Madison's congressional colleagues who discussed and debated his proposed amendments to the Constitution were, like him, lawyers and meticulous draftsmen. The legislative history reveals thorough deliberation and a keen sensitivity to semantic nuance.[25] What is now the Second Amendment was itself amended in the legislative process, and several suggested amendments to it were rejected.[26] Most significantly, the Senate declined to add the phrase "for the common defense" after the phrase "to keep and bear arms."[27] The choice of words was deliberate and considered. By speaking of "the right of the people" to keep and bear arms, and excluding proposed language tying that right to the common defense, the framers intended to, and did, recognize an individual right.

The contrary view—that the right extends to the states or to the people collectively, but not to the people as individuals—was never even suggested at the time of the Amendment's drafting or ratification. That view neither enjoys nor merits significant scholarly support now.[28] It appears to be the relatively recent invention of some who favor gun control.[29] As Stephen Halbrook notes:

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25. *See generally* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION (C.C. Tansill ed., Ohio Univ. Press 1966).

26. *See* HALBROOK, *supra* note 5, at 76-82.

27. *Id.* at 81; *see also* MALCOLM, *supra* note 12, at 161.

28. *But see* Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365 (1993); Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 YALE L.J. 661 (1989); Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22 (1984); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995) (arguing that the Second Amendment guarantees a right to bear arms only for those individuals who are part of the "well regulated militia"); Williams, *supra* note 11.

29. Daniel D. Polsby states that:

> The "collective rights" theory seems to have flowered in the 1960s or '70s as a prop in national political debates about gun control laws. The most famous and widely cited argument for this position appeared in *Parade* magazine in 1990, ostensibly authored by former Chief Justice Warren E. Burger, a judge not famous then or now as a constitutional authority and whose 30-year judicial career had in any case included not a single Second Amendment decision.

Polsby, *supra* note 8, at 35.

> In recent years it has been suggested that the Second Amendment protects the "collective" right of states to maintain militias, while it does not protect the right of "the people" to keep and bear arms. If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis.[30]

Just like the rights to the free exercise of religion, speech, assembly, petitioning the government for redress of grievances, a speedy and public trial by an impartial jury, and the rights to be free of unreasonable searches and seizures and cruel and unusual punishment, the right to keep and bear arms is an individual right.

B. The Right Applies Generally; It Is Not Contingent Upon Service in the Armed Forces or Militia

In *United States v. Miller*,[31] the Supreme Court stated that an individual's possession of a gun was not protected by the Second Amendment absent "some reasonable relationship to the preservation or efficiency of a well-regulated militia."[32] More recently the Court, citing *Miller*, applied the rational basis test in approving a firearm regulatory scheme, noting:

> These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See *United States v. Miller*, 307 U.S. 174, 178 (1939) (the Second Amendment guarantees no right to keep and bear a firearm that does not have "some reasonable relationship to the preservation or efficiency of a well regulated militia") . . . .[33]

Lower courts have followed suit, holding that Second Amendment rights attach only in counection with militia activity.[34] One

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30. HALBROOK, *supra* note 5, at 83.
31. 307 U.S. 174 (1939).
32. *Id.* at 178.
33. Lewis v. United States, 445 U.S. 55, 65-66 n.8 (1980).
34. *See, e.g.*, United States v. Rybar, 103 F.3d 273, 285-86 (3d Cir. 1996) (holding that defendant's possession of machine guns lacked connection with militia-related activity required for Second Amendment protections to apply); Love v. Pepersack, 47

U.S. District Court stated that it was "unaware of a single case which has upheld a right to bear arms under the Second Amendment to the Constitution, outside of the context of a militia."[35] And not just any militia will do; individuals who belong to an "unorganized" or "sedentary" militia will raise their Second Amendment claims in vain.[36] Under the prevailing judicial view, the Second Amendment operates only as necessary to assure the preservation or efficiency of a well-regulated militia actively maintained by the state.[37]

This prevailing judicial view is precisely the opposite of what those who drafted, debated, and ratified the Bill of Rights intended. Given the Second Amendment's juxtaposition of two separate statements—one concerning the right to keep and bear arms, the other concerning the desirability of a well-regulated militia—contemporary confusion as to its meaning might be inevitable. But the intent of those who approved the language is clear. The Second Amendment consists of twenty-seven words in a single sentence: "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."[38] The subject of the sentence is "The right of the people to keep and bear Arms." The predicate is "Shall not be infringed." In her seminal study *To Keep and Bear Arms: The Origins of an Anglo-American Right,* Joyce Lee Malcolm explains why the rest of the sentence is there and what it means:

> The Second Amendment was meant to accomplish two distinct goals, each perceived as crucial to the maintenance of

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F.3d 124 (4th Cir. 1995) (holding that plaintiff, whose application to purchase a handgun was denied, failed to show how her possession of the handgun would preserve or ensure the effectiveness of the militia so as to support her claim of a Second Amendment violation); *cf.* United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977) (holding that although defendant was technically a member of the Kansas militia, this membership did not entitle him to possession of an unregistered firearm).

35. Thompson v. Dereta, 549 F. Supp. 297, 299 (D. Utah 1982).

36. United States v. Hale, 978 F.2d 1016, 1020 (8th Cir. 1992).

37. *See* United States v. Wright, 117 F.3d 1265 (11th Cir. 1997) (holding that statutes criminalizing possession of machine guns and unregistered destructive devices did not violate Second Amendment, notwithstanding defendant's membership in a state unorganized militia; necessary to a successful claim would be a showing of reasonable relationship between possession of prohibited firearms and the preservation or efficiency of a well regulated militia actively maintained by the state), *cert. denied,* 118 S. Ct. 584 (1997).

38. U.S. CONST. amend. II.

> liberty. First, it was meant to guarantee the individual's right to have arms for self-defence [sic] and self-preservation. . . .
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> . . . [T]hese private weapons would afford the people the means to vindicate their liberties.
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> The second and related objective concerned the militia, and it is the coupling of these two objectives that has caused the most confusion. . . . [I]t would seem redundant to specify that members of a militia had the right to be armed. A militia could scarcely function otherwise. But the argument that this constitutional right to have weapons was exclusively for members of a militia falters on another ground. The House committee eliminated the stipulation that the militia be "well-armed," and the Senate, in what became the final version of the amendment, eliminated the description of the militia as composed of the "body of the people." These changes left open the possibility of a poorly armed and narrowly based militia that many Americans feared might be the result of federal control. Yet the amendment guaranteed that the right of "the people" to have arms not be infringed. Whatever the future composition of the militia, therefore, however well or ill armed, was not crucial because the people's right to have weapons was to be sacrosanct. . . .
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> . . . .
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> The clause concerning the militia was not intended to limit ownership of arms to militia members, or return control of the militia to the states, but rather to express the preference for a militia over a standing army.[39]

Historically, logically, and syntactically, the heart of the Amendment is the recognition of the right of the people to keep and bear arms. The clause referring to the militia was never intended to circumscribe the individual right. Professor Polsby explains the Amendment's often misunderstood reference to the militia this way:

> [T]he Second Amendment does not say, "A well regulated militia, being necessary to the security of a free state, shall not be infringed." Nor do the words of the amendment assert that "the right of the people to keep and bear arms" is conditional upon membership in some sort of organized soldiery like the National Guard. Indeed, if there is conditional language in the Second Amendment at all, evidently the contingency runs the other way: "Because the people have a right to keep and bear

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39. MALCOLM, *supra* note 12, at 162-63.

> arms, states will be assured of the well regulated militias that are necessary for their security." Some version of this reading is supported by almost all of the constitutional historians and lawyers who have published research on the subject.[40]

William Van Alstyne notes that the "guarantee of the right of the people to keep and bear arms [is] the predicate for the other provision," and that in "relating these propositions within one amendment," the text

> does not disparage, much less does it subordinate, "the right of the people to keep and bear arms." To the contrary, it expressly *embraces* that right and indeed it erects the very scaffolding of a free state upon *that* guarantee. *It derives its definition of a well-regulated militia in just this way for a "free State"*: The militia to be well-regulated is a militia to be drawn from just such people (i.e., people with a right to keep and bear arms) rather than from some other source (i.e., from people without rights to keep and bear arms).[41]

Thus, membership in the general militia, or any militia, is not a prerequisite to the exercise of the individual right to keep and bear arms.[42] Even if such membership *were* required, however, the right would remain quite broadly available. Hamilton, writing in the Federalist Papers, implied that the militia was

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40. Polsby, *supra* note 8, at 34. Additionally, Halbrook notes:

> Yet the denial of the antecedent, should it be expressed in the second premise, fails to imply the denial of the consequent in the conclusion; that is, even if a militia is not necessary for the existence of a free state, the people still have the right to keep and bear arms. . . . In sum, the syntax of the proposition that makes up the Second Amendment necessitates the construction that the right to keep and bear arms is absolute and is not dependent on the needs of the militia; the contrary view, that government may restrict this right, commits the fallacy of denying the antecedent and is therefore a misconstruction.

HALBROOK, *supra* note 5, at 86 (citations omitted).

