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Donald W. Dowd  
*Villanova University School of Law*

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## THE RELEVANCE OF THE SECOND AMENDMENT TO GUN CONTROL LEGISLATION

Donald W. Dowd\*

### I. INTRODUCTION

Many years ago, then Senator Hugh Scott wrote me a surprising letter assuring me that by killing some long forgotten gun control bill he had protected my interest as a hunter. I wrote back indicating that in Philadelphia I felt more like the hunted than a hunter. Pennsylvania is a big state, and there is a big difference between the way guns are viewed in Philadelphia and Elk County.<sup>1</sup> Certainly some Philadelphians are fond of guns, but enthusiasts often include drug dealers, muggers, and kids in street gangs. Many other Philadelphians have their sleep shattered by gun shots, and others live in fear of armed robbery, drive-by shootings, gang warfare and random fire. These Philadelphians view the gun as an enemy, and they have little feeling of how—to the residents of Elk County—the gun may seem a friend, fun to shoot, necessary for hunting and occasionally useful to scare off a trespasser. These different perceptions have clashed in both state and national legislatures during numerous battles about laws that would impose gun controls.

A rallying cry of those who oppose gun controls is that such legislation would fly in the face of the Second Amendment, which endows all Americans with the right to keep arms. Many gun control opponents believe that we started our nation as a free people who could be trusted with firearms, and we should not

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\* Professor of Law, Villanova University School of Law. A.B., 1951, J.D., 1954, Harvard University. Research assistance provided by Daniel Layden, J.D., 1997, Villanova University School of Law.

1. Reflecting these concerns, Philadelphia enacted municipal ordinances in an attempt to curb the trend of urban violence. However, the Pennsylvania Commonwealth Court ruled that the city was prohibited from passing such ordinances by state legislation. See *Ortiz v. Commonwealth*, 655 A.2d 194 (Pa. Commw. Ct. 1995) (dismissing a petition by representatives of Philadelphia challenging the constitutionality of state gun control legislation). In *Ortiz*, the Commonwealth Court of Pennsylvania upheld amendments to Pennsylvania's Uniform Firearms Act, 18 PA. CONS. STAT. ANN. §§ 6101-6124 (West 1983 & Supp. 1996), which prohibited municipalities from enacting local gun control ordinances. See *Ortiz*, 655 A.2d at 195-96. Representatives of Philadelphia and various interest groups, including the Philadelphia Anti-Drug/Anti-Violence Network, the Consumer Education and Protective Association, the Fathers Day Rally Committee and the National Congress of Puerto Rican Rights, challenged the constitutionality of the statute that preempted a city ordinance prohibiting a variety of assault weapons. See *id.* at 195. The court held that Philadelphia's unique gun control concerns were insufficient to usurp the Commonwealth's overriding power to legislate. See *id.* at 197-98.

surrender our birthright out of fear. This appeal has strong emotional, political, and historical pull. Although the Second Amendment looms large in the rhetoric of gun control opponents, and appeals to it may have helped defeat gun control bills, it has had little real effect as a constitutional limit. In fact, the United States Supreme Court has never invalidated legislation under this Amendment and has only considered Second Amendment claims in three cases. In *United States v. Cruikshank*,<sup>2</sup> the Court held that the Second Amendment created no right to keep or bear arms.<sup>3</sup> In *Presser v. Illinois*,<sup>4</sup> it held that the Second Amendment was not applicable to state legislation,<sup>5</sup> and in *Unit-*

2. 92 U.S. 542 (1875).

3. See *Cruikshank*, 92 U.S. at 553. In *Cruikshank*, the Supreme Court reversed the criminal convictions of several Ku Klux Klan members obtained under the Enforcement Act of 1870. See *id.* at 544-48, 559. The defendants were convicted of depriving African-American citizens of the rights and privileges secured to them under the Constitution and laws of the United States. See *id.* at 544-48. Among the rights deemed violated was the right to bear arms. See *id.* at 545. Chief Justice Waite, speaking for the Court, noted that the right to bear arms "is not a right granted by the Constitution" and is not "in any manner dependent upon that instrument for its existence." *Id.* at 553. The Chief Justice further stated that "[t]he Second Amendment declares that [the right to bear arms] shall not be infringed; but this . . . 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 . . ." *Id.*

*Cruikshank* is generally cited for the proposition that the Second Amendment does not apply against the states. See *id.* at 553. However, this rule stands only as part of a larger decision which held that the Fourteenth Amendment generally, and the Enforcement Act of 1870 specifically, did not create new rights, but rather only protected those rights existing prior to the Constitution's adoption. See *id.* at 554-55.

4. 116 U.S. 252 (1886).

5. See *Presser*, 116 U.S. at 264-65. The defendant in *Presser* was convicted of violating an Illinois statute prohibiting armed public association, drilling, or parading by citizens not part of the state militia. See *id.* at 253-54. In upholding the conviction, the Court rejected *Presser's* appeal that the statute conflicted with the military powers granted to the federal government under the Constitution and Second Amendment. See *id.* at 264-65. The Court stated in its holding that the Second Amendment "is a limitation only upon the power of Congress and the National Government, [but] . . . not upon that of the States." *Id.* at 265.

While *Presser* exposes the inefficacy of the Second Amendment as a viable restriction on states, *Presser* is a good example of the possible effectiveness of alternative challenges to gun control legislation rather than traditional Second Amendment challenges. Regulation of self-styled "militia groups," or their military parades or gatherings could be challenged under the First Amendment as violative of the rights of free association and symbolic speech. See *Texas v. Johnson*, 491 U.S. 397 (1989) (holding a Texas statute which criminalized public flag burning was violative of First Amendment free speech protection); *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977) (ordering a stay of injunction which prohibited military type parade by the National Socialist Party). Further, a recent lower court case has indicated that the sale of guns under some circumstances might be protected as "commercial speech." See *Nordyke v. County of Santa Clara*, 933 F. Supp. 903 (N.D.

*ed States v. Miller*,<sup>6</sup> it held that the Second Amendment was not applicable to the keeping of arms unless the arms had “some reasonable relation to the preservation or efficiency of a well regulated militia.”<sup>7</sup>

As a longtime observer of the Supreme Court and its constitutional decision-making, I am well aware that constitutional rights never thought of before may suddenly emerge<sup>8</sup> and rights considered dead may come to life.<sup>9</sup> Although long ignored, the Second Amendment has recently been the subject of lively and provocative commentary; some scholars argue for a very narrow reading of this Amendment,<sup>10</sup> and books argue for a very broad

Cal. 1996) (holding a lease provision banning gun sales at county fairgrounds is an unconstitutional violation of First Amendment commercial speech rights).

6. 307 U.S. 174 (1939).

7. *Id.* at 178. The defendants in *Miller* were indicted for possessing sawed-off shotguns in violation of the National Firearms Act of 1934. *See id.* at 174-75. The Western District Court for Arkansas quashed the indictments, holding the Firearms Act unconstitutional on Second Amendment grounds. *See id.* at 177. The Supreme Court, in a brief opinion reversing the district court and remanding for trial, held that the Second Amendment protects only those weapons related to militia activity. *See id.* at 178. The 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.

*Id.* (citation omitted).

8. *See e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (examining the fundamental due process privacy right to abortion secured under the Fourteenth Amendment); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the first major modern-era case using a substantive due process approach to fundamental rights).

9. *See e.g.*, *United States v. Lopez*, 115 S. Ct. 1624 (1995) (invalidating a federal statute for the first time in sixty years on grounds that Congress exceeded its constitutional powers under the Commerce Clause).

10. *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 Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22 (1984); Charles J. Dunlap, Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643, 649-50 & n.35 (1995); 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 (1989); Peter Buck Feller & Karl L. Gotting, *The Second Amendment: A Second Look*, 61 NW. U. L. REV. 46 (1966-67); Dennis Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 67-68 (1995); John Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI.-KENT L. REV. 148 (1971); Ralph J. Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional*

reading.<sup>11</sup> In this paper I would like to speculate on how some of these arguments would likely fare in the Supreme Court today and discuss whether the Second Amendment could become a meaningful legal weapon in the war over gun controls. In Part II, I consider the proffered interpretations of the Second Amendment as follows: (1) the state militia theory argues that the Sec-

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*History*, 16 CATH. U. L. REV. 53 (1966); Robert E. Shalhope & Lawrence Delbert Cress, *The Second Amendment and the Right to Bear Arms: An Exchange*, 71 J. AM. HIST. 587 (1984); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961 (1975); David C. Williams, *Civil Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

11. See STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984); JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Donald L. Beschle, *Reconsidering the Second Amendment: Constitutional Protection for a Right of Security*, 9 HAMLIN L. REV. 69 (1986); Sayoko Blodgett-Ford, *The Changing Meaning of the Right to Bear Arms*, 6 SETON HALL CONST. L.J. 101 (1995); Michelle Capezza, Comment, *Controlling Guns: A Call for Consistency in Judicial Review of Challenges to Gun Control Legislation*, 25 SETON HALL L. REV. 1467 (1995); Robert J. Cottrol & Raymond T. Diamond, "Never Intended to be Applied to the White Population." *Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307 (1995) [hereinafter *Racial Disparity*]; Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991) [hereinafter *Afro-Americanist*]; Anthony J. Dennis, *Clearing the Smoke from the Right to Bear Arms and the Second Amendment*, 29 AKRON L. REV. 57 (1995); Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65 (1983); William Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 MIL. L. REV. 1 (1992); Richard E. Gardiner, *To Preserve Liberty—A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63 (1982); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms"*, 49 LAW & CONTEMP. PROBS. 151 (Winter 1986) [hereinafter *Linguistic Analysis*]; David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y. 559 (1986) [hereinafter *Armed Citizens*]; David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1, 45-49 (1987) [hereinafter *Historiography*]; Don B. Kates, Jr., *Gun Control: Separating Reality from Symbolism*, 20 J. CONTEMP. L. 353 (1994) [hereinafter *Gun Control*]; Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983) [hereinafter *Original Meaning*]; David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. CONTEMP. L. 381 (1994); David B. Kopel et al., *A Tale of Three Cities: The Right to Bear Arms In State Supreme Courts*, 68 TEMP. L. REV. 1177 (1995); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983); Thomas M. Moncure, Jr., *The Second Amendment Ain't About Hunting*, 34 HOW. L.J. 589 (1991); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995); Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994).

ond Amendment is only concerned with the keeping of arms to protect state militias from federal destruction; (2) the republican militia theory argues that the keeping of arms by the members of a universal republican militia in order to preserve the right to resist tyranny is protected by the Second Amendment; and (3) the individual rights theory argues that the Second Amendment protects the individual right to keep arms for self-defense, hunting, or any other legitimate purpose.

In Part III, I consider whether the Second Amendment is applicable to state legislation and whether the Second Amendment could be a source of federal power as well as a limit on it. In Part IV, I consider standards of review that could be applied to Second Amendment limits on gun control legislation. Finally, in Part V, I conclude by considering how relevant the Second Amendment will prove to the Supreme Court's consideration of gun control legislation.