41. Van Alstyne, *supra* note 11, at 1243-44 (citations omitted).

42. *But see* Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?* 15 U. DAYTON L. REV. 5, 6-7 (1989); Peter Buck Feller & Karl L. Gotting, *The Second Amendment: A Second Look*, 61 NW. U. L. REV. 46 (1966); Kevin D. Szczepanski, *Searching for the Plain Meaning of the Second Amendment*, 44 BUFF. L. REV. 197, 213 (1996) (arguing that the right to keep and bear arms is "a narrow individual right that is conditioned on the necessity of a militia to the security of a free state"); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961 (1975) (rejecting the individualist view of the Second Amendment).

synonomous with "the great body of the people," or at least those people represented in Congress:

> If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense, which is paramount to all positive forms of government; and which, against the usurpations of the national rulers, may be exerted with infinitely better prospect of success, than against those of the rulers of an individual State. . . .
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> The obstacles to usurpation and the facilities of resistance increase with the increased extent of the state; provided the citizens understand their rights and are disposed to defend them. . . .
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> . . . .
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> [T]he great body of the people . . . are in a situation . . . to take measures for their own defence . . . .[43]

In a discussion of "[t]he project of disciplining all the militia of the United States," Hamilton explicitly assumed that the project would have to encompass the "the people at large."[44] Other leading advocates of the new Constitution agreed. Richard Henry Lee stated: "A militia, when properly formed, are in fact the people themselves . . . and include . . . all men capable of bearing arms . . . . [T]o preserve liberty, it is essential that the whole body of the people always possess arms . . . ."[45] George Mason, speaking in Virginia's ratification convention, defined the militia as "the whole people," adding that "[t]o disarm the people is the best and most effectual way to enslave them."[46]

A century later the Supreme Court maintained the same expansive definition of the militia:

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

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43. THE FEDERALIST NO. 29, at 178-80 (Alexander Hamilton) (Jacob B. Cooke ed., 1961).

44. THE FEDERALIST NO. 28, at 183-84 (Alexander Hamilton) (Jacob B. Cooke ed., 1961).

45. Richard Henry Lee, *Additional Letters From the Federal Farmer, in* 2 THE COMPLETE ANTI-FEDERALIST 339, 341-42 (Herbert J. Storing ed., 1981).

46. 1 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 425 (J. Elliot ed. 1836) (statement of George Mason).

> vision in question [i.e., the Second Amendment] out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.[47]

A definition nearly as expansive persists in the current U.S. Code, which defines the unorganized militia of the United States as all able-bodied men aged seventeen to forty-five and all female members of the National Guard.[48] William Van Alstyne concludes that the "well regulated Militia" refers to "the ordinary citizenry"[49]—i.e., nearly everyone.

But membership in even so broadly defined a militia is unnecessary to the exercise of Second Amendment rights. The right to keep and bear arms was intended to apply as generally as every other individual right in the Bill of Rights.

How, then, does one account for the federal judiciary's apparently contrary holdings? Brannon P. Denning considers this question in his study of *United States v. Miller* and its progeny.[50] Noting that *Miller* is "the only Supreme Court decision directly interpreting the Second Amendment in this century," Denning argues that "lower courts have strayed" from *Miller*'s actual holding to the point of intellectual dishonesty.[51] The common conclusion that the Second Amendment does not impede "regulation of privately-held arms" relies on two premises:

> [F]irst, that the Supreme Court in *Miller* held that the Second Amendment guaranteed no individual right to keep and bear firearms; second, that lower courts have honestly, consistently, and uniformly applied the holding in *Miller* and have all arrived at the same conclusion. Imbedded within this argument, however, are two very important implied premises: first, that the Supreme Court's *Miller* decision actually held what [opponents of the individual right interpretation] say it held; and second, that subsequent lower court decisions have honestly

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47. Presser v. Illinois, 116 U.S. 252, 265 (1886).

48. *See* 10 U.S.C. § 311 (1994); *see also* Reynolds, *supra* note 11, at 478.

49. Van Alstyne, *supra* note 11, at 1241.

50. Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of* United States v. Miller *and the Second Amendment*, 26 CUMB. L. REV. 961, 962-63 (1995) (analyzing United States v. Miller, 307 U.S. 174 (1939)).

51. *Id.* at 962.

> interpreted and consistenly [sic] applied *Miller* when deciding Second Amendment cases.[52]

Denning claims that neither of these premises is valid. With respect to the first premise, Denning finds *Miller* "the subject of 'considerable confusion and misunderstanding.'"[53] With respect to the second, he finds that "lower federal courts have consistently misinterpreted" the *Miller* holding.[54] "The most common approach in disposing of Second Amendment claims in the lower courts has been to apply what the courts have decided is the *Miller* 'test,'" Denning observes, but "the courts are not in agreement as to what the *Miller* test is."[55] In fact, at least three distinct interpretations have evolved. "The first concludes that *Miller* directs courts to grant Second Amendment protection only where there is some demonstrable relationship between the weapon that is restricted and the maintenance of a militia."[56] The second focuses on the "state of mind of the possessor." In other words, did the weapon holder intend "to insure the maintenance and efficacy of a militia"?[57] The third is the "trump card: no individual can make . . . a colorable Second Amendment claim because the Second Amendment protects only a collective right of undifferentiated state citizens to form militias and to employ them to oppose federal tyranny."[58] An alternative reading of the third interpretation holds that the Second Amendment merely protects "the states' right to maintain militias free from federal control."[59]

These interpretations, however, find "little support" in *Miller*'s text.[60] Even if *Miller* did support the militia/collective

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52. *Id.* at 965.

53. *Id.* (quoting *Government Policies Associated with the Second Amendment: Hearings Before the Subcomm. on Crime of the House of Representatives*, 103d Cong. 1 (1993) (statement of Edward E. Kallgren)).

54. *Id.*

55. *Id.* at 971.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 972 n.58. Moreover, these interpretations overlook the several contrary Supreme Court cases identifying the right to keep and bear arms as an individual right, albeit in dicta. *See id.* at 972 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (suggesting that the phrase "the right of the people" in the First, Second, and Fourth Amendments should be construed consistently)); Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting) (stating that the right to keep and bear

right interpretation, the strength of the holding would be questionable in light of the case's unusual procedural posture:

> *Miller* reached the Supreme Court on appeal from a Kansas district court opinion which held that § 6 of The National Firearms Act violated the Second Amendment . . . . The defendants, Jack Miller and Frank Layton, were charged with "unlawfully, knowingly, wilfully, and feloniously transport[ing] in interstate commerce . . . a double barrel 12-gauge Stevens shotgun having a barrel less than 18 inches in length . . . [and] not having registered said firearm as required."
>
> The trial court judge sustained a demurrer which alleged that § 6 of The National Firearms Act "offend[ed] the inhibition of the Second Amendment to the Constitution." The Supreme Court reversed this decision and remanded the case to the district court. . . . [A]pparently unwilling to risk an unfavorable outcome . . . [t]he defendants not only chose not to have counsel appear at the Supreme Court to engage in oral argument, but in fact disappeared after the district court's decision was handed down.[61]

In other words, after losing in the trial court, the government appealed to the Supreme Court; and in the Supreme Court, the previously winning parties did not appear and were not represented. Thus, the Court's decision "was based more on an absence of evidence in the record than any searching inquiry into the origin and development of the Second Amendment."[62] Even so, the Court's holding is modest:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the

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arms is within the "scope of the liberty" the Constitution provides the individual); Patton v. United States, 281 U.S. 276, 298 (1930) ("The first ten amendments . . . were substantially contemporaneous and should be construed *in pari materia*."); Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 417 (1850) (stating that if black slaves were citizens of the United States, they would have the individual right to keep and carry arms).

61. *Id.* at 973 (first alteration in original) (citations omitted) (quoting United States v. Miller, 307 U.S. 174, 175, 176 (1939)).

62. *Id.* at 974.

> ordinary military equipment or that its use could contribute to the common defense.[63]

Denning notes that "Solicitor General Robert Jackson argued a 'collective-rights' interpretation . . . in the government's brief," but the Court "did not buy wholesale" his argument.[64] Thus, Denning concludes:

> *Miller* is perhaps most notable for the questions it left unanswered. What would have happened, for example, if Miller and Layton had retained an attorney to represent them at oral argument and put on evidence about the militia and weapons that militia members generally possessed? Or what if they had argued that the introductory phrase of the Second Amendment merely expressed a widespread sentiment against standing armies and was not meant to qualify or to limit the "right of the people to keep and bear arms?" Given the incomplete record before the *Miller* court, as well as the very narrow holding of the case, questions regarding the meaning of the Second Amendment and its outer limits should be regarded as far from settled.[65]

Second Amendment jurisprudence, such as it is, is at best inconclusive. Only once in the present century has the Supreme Court squarely addressed the Amendment—and it did so in a case where the parties asserting Second Amendment rights did not appear and were not represented. The Court's holding was based on a sparse record, minimal evidence, and no argument. Moreover, as Denning shows, "subsequent lower courts have read *Miller* more broadly than the opinion warrants."[66] The Second Amendment is ripe for serious judicial consideration. When a suitable case permits the Supreme Court to give the Amendment that consideration, the Court will encounter abundant evidence that the right to keep and bear arms was intended to apply generally and is not contingent upon service in the armed forces or militia.

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63. *Miller*, 307 U.S. at 178.
64. Denning, *supra* note 50, at 974-75 (footnote omitted).
65. *Id.* at 976.
66. *Id.* at 976 n.79.

C. The Right Applies to Arms One Can Keep in One's Home and Bear on One's Person; It Does Not Apply to Large Crew-operated or Machine-carried Weapons

Larry Arnn, of the Claremont Institute, has observed that if the Second Amendment were interpreted as broadly as the First Amendment, we would all have the right to own nuclear weapons.[67] That, some commentators argue, is precisely the problem with the individual right interpretation of the Second Amendment: it leads inexorably to the conclusion that "individuals may keep and bear grenades, machine guns, missiles, tanks, or whatever 'arms' they desire."[68] Needless to say, the courts have not yet interpreted the Second Amendment so broadly. In fact, one searches the record in vain for any gun control scheme ruled unconstitutional on Second Amendment grounds.[69] The Supreme Court has noted that Second Amendment rights are not absolute,[70] and has held that various gun control provisions do not infringe on any constitutionally protected liberties.[71] Lower courts have held that the Second Amendment does not invalidate firearms registration requirements[72] and does not sanction individual possession of military or semiautomatic weapons.[73]

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67. *See* Larry Arnn, *The Right of the People*, PRECEPTS (Claremont Inst., Claremont, Cal.), June 26, 1997, at 1, 1.

68. Szczepanski, *supra* note 42, at 203. In essence, the argument holds that since "the exact scope of the individual right is not self-evident, and is not expressly defined in the Constitution," but that under the individual right interpretation "the federal and the state governments may not infringe on the right," the only "'logical conclusion' is that the individual may keep and bear" whatever weapons he wants. *Id.* Rejecting that conclusion, those who formulate the argument insist that the premise must be rejected also.

69. *But see* cases overturning portions of the Brady Bill on other grounds cited *infra* note 155.

70. *See* Konigsberg v. State Bar, 366 U.S. 36, 50 n.10 (1961) (comparing Second Amendment rights to First Amendment Rights which are "not mathematical formulas"); *see also* United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976) (agreeing with Supreme Court decisions holding that Second Amendment rights are not unlimited).

71. *See* Lewis v. United States, 445 U.S. 55, 65 n.8 (1980) (considering the constitutionality of gun control provisions of Omnibus Crime Control and Safe Street Act).

72. *See, e.g.*, United States v. Tomlin, 454 F.2d 176 (9th Cir. 1972) (concluding that statutes requiring registration of firearms and making it illegal to possess an unregistered firearm are not unconstitutional); United States v. Williams, 446 F.2d 486 (5th Cir. 1971) (holding that statutes proscribing offense of and penalty for possession of unregistered firearms do not violate Second Amendment).

73. *See* United States v. Hale, 978 F.2d 1016 (8th Cir. 1992) (affirming conviction for possession of a machine gun); United States v. Rose, 695 F.2d 1356, 1359 (10th Cir. 1982).

Yet, paradoxically, the courts have indicated that to the extent particular weapons are covered by the Second Amendment, it is because of their amenability to military or militia use.[74] In its leading Second Amendment case, *United States v. Miller*,[75] the Supreme Court stated:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.
>
> The Constitution as originally adopted granted to the Congress power—"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.[76]

In summary, the courts have held both that particular military weapons are not covered, and that if any weapons are covered, it is because of their suitability for militia use.

So, what is the rule, and where is the line? Justice Douglas blithely claimed in a dissent joined by only one other Justice: "There is no reason why all pistols should not be barred to everyone except the police."[77] Somewhat more plausibly, Sue

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74. *See* Quilici v. Village of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982) (holding that the right to bear arms extends only to those arms necessary to maintain a well-regulated militia).

75. 307 U.S. 174 (1939).

76. *Id.* at 178 (citations omitted) (quoting U.S. CONST. art. I § 8, cls. 15-16). Justice Thomas noted that in *Miller*, "[t]he Court did not, however, attempt to define, or otherwise construe, the substantive right protected by the Second Amendment." Printz v. United States, 117 S. Ct. 2365, 2386 n.1 (1997) (Thomas, J., concurring).

77. Adams v. Williams, 407 U.S. 143, 150 (1972) (Douglas, J., dissenting).

Wimmershoff-Caplan argues: "Constitutional principles accommodate modern technology. If the right to private ownership of firearms is limited to the colonists' muskets, by the same logic, freedom of speech does not cover radio, movies and TV, but is confined to the unamplified, untransmitted voice."[78] The Founders never drafted a list of approved weapons, but, argues Halbrook:

> [T]he intent of the state conventions that requested adoption of a bill of rights and of the framers in Congress—who were all influenced by the classical vindications of natural rights, by English common law, and by the American revolutionary experience—was that the Second Amendment recognized the absolute individual right to keep arms in the home and to carry them in public.[79]

Perhaps the best test would be a simple two-part query based on the Second Amendment's plain text. First, can one keep it? Second, can one bear it? If the weapon can be kept in one's home or borne on one's person, the right to keep and bear arms applies.[80] To the extent that gray areas remain, they may be clarified by considering what sort of arms an infantryman in a general militia would be expected to keep and bear.[81] Thus, the Second Amendment probably protects so-called assault weapons but definitely excludes weapons which are crew-served, machine-carried, or weapons of mass destruction.[82]

D. Among the Purposes of the Fourteenth Amendment Was to Apply the Second Amendment to the States

The federal courts have never exercised the authority Congress gave them under the Fourteenth Amendment to apply the Second Amendment to the states. In *United States v.*

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78. Wimmershoff-Caplan, *supra* note 3, at A18.

79. HALBROOK, *supra* note 5, at 87.

80. *See, e.g.*, Reynolds, *supra* note 11, at 478-79. *But see* GEORGE D. NEWTON, JR. & FRANKLIN E. ZIMRING, FIREARMS AND VIOLENCE IN AMERICAN LIFE 113 (1969); Maynard Holbrook Jackson, Jr., *Handgun Control: Constitutional and Critically Needed*, 8 N.C. CENT. L.J. 189 (1977); John Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI.-KENT L. REV. 148 (1971).

81. *See* Kates, *Handgun Prohibition*, *supra* note 11, at 219-20, 245, 258-61; *see also* State v. Kessler, 614 P.2d 94, 98-99 (Or. 1980).

82. *See* Colonel Charles J. Dunlap, Jr., USAF, *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643, 662 (1995).

Cruikshank,[83] the Supreme Court firmly refused the opportunity to do so when it stated:

> The second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called . . . the "powers which relate to merely municipal legislation, or what [was], perhaps, more properly . . . called *internal police*, . . . not surrendered or restrained" by the Constitution of the United States.[84]

Subsequent decisions have followed suit, consistently indicating that the Second Amendment limits only federal, not state, action.[85]

The federal judiciary has failed to deem the right to keep and bear arms a fundamental right and apply it to the states despite clear evidence that the 39th Congress intended, through the Fourteenth Amendment, for it to do so.[86] As William Van Alstyne explains:

> [I]n reporting the Fourteenth Amendment to the Senate on behalf of the Joint Committee on Reconstruction in 1866, Senator Jacob Meritt Howard of Michigan began by detailing the "first section" of that amendment, i.e., the section that "relates to the privileges and immunities of citizens." He explained that the first clause of the amendment (the "first section"), once approved and ratified, would "restrain the power of the

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83. 92 U.S. 542 (1875).

84. *Id.* at 553 (citation omitted) (quoting Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 139 (1837)).

85. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 4 n.2 (1964); Adamson v. California, 332 U.S. 46, 50-51 (1947); Miller v. Texas, 153 U.S. 535, 538 (1894); Presser v. Illinois, 116 U.S. 252, 265 (1886); Fresno Rifle and Pistol Club, Inc. v. Van de Kamp, 965 F.2d 723, 729-30 (9th Cir. 1992); Quilici v. Village of Morton Grove, 532 F. Supp. 1169, 1180-81 (N.D. Ill. 1981), *aff'd*, 695 F.2d 261 (7th Cir. 1982); Pencak v. Concealed Weapon Licensing Bd., 872 F. Supp. 410, 413 (E.D. Mich. 1994); Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 216 (S.D. Tex. 1982).

86. *See* Barnett, *supra* note 11, at 450.

> States" even as Congress was already restrained (by the Bill of Rights) from abridging
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> > the personal rights guarantied [sic] and secured by the first eight amendments of the Constitution; such as . . . *the right to keep and to bear arms* . . . .
>
> In the end, Senator Howard concluded his remarks as follows: *"The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."* There was no dissent from this description of the clause.[87]

That this clear expression of legislative intent has long been ignored does not mean that it should continue to be ignored. The judiciary's duty is to uphold the Constitution, not unjustifiable departures therefrom, however longstanding.[88] The Second Amendment should be incorporated through the Fourteenth Amendment and applied to the states.

E. Opponents of the Right to Keep and Bear Arms May Properly Seek to Circumscribe or Repeal the Second Amendment Only Through a New Constitutional Amendment; Judicial or Statutory Shortcuts to That End Are Dishonest and Dangerous

Those who disfavor or disdain the clear meaning and intended effect of the Second Amendment cannot properly ignore or misinterpret it. Attempts to eviscerate the amendment through judicial or statutory legerdemain both flaunt the purpose of a written constitution and jeopardize the other individual rights recognized and protected by the Bill of Rights. Quoting again from Joyce Lee Malcolm:

> [T]his particular right is threatened with misinterpretation to the point of meaninglessness. Granted, this is a far easier

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87. Van Alstyne, *supra* note 11, at 1252 (citations omitted); *see also* Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations By a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597, 598-99 (1995).