## II. SECOND AMENDMENT INTERPRETATIONS

### A. *The Right to Keep Arms Under the State Militia Theory*

#### 1. *Textual Arguments*

The Second Amendment states that “[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.”<sup>12</sup> This provision, like many other parts of the Constitution, is not remarkably clear. The initial issue in considering this text is whether the first clause (the “militia clause”) explains and implicitly limits the second clause. In *United States v. Miller*, the Supreme Court held that the militia clause was a limit on the right to keep and bear arms and that arms not suitable for militia use were not covered by the Second Amendment because they were not reasonably related to a well-regulated militia.<sup>13</sup> In *Miller*, the Court did not consider whether the keeping of arms suitable for militia service, but not specifically held for that purpose, was covered by the Second Amendment.

Today, the Supreme Court would probably follow a consistent line of Circuit Court cases<sup>14</sup> and go beyond *Miller* to hold

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12. U.S. CONST. amend. II.

13. *Miller*, 307 U.S. at 178. For a discussion of *Miller*, see *supra* note 7.

14. For a survey of the positions taken by the federal circuit courts concerning the prohibitive scope of the Second Amendment, see generally *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992) (holding that the Second Amendment only protects

that the Second Amendment prohibits infringement of the right to keep and bear arms only when the arms are kept to perform militia obligations.<sup>15</sup> The Supreme Court could reason that the

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possession of those weapons with a reasonable relation to a well regulated militia), *cert. denied*, 133 S. Ct. 1614 (1993); *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992) (noting that the Second Amendment limits only federal power, not the states'); *Farmer v. Higgins*, 907 F.2d 1041 (11th Cir. 1990) (dismissing the argument that the Second Amendment allows for private possession of machine guns); *United States v. Nelsen*, 859 F.2d 1318 (8th Cir. 1988) (holding that prohibition of switchblade knives did not impair the state militia and therefore did not violate the Second Amendment); *United States v. Toner*, 728 F.2d 115 (2d Cir. 1984) (holding that the right to possess a gun is not a fundamental right); *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982) (stating that handgun possession is not guaranteed by the Second Amendment); *United States v. Rose*, 695 F.2d 1356 (10th Cir. 1982) (holding that a prosecution for possession of unregistered Uzi semi-automatic weapons did not violate the right to bear arms); *United States v. Houston*, 547 F.2d 104 (9th Cir. 1977); *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977) (holding that the Second Amendment does not protect the right to possess weapons unrelated to militia, even though the defendant was technically a member of the state militia); *United States v. King*, 532 F.2d 505 (5th Cir. 1976); *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976) (holding that the possession of a weapon must bear a reasonable relation to a well-regulated militia for Second Amendment protection); *United States v. Birmley*, 529 F.2d 103 (6th Cir. 1976); *United States v. Swinton*, 521 F.2d 1255 (10th Cir. 1975) (holding that there was no absolute constitutional right for individual possession of firearms); *United States v. Johnson*, 497 F.2d 548 (4th Cir. 1974); *United States v. Three Winchester 30-30 Caliber Lever Action Carbines*, 504 F.2d 1288 (7th Cir. 1974) (holding that the statute prohibiting possession of firearms by a convicted felon does not infringe on Second Amendment right to bear arms); *Eckert v. City of Philadelphia*, 477 F.2d 610 (3d Cir. 1973) (finding right to bear arms must be reasonably related to the preservation or efficiency of well regulated militia); *United States v. Day*, 476 F.2d 562 (6th Cir. 1973) (stating that no right to individual possession of arms is granted by the Constitution and Congress has the power to regulate weaponry under the Commerce Clause); *Cody v. United States*, 460 F.2d 34 (8th Cir. 1972) (holding that the Second Amendment is not an absolute bar to congressional regulation); *United States v. Tomlin*, 454 F.2d 176 (9th Cir. 1972) (finding that statutes requiring registration of firearms are not an unconstitutional infringement on Second Amendment rights); *United States v. Johnson*, 441 F.2d 1134 (5th Cir. 1971) (requiring a showing that a federally-regulated weapon is related to the efficiency of a state militia for Second Amendment protection to apply); *Stevens v. United States*, 440 F.2d 144 (6th Cir. 1971) (noting that the constitutional right to keep arms applies only to the right of the state to maintain a militia and not to the individual right of gun possession); *United States v. McCutcheon*, 446 F.2d 133 (7th Cir. 1971); *United States v. Lauchli*, 444 F.2d 1037 (7th Cir. 1971); *United States v. Decker*, 446 F.2d 164 (8th Cir. 1971) (holding that then record keeping requirements of the Gun Control Act of 1968 do not infringe on the right to bear arms); *United States v. Synnes*, 438 F.2d 764 (8th Cir. 1971); *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942) (finding that the Second Amendment does not act as an absolute bar against federal regulation of weapon possession); *United States v. Tot*, 131 F.2d 261 (3d Cir. 1942) (holding that the possession of a weapon must be reasonably related to the preservation of a militia for Second Amendment protection to apply), *rev'd on other grounds*, 319 U.S. 463 (1943).

15. See Herz, *supra* note 10, at 72-82 (arguing that federal jurisprudence clearly <https://scholarworks.umt.edu/mlr/vol58/iss1/5>

militia limitation on the right to keep and bear arms would be meaningless if the keeping of arms was not related to militia service. No other reason for keeping arms is supported by the language of the Second Amendment, and there is no mention of the need to keep arms for self-defense, hunting, recreation, or any other purpose.

The term "militia" is used in various provisions of the Constitution in ways that show what kind of militia was envisioned by the Second Amendment. The reference within the Second Amendment itself is not just to a militia, but to a "well regulated militia."<sup>16</sup> In the body of the Constitution there are also several references to the term "militia."<sup>17</sup> Article I gives the Congress the "[p]ower . . . [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . ,"<sup>18</sup> as well as the power to organize, arm, and discipline a militia, but reserves to the states the right to appoint its officers.<sup>19</sup> In Article II, the President is made the Commander in Chief of "the Militia of the several states, when called into the actual Service of the United States."<sup>20</sup> These provisions provide a basis for the Court to conclude that the type of service protected by one's right to keep and bear arms is prescribed to an organized state militia, not simply an amorphous body of men and certainly not groups simply using the name "militia."<sup>21</sup>

If the Supreme Court adopted this reading of the Second Amendment, the Amendment would become irrelevant to almost all gun control legislation. Because only regulations of weapons kept for state militia service would be protected, the Second Amendment would apply only to the rare case where the state

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supports a narrow interpretation of the right to bear arms under the Second Amendment, and consequently supports a broad range of valid governmental regulation).

16. U.S. CONST. amend. II.

17. See U.S. CONST. art. I, § 8, cl. 15, 16.

18. U.S. CONST. art. I, § 8, cl. 15.

19. The Constitution explicitly states:

The Congress shall have Power . . . [t]o 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 . . . .

U.S. CONST. art. I, § 8, cl. 16.

20. U.S. CONST. art. II, § 2, cl. 1.

21. See *Presser v. Illinois*, 116 U.S. 252, 266 (1886). The Court in *Presser* considered the fact that the defendant did not belong to an organized state militia or a United States troop to be fatal to his challenge of the Illinois statute prohibiting public paramilitary activity. See *id.*



militia required or permitted its members to keep arms for militia service and federal legislation impinged on that right. Nevertheless, current disputes over gun control legislation are concerned with this kind of impingement. However, under this reading, the Second Amendment would be, for all practical purposes, truly irrelevant to gun control laws.

## 2. Historical Arguments

### a. Standing Army Argument

To many commentators, a narrow textual reading of a right expressly given in the Bill of Rights is a flawed approach to constitutional interpretation.<sup>22</sup> They insist that the true meaning of the Second Amendment can only be understood by looking to history and that such an historical analysis would show that the Second Amendment was not meant to be limited to arms held for state militia purposes.<sup>23</sup> Clio, the muse of history, however, has not proven to be the most reliable, steady, or just muse for constitutional interpretation.<sup>24</sup> Chief Justice Marshall ignored history and relied on language and logic in his decision in *Marbury v. Madison*,<sup>25</sup> while conversely, Chief Justice Taney in the infamous *Dred Scott*<sup>26</sup> case stated that he was bound by history to hold that blacks could not be considered persons or citi-

22. See Reynolds, *supra* note 11, at 464-75. Scholars adhering to the "standard model" of Second Amendment interpretation note that the Amendment's text and historical underpinnings support an individual right to keep and bear arms. See *id.* at 466. These academics argue that the Framers intended the Second Amendment to secure an individual, not collective, right to possess weapons. See *id.* at 466-68. See also, MALCOLM, *supra* note 11, at 119; Kates, *Original Meaning*, *supra* note 11, at 218-24.

23. See Reynolds, *supra* note 11, at 464-75. See also, MALCOLM, *supra* note 11, at 218-24.

24. Some commentators argue that judicial application of the original intent doctrine in making case decisions is not only ineffective but is also often inaccurate. See generally LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 284-320 (1988) (analyzing the efficacy of historical analysis by judiciary); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, in SUPREME COURT REVIEW 119, 155 (Philip B. Kurland, ed., 1965) (stating that "[t]he Court, in performing its self-assumed role as a constitutional historian, has been, if not a naked king, no better than a very ragged one").

Supreme Court Justice Clarence Thomas, however, is a strict adherent to the original intent model and espouses the strict application of constitutional text and history in modern jurisprudence. See Christopher E. Smith, *Bent on Original Intent: Justice Thomas is Asserting a Distinct and Cohesive Vision*, ABA JOURNAL, October 1996, at 48.

25. 5 U.S. (1 Cranch) 137 (1803).

26. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).

zens under the Constitution since they were not so regarded at the time of the adoption of the Bill of Rights.<sup>27</sup> Even today, the "original intent" controversy rages on.<sup>28</sup> Historians paint and repaint their pictures of the past so that historical views are subject to continuing re-evaluation while lawyers and judges use bits and pieces of historical evidence not to illuminate the past, but to bolster an argument or prove a point about the present. Regardless of whether it is misread or misunderstood, the history enshrined in court decisions lives on as doctrine.

Advocates of the historical approach criticize advocates of the textual approach for ignoring the colorful history surrounding the term "militia." When the Second Amendment was adopted, memories of England's glorious revolution, a century earlier, had not faded and memories of the American Revolution were fresh indeed. Still more vivid was the awareness of the disorder in the decade following the American Revolution.<sup>29</sup> An historical interpretation would require the Court to consider not only the words of the Second Amendment, but the concerns of the Framers that prompted the adoption of the Second Amendment. What were the concerns?

Primarily, there was the lingering fear that a standing federal army would lord over the people of the new nation.<sup>30</sup> In the

27. See *id.* at 404-05.

28. See LEVY, *supra* note 24, at 388 (arguing that judges often misuse an original intent analysis in constitutional decision making); see also Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: The Intent Theory of Constitutional Construction*, 27 CAL. L. REV. 399 (1939) (concluding that intent theory inverts proper judicial process).