88. Consider, for example, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 407 (1857), the shameful decision preserving slavery which, incidentally, specifically mentions the right to keep and bear arms as a badge of liberty, *id.* at 417, noting that the slaves did not have the right but would if they were free. Consider also *Korematsu v. United States*, 323 U.S. 214 (1944), which allowed the internment of Japanese-Americans during World War II, and *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) ("separate but equal"), *overruled by Brown v. Board of Education*, 347 U.S. 483 (1954). *Cf. Brown*, 347 U.S. at 495 (1954) (rejecting *Plessy*).

> method of elimination than amendment, being much quicker and not requiring the same rigid consensus or forthright discussion of its constitutional relevancy. But it is also the way of danger. For to ignore all evidence of the meaning and intent of one of those rights included in the Bill of Rights is to create the most dangerous sort of precedent, one whose consequences could flow far beyond this one issue and endanger the fabric of liberty.
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> . . . We are not forced into lockstep with our forefathers. But we owe them our considered attention before we disregard a right they felt it imperative to bestow upon us.[89]

Because the right to keep and bear arms is rooted in the right to self-defense, a fundamental element of natural law, one could question the moral legitimacy of a new constitutional amendment purporting to repeal the Second Amendment. After all, the Bill of Rights does not confer rights; it merely recognizes and reserves them. At least, however, an effort at outright repeal would be more honest and justifiable than a continued attempt to achieve the same end through misinterpretation, whether willful or ignorant.[90]

Proponents of gun control may be motivated by concern that widespread availability and ownership of firearms causes or

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89. MALCOLM, *supra* note 12, at 176-77.

90. However, David C. Williams argues that

> [m]any legal scholars who argue that the Amendment guarantees an individual right to revolt write as if the public were presently a unified entity called "the people." For these scholars, the People seem to be an element of cosmology taken on faith, a necessary piece of their analytical structure. This Article argues, by contrast, that the American people are not so united. Accordingly, a Second Amendment revolution may not be possible for today, and so we may need a reinterpretation of the Amendment. . . . [A]ny modern Second Amendment theory must demonstrate those unities in order to demonstrate the modern viability of the historical amendment.
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> . . . .
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> . . . [T]his Article suggests that these problems render "peoplehood" impossible in modern America and, as a consequence, revolution may no longer be a viable option for us. In a sense, the Second Amendment is a fragment of a language that we no longer speak: it depends on the notion of a civic republican People, but we have become too liberal and individualistic to support such a concept. As American beliefs, demographics, and epistemology change, certain forms of sociopolitical organization close as options. A Second Amendment revolution is one that has closed; it is a part of the American heritage that can have no more lived meaning.

David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring With the People*, 81 CORNELL L. REV. 879, 882, 885 (1996).

exacerbates violent crime. If so, their concern is misplaced for two reasons. First, a growing body of sociological and criminological literature examines the effect of the availability and distribution of firearms on crime.[91] The most exhaustive of these studies present conclusions that gun control proponents would find counterintuitive—namely, that to the extent a correlation between breadth of firearms distribution and criminal violence can be documented, the relationship is inverse.[92]

Second, while interesting and possibly reassuring, those studies are at best peripheral to the question of how to interpret and apply the Second Amendment, if not utterly irrelevant. The Second Amendment is a command, not a policy proposal. Assume that it did, in fact, facilitate criminal activity. Would it be unique? The Fourth Amendment, which recognizes "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,"[93] routinely enables criminals to evade arrest—or, once arrested, to evade prosecution or conviction because of the Exclusionary Rule. That the Fourth Amendment thus facilitates and even protects criminal activity does not dissuade us from honoring the right it guarantees. In like manner, the Sixth Amendment enables some criminals to avoid convictions, but that fact does not dissuade us from honoring the rights to jury trial and assistance of counsel.

The same is true for the Second Amendment. Even if it led to higher gun violence—and solid evidence that it does is conspicuously lacking—this in itself should not dissuade us from honoring the right to keep and bear arms. "Foolish liberals who are trying to read the Second Amendment out of the Constitution by claiming it's not an individual right or that it's too much of a safety hazard don't see the danger in the big picture," says Alan Dershowitz.[94] "They're courting disaster by encouraging others to use the same means to eliminate portions of the Constitution they don't like."[95] As Reynolds and Kates remind us:

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91. *See infra* notes 123-130 and accompanying text.

92. *See infra* notes 128-130 and accompanying text.

93. U.S. CONST. amend. IV.

94. Telephone Interview by Dan Gifford with Alan Derahowitz, Law Professor, Harvard University (May 3-4, 1994), *quoted in* Dan Gifford, *The Conceptual Foundations of Anglo-American Jurisprudence in Religion and Reason*, 62 TENN. L. REV. 759, 789 (1995).

95. *Id.*

> The Constitution, and especially the Bill of Rights, is a package deal: It is all or nothing, and for each of us there are likely to be parts we dislike. Where such parts exist, the answer is either to live with them or to amend the Constitution, not to interpret pieces of it out of existence. . . . We forget that at our peril, and as the mass-marketing of the states' right interpretation of the Second Amendment demonstrates, we appear perilously close to forgetting it now.[96]

In summary, then, the Second Amendment recognizes an individual right. The right applies generally and is not contingent on service in a militia. While the exact scope of the right is subject to debate, at the very least it applies to the sorts of arms one might use in the infantry. Through the Fourteenth Amendment, the Second Amendment was intended to protect the people against state as well as federal infringement of the right to keep and bear arms. Efforts to circumscribe or repeal the right through any means short of a constitutional amendment are fraught with danger, for the right is as fundamental to our system of ordered liberty as the other individual rights acknowledged in the Bill of Rights.

III. HISTORY AND PURPOSES OF THE RIGHT

With respect to most of the five fundamental points addressed above, the question of how to interpret the Second Amendment has largely been answered—by the academics, if not the judges. We now focus on a corollary question: aside from what the Amendment means, why is it there? What motivated the founders to include it, and how are their motivations relevant to our understanding and application of their language?

To answer these questions, a brief overview of the origin of the right to keep and bear arms may be useful.[97] In medieval England, keeping and bearing arms was not a right; it was an often onerous duty owed to one's Lord, one's fellow citizens, and the Crown. Police forces were unknown, and standing armies were employed only in times of war. Thus, the responsibility to keep the peace and enforce the rights of Englishmen fell on all

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96. Reynolds & Kates, *supra* note 7, at 1767-68.

97. For the definitive history of the origins of the right, see MALCOLM, *supra* note 12, from which the following information is summarized.

free men, each of whom was expected to be armed, and each of whom was obligated to take his turn keeping watch over the town, participating in the militia, and raising or responding to the hue and cry when misconduct occurred or danger threatened.[98] The ideal of the citizen militia was far more influential than the actual performance thereof. Despite its inadequacies as a defensive force, Englishmen, jealous of their rights, considered the militia the proper means of defending their homeland, viewing standing armies with suspicion.[99]

The *duty* to keep and bear arms became the *right* to keep and bear arms in the wake of the Glorious Revolution of 1689, when the English replaced James II with William and Mary. Promptly following the Revolution, Parliament issued the Declaration of Rights, including this: " 'That the Subjects which are Protestants may have Arms for their Defence [sic] suitable to their Conditions and as allowed by Law.' "[100] There were three primary motivations for recognizing the right. First, the natural right of self-defense was assumed to exist almost universally (even for Catholics); but the right to defend oneself against robbers, highwaymen, cutthroats, and other malefactors would be meaningless without the corresponding right to possess effective *means* of defense. Second, the common defense required a militia composed of every free man as a guard against invasion. Third, and most interestingly, the universal right to have arms served as a check on royal power, and thus a guarantor of the rights and liberties of Englishmen. This third purpose was not merely hypothetical; James II's abdication and flight resulted in no small part from the unwillingness of his armed subjects, many of whom he had attempted to disarm, to submit to his increasingly authoritarian rule.[101]

All three purposes were grounded in a form of self-defense. The first dealt with defending one's self, one's property, and one's family against criminals. The second combined self-defense with the common defense against an external invasion. The third also combined self-defense with the common defense, but against internal threats to liberty—including the Crown itself.

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98. *See id.* at 120.

99. *See id.* at 64.

100. *Id.* at 119 (quoting English Declaration of Rights, 1 W. & M., sess. 2, ch. 2 (1689) (Eng.)).

101. *See id.* at 110-11.

Citizens might keep weapons not only to defend the sovereign, but to defend themselves against the sovereign.

William, obviously, resisted limits on royal power,[102] but through his reign and the centuries that followed, the second purpose declined in importance, as the practical limitations of the militia and the need for professional armed forces became more apparent,[103] and the third purpose increased in importance. As Malcolm notes, belief in the utility of the right to have arms for both individual and constitutional defense grew in Anglo-American thought through the time of the American Revolution and beyond. Malcolm writes:

> Even a century ago both conservative and liberal statesmen and theorists regarded the armed citizen as crucial to the maintenance of limited government and individual liberty. Clearly they lacked our confidence in what the American founders liked to call "parchment barriers." According to Thomas Macaulay, the Englishman's ultimate security depended not upon the Magna Carta or Parliament but upon "the power of the sword." To his mind "the legal check was secondary and auxiliary to that which the nation held in its own hands . . . the security without which every other is insufficient." England's greatest jurist, William Blackstone, believed that private arms undergirded the constitutional structure. His list of rights in the first chapter of his work *Commentaries on the Laws of England* was followed by the admission: "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." As an added protection, he explained, there were "auxiliary rights." The fifth and last auxiliary right, meant to protect all the others, "is that of having arms for their defence . . . [sic] It is, indeed, a publick 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."[104]

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102. *See id.* at 120.