Historical analysis and the "original intent" theory are employed by advocates on both sides of the Second Amendment debate as support for their respective positions. See, e.g., Kates, *Original Meaning*, *supra* note 11 (applying intent theory and historical analysis in arguing that the Second Amendment was intended to provide an individual right to arms). But see Weatherup, *supra* note 10, at 1000 (stating that the "[d]elegates to the Constitutional Convention had no intention of establishing any personal right to keep and bear arms" and that therefore, an historical analysis of the Second Amendment favors a collectivist interpretation).

29. See generally MERRILL JENSON, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION* (1962).

30. See, e.g., Weatherup, *supra* note 10, at 982. The potential threat of a standing army to the republic and individual liberties was a central concern of the constitutional framers. For example, Samuel Adams wrote that "a standing army, however necessary it be at sometimes, is always dangerous to the liberties of the people . . . . Such power should be watched with a jealous eye." JENSON, *supra* note 29, at 29. Likewise, James Madison entertained Adams suspicion, stating that "a standing military force, with an overgrown Executive, will not long be safe companions to liberty. The means of defense [against] foreign danger, have always been the instruments of tyranny at home." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 465 (M. Farrand, ed., 1911).

*Federalist Papers*, James Madison urged the ratification of the Constitution and addressed fears that Congressional power to establish a federal army was potentially destructive to the states.<sup>31</sup> Madison explained that such fears were visionary because no federal army could impose its will on the states when the federal army was small compared to the vast state militia.<sup>32</sup> Madison further argued that the federal army was not like the army of a European tyrant.<sup>33</sup> Specifically, it could not prevail over the American people because they elected their own governments, were permitted to have arms, and were led by officers of the militia appointed by their local governments.<sup>34</sup> In spite of Madison's assurances, skeptics urged that the framers include a prohibition against standing armies in the Bill of Rights.<sup>35</sup> However, the ban on standing armies was not incorporated. Instead, the following compromises were preserved in the body of the Constitution: (1) the provision that created a federal army but required reappropriation for the army to be held every two years,<sup>36</sup> and (2) a provision that created a militia officered by the states but subject to federal call-up and regulation.<sup>37</sup> The

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The Supreme Court has recognized the role that fear of a standing army had upon the enactment of the Second Amendment. In *United States v. Miller*, the Court noted:

The Militia which the States were expected to maintain and train is set in contrast with the Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the militia. . . .

*Miller*, 307 U.S. at 178-79 (1939).

31. See THE FEDERALIST NO. 46 (James Madison).

32. See *id.*

33. See *id.*

34. See *id.*

35. George Mason, author of the Virginia Bill of Rights, refused to sign the final draft of the Constitution because it failed to protect the liberty of the people from the danger of a standing army in time of peace. See MALCOM, *supra* note 11, at 155. Likewise, Elbridge Gerry, a delegate of Massachusetts, objected that the Constitution did not provide sufficient checks against the danger of a standing army. See *id.* at 153. Even Thomas Jefferson, in a letter to James Madison, noted that the Constitution as drafted was incomplete because it lacked a federal declaration of rights, including protection against standing armies. See *id.* at 157.

During the early phases of drafting the Bill of Rights, a proposal was set forth; this proposal included what would become the Second Amendment statement that standing armies are "dangerous to liberty" and would be authorized in peace time only upon a vote by two-thirds of each House of Congress. See HARDY, *Historiography*, *supra* note 11, at 57 & n. 255. The proposal failed and the Second Amendment eventually passed without limiting federal armed forces. See *id.*

36. U.S. CONST. art. 1, § 8, cl. 12.

37. U.S. CONST. art. 1, § 8, cl. 15, 16.

adoption of the Second Amendment in the Bill of Rights could be viewed as a partial response to the standing army concern because it affirmed the importance of the militia and assured that its members could not be disarmed.<sup>38</sup> This historical argument that the Second Amendment was designed to protect state militia from federal encroachment complements the textual argument that the "militia" clause limits the "right to keep and bear arms" clause<sup>39</sup> and thus supports a state militia reading of the Second Amendment.

*b. The Second Amendment and the Right to Resist or Revolt*

Historically, the term "militia" did not mean a state militia, but rather a body of men that was responsible for defending its community.<sup>40</sup> This forms the basis of the republican militia theory.

The first argument supporting the republican militia theory is that the people have the individual right to resist tyranny. In making this argument, some commentators rely on history which they feel proves that the Second Amendment is not only about the relation of the state militia and the federal standing army, but also about the essential role of the militia in resisting tyran-

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38. See, e.g., Kates, *Original Meaning*, *supra* note 11, at 215-17 (noting that establishing a well-armed militia was accomplished by guaranteeing arms for individual citizens); *id.* at 217 n.53 (arguing that the "independence and self reliance necessary to [a] citizen of [the] republic was protected by assuring each individual the right to possess the arms necessary to defending, and securing food for himself and his family"); Shalhope, *supra* note 11, at 604-12 (stating that the Framers "firmly believed that the character and spirit of the republic rested on the freeman's possession of arms as well as his ability to defend himself and his society"). *But see* Dunlap, *supra* note 10, at 649-50 & n.35 (recognizing but dismissing the argument that the Second Amendment protects arms for hunting and self protection).

Pennsylvania delegates, during the Constitution's ratification period, published a series of proposals for a federal bill of rights that explicitly noted the individual nature of the right to bear arms. Kates, *Original Meaning*, *supra* note 11, at 222. The Pennsylvania proposal stated:

That the people have a right to bear arms for the defense of themselves and their own State or the United States, or for the Purpose of killing game; and no law shall be passed for disarming any of them unless for crimes committed, or real danger of public injury from individuals . . . .

2 BILL SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 665 (1971).

39. See U.S. CONST. amend. II.

40. See *Miller*, 307 U.S. at 179. The Court stated in *Miller* that "[t]he significance attributed to the term Militia appears from the debates in the Convention, the history and the legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense." *Id.*

ny.<sup>41</sup> In his provocative article, *The Embarrassing Second Amendment*, Professor Levinson criticizes the interpretation that the Second Amendment was only meant to protect state militia from federal attempts to disarm its members.<sup>42</sup> He states that this interpretation is historically and philosophically inaccurate because it does not take into account the republican ideas of the Anti-Federalists, who were the moving forces in securing the adoption of the Bill of Rights.<sup>43</sup> These republican ideas included the idea of a universal militia of all able-bodied male citizens armed so they might be able to resist an oppressive government. Professor Levinson argues that the Second Amendment was adopted to secure this right and thus the Second Amendment protects the right of all able-bodied men to keep arms in readiness for a call to defend the state or to resist a tyrannical state.<sup>44</sup> Professor Levinson concludes that this protection means

41. See generally Levinson, *supra* note 11.

42. See *id.* at 645-52.

43. See *id.* See generally Reynolds, *supra* note 11; Van Alstyne, *supra* note 11; Kates, *Original Meaning*, *supra* note 11; Hardy, *Historiography*, *supra* note 11; Shalhope, *supra* note 10.

44. See Levinson, *supra* note 11, at 651-52; see also Williams, *supra* note 10, at 559-60 (analyzing the Levinson article and recognizing the collective right of a universal militia to keep arms under the Second Amendment); see also Dunlap, *supra* note 10, at 653-56 (discussing the historical right to revolution attributed to the Second Amendment under republicanism); 3 JOSEPH STORY, COMMENTARIES § 1890 (1833) (recognizing that the Second Amendment and an armed citizenry are realistic means of resisting tyranny).

The fear of a standing army and a tyrannical federal government lies at the center of the Second Amendment. See Weatherup, *supra* note 10, at 982. Patrick Henry equated the potential tyranny of Congress with that of the English crown and suggested that force might be necessary to preserve the future liberty of the states. See Letter from T. Jefferson to Wm. Smith, in THOMAS JEFFERSON WRITINGS 911 (M. Peterson ed. 1984). Therefore, some scholars argue that the founders sought to protect the right to arms for all "able bodied men" to assure that the people remained "dangerous to tyranny" and prepared to revolt if necessary. See Moncure, *supra* note 11, at 596. In fact, the right of the people to overthrow an oppressive government was often viewed both as a right and an affirmative duty. The Declaration of Independence provides that:

[W]hensoever any Form of Government becomes destructive to these ends, it is the Right of the People to alter or abolish it, and to institute new Government . . . Prudence, indeed, will dictate that Governments long established should not be changed for light or transient causes . . . . But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government and to provide new Guards for their future security.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added); see also Moncure, *supra* note 11, at 596 (examining Virginia's Declaration of Rights, which imposes a civic duty to overturn despotic government).

that most men, as part of the universal militia, would have the right to keep arms.<sup>45</sup>

The picture of brave, patriotic farmers armed with their own muskets and minutemen, acting not as a part of the British-controlled militia, but at the call of their neighbors and friends to resist tyranny, supports a reading of the Second Amendment sustaining the right to keep and bear arms to resist an oppressive government. Based on this picture of revolutionary history, it may be reasonable to interpret the Second Amendment as ensuring the right to resist the tyranny of Washington D.C. or Boston, as well as London, by preserving an armed citizenry. However, a look at post-Revolution history may well lead to another conclusion.

The history of the United States, between the enactment of the Articles of Confederation and the adoption of the Constitution, does not support the right to resist or revolt. When Captain Daniel Shays led his poor western Massachusetts farmers against the tyranny of Boston in 1787, he may have thought of himself as a minuteman. However, he soon found out that he was considered an insurrectionist—if not a traitor—by Samuel Adams, who, as a leader of the American Whigs, was one of the fathers of the American Revolution. Samuel Adams was also among the most radical extollers of the right to resist both the British taxes, which were imposed without representation, and the standing army of England, whose job was to enforce the imposition of those taxes.<sup>46</sup> To Samuel Adams, the difference between his revolt against London and Shays' revolt against Boston was clear.<sup>47</sup> England was a distant power that imposed its

45. Levinson does not comment on old and infirm men and all women, but I suppose "militiaman" would today be transmuted into "person."

46. Samuel Adams' status as a radical leader of the revolutionary movement is well documented. See generally RALPH VOLNEY HARLOW, SAMUEL ADAMS: PROMOTER OF THE AMERICAN REVOLUTION (1975); JOHN C. MILLER, SAM ADAMS: PIONEER IN PROPAGANDA (1936). His passionate propaganda served as a major impetus in stirring the colonies toward revolt. See HARLOW, *supra*, at 190 (noting that Adams' actions and commentaries were aimed at stirring up the revolutionary emotions of the people).