103. *See id.* at 120-28.

104. *Id.* at x-xi (quoting THOMAS MACAULAY, CRITICAL AND HISTORICAL ESSAYS, CONTRIBUTED TO THE EDINBURGH REVIEW 154, 162 (Liepzig, 1850) and WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1:135, 1:139 (University of Chicago Press 1979 (1765-1769))).

If anything, the Founders of the American republic placed an even greater emphasis on the importance of the right to have arms as a deterrent to tyranny.[105] Throughout the period leading up to the American Revolution, the aggrieved colonists were acutely aware of their rights as Englishmen. Much of the Declaration of Independence consists of a list of complaints about royal violations of those rights.[106] And while the American Constitution did not, as originally submitted, contain a Bill of Rights, its authors clearly assumed that American citizens enjoyed the traditional rights of Englishmen, including the right to have arms. In fact, as Halbrook observes, partisans on *both* sides of the debate over adoption of the Bill of Rights assumed that with or without the Bill of Rights, Americans would retain the right to keep and bear arms:

> The view that the rights of freemen were too numerous to enumerate in a bill of rights was coupled with the argument that the ultimate protection of American liberty would be provided by the armed populace rather than by a paper bill of rights. Nicholas Collins, a bill of rights opponent, argued in his "Remarks on the Amendments" that the American people would be sufficiently armed to overpower an oppressive standing army. . . . On the other hand, the proamendment view held that both the existence of a bill of rights *and* an armed populace to enforce it were necessary to provide complementary safeguards.[107]

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105. Don B. Kates has noted:

> Tyrannous ministers will push their usurpations to the point that even an unarmed people will rise *en masse* to take their rights back into their bloody hands regardless of casualties. But where the people are armed it would rarely, if ever, come to this for, as Thomas Paine asserted, "arms like laws discourage and keep the invader and plunderer in awe and preserve order in the world as well as property." To avoid domestic tyranny, wrote Trenchard and Moyle, the people must be armed . . . .

Kates, *supra* note 2, at 96-97 (footnote omitted) (quoting 1 THOMAS PAINE, THE WRITINGS OF THOMAS PAINE 56 (Moncure D. Conway ed., G.P. Putnam Sons 1894)). Stephen Halbrook describes the assumption that both the widespread distribution of firearms and the practice of conducting militia exercises would have a deterrent effect against tyranny, demonstrating the people's strength and thereby dissuading the government from infringing upon their rights, including the right to keep and bear arms. *See* HALBROOK, *supra* note 5, at 82.

106. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

107. HALBROOK, *supra* note 5, at 82 (citations omitted).

This assumption played a significant role in the Constitution's ratification. The revolutionary experience had shown the need for professional armed forces, and experience under the Articles of Confederation had shown the need for a stronger and more effective national government; but the Constitution's provision for a federal government with power to create a standing army raised serious apprehensions. Madison responded to these apprehensions in Federalist No. 46:

> But ambitious encroachments of the Foederal Government, on the authority of the State governments, would not excite the opposition of a single State or of a few States only. They would be signals of general alarm. . . . *The same combinations in short would result from an apprehension of the foederal, as was produced by the dread of a foreign yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case, as was made in the other.*[108]

To be sure, Madison considered the federal threat to state governments remote, and the threat of the suppression of freedom by a federal army even more remote. He did not consider the right to keep and bear arms the first line of defense against federal tyranny; in fact, he expected exercise of the right to be unnecessary in that context. But he clearly appreciated the right's deterrent effect:

> Extravagant as the supposition is, let it however be made. Let a regular army, fully equal to the resources of the country be formed; and let it be entirely at the devotion of the Foederal Government; still it would not be going too far to say, that the State Governments with the people on their side would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield in the United States an army of more than twenty-five or thirty thousand men. *To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by*

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108. THE FEDERALIST No. 46, at 320 (James Madison) (Jacob E. Cooke ed., 1961) (emphasis added).

> *men chosen from among themselves, fighting for their common liberties . . . .*[109]

That the founders plainly intended to honor the right to have arms—in fact, were proud of the universality of the right—is apparent from Madison's next passage:

> It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the last successful resistance of this country against the British arms will be most inclined to deny the possibility of it. Besides *the advantage of being armed, which the Americans possess over the people of almost every other nation,* the existence of subordinate governments to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.[110]

Madison believed that neither the right to keep and bear arms alone, nor the division of power between federal and state governments alone, would necessarily suffice to thwart tyranny. But those two factors combined, he asserted, precluded the federal government from usurping state authority and individual rights. A federal government that respected the rights of its citizens, he suggested, would have nothing to fear from an armed populace. In contrast, "[n]otwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms."[111]

Notwithstanding Madison's assurances, the Constitution was ratified only with the understanding that a formal bill of rights would immediately follow. The article that became the Second Amendment blended (1) an expression of the importance of the maintenance of a general militia as a counterweight to the federal authority to create a regular army with (2) the independent recognition of the individual right to keep and bear arms. Despite the confusion resulting from the Amendment's unfortunate semantic construction, the intent of those who authored

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109. *Id.* at 321 (emphasis added).
110. *Id.* (emphasis added).
111. *Id.* at 322.

and ratified the Amendment with respect to the underlying right is clear. As Professor Polsby notes:

> We can only extrapolate and conjecture about how the Founders would have understood the First Amendment's "freedom of the press" to apply to the Playboy Channel, or how the "search and seizure" language of the Fourth Amendment would have been thought to bear on overheard cellular telephone calls. But no ambiguity at all surrounds the attitude of the constitutional generation concerning "the right of the people to keep and bear arms." To put the matter bluntly, the Founders of the United States were what we would nowadays call gun nuts.[112]

Utterly absent from the historical record, however, is any indication that these early "gun nuts" intended the right to keep and bear arms merely to protect recreational pursuits. Hunting was tremendously important in both England and America—to the prosperous for sport, to the poor for subsistence—and in England, the Game Acts played a key role in the development of the right to have arms.[113] But those who drafted and ratified the Second Amendment never cited hunting as a justification for the right. Their motivations for recognizing it matched those of their English forbears of a century earlier: the right was essential to self-defense, the common defense, and, most importantly, the preservation of liberty.

Arms were obviously necessary for self-defense in frontier America, where government-provided law enforcement did not exist. Arms were also useful to the common defense.[114] But arms were absolutely vital to the defense of liberty itself. Alexander Hamilton wrote that

> if circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people while there is a large body of citizens little if at all inferior to them in discipline and the

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112. Polsby, *supra* note 8, at 34.

113. *See* MALCOLM, *supra* note 12, at 12-13, 25-26, 54, 56, 65, 69-77, 86-92, 103-06, 116, 120, 125-29.

114. The founders had no illusions about the efficacy of a general militia alone in times of war. Despite the heroism of the minute men, the general militia had proven wanting as a defensive force, and a regular army had proven necessary. But without the minute men, there might not have been time to organize the regular army. The armed citizen-soldier was the new Republic's only defense, but he was its first as well as its last resort.

> use of arms, who stand ready to defend their own rights, and those of their fellow citizens.[115]

The constitutionally guaranteed right to keep and bear arms counterbalanced the Constitution's grants of authority to the federal government. Widespread ownership of arms was at least as important as were both the separation of powers and federalism in preventing tyranny, preserving limited government, and protecting the rights of the people. Said Judge Cooley:

> Among the other safeguards to liberty should be mentioned the right of the people to keep and bear arms. . . . The alternative to a standing army is "a well-regulated militia"; but this cannot exist unless the people are trained to bearing arms. The Federal and State constitutions therefore provide that the right of the people to bear arms shall not be infringed . . . .[116]

Justice Story also commented:

> The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers, and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.[117]

While the Founders intended to create a strong central government, they were acutely aware of its dangers. Washington reportedly observed that what characterized government was, ultimately, force; and its coercive power made it a fearful master.[118] The Founders needed to assure the people that they would have the tools to resist this dangerous master if it overstepped its bounds. Several of The Federalist Papers discuss the tendency of all governments to expand their own powers at the

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115. THE FEDERALIST NO. 29, at 184 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

116. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 729 (8th ed. 1927), *cited in* Halbrook, *supra* note 87, at 617.

117. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 646 (5th ed. 1891), *cited in* Halbrook, *supra* note 87, at 617.

118. "Government is not reason, it is not eloquence, it is force; like fire, a troublesome servant and a fearful master." This statement is commonly attributed to Washington, particularly to his Farewell Address. However, the quote does not appear in the text of the Farewell Address or, for that matter, anywhere else in Washington's known writings. *See* Gifford, *supra* note 94, at 801 n.201.

expense of the liberties of the governed, whether through gradual encroachments or blatant usurpation.[119]

Along with the problem of power, the Founders wrestled at length with the problem of faction: how could they prevent a single, powerful, self-interested group from manipulating the machinery of government to its own ends? Realistic enough to realize that they could not abolish faction or self-interest, the Founders decided to distribute power broadly enough to make a single faction's acquisition of all governmental power so highly difficult as to border on the impossible. In like manner, the Second Amendment disperses power. It reflects a recognition that the causes of liberty and order are far better served by allowing everyone to be armed, rather than having the government armed and the people disarmed.