However, once the Revolution ended and America secured its independence, Adams' character seems to have shifted from revolutionary inciter to governmental preserver. As early as 1784, Adams showed contempt for community grievances concerning the new federal government. See *id.* at 315. When Shays' Rebellion occurred in 1787, Adams was as relentless in his demands for the drastic punishment of the insurgents as he was in demanding English blood a decade earlier. See *id.* at 316. See MARION L. STARKEY, A LITTLE REBELLION 198 (1955) (noting Adams' inflexibility concerning the arrest and punishment of Shays' rebels).

47. See HARLOW, *supra* note 46, at 315-16.

will on an unrepresented people, and therefore, the people had a right to revolt.<sup>48</sup> But Massachusetts was the people's state where citizens could vote and petition.<sup>49</sup> The right to take arms against a tyranny is not the right to take arms against a democracy.<sup>50</sup> In any event, Shays lost; but Massachusetts and the rest of the nation were given a fright and made aware of the weakness of dealing with such problems under the Articles of Confederation. Furthermore, Shays' Rebellion prompted the adoption of the Constitution.<sup>51</sup> In the early years of the republic, the federal

48. See *id.* at 316.

49. See *id.* at 315-16.

50. See STARKEY, *supra* note 46, at 198. Adams justified his stern position by distinguishing the American Revolution from rebellions against the Union. He stated that "[i]n monarchy the crime of treason may admit of being pardoned or lightly punished . . . but the man who dares rebel against the laws of a republic ought to suffer death." *Id.*

Thomas Jefferson took a different view. John Morse, a Nineteenth century biographer, wrote:

To the gaze of such a patriot everything which took place in his own country seemed admirable. Even Shay's insurrection in Massachusetts, which, by the alarm that it spread among all thinking men, contributed largely to the adoption of the new Constitution, seemed to Jefferson a commendable occurrence. Undeniably he talked some very bad nonsense about it.

The commotions offer nothing threatening; they are a proof that the people have liberty enough, and I could not wish them less than they have. If the happiness of the mass of the people can be secured at the expense of a little . . . blood, it will be a precious purchase. To punish these errors too severely would be to suppress the only safeguard of the public liberty. A little rebellion now and then is a good thing, . . . an observation of this truth should render honest republican governors so mild in their punishment of rebellions as *not to discourage them too much*. It is a medicine necessary for the sound health of government. Thus I calculate,—an insurrection in one of thirteen States in the course of eleven years that they have subsisted, amounts to one in any particular State in one hundred and forty-three years, say a century and a half. This would not be near as many as have happened in every other government that has ever existed. So that we shall have the difference between a light and a heavy government as clear gain. Can history produce an instance of rebellion. . . . What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is its natural manure.

It shakes one's faith in mankind to find a really great statesman uttering such folly!

JOHN MORSE, THOMAS JEFFERSON 90-91 (Houghton, Mifflin & Co. 1883).

The Supreme Court has expressly rejected the right to rebellion. *Denis v. United States*, 341 U.S. 494, 501 (1951) ("Whatever theoretical merit there may be to the argument that there is a 'right' to rebellion against dictatorial governments it is without force where the existing structure of the government provides for peaceful and orderly change.").

51. See Weatherup, *supra* note 11, at 981. James Madison wrote in his intro-

government repeatedly put down revolts and insurgencies.<sup>52</sup> In light of this history, it is not likely that the Second Amendment was meant to give constitutional protection to the likes of Daniel Shays to keep arms for insurrection. Militias were intended to suppress insurrections and not to further them.

Two other arguments have been advanced against finding support in the Second Amendment for protection of the right to resist or revolt. First, even if the Second Amendment embodied some republican right of resistance or revolt which required the keeping of arms, that right could not be exercised today because it would be based on the presumption that those who had the right to be armed and resist were those who had been schooled together in republican virtue as part of a meaningful universal militia. Some argue the republican militia theory is anachronistic because today there is no universal militia and no schooling in common virtue.<sup>53</sup> Second, the right to resist or revolt has no meaningful significance today because resistance against a modern state with privately held arms is fanciful.<sup>54</sup> In essence, it may be debatable whether or not Americans today lack the republican virtues of their eighteenth century ancestors, but it cannot be doubted that the balance of firepower has shifted overwhelmingly from the people to the state.<sup>55</sup> Perhaps this does not

ductory notes on the Federal Convention of 1776 that Shays' Rebellion was one of the "ripening incidents" that led to the Convention. *See id.* *See also* HARLOW, *supra* note 46, at 304-27.

52. *See generally* ORVILLE J. VICTOR, HISTORY OF AMERICAN CONSPIRACIES (1973). The nation's first several decades saw some notable insurrections and conspiracies against the Union, including the "State of Frankland" Insurrection, Shays' Rebellion, the Whiskey Insurrection, Wilkinson's Western Conspiracy, Denmark Vesey's Slave Insurrection, Nat Turner's Slave Insurrection, the South Carolina Nullification Insurrection, the "Patriot" War, Dorr's Rebellion, and John Brown's Conspiracy. *See id.*

The state militias were also used to quash race and labor riots, which struck American cities in the nineteenth century, including the New York riot of 1834, the Providence Snowtown riot of 1831, the Cincinnati riots of 1841, and the Philadelphia race riot of 1849. *See* Robert J. Cottrol & Raymond T. Diamond, *Afro-Americanist*, *supra* note 11, at 340-42.

53. *See* Brown, *supra* note 10. Brown argues that the republican right of revolution presupposes a virtuous citizenry, which does not exist in modern America. *See id.* at 663-65. Therefore, the right to armed revolt no longer exists under Second Amendment republican theory. *See id.*; *see also* Williams, *supra* note 10, at 561 (stating that "[i]f the citizenry is not virtuous, we have no assurance that it will use its arms in virtuous ways").

54. *See* Dunlap, *supra* note 10, at 660-67. Colonel Dunlap, a Staff Judge Advocate in the United States Air Force, maintains that the sophistication of modern armies and weaponry renders moot the question of rightful insurrection by the populace. *See id.* at 666-67.

55. *See id.* at 660-67.



make the idea of citizen armed resistance anachronistic, and the Second Amendment moot. Flies can bite elephants, and men with small arms can hurt those much more heavily armed.<sup>56</sup> However, it would seem likely that any government so evil as to justify resistance and revolt would not hesitate to crush the resistance of privately armed civilians. The Second Amendment would not provide much of a shield in this situation.

It is democratic institutions, not guns, that protect us against tyranny. Our bulwarks against oppression are free speech and a free press and the right to elect our leaders and look to an independent judiciary—not our right to keep arms to revolt. Furthermore, it seems highly unlikely that in a country where the fear of violent crime and terrorism spreads from New York City to Oklahoma City to Atlanta, the Supreme Court would limit gun control regulations necessary to protect us against enemies, foreign or domestic, based on a theoretical right to revolt protected by the Second Amendment.

Another argument supporting the republican militia theory is that the states have the collective right to resist incursions by the federal government. Tragically, the fears of conflict between the states and the federal government did not prove as Madison had envisioned.<sup>57</sup> The question of whether the states, through their armed citizens and their militia, could resist perceived federal oppression was finally resolved in the bloody Civil War.<sup>58</sup> Again, it is inconceivable that the Supreme Court now would protect the right of state militias to resist the federal government and engage in another civil war.

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56. See Levinson, *supra* note 11, at 657 (stating that armed insurgency need not be victorious to be an effective deterrent against tyranny); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 115 (1987) (adopting a cost/benefit analysis in correlating effectiveness of rebellion not only to the capacity of obtaining victory, but also to the ability to raise the cost of fighting).

57. See THE FEDERALIST NO. 46 (James Madison). Madison had noted in his quest for the Constitution's ratification that the concern of state conflict with a federal army was exaggerated and improbable. See *id.* He further attempted to assuage fears of federal power by claiming that the federal army would be powerless against a community of well-armed state militias. See *id.* The Civil War and the ultimate Union victory proved Madison's assertions tragically incorrect.

58. Orville J. Victor documented in his HISTORY OF AMERICAN CONSPIRACIES the rebellious nature of the states and its citizens, which, in his opinion, foretold the American Civil War. In his book published during the War, Orville wrote that "the story of such conspiracies, insurrections and popular commotions . . . directly . . . affected the order of society, the destiny of the States, [and] the political institutions of the Republic." VICTOR, *supra* note 52, at 19.

## B. *The Individual Right to Keep Arms Theory*

A different interpretation of the Second Amendment is that it ensures the right to bear arms quite apart from any militia service. This argument is advanced on both textual and historical bases.

### 1. *Textual Arguments*

It can be argued that the text of the United States Constitution shows that the Second Amendment was designed not only to protect the militia,<sup>59</sup> but also to protect the individual's right to keep and bear arms.<sup>60</sup> This argument is based upon the Second Amendment's position within the Bill of Rights, which gives rise to the assumption that the Second Amendment was designed to protect individual rights, not simply to regulate the relation of state militia and the federal government.<sup>61</sup> According to this argument, the text of the Second Amendment must be read as are other provisions of the Bill of Rights, that is, in a way that protects individual rights, not just the corporate rights of those in a militia.<sup>62</sup> One could argue that the phrase "right of the people" in the Second Amendment no more denotes a corporate right than it does in the Fourth Amendment.<sup>63</sup> The Fourth Amendment does not merely protect the right of the people as a whole against unreasonable searches or seizures but protects the rights of individuals.<sup>64</sup> Similarly, it can be argued that the right of the

59. See, e.g., Herz, *supra* note 10.

60. See Reynolds, *supra* note 11, at 466-71; Kates, *Original Meaning*, *supra* note 11, at 214-20.

61. See Reynolds, *supra* note 11, at 466-67. The "standard model" scholars of the Second Amendment interpret the Amendment as clearly granting an individual right to arms by its very language. See *id.* As Professor Reynolds writes:

The text's support is seen as straightforward: the language used, after all, is "right of the people," a term that appears in other parts of the Bill of Rights that are universally interpreted as protecting individual rights. Thus any argument that the right protected is not one enforceable by individuals is undermined by the text.

*Id.*; see also Kates, *Original Meaning*, *supra* note 11, at 218 (stating that logic and constitutional consistency mandate that the right granted by the Second Amendment be recognized as an individual "right of the people").

62. See *id.* at 214-20.

63. Compare U.S. CONST. amend. II ("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.") with U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

64. See *Katz v. United States*, 389 U.S. 347, 353 (1967) (recognizing that the

people to keep and bear arms in the Second Amendment must be read to protect an individual right. The principal arguments made by proponents of an individual right to bear arms theory, however, are not textual but historical and philosophical.

## 2. *Historical Arguments*

Arms were pervasive in the America of the eighteenth century. Not only were they necessary for militia service, but often for life itself. Life was dangerous. A gun was essential to the protection of home and family from Indians, marauders and wild beasts in the sparsely settled country. Self-defense was often the only defense because no public authority could be called on to guarantee safety. A disarmed America was not only unthinkable politically, but was also a practical absurdity. Americans were not merely armed by necessity, but undoubtedly thought they had a right to be armed because of this necessity.

It may be argued that those who proposed and adopted the Second Amendment shared a common historical and philosophical understanding that individuals had a right to keep arms for self-defense. American Whigs, schooled in Locke, were exponents of the natural right theory and incorporated that theory into the Bill of Rights.<sup>65</sup> What could be more important than the right to life and the means of defending it? Moreover, the Framers of the Constitution and the Bill of Rights were well read in Blackstone, who set forth the right to keep arms for self-defense as a common-law right of free Englishmen.<sup>66</sup> Furthermore, the Framers were undoubtedly aware of, and sympathetic to, the principles incorporated in the English Bill of Rights, the language of which was a model for the Second Amendment.<sup>67</sup> This philosophical

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Fourth Amendment protects individuals, not places, from unreasonable searches and seizures and establishing the principle of a personal expectation of privacy).

65. 1 WILLIAM BLACKSTONE, COMMENTARIES, 129.

66. William Blackstone considered the right to personal security as one of the traditional rights enjoyed by Englishmen and akin in importance to the rights to liberty and property. See BLACKSTONE, *supra* note at 65, at 143-44. He considered the right to bear arms an auxiliary right necessary to protect and maintain these rights. See *id.* Blackstone further acknowledged the common-law right of self-defense as a primary law of nature, and therefore, the "right of having and using arms for self-preservation and defense" as inalienable. *Id.* at 130-34, 144. See also MALCOLM, *supra* note 11, at 135-64; Kates, *Original Meaning*, *supra* note 11, at 235-39 (discussing the English Bill of Rights and the common-law guarantee of private arms); STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS 1-17 (1989) (describing the outrage at British attempts to disarm Boston colonists as a violation of their rights as Englishmen).

67. "Recent scholarship says that the English Bill of Rights was understood to

background supports an interpretation of the Second Amendment that establishes an individual right to keep arms specifically for self-defense. Some state constitutions expressly recognize such a right.<sup>68</sup> Although the federal Constitution does not contain such an express recognition, this omission may not be due to an outright rejection of the idea, but instead to an implicit understanding that it was included.<sup>69</sup> Although disputed by some historians,<sup>70</sup> the proponents of this position have been prolific and offer this historical view as a "standard model."<sup>71</sup>

The Supreme Court has never accepted an individual right theory of the Second Amendment. However, if the Court were to accept such a theory, it would be deluged with a myriad of issues not raised under the state militia theory. Three issues in particular would need to be addressed: (1) the right to keep arms for self-defense by threatened groups; (2) the right to keep arms by individuals generally; and (3) the right to keep arms for hunting or other recreational uses.

#### *a. The Right to Keep Arms For Self-Defense by Threatened Groups*

It could be argued that the right of self-defense should not be limited to individuals but should extend to threatened groups. Throughout our history, certain groups of people have felt both threatened by other groups and unable to rely on public authorities to protect them. For example, white settlers were afraid of Indian raids, and white slave owners were afraid of slave revolts. Although the law clearly provided protection to the settlers and the slave owners in these situations, law enforcement was not always available. As a result, both settlers and slave holders

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have recognized the right to keep arms for self defense." See Hardy, *Historiography*, *supra* note 11, at 16-24; Kates, *Original Meaning*, *supra* note 11, at 235-39.

68. See ALA. CONST. art. 1, § 26; ARIZ. CONST. art. 2, § 26; COLO. CONST. art. 2, § 13; CONN. CONST. art. 1, § 15; DEL. CONST. art. I, § 20; FLA. CONST. art. 1, § 8; IND. CONST. art. 1, § 32; KY. CONST. § 1, para. 7; MICH. CONST. art. 1, § 6; MISS. CONST. art. III, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; NEB. CONST. art. I, § 1; N.H. CONST. pt. 1, art. 2-a; N.D. CONST. art. I, § 1; OKLA. CONST. art. II, § 26; OR. CONST. art. I, § 27; PA. CONST. art. I, § 21; S.D. CONST. art. VI, § 24; TEX. CONST. art. I, § 23; UTAH CONST. art. I, § 6; VT. CONST. ch. I, art. 16; WASH. CONST. art. I, § 24; W. VA. CONST. art. III, § 22; WYO. CONST. art. I, § 24.

69. See Hardy, *Historiography*, *supra* note 11, at 43-59.

70. See Herz, *supra* note 10 and accompanying text.

71. See *supra* note 11 and accompanying text. It is not within the scope of this Article to review, yet again, all the arguments in favor or against this position, but rather to indicate that there is an arguable historical basis for this interpretation of the Second Amendment.

were heavily armed, and no one attempted to disarm them. On the other hand, the Indians and slaves did not have the law on their side and were often desperately fearful of attacks by armed whites. Did the law and the Constitution protect their rights to defend themselves by being armed? Certainly not. Indians were considered enemies—not citizens—and therefore, they were not entitled to protection under the Constitution<sup>72</sup> according to the infamous *Dred Scott* decision, in which Chief Justice Taney expressed his horror at the thought of ruling that slaves were citizens, for then, presumably, slaves would have the right to be armed under the Second Amendment.<sup>73</sup> Some African-American commentators ironically say that, although Taney was wrong in his central holding, he was right in asserting that the Second Amendment protected the right to be armed.<sup>74</sup> They argue that armed blacks have discouraged and defended themselves against attacks by groups like the Ku Klux Klan.<sup>75</sup> They further argue that the Second Amendment should therefore be considered a bulwark in protecting African-American citizens in their legitimate right to self-defense because it would keep them from being disarmed as they were before the Civil War.<sup>76</sup> Some even argue

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72. The Framers left the legal status of Native Americans indefinite, although it was implied that they were not considered citizens entitled to the rights guaranteed by the Constitution. This position was later endorsed in the decision *Cherokee Nation v. Georgia*, which set forth the relationship of American Indians with the United States. 30 U.S. (5 Pet.) 1 (1831).

In *Cherokee Nation*, the Cherokee tribe, as an independent nation, sought an injunction against the state of Georgia from enforcing state laws and seizing Cherokee lands. *See id.* at 15. In denying the injunction, Chief Justice Marshall refused to recognize the Cherokee as a foreign nation and definitively established all Indian tribes as sovereigns to the federal government, possessing neither collective nor individual rights under the Constitution. *See id.* at 17. Marshall stated that the Indian tribes were in "a state of pupilage" and that their relation with the United States resembled that of a ward to his guardian. *See id.* Therefore, Marshall went on to hold that Indians were entitled only to those rights that Congress chose to bestow upon them, not those granted citizens under the Constitutions. *See id.* at 18.

73. *See Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).

74. *See generally* Cottrol & Diamond, *Afro-Americanist*, *supra* note 11. These scholars argue that the *Dred Scott* decision implicitly recognized the individual citizen's right to arms. Therefore, all Americans, including African-Americans, have the natural right to arm themselves. *See id.*

75. *See* Cottrol & Diamond, *Racial Disparity*, *supra* note 11, at 351-54.

76. *See* Cottrol & Diamond, *Afro-Americanist*, *supra* note 11, at 349-55 (noting the importance that the right to arms had in African-American self-defense).

The disarming of African-Americans following the Civil War was a widespread practice in the South. *See id.* *Plessy v. Ferguson*, 163 U.S. 537 (1896), paved the way for segregation and separate treatment of black Americans. *See* Cottrol & Diamond, *Afro-Americanist*, *supra* note 11, at 350. While *Plessy* has since been overturned, some modern Second Amendment scholars fear that current gun control legis-

that the true purpose of gun control legislation since the Civil War has been to disarm blacks again.<sup>77</sup> The acceptance of this argument, however, could be very dangerous to African-Americans and other minorities. The danger comes from the possibility that white racist citizens, like members of the Ku Klux Klan, could also rely on this interpretation of the Second Amendment to resist being disarmed. Moreover, the main danger in many minority communities is the presence, not the absence, of guns and other arms.<sup>78</sup> In light of the present situation, in which African-Americans and other minority groups are frequently the victims of gun violence, I think it is unlikely that the Supreme Court would adopt an historical argument that the Second Amendment insures the right of one group of citizens to be armed in order to contend with another group of armed citizens.<sup>79</sup>

*b. The Right to Keep Arms For Self-Defense by Individuals*

The historical argument for keeping arms for individual self-defense may be more persuasive. In modern criminal law, there are assumptions that the responsibility for keeping peace has passed from the individual to the state and that the use of force to keep the peace is effectively a state monopoly. This modern view differs markedly from eighteenth century views.

In the eighteenth century, individuals and families often lived far from any effective governmental help.<sup>80</sup> Self-defense was essentially the only defense and that defense usually required guns or some other weapons. Even in towns there was no regular police, and residents had to rely on themselves and their

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lation may have disparate racial implications and risks escalating oppressive conduct toward disarmed African-Americans. *See id.* at 360-61; Cottroll & Diamond, *Racial Disparity*, *supra* note 11, at 1333-34.

If, as these scholars allege, gun control laws are discriminatory as applied against African-Americans, an alternate argument might be made. Gun control legislation applicable to some groups and not others would present serious equal protection issues under the Fourteenth Amendment. Therefore, challenges to gun control legislation might prove more effective under the Equal Protection Clause than the Second Amendment for those arguing that such laws are racially motivated.

77. *See Cottroll & Diamond, Afro-Americanist, supra* note 11, at 360-61; Cottroll & Diamond, *Racial Disparity, supra* note 11, at 1333-34; Reynolds, *supra* note 11, at 494 (noting that the "state rights" theory of the Second Amendment arose in the twentieth century as an attempt to uphold laws primarily intended to disarm African-Americans and immigrants).

78. *See generally*, Bogus, *supra* note 10; Herz, *supra* note 10.

79. *See Reynolds, supra* note 11, at 464-71.

80. *See generally* Kates, *Original Meaning, supra* note 11, at 214-16.

arms for protection. Indeed, when public force was used for protection, private arms often played a role. Private individuals, privately armed, were frequently pressed into service.<sup>81</sup> It would be hard to argue that at the time of the adoption of the Second Amendment, the right of the individual to armed self-defense had been ceded to the state. Even today there are vast open areas which are lightly policed and dangerous urban areas where it would seem foolhardy to await the assistance of the police when under attack. As in the eighteenth century, self-defense today is often a necessity.<sup>82</sup> However, the issue is not whether a right of self-defense was recognized at the time of the adoption of the Bill of Rights, but rather, whether the Second Amendment was intended to protect the right to keep arms for this purpose.

Neither the federal government nor the states have ever purported to eliminate the right of self-defense through gun control laws. They have, however, restricted access to arms and regulated the varieties of arms which can be kept for self-defense. If the Supreme Court construed the Second Amendment to protect the right to keep arms for self-defense, it would be compelled to review all gun control legislation in the light of this Amendment. Initially, the Court would have to determine what kind of arms would be protected under this theory.