IV. CONTINUING IMPORTANCE OF THE RIGHT

We have noted three purposes of the Second Amendment right to keep and bear arms: self-defense, the common defense, and the defense of liberty. Obviously, circumstances have changed substantially since these justifications gave rise to the right's formal recognition in the Constitution. Law enforcement agencies at the local, state, and federal level are charged with deterring crime and arresting its perpetrators. A permanent and professional federal military establishment, supplemented by state national guards, is responsible for the common defense. And more than two centuries after its inception, America's federal government remains subject to popular control. The change in circumstances, however, has not changed the need for the right to keep and bear arms. The original reasons for recognizing the right remain valid.

Federal courts have recognized that the purposes of the Second Amendment include self-defense.[120] Anti-gun advocates, however, argue that firearms are more likely to cause injury than to prevent it. For example, as this article was being written one well-financed anti-gun organization, Cease Fire, began

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119. *See, e.g.*, THE FEDERALIST NOS. 12, 28 (Alexander Hamilton), NOS. 19, 39, 46, 48 (James Madison).

120. *See, e.g.*, United States v. Gomez, 81 F.3d 846 (9th Cir. 1996); United States v. Panter, 688 F.2d 268 (5th Cir. 1982).

mounting a nationwide media blitz featuring a television advertisement which, as the *Wall Street Journal* reports,

> starts with an adorable youngster piling books on a chair, determined to reach a box on the top shelf of his parents' bedroom closet. The music evokes a Hollywood movie, as if the child were about to discover "E.T." But when he stretches on tiptoes to open the box, what he finds is a handgun. Curious, he points it toward his face. At the sound of a gunshot blast, the screen goes black.
>
> A stark printed message follows: "10 children are killed by a handgun every day."
>
> . . . .
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> . . . "[W]e're trying to change perceptions," Mr. Wenner[, the primary promoter of Cease Fire,] says. "The reason most men buy handguns is because they think they can protect their family. But it doesn't work. Handguns are much more likely to bring harm."[121]

If true, the message in the Cease Fire ad would mean that 3,650 children per year are being killed by guns.

Tanya Metaksa executive director of the National Rifle Association's Institute for Legislative Action does not dispute that number, but strongly disputes the ad's implications. She explains that most of the deaths result from homicide and suicide, not accidents. In 1995, she says, the latest year for which statistics are available, only 181 children died in gun accidents.[122] While each of those deaths is deeply regrettable, consider the rest of the story. Criminologists and sociologists are just beginning to quantify how efficacious firearms can be as a means of self-defense. Gary Kleck and Marc Gertz find that privately owned firearms defend against crime over *two million times* per year.[123]

One key to this success is the spread of state laws requiring law enforcement officials to issue concealed carry permits to every firearms owner applying who satisfies certain objective criteria. More than half the states have adopted such concealed carry laws, also called "shall-issue" laws. Advocates of gun con-

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121. G. Bruce Knecht, *Big Guns in the Media Take Aim Against Firearms*, WALL ST. J., Nov. 20, 1997, at B1.

122. *See id.*

123. *See* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 163-67 (1995).

trol predicted that such laws would result in blood running through the streets, but Jeffrey R. Snyder shows that no such thing happened.[124] "The debate over concealed-carry laws centers on the extent to which such laws can actually *reduce* the crime rate," Snyder says.[125] With ten years of evidence from twenty-five different states, including diverse populations both urban and rural, Snyder concludes that, "shall-issue licensing systems work."[126] Other researchers likewise find no evidence that mandatory issuance of concealed carry permits increases gun violence, and significant evidence to the contrary.[127]

The most exhaustive study to date, performed by John R. Lott and David B. Mustard and published in the University of Chicago's *Journal of Legal Studies*, concluded that concealed carry laws were responsible for a statistically significant decrease in violent crime, without a statistically significant increase in firearms accidents.[128] The Lott-Mustard study analyzed data from all 3,000 counties in the United States over a fifteen-year period (1977 to 1992), employing sophisticated statistical models to account for differences in factors exogenous to the gun-crime relationship among the various counties. The study concluded that concealed carry laws reduce murder by 7.65%, aggravated assault by 7%, and rape by 5%.[129] Had concealed carry laws been in effect in every state in 1992, 1,414 murders; 4,177 rapes; and 60,363 aggravated assaults would have been avoided yearly.[130]

Israel has the equivalent of a nationwide shall-issue concealed-carry policy. Kates and Polsby suggest that this policy discourages not only crime, but terrorism, citing a thwarted machine-gun massacre:

> Israelis (including Arabs) who want to own a personal firearm must obtain a license; but this is available, on demand,

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124. *See* Jeffrey R. Snyder, *Fighting Back: Crime, Self-Defense, and the Right to Carry a Handgun*, POL'Y ANALYSIS (Cato Inst., Wash. D.C.), Oct. 22, 1997.

125. *Id.* at 2.

126. *Id.* at 55.

127. *See* David Kopel, *The Untold Triumph of Concealed Carry Permits*, POL'Y REV., (Heritage Found., Wash. D.C.), July-Aug. 1996; *see also* Kates, *Handgun Prohibition*, supra note 11, at 268.

128. *See* John R. Lott & David B. Mustard, *Crime, Deterrence, and Right to Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997).

129. *See id.* at 25.

130. *See id.* at 19, 24.

> to any trained, responsible adult. . . . [I]n Israel, a permit to possess a firearm is also a permit to carry it, concealed or unconcealed, on one's person. Indeed, authorities recommend that people who own guns should carry them, the better to secure them from thieves or children. As a consequence, any good-sized crowd of people is sure to contain some number of citizens carrying personal weapons, usually concealed. American-style massacres, in which numbers of unarmed victims are shot down before police can arrive, astound Israelis, who note
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> > what occurred at a [crowded venue in] Jerusalem some weeks before the California MacDonald's [sic] massacre: three terrorists who attempted to machine-gun the throng managed to kill only one victim before being shot down by handgun-carrying Israelis. Presented to the press the next day, the surviving terrorist complained that his group had not realized that Israeli civilians were armed. The terrorists had planned to machine-gun a succession of crowd spots, thinking that they would be able to escape before the police or army could arrive to deal with them.[131]

The incident illustrates the potential utility of a more liberal policy toward bearing arms. While nation-to-nation comparisons of firearms distribution and crime rates are problematic,[132] the evidence from within the United States, where thirty-one states representing 49% of the nation's population now have right-to-carry laws, is clear: respecting the individual right to keep and bear arms reduces criminal violence.[133]

The Founders considered self-defense, the common defense, and the defense of liberty not as distinct enterprises, but as

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131. Don B. Kates, Jr., & Daniel D. Polsby, *Of Genocide and Disarmament*, 86 J. CRIM. L. & CRIMINOLOGY 247, 252 (1995) (book review) (first alteration in original) (citations omitted) (quoting Don B. Kates, *Firearms and Violence: Old Premises and Current Evidence*, *in* VIOLENCE IN AMERICA 209 (Hugh D. Graham & Ted R. Gurr eds., 1989)).

132. *See generally* DAVID KOPEL, THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROL OF OTHER DEMOCRACIES? (1992).

133. *See* Lott & Mustard, *supra* note 128; *see also* KOPEL, *supra* note 132; Don B. Kates, Jr., *The Value of Civilian Handgun Possession As A Deterrent to Crime or A Defense Against Crime*, 18 AM. J. CRIM. L. 113 (1991); Gary Kleck, *The Relationship between Gun Ownership Levels and Rates of Violence in the United States*, *in* FIREARMS AND VIOLENCE 99 (Don B. Kates, Jr. ed., 1984); Gary Kleck & Miriam A. DeLone, *Victim Resistance and Offender Weapon Effects in Robbery*, 9 J. QUANTITATIVE CRIMINOLOGY 55 (1993).

aspects of the same integral endeavor. Indeed, as Kates explains, "self-defense is at the core of the second amendment," but "the Founders' view of self-protection" was both "stronger" and "more inclusive" than ours.[134] Kates further states:

> To the Founders and their intellectual progenitors, being prepared for self-defense was a *moral* imperative as well as a pragmatic necessity; moreover, its pragmatic value lay less in repelling usurpation than in deterring it before it occurred.
>
> The underpinnings of the classical liberal belief in an armed people are obscure to us because we are not accustomed to thinking about political issues in criminological terms. But the classical liberal worldview was criminological, for lack of a better word. It held that good citizens must always be prepared to defend themselves and their society against criminal usurpation—a characterization no less applicable to tyrannical ministers or pillaging foreign or domestic soldiery . . . than to apolitical outlaws.[135]

The Founders shared Locke's view that the right to resist and overthrow tyranny flows logically from the individual's right to self-preservation.[136] Plenty of ideas were hotly disputed in the debate over ratification of the Constitution and the Bill of Rights, but this idea was not one of them. In fact, writes Halbrook, "[t]he Federalists were actually in close agreement with Jefferson on the right to arms as a penumbra of the right to revolution."[137] Thus, the Second Amendment speaks of the security of a free State—not, as Van Alstyne notes, *the* State, but a *free* State, which may be something quite different.[138]

Does the Second Amendment remain needed as a defense against tyranny, a guarantor of liberty? Some scoff at the notion, dismissing the "insurrectionist theory" as unfounded or unrealistic.[139] But the Declaration of Independence straightforwardly claims "that whenever any form of government becomes destruc-

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134. Kates, *supra* note 2, at 89.