If the right of self-defense is an accepted justification for the right to keep arms under the Second Amendment, the type of arms kept would still have to have a reasonable relation to self-defense. The right to keep arms for self-defense would certainly

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81. *See id.*

82. *See* Moncure, *supra* note 11, at 590. William Blackstone noted that the common law recognized the three fundamental rights of the people as "the right to personal security, the right of personal liberty and the right of private property." 4 BLACKSTONE, *supra* note 65, at 3. In fact, Blackstone identified self-defense as the "primary law of nature so it is not, neither can it be, in fact, taken away by the law of society." *Id.* at 144.

James Kent, a nineteenth century legal commentator, also likened the right of self-defense as a natural law that "cannot be superseded by the law of society." 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW, 16. He noted that "municipal law . . . has . . . left with individuals the exercise of the natural right of self-defense, in all those cases in which the law is either too slow or too feeble to stay the hand of violence." *Id.*

These commentaries concerning the fundamental nature of the right to individual self-defense suggest that modern challenges to gun control legislation might fair well if framed as intrusions upon the substantive due process clauses of the Fifth and Fourteenth Amendments. While the Supreme Court has been reluctant to expand its list of "fundamental rights," the historical antecedents to the right of armed self-defense are stronger and more clear than those for the recognized rights of abortion or birth control and, therefore, could also conceivably be recognized by the Court.

not include the right to keep an arsenal. Even under a self-defense reading of the Second Amendment, the state could limit the kind and number of weapons that could be kept to those appropriate for self-defense. To do this, the Court would need to review legislation to determine if it impinged on the legitimate keeping of arms for self-defense, either on its face or as applied.

The Supreme Court in *United States v. Miller*<sup>83</sup> suggested that if the possession of arms was protected under the Second Amendment, it was limited to arms similar to those used in the militia.<sup>84</sup> Because the Supreme Court made this limitation, perhaps it should have also limited possession to those weapons that were used in the eighteenth century: the swords, rifles, and muskets of the colonial militiaman. Or perhaps the Court should have held that the possession of all weapons that could be used by state militias in modern warfare is protected under the Second Amendment. In such a case, because almost every kind of weapon may be used in today's warfare, the only arms left unprotected would be those unusable antique weapons that could not be related to military practice.<sup>85</sup> Under this interpretation, arms protected under the Second Amendment could include not only the armed tanks favored by Mr. DuPont,<sup>86</sup> but also high

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83. 307 U.S. 174 (1939).

84. See *id.* at 178. See also Levinson, *supra* note 11, at 654-55 (recognizing that *Miller* can be read to support extreme anti-gun control arguments, including the right of individual possession of "bazookas, rocket launchers, and other armaments"); Kates, *Original Meaning*, *supra* note 11, at 248-50, 260-61 (interpreting *Miller* as requiring arms to be commonly used and part of ordinary military equipment to qualify for Second Amendment protection). *But see*, Herz, *supra* note 10, at 68 (questioning a broad reading of *Miller*, which conceivably allows private possession of military armament).

85. See *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942). The court in *Cases* was forced to interpret the extent of *Miller* just three years after the Supreme Court decided that case. In affirming a conviction for the illegal transport and receipt of firearms and ammunition, the First Circuit construed the reach of *Miller*, stating that "if the rule of the *Miller* case is general and complete, the result would follow that, under present day conditions, the federal government would be empowered only to regulate the possession or use of weapons such as flintlock musket or matchlock harquebus." *Id.* at 922. The court held that such a reading of *Miller*, limiting federal regulatory power to antique weaponry and protecting any arms tenuously related to the militia, "is in effect to hold that the limitation of the Second Amendment is absolute." *Id.* In refusing to give *Miller* this effect, the First Circuit dismissed the notion that any weapon that conceivably could qualify as a militia-type weapon is beyond the scope of federal control. See *id.*

86. John DuPont, an eccentric millionaire from suburban Philadelphia, was known for his extensive weapons collection and for driving about in an armored military vehicle. In January of 1996, Mr. DuPont stayed off police for two days with the threat of his armament while he was being sought for shooting a guest to death on his estate. See *N.B.C. Nightly News: Eccentric Millionaire John DuPont Arrested*



explosives or even atomic weapons.<sup>87</sup>

This would, of course, be absurd. What is not absurd, however, is to consider how difficult it is to be true to the eighteenth century in the twentieth century. Under a self-defense theory, there would be formidable problems of deciding which weapons are or are not suitable for self-defense in view of modern concerns. The current perception about which weapons are suitable for self-defense has clearly evolved since the eighteenth century. For example, the possession of weapons is more widespread today, and the weapons themselves are now more varied and lethal.<sup>88</sup> If an intruder could have a machine gun, is a machine gun necessary to defend against potential intruders? If the Supreme Court were to adopt a self-defense theory it would be forced to resolve countless issues such as this. In case after case, the Court would then have to consider which weapons would warrant Second Amendment protection.<sup>89</sup>

An added concern regarding the self-defense theory is the suggestion that a right to self-defense exists to protect not just a home but a neighborhood; in other words, the self-defense theory may extend to a collective self-defense. This notion of a collective self-defense raises the issue of whether a group has the right to have an armed private "police." America has a long tradition of private police including Pinkertons, company police, security guards, and even the "Town Watch" movement.<sup>90</sup> These private police are both lauded and feared and are usually carefully regu-

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for *Murder of Olympic Wrestler*, (NBC television broadcast, Jan. 29, 1996).

87. See Levinson, *supra* note 11, at 654-55.

88. See Dunlap, *supra* note 10, at 666-68.

89. See Levinson, *supra* note 11, at 653-56; Kates, *Original Meaning*, *supra* note 11, at 248-61; Herz, *supra* note 10, at 68.

The political furor surrounding the "Assault Weapons Ban" illustrates the passionate arguments a court might face if an individual right to armed self-defense was recognized. Enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, the statute prohibits nineteen types of semi-automatic weapons. See 42 U.S.C. §§ 13701-14223 (1994). Hotly debated in Congress, the assault gun ban still stirs controversy in both academia and popular America. See Harry A. Chernoff, et. al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527 (1996); Herb Kohl, *Response to The Politics of Crime*, 33 HARV. J. ON LEGIS. 581 (1996); See also Kopel, *supra* note 11.

90. Town Watch groups became popular in the 1980's as a local method of combating crime. These private groups, which often act in tandem with law enforcement, have grown significantly in their number and effectiveness. See Walt Philbin, *Local Parties Leading Again: "Night Out" Tops in United States*, NEW ORLEANS TIMES-PICAYUNE, Oct. 9, 1996, at B1 (documenting the Town Watch movement and noting that the 13th annual Town Watch "night out" involved over 29.5 million Americans in 9,000 communities).

lated. Under the self-defense theory of the Second Amendment, the Court would have to consider whether the keeping of arms by these private police would be entitled to heightened constitutional protection. Specifically, the Supreme Court would be asked whether these groups could assert the right to keep arms appropriate to a police force yet not allowed to individuals.

This, and a myriad of other related questions, would face the Court if it adopted a self-defense theory of the Second Amendment. As a further example, if one has the right to possess arms for self-defense under the Second Amendment, a related question would arise of whether one has the right of access to these arms. If there is such a right, the Court would be asked to review a wide range of laws, both federal and state, that limit access to and possession of arms in the following manner: first, by controlling the manufacture, importation, and sale of arms; second, by requiring licensing and registration of guns;<sup>91</sup> and third, by regulating the concealment of guns.<sup>92</sup> Federal laws that create such limits on the use and possession of arms used in self-defense would be open to constitutional scrutiny under the Second Amendment.

In conclusion, it is unlikely that the Supreme Court would extend the state militia theory to an absolute right of self-defense.<sup>93</sup> I doubt that the Court would cut anchor from this interpretation of the Second Amendment unless the Court was persuaded that history and logic compelled the adoption of an individual right to keep and bear arms. Policy could also convince the Court that to refuse to adopt this reading would expose peo-

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91. See, e.g., the Brady Handgun Violence Protection Act, 18 U.S.C. § 922(s) (1994) ("Brady Act"). The Brady Act amended the Gun Control Act of 1968 and requires mandatory waiting periods and background checks prior to the purchase of a handgun. The constitutionality of the Act was immediately challenged in the Senate where it was hotly debated and became the subject of filibusters, amendments, and presidential veto threats. H.R. REP. NO. 103-344, at 12-13 (1993). For further discussion of the debate surrounding the Brady Act and other restrictive legislation, see Bob Dole, *The Brady Bill: It's Just Not Enough*, 3 KAN. J.L. & PUB. POL'Y 135 (1993-94); Dyan Finguerra, *The Tenth Amendment Shoots Down The Brady Act*, 3 KAN. J.L. & PUB. POL'Y 637 (1995); Ronald A. Giller, *Federal Gun Control in the United States: Revival of the Tenth Amendment*, 10 ST. JOHN'S J. LEGAL COMMENTARY 151 (1994).

92. See also Clayton E. Cramer & David B. Kopel, "Shall Issue:" *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679 (1995) (exploring legislation affecting the right to carry concealed handguns).

93. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing that the due process right of privacy limits a legislature's freedom to proscribe or regulate abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the first major modern case to protect a fundamental right using substantive due process reasoning).

ple to the deprivation of meaningful rights which could only be secured by judicial protection. I do not think the Court would be persuaded by the argument that such a reading is at least as plausible as a state militia reading. The language of the Second Amendment connects the right to keep arms to the militia, and historically, the fear of a standing army can explain this connection.

*c. The Right to Keep Arms for Hunting or Other Recreational Uses*

Some of the most fervent arguments for Second Amendment protection for the keeping of guns come from those who keep guns for hunting or other recreational purposes. In the eighteenth century people kept guns for hunting, sport, and dueling.<sup>94</sup> Undoubtedly, people also kept gun collections.<sup>95</sup> However, it is not likely that possession of weapons for these uses was protected as a right under the Second Amendment. For, while there is legitimate argument that self-defense is an inalienable right, and the right to keep arms was given to support this right, there is no similar argument for hunting, shooting, gun collecting or other recreational uses of guns. Although in the eighteenth century hunting may have been relatively free from restraint, in the last two centuries the states have increasingly regulated this activity in the interest of game management and public safety. It is unlikely that arms used for hunting would be protected any more than the right to hunt itself.<sup>96</sup>

It is true that, at the time the Bill of Rights was adopted,

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94. See Kates, *Original Meaning*, *supra* note 11, at 228-29; Moncure, *supra* note 11 (recognizing traditional reasons for gun possession in the United States as defense of self and state, hunting, and recreation).

95. Thomas Jefferson, for one, maintained a substantial collection of weapons at Monticello and was a supporter of the individual right to arms. He wrote:

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

1 THE JEFFERSONIAN CYCLOPEDIA 318 (John P. Foley ed., reissued 1967).

96. See *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371 (1978). In *Baldwin*, the Supreme Court upheld a Montana statute which required out-of-state hunters to pay a higher license fee to hunt than Montana residents. See *id.* at 372-73. In holding that the licensing system did not violate the Privileges and Immunities Clause of Article IV, the Court noted that recreational hunting is not a fundamental right and therefore is readily subject to state and local regulation. See *id.* at 388.

Americans highly valued their right to hunt. Some Pennsylvanians, who were as passionate of hunters then as now, wanted the right to keep arms for hunting to be included in the Bill of Rights.<sup>97</sup> However, no such express right was included, and there is little reason to believe that the failure to mention hunting within the language of the Second Amendment was an oversight or a belief that it was already covered elsewhere. It would be difficult to show that the right to keep arms for hunting was either a common-law or natural right of the same order of importance as the right to keep arms for self-defense.<sup>98</sup>

Although one judge has indicated that gun collectors ought to be considered differently than collectors of other items<sup>99</sup> because of the Second Amendment, I do not think the Supreme Court would adopt this position either. To do so would require a reading of the Second Amendment as a protection of the keeping of arms no matter how trivial the reason.

### III. STATE AND FEDERAL POWER UNDER THE SECOND AMENDMENT

If the Supreme Court held that the Second Amendment is only designed to protect state militia from federal interference, the Amendment would not be a limit on the state's power to enact gun control laws but would only be a limit on the federal government's power to do so. However, if the Supreme Court held that the Second Amendment creates a personal right to keep arms, the Supreme Court would be required to decide whether or not the Second Amendment was incorporated by the Due Process Clause of the Fourteenth Amendment. It is difficult to imagine that the Supreme Court today would hold there is an

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97. See Hardy, *Historiography*, *supra* note 11, at 45-46. The minority delegates at the Pennsylvania State Convention of 1790 unsuccessfully proposed express protection for the right to bear arms for hunting. The proposal stated "[t]hat the people have a right to bear arms for the defense of themselves and their own State . . . or for the purpose of killing game . . ." *Id.* at 46 (emphasis added).

98. Regardless, respect for hunters' interest groups is a powerful influencing factor on gun control legislation. For example, President Clinton has repeatedly emphasized that the gun control laws he favors, such as the Brady Act and Assault Weapons Ban, do not restrict the ability to hunt. President Clinton has contended that "two hunting seasons have come and gone since the two bills have been enacted and no sportsman has lost a gun or the right to hunt." Thomas B. Edskall, *Wedge Attack May Not Find an Opening: Administration Has a Defense in Place*, WASH. POST, Oct. 18, 1996, at A32.

99. See *United States v. Breier*, 827 F.2d 1366 (9th Cir. 1987) (Noonan, J., dissenting) (likening a defendant gun collector to "a hobbyist who has been turned into a criminal by the too vivid zeal of government agents and prosecutors").

individual right to keep arms protected against federal laws but not against state laws. Such a holding would suggest that the Amendment gives protection against Washington D.C., but not against Boston. Notwithstanding this, some cases indicate the Court might not find that the Second Amendment was incorporated by the Due Process Clause of the Fourteenth Amendment.<sup>100</sup> I think it is clear that if the Supreme Court held that individual rights were protected under the Second Amendment, it would find that the Amendment is applicable to the states.

A fascinating issue that could arise if the Supreme Court held there was an individual right to keep arms is whether the Second Amendment is both a limit on federal power and a potential source of federal power. In other words, could Congress declare, contrary to *Miller*, that the Second Amendment does protect the individual right to keep arms and pass legislation limit-

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100. See *Presser v. Illinois*, 116 U.S. 252 (1886) (noting that the right of citizens to arm themselves affects only the federal government and not the states); *United States v. Cruikshank*, 92 U.S. 542 (1875) (recognizing that the individual right to bear arms existed prior to the Constitution, but holding that the Second Amendment restricts only federal intrusion on that right).

Those African-American scholars who argued that the Second Amendment should have aided blacks in their right to defend themselves after the Civil War would be shocked by such a holding. Their whole argument is premised on the unsailable assumption that the ante-bellum laws, which disarmed blacks, would be struck down after the enactment of the Fourteenth Amendment. See Cottrol & Diamond, *Afro-Americanist*, *supra* note 11, at 345-49. Arguably, the ante-bellum laws which disarmed the freed slaves were a significant influence on the Thirty-ninth Congress' debate concerning the Fourteenth Amendment. See *id.* at 346. They also played a part in the nation's broader reconsideration of the balance between principles of federalism and individual rights. See *id.* However, whether or not Congress intended the Fourteenth Amendment to protect citizens from state deprivations of the Bill of Rights, the Supreme Court, beginning with the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), sought to preserve the nation's pre-war federalist structure and judicially limited the Fourteenth Amendment's scope. See Cottrol & Diamond, *Afro-Americanist*, *supra* note 11, at 346-47. As a result, the Second Amendment was effectively limited to application against the federal government, and the post-war disarming of African-Americans was allowed to continue. See generally *Cruikshank*, 92 U.S. at 542. Without the protective arm of the federal government to ensure their right of armed self-defense, the personal security and political rights of southern blacks were left largely to hostile state governments. See Cottrol & Diamond, *Afro-Americanist*, *supra* note 11, at 348. In the Jim Crow era that followed, the necessity of bearing arms would become a critically important issue to African-Americans. See *id.*

The United States' history of marginalization and discrimination against women also raises interesting issues concerning the effect a limited Second Amendment right has on female citizens. See Inge Anna Larish, Note, *Why Annie Can't Get Her Gun: A Feminist Perspective on the Second Amendment*, 1996 U. ILL. L. REV. 467 (1996) (noting that women are denied the right of self-defense and protection under a reading of the Second Amendment that does not grant an individual the right to bear arms).

ing state gun control laws under its power to enforce the Fourteenth Amendment?<sup>101</sup> If so, would the Supreme Court be bound by this congressional declaration? I think the Court would not consider itself bound, but would distinguish the attempt of Congress to expand the scope of a right and its attempt to create a right.<sup>102</sup> However, if the Supreme Court were to adopt an individual rights theory, Congress would have power to limit state gun control legislation under section five of the Fourteenth

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101. Arguably, Congress has already made such a statement. See 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 (1995). Following the Civil War, Congress passed the Freedmen's Bureau Act of 1866 in response to the Southern State's slave codes, which forbade basic civil rights, including the right to bear arms, from African-Americans. See *id.* at 598. The act specifically provided that the new American citizens should have "full and equal benefit of all laws and proceedings concerning personal liberty . . . including the constitutional right to bear arms . . ." *Id.* The same Congress adopted the Fourteenth Amendment two years later. See HALBROOK, *supra* at 598. In 1941, Congress spoke again concerning the inherent nature of the right to keep weapons. When it passed the Property Requisition Act during the Second World War, Congress specifically exempted personal firearms from the scope of the act, noting that "nothing in this Act shall be construed . . . to impair or infringe in any manner the right of any individual to keep and bear arms." Property Requisition Act of 1941, Pub. L. No. 274, 55 Stat. 742; see HALBROOK, *supra* at 599. Finally, in 1986, Congress reaffirmed the right to keep and bear arms for the third, and most recent time. In the Firearms Owners' Protection Act of 1986, Congress noted that the "rights of citizens . . . to keep and bear arms under the Second Amendment to the United States Constitution . . . require[d] additional legislation to correct existing firearms statutes and enforcement policies . . ." Firearms Owners' Protection Act, 18 U.S.C. § 921 (1994).

102. The "ratchet theory," a theory propounded by Justice Brennan, suggests that Congress has the power to expand the prism of substantive rights guaranteed under the Fourteenth Amendment, but lacks the power to dilute them. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Further, while Congress has the power to broaden a right, it is precluded from creating a new right under the auspices of the Fourteenth Amendment. See *EEOC v. Wyoming*, 460 U.S. 226 (1983) (Rehnquist, J., dissenting). Therefore, the deference afforded to Congress by the Court might validate legislation that expands the scope of the Second Amendment guarantee to arms and effectively limits *Cruikshank's* rule of the non-applicability of the Second Amendment to the states. However, such legislation could neither dilute the right to bear arms nor could it be viewed as creating a new substantive right to take its place. See *Wyoming*, 460 U.S. 226 (Rehnquist, J., dissenting).

Quite opposite from the issue of Congress expanding the right to bear arms, substantial questions arise concerning Congress's ability to otherwise federally restrict that right. Since the 1930s, Congress has found little difficulty in sustaining federal health and safety legislation under one of its enumerated powers, such as the taxing and spending power or its control over interstate commerce. Recently, however, in *United States v. Lopez*, 115 S. Ct. 1624 (1995), what seemed a settled principle became unsettled. In a five-to-four decision, the Court struck down a federal statute prohibiting the possession of firearms in a school zone as not sufficiently connected to commerce. The ramifications of *Lopez* have not been worked out, but it is possible that the limits on federal power in Article I and an appeal to state rights under the Tenth Amendment might prove an effective barrier to federal gun control legislation.

Amendment.<sup>103</sup>

#### IV. JUDICIAL REVIEW UNDER THE SECOND AMENDMENT

As discussed above, under a state militia theory of the Second Amendment, few, if any, cases would arise involving federal gun control statutes impinging on state militia because no gun control legislation has been directed at the keeping of arms for state militia purposes. Thus, there is little need to discuss what level of scrutiny would be appropriate in cases where gun control legislation is challenged under the Second Amendment. However, under a theory that the Second Amendment is applicable to individual possession of arms, there would be many cases to review because almost all gun control laws could be challenged for impinging on someone's right to keep arms. Some cases would involve threshold questions, like those previously discussed, concerning what kind of arms are covered by the Second Amendment.<sup>104</sup> More questions would arise in cases such as those involving hand gun regulations, where the weapons regulated are appropriate for self-defense.<sup>105</sup> In these self-defense cases, the Court would first make a finding that the regulation did impinge on the individual right to keep arms for self-defense and then decide whether the regulation was invalid under the Second Amendment. When there is a clear conflict between a gun control statute and the asserted right to keep arms, it is unlikely that the Supreme Court would hold this right absolute and require a constitutional amendment to sustain any state or federal legislation that impinges on the keeping of arms.<sup>106</sup> Rather, the Court will likely consider the conflict between the Second Amendment right to keep arms and the government's right under its police power to control arms to protect the public against danger of death and injury caused by weapons. The Court would then be faced with the problem of deciding what approaches and tests should be used for judicial review in these cases.

One suggested approach is to treat the Second Amendment like the First Amendment. The most famous slogan of those who

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103. U.S. CONST. amend. XIV.