135. *Id.*

136. *See id.* at 90 (citing John Locke, *An Essay Concerning the True Origin, Extent and End of Civil Government (Second Treatise of Government), in* TWO TREATISES OF GOVERNMENT 119, 129-30 (Thomas I. Cook ed., 1947) (1690)).

137. HALBROOK, *supra* note 5, at 67 (discussing THE FEDERALIST PAPERS NOS. 28, 29 (Alexander Hamilton), NO. 46 (James Madison)).

138. *See* Van Alstyne, *supra* note 11, at 1244.

139. *See* Dennis Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. L. REV. 107 (1991); *see also* Dunlap, *supra* note 82, at 644-45.

tive of these ends, it is the right of the people to alter or abolish it."[140] The Founders took seriously the right of the people to rebel against a government that undermined their rights and governed without their consent. After all, they had just done so themselves.

The "insurrectionist theory" label does not do justice to this aspect of the Second Amendment. True, the Second Amendment implicitly authorizes recourse to arms when less drastic means fail to attain or retain the proper ends of government identified in the Declaration. But the Amendment's greater value lies in the deterrent effect it would have, were it respected and enforced to the degree of its companion rights in the Bill of Rights. Although it implicitly authorizes rebellion—and explicitly provides the means of waging rebellion—the Amendment, if observed, should make rebellion less likely by making it less likely to be necessary. The Second Amendment should stand as a reminder to those who govern of the people's ultimate right to preserve or reestablish their rights by arms. One need not prophesy armed struggle by American citizens against their own government to propose that the citizenry's widespread ownership of firearms could safeguard liberty by deterring tyranny. The great value of the right is political, not military. This value lies not in the fact that the Amendment enables armed resistance, but that *by* enabling armed resistance it should make the conditions which would justify such resistance less likely to occur.

During my congressional campaign, I came to know many rational citizens who seriously felt that the federal government threatened their rights more than it protected them. These were not zealots and cranks, but people who, weighing benefits provided and burdens imposed, reluctantly concluded that, with respect to the federal government, the latter greatly outweighed the former. They were not alone. Professor Glenn Harlan Reynolds warns:

> When large numbers of citizens begin arming against their own government and are ready to believe even the silliest rumors about that government's willingness to evade the Constitution, there is a problem that goes beyond gullibility. This country's political establishment should think about what it

140. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

> has done to inspire such distrust—and what it can do to regain the trust and loyalty of many Americans who no longer grant it either.[141]

The ranks of profoundly disaffected citizens also include millions "who have not and would not organize themselves into paramilitary groups," adds Randy Barnett.[142] "What, then," he asks, "has the political establishment done to inspire the distrust of so many law abiding, nonviolent citizens?"[143] He answers that the grievances are far too many to enumerate, but among them he identifies "the longstanding movement to ban (as opposed to 'regulate') the sale and possession of some or all firearms in this country and the reaction of the political establishment to the argument that such legislation would violate the Second Amendment to the Constitution."[144] Barnett notes that the gun control issue "exemplifies a number of grievances that apply far beyond the matter of guns"[145]—namely, the federal government's habit of acting far beyond the scope of its enumerated powers;[146] its routine violation of rights the Founders considered retained by the people;[147] and the employment of brutal measures by the paramilitary elements of federal law enforcement agencies "to suppress and even to kill dissidents."[148]

I heard these grievances time and again on the campaign trail. In the course of my congressional race, I met representatives of the business community, pro-family groups, and other interests; and along with them, I met many volunteers, contributors, and delegates whose primary motivation for political activity was their concern for the Second Amendment. They feared that bans on certain types of rifles and ammunition, the imposition of waiting periods prior to firearms purchases, and efforts to require firearms registration were a prelude to efforts to confiscate their guns—and, perhaps, along with their guns, other rights as well. An experience related in *Forbes* magazine

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141. Glenn Harlan Reynolds, *Up in Arms About a Revolting Movement*, CHI. TRIB., Jan. 30, 1995, § 1, at 11, *cited in* Barnett, *supra* note 11, at 444-45.
142. Barnett, *supra* note 11, at 445.
143. *Id.*
144. *Id.*
145. *Id.*
146. *See id.* at 445-49.
147. *See id.* at 449-53.
148. *Id.* at 453.

indicates that their fears are not entirely irrational. The author recounts:

> When I was growing up, I thought that nothing better demonstrated my father's nutty side than his opinion on gun control. "Any form of licensing is just an underhanded attempt to ban guns," my old man, an avid sportsman and expert marksman, would expound. I would roll my eyes. Here we go again.
>
> Dad was right.
>
> Last year he wanted to give me a shotgun. A premium-grade, 12-bore side-by-side, handmade in Germany in the 1920s, it has beautiful engraving on its side locks, and weighs just over 5 pounds. It would be prefect in a Ralph Lauren ad. But before Dad could send the gun from Seattle, where he lives, I had to obtain a New York City gun permit.
>
> The ordeal began.
>
> For all of New York City there is only one place to get an application for a long-barreled gun permit—a dingy, understaffed office in the basement of the Criminal Court Building in deepest Queens. (For handguns, there's a different place).
>
> After standing in line for a half-hour I was given a fistful of papers to fill out—criminal record, history of mental instability, that kind of thing. A polite clerk, Ms. Metts, wanted three full sets of fingerprints. That took another half-hour. I had to produce a recent utilities bill and my passport, and four mug shots.
>
> Then I started doling out money: $74 for the New York State Division of Criminal Services for checking out my fingerprints; $55 to the New York City Police Department for their time. Luckily I had been forewarned: No cash, no credit cards, no checks. Bring money orders. And make sure that you have two, one for the city and one for the state.
>
> All this took place last Nov. 15. Today is Mar. 18. Four months, and I'm still waiting for my permit.
>
> So, Dad, you were right: From licensing guns to outright banning is only a short step. When I commented to Ms. Metts that there seemed to be an awful lot of red tape involved in the process, she cheerfully replied: "You should try getting a handgun permit. No, don't bother. You'll never get it. Frankly, we don't really want people to have guns." An honest woman.[149]

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149. Lawrence Minard, *Don't Outlaw It—Red Tape It*, FORBES, April 7, 1997, at 39.

Suppose that New York City required anyone who wished to publish a letter to the editor or speak on a radio talk show to first obtain a permit. Suppose further that the permit could be obtained only after undergoing an ordeal like that of the would-be recipient of his father's rifle. Immediately and fiercely, the attempt would be denounced from around the nation as a clear violation of the First Amendment, and the law would be judicially enjoined before it even came close to getting onto the books. But let the ordeal instead apply to those wishing to exercise Second Amendment rights, and no outcry ensues. The news media and judiciary, so jealous of First Amendment rights, are conspicuously absent when the Second Amendment is under the gun. Second Amendment advocates are correct in believing that the right that matters so much to them does not matter at all to those who report the news, to many state and local governments, or to any branch of the federal government.[150]

The Second Amendment proponents I met in the course of my congressional campaign were not the wild-eyed radicals or paranoid conspiracy theorists of common caricature, but responsible citizens, generally with wholesome families, usually with respectable jobs, and always with the willingness to participate in the often tedious and frustrating political process. They were good people who considered their firearms badges of their wan-

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150. Instead, these seem to favor

> what might be called (with some imprecision) the European paradigm: an armed government and a disarmed population. The question is whether over the long pull this prototype is inherently more irenic with respect to social violence than one in which firearms are more popularly distributed.
>
> Most American gun-phobes clearly prefer the European paradigm for two reasons. First they consider it ludicrous that their own government might become the origin of a secular danger commensurate with armed resistance. Massacres and attrocities [*sic*] have occurred in American history, along with a civil war that was sanguinary even by the standards of its time; but literal genocides have been fairly remote from American history. Second, gun-phobes do not give credence to the prospect that individual precautions, such as being armed, could prove to be cost-effective (in the broadest sense), given that any hypothetical, assumed-to-be pathological government would command a heavily equipped modern army, against which small arms would certainly be helpless.
>
> Such reasons . . . are unconvincing when looked at closely.
>
> . . . .
>
> . . . Guerrillas have often held their own against regular military formations; and even if their record were significantly weaker than it is, an armed population might possess a sort of general deterrent utility . . . .

Kates & Polsby, *supra* note 131, 249-50 (citations omitted).

ing freedom and independence, and who genuinely felt that the federal government was already infringing their right to keep and bear arms in violation of the Second Amendment. In their concerns, they were joined by many who did not own guns. As a candidate, I conducted in-district fundraisers or delegate meetings six nights a week. In nearly every meeting—along with the questions about taxes, federal spending, the predictable hot-button issues, and particular local concerns—someone would mention what happened at Ruby Ridge[151] or Waco, usually recounting another incident of federal overreaching less lethal but closer to home. These individuals would then express genuine concern about our ability to retain a government of limited, enumerated powers which respected inalienable rights and remained subject to the consent of the governed.

In considering their views, and their deep alienation from the federal government, I reflected on the letter Sullivan Ballou, a major in the second Rhode Island volunteers, wrote to his wife Sarah at home in Smithfield, a week before he was killed at the Battle of Bull Run. Major Ballou wrote:

> July 14, 1861
> Washington, D.C.
>
> Dear Sarah,
>
> The indications are very strong that we shall move in a few days, perhaps tomorrow, and lest I should not be able to write you again, I feel impelled to write a few lines that may fall unto your eye when I am no more.
>
> I have no misgivings about, or lack of confidence in, the cause in which I am engaged, and my courage does not halt or falter. I know how American civilization now leans upon the triumph of the government, and how great a debt we owe to those who went before us through the blood and suffering of

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151. As recounted by David B. Kopel,

> [A]t Ruby Ridge, the first person killed by the government agents was Sammy Weaver, and he was about as unarmed as possible. A U.S. Marshal's machine gun bullet had nearly severed his arm. Sammy had dropped his gun, and was running home, when he was fatally shot in the back by a Marshal.
>
> Later, Sammy's mother Vicki Weaver was shot through the head by an FBI sniper, as she stood in the doorway of her home. The only thing she had in her hands was her infant daughter.

David B. Kopel, Editorial, THE AM. SPECTATOR, July 1997, at 73.

> the revolution, and I am willing, perfectly willing, to lay down all my joys in this life to help maintain this government, and to pay that debt.
>
> Sarah, my love for you is deathless. It seems to bind me with mighty cables that nothing but Omnipotence can break. And yet my love of country comes over me like a strong wind, and bears me irresistibly with all those chains to the battlefield.[152]

"I am willing," wrote Sullivan Ballou, "perfectly willing, to lay down all my joys in this life to help maintain this government."[153] Does *anyone* in America feel that way about the federal government now?

Perhaps the replacement of popular affinity for with resentment and apprehension of our government has occurred largely because Sullivan Ballou and his contemporaries saw their government as *protecting* their most fundamental rights, while the concerned citizens I met in my campaign and their contemporaries see their government as *threatening* theirs. With gun owners this is particularly the case, and their fears cannot be dismissed as unreasonable.[154]

As noted above, one grave concern of many gun owners is that the federal government seems determined to ignore the Second Amendment. Perhaps the Supreme Court's recent decision overturning portions of the Brady Bill, in the twin cases of *Printz v. United States* and *Mack v. United States*,[155] offers a ray of hope. The Brady Bill required local law enforcement officials to conduct background checks on prospective handgun purchas-

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152. Letter from Sullivan Ballou to Sarah Ballou (July 14, 1861) *recorded on Ashokan Farewell/Sullivan Ballou Letter, on* THE CIVIL WAR: ORIGINAL SOUND TRACK RECORDING (Elektra Nonesuch 1990).

153. *Id.*

154. This thesis merits more in the way of support than personal observation and anecdotal evidence from an unsuccessful congressional campaign. Some support is found in Barnett, *supra* note 11. Perhaps more specific support will come in a future article, although I am presently at a loss for it. I know of no long-term, broad-based study rating how free people feel, nor of any reliable measurement of citizen affinity for, much less willingness to die for, the federal government. Even if such studies existed, I know of no way to find comparable data dating from Civil War times. I look forward to the contribution of someone who does.

155. 117 S. Ct. 2365 (1997). For another example of gun control legislation being overturned on grounds other than the Second Amendment, see *United States v. Lopez*, 514 U.S. 549 (1995).

ers. The Court held that requirement unconstitutional: Congress lacks the authority to force state officers to execute federal laws.

The Court did not decide the case on Second Amendment grounds, at least in part because the litigants did not raise Second Amendment issues. However, the concurrence of Justice Thomas adumbrates future consideration of the Second Amendment. As the most recent pronouncement from any Justice on the Second Amendment, and the first mention of the Amendment in a Supreme Court opinion in several years, the concurrence merits extended quotation. Justice Thomas advocated a narrow interpretation of legislative power under the Commerce Clause, but suggested that even under a broad reading of the Commerce Clause and no reading of the Tenth Amendment, the provision at issue might have violated the Second Amendment:

> The Court today properly holds that the Brady Act violates the Tenth Amendment in that it compels state law enforcement officers to "administer or enforce a federal regulatory program." Although I join the Court's opinion in full, I write separately to emphasize that the Tenth Amendment affirms the undeniable notion that under our Constitution, the Federal Government is one of enumerated, hence limited, powers. . . . Accordingly, the Federal Government may act only where the Constitution authorizes it to do so.
>
> In my "revisionist" view, the Federal Government's authority under the Commerce Clause, which merely allocates to Congress the power "to regulate Commerce . . . among the several states," does not extend to the regulation of wholly *intra* state, point-of-sale transactions. Absent the underlying authority to regulate the intrastate transfer of firearms, Congress surely lacks the corollary power to impress state law enforcement officers into administering and enforcing such regulations. Although this Court has long interpreted the Constitution as ceding Congress extensive authority to regulate commerce (interstate or otherwise), I continue to believe that we must "temper our Commerce Clause jurisprudence" and return to an interpretation better rooted in the Clause's original understanding.
>
> Even if we construe Congress' authority to regulate interstate commerce to encompass those intrastate transactions that "substantially affect" interstate commerce, I question whether Congress can regulate the particular transactions at issue here. The Constitution, in addition to delegating certain enumerated powers to Congress, places whole areas outside the reach of Congress' regulatory authority. The First Amend-

> ment, for example, is fittingly celebrated for preventing Congress from "prohibiting the free exercise" of religion or "abridging the freedom of speech." The Second Amendment similarly appears to contain an express limitation on the government's authority. That Amendment provides: "[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." This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. If, however, the Second Amendment is read to confer a *personal* right to "keep and bear arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections. As the parties did not raise this argument, however, we need not consider it here. Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms "has justly been considered, as the palladium of the liberties of a republic."[156]

Justice Thomas added two intriguing footnotes. In the first, he observed that *Miller*,[157] the leading decision to date in the Court's meager Second Amendment jurisprudence, neither defined nor construed "the substantive right protected by the Second Amendment."[158] If *Miller* did not define the substantive right, certainly no other Supreme Court decision did. Thus, the right remains undefined, and it may finally be growing ripe for judicial definition.

Justice Thomas' second footnote observed that "a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right."[159] Perhaps, ere long, the full Court will have the opportunity to say so.

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156. *Printz*, 117 S. Ct. at 2385-86 (Thomas, J., concurring) (citations omitted) (quoting *Printz*, 117 S. Ct. at 2378; U.S. CONST. art. 9, § 8, cl. 3; United States v. Lopez, 514 U.S. 549, 601 (1995) (Thomas, J. Concurring); U.S. CONST. amend. I; U.S. CONST. amend. II; and 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1890, at 746 (1833)).

157. United States v. Miller, 307 U.S. 174 (1939). For further discussion see *supra* notes 50 to 66, and accompanying text.

158. *Printz*, 117 S. Ct. at 2386 n.1 (Thomas, J., concurring).

159. *Id.* at 2386 n.2 (Thomas, J., concurring).

V. CONCLUSION

The Supreme Court has never specifically defined the right to keep and bear arms, but the overwhelming majority of legal scholarship on the Second Amendment agrees on the nature and meaning of the right. It is an individual right, not a collective right or a right of the states. The right applies generally, not just to those who serve in the armed forces or militia. It applies to arms one can keep, in one's home or place of work, and bear, on one's person, by oneself. Although it has not yet been applied to the states through the Fourteenth Amendment, it was intended to, and should be, so applied. Proponents of gun control ignore these findings at the peril of other constitutional rights. Those who object to the individual right to keep and bear arms may properly seek to circumscribe or repeal the Second Amendment only through a new constitutional amendment. Judicial or statutory shortcuts to that end are dishonest and dangerous.[160]

Although judicially neglected, the Second Amendment is profoundly important. Without the right to defend themselves, their families, their homes, their property, and their freedoms, citizens would have to look to the state for protection instead, trading away a significant element of their freedom for an illusory and unenforceable promise of security—a poor bargain indeed. The right to keep and bear arms contributes to securing a free state not only by deterring invasion or tyranny, but by fostering the vigorous virtues of independence, self-reliance, and vigilance—virtues that cultivate a love for, and a willingness to defend, not only the right to keep and bear arms, but also all the constitutionally guaranteed rights of the people.

Much contemporary political discourse assumes that those who favor a literal or expansive reading of the Second Amendment are either extremists or are pandering for the support of

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160. Indeed, Washington stated:

> If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.

George Washington, Farewell Address (Sept. 17, 1796), *in* WRITINGS OF GEORGE WASHINGTON 214, 229 (John C. Fitzpatrick ed., 1940).

extremists.[161] In fact, the great weight of available evidence indicates that the Second Amendment means what it says, that its proponents are faithful to the original understanding of its framers, and that the purposes motivating its inclusion in the Bill of Rights remain valid.

161. *See, e.g.*, George de Lama, *For Militias, Invaders of U.S. Are Everywhere*, CHI. TRIB., Oct. 31, 1994, at 1; Albert R. Hunt, *Politics & People: Stop Encouraging the Crazies*, WALL ST. J., April 27, 1995, at A15; Mark Potok, *Militias Find Bombing Has Repercussions*, USA TODAY, April 28, 1995, at 1A; Robert Wright, *Did Newt Do It?*, THE NEW REPUBLIC, May 15, 1995, at 4.