104. See *supra* notes 85-91 and accompanying text.

105. See *Kates*, *Original Meaning*, *supra* note 11.

106. This analysis will occur no matter how strongly the state or the federal government connects the legislation to its interest in public peace and safety. See Van Alstyne, *supra* note 11, at 1253 (noting that although the right to bear arms may be personal, the right is not necessarily absolute).

oppose gun controls is "Guns Don't Kill, People Do." Implicit in this slogan is the argument that harm comes not from the mere possession of arms, but from their improper use. Because gun control regulations that focus on obtaining and possessing guns necessarily apply before any harm has been done, it could be argued that the Court should adopt a First Amendment approach in Second Amendment cases and apply a "prior restraint" standard similar to that applied in First Amendment cases involving freedom of speech or of the press.<sup>107</sup> Under the "prior restraint test," almost all gun control regulations would be presumptively unconstitutional, and a very heavy burden would be placed on the state to overcome this presumption. Arguably, a free speech standard is appropriate because both the right to free speech and the right to keep arms are essential to a democracy. It could be argued that just as free speech is essential to the functioning of our democracy, so too is the right to keep and bear arms essential to our survival as a free people.

The likely success of this "free speech" argument is doubtful. First, the values that would be protected under the Second Amendment have little to do with those that gave rise to the prior restraint standard under the First Amendment; the fear of "chilling effects" of prior restraints on the exercising of First Amendment rights is hardly applicable to the Second Amendment. Opinions are formed and laws are made by the effect of words, not guns. Second, the possibility of harm coming from the possession of a press is quite different from the possibility of harm from possession of a gun. The First Amendment may, in most cases, require us to wait until we hear the words, but does the Second Amendment require us to wait until we hear the gunfire? The state surely has an interest in preventing carnage, not just in picking up the dead and wounded and punishing those responsible. A legislature cannot be presumed to have acted unconstitutionally when it passes gun control measures for the purpose of preventing the harm that can be caused by guns.

For the same reasons that the Supreme Court would reject a "prior restraint" test, it is also highly unlikely that the Court would adopt other standard First Amendment tests such as a "clear and present danger" test,<sup>108</sup> a *Brandenburg* "proximity"

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107. The Doctrine of Prior Restraints was a reaction against the old English licensing scheme by which nothing could be published without prior state approval. In reaction, First Amendment establishes that any governmental action that prevents expression from occurring, as distinguished from punishment once it had occurred, is presumptively unconstitutional. See *Near v. Minnesota*, 283 U.S. 697, 719 (1931).

108. The Clear and Present Danger Doctrine was developed by Justice Oliver



test,<sup>109</sup> or an "overbreadth" test.<sup>110</sup>

The Court must be persuaded to adopt a "balancing test." This test would require the Court to balance the interest the state has in preventing harm against the interest of the individual to possess arms.<sup>111</sup> Because the safety of many (the public) always outweighs the safety of one, application of this "balancing test" would not be very effective in protecting the right to keep arms. Any protection offered by a balancing test like this may well prove illusory because the weights are loaded in favor of the state. However, one benefit of such a test would be that the Court would require the state to come forth with evidence of real danger posed by gun ownership, rather than hypothetical assumptions. Unfortunately, this evidentiary requirement may again prove of little practical advantage to those who oppose gun controls laws.<sup>112</sup> The legislature would have little trouble finding some experts and some data to bolster its safety claims, and legislative judgment that is supported by evidence, especial-

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Wendell Holmes and holds that speech, which has "all the effect of force," is not protected by the First Amendment. See *Schenck v. United States*, 249 U.S. 47, 52 (1919). Under this Doctrine, legislation restricting First Amendment free speech will be upheld if necessary to prevent grave and immediate danger. See *id.* at 52.

109. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In *Brandenburg*, an anonymous *per curiam* decision by the Supreme Court, the Court purported to summarize the previous fifty years of free speech analysis. See *id.* at 447-48. The Court stated that legislation which proscribes speech is unconstitutional unless it is directed to inciting *imminent* lawless action and is likely to incite or produce such action. See *id.* at 448-49.

110. The Overbreadth Doctrine maintains that the government may not achieve its concededly valid purpose by legislation that has an unnecessarily broad reach. See *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The doctrine requires that a statute be invalidated if it punishes protected speech or conduct in its effort to regulate otherwise unprotected expression. See *id.* at 613.

111. Justice Harlan interpreted the Fourteenth Amendment with such a balancing approach. He believed that in recognizing that a person has a liberty interest under the Due Process Clause, a court still needed to balance the interest with the countervailing interest asserted by the state. See *Shapiro v. Thompson*, 394 U.S. 618, 672 (1969) (Harlan, J., dissenting). In this respect, fundamental rights existed on a continuum, where competing state and individual interests must be weighed. This balancing approach to the rights falling within the Fourteenth Amendment has greatly influenced recent Supreme Court decisions. See *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261 (1990) (weighing state and liberty interests in a case involving the right to refuse medical treatment); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (weighing state and liberty interests in a case involving a woman's right to abortion); see also Brian C. Goebel, Note, *Who Decides if There is "Triumph in the Ultimate Agony?": Constitutional Theory and the Emerging Right to Die with Dignity*, 37 WM. & MARY L. REV. 827 (1996) (exploring Harlan's balancing approach to liberty interests and applying those principles to "right to die" cases).

112. For an in-depth examination of a compelling argument for the modern push for gun control legislation, see Herz, *supra* note 10.

ly when it concerns public safety, is unlikely to be overturned even if there are good arguments and evidence supporting a different conclusion. Except for the rare case of gun control legislation that has no connection to public safety, gun control legislation would survive scrutiny by the Court under a “balancing test.”

An alternate approach available to the Court is to treat the Second Amendment right to bear arms as a fundamental right and subject any gun control legislation or regulation that impinges on this right to a strict scrutiny test.<sup>113</sup> It could be argued that this test should be applied to protect Second Amendment rights because the Second Amendment rights are specifically enunciated in the Constitution. This test would require that the legislation be narrowly tailored to accomplish a compelling state interest. Although this strict scrutiny standard would seem to give more protection to those challenging gun control legislation than would a “balancing test,” it is doubtful that the adoption of this test would significantly advance their cause. Again, the reason gun control legislation would survive even this test is the overwhelming public safety concern. In the context of this strict scrutiny, the Court would most likely find that public safety constitutes a compelling state interest, and legislation would pass muster on this count. However, despite proof of a compelling state interest for regulations, the legislation must face one additional hurdle under this strict scrutiny test—it must be narrowly tailored. In a few cases, proponents of gun control legislation might convince the Court that the legislation is not narrowly tailored. For instance, if the state asserted a safety concern with assault weapons, legislation that also covered hand guns might be challenged. But few disputes will be of this nature. Most legislation will assert broad safety concerns and broad gun control measures to match, covering both “good” and “bad” gun possessors and “good” and “bad” guns. Such legislation cannot be narrowly tailored to reach only the bad people who kill with their innocent guns. I think it is doubtful that the Court would strike down gun control laws as poorly tailored and give sewing lessons on the correct patterns of gun control legislation to Congress or state legislatures.

In conclusion, even if the opponents of gun control laws can convince the Court that the Second Amendment does cover indi-

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113. See BLACKSTONE, *supra* note 65; Moncure, *supra* note 11, at 590 (stating that the right to have arms is auxiliary to the fundamental right to self-defense).

vidual possession of arms, they may have won the battle but not the war. Gun control laws may well pass muster under whatever "test" the Court might apply in reviewing them.

## V. CONCLUSION

I think the Supreme Court is not likely to rely on the Second Amendment to invalidate either federal or state gun control laws for several reasons. The primary reason for this conclusion is that guns are dangerous, and the criminal or accidental use of guns can kill or wound. Gun control laws are enacted to diminish this danger. Of course, there are fiery disputes between "pro-gun" groups and "anti-gun" groups about such questions as whether the danger has been over-estimated, whether some guns are more dangerous than others, and whether particular regulations would be effective. Instead of attempting to resolve all of these issues in the courts, I believe the Court would determine that these issues are best left to Congress or state legislatures. Therefore, I think that the Supreme Court would avoid these problems by adhering to a reading of the Second Amendment which would conclude that no personal right to keep arms is secured by the Amendment, and, therefore, gun regulation affecting the possession of guns does not present a Second Amendment question.

However, it is possible that the Court might be persuaded by the barrage of articles and books supporting an individual rights theory.<sup>114</sup> If the Court adopted this reading of the Second Amendment, it would have to consider the Amendment when reviewing gun control laws. I believe that in reviewing such legislation, the Court would reject First Amendment tests and apply a balancing test to weigh the Second Amendment interest against the state's interest in public safety. The Court would give great weight to the state's safety interest and, as stated above, would be unlikely to substitute its judgment for the state's determination. The scales would tip almost always in favor of the state. Only in cases where there is obviously no arguable safety interest would the scales come down in favor of the Second Amendment claim, and it is difficult to imagine that much, if any, gun control legislation would be of this character.

The Court might be persuaded to adopt a strict scrutiny

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114. These theories suggest that any other decision would make the Second Amendment almost meaningless and would be inconsistent with the idea of the right to keep arms at the time of the adoption of the Amendment.

standard, which could put the broadest gun control legislation into question, but even then the state would be likely to prevail except in the rare case where the legislation was very badly tailored indeed. Thus, all, or almost all, cases would be resolved in the same way, whether or not the Second Amendment is applied and whether or not the Court adopts a strict scrutiny standard. At least in the courts, the sound and the fury over the correct reading of the Second Amendment would signify nothing.

On the other hand, in the popular press, the scholarly journals, and the legislative halls, arguments about the Second Amendment continue to signify a great deal. Whether or not they have forensic importance, Second Amendment studies illuminate important pages in our early history. A commitment to independence and self-sufficiency characteristic of many Second Amendment enthusiasts can sometimes take an ugly and dangerous form as in Waco or recently here in Montana,<sup>115</sup> but it should not be forgotten that these values have deep roots in American history and in the American psyche. To ignore or depreciate these values would be insensitive to our history and to the basic beliefs of many honest present-day Americans. In considering gun control proposals, legislators should give heed not only to the voting power of gun control opponents (which they obviously do), but also give weight to the fact that many Americans believe that they have an historic right as free Americans to keep arms to ensure their liberty and safety. In the war over gun controls, the Second Amendment may be considered far more relevant in arguments in the public forum than it would be in arguments before the Supreme Court.

Gun control opponents may win in the legislature, although they would lose in the courts. It is not a bad thing for the legislatures to protect rights that have not been protected by the Su-

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115. The potential threat of an armed citizenry recently manifested itself in the 1993 Waco, Texas disaster and the 1995 Freeman Compound standoff.

In Waco, an armed group of religious zealots held off government law enforcement for several weeks following a dramatic shootout in which numerous federal agents and cultists were killed and injured. The standoff ended when the religious sect burned their compound, killing everyone inside. See Dick Johnson, *40 Bodies of Cult Members are Found in Charred Ruins*, N.Y. TIMES, April 22, 1993, at A1.

While not rising to an exchange of gun fire, the standoff at the Freeman compound in Montana also exemplified the potential threat of a renegade armed group to both the community and the nation. The Freemen, a group claiming independence from national authority, threatened their neighbors and the federal government with armed resistance in disputes over property annexation. See Kim Murphy, *Renegades Take Refuge in Plain Sight in Montana—Threat of Violence Prevents Capture*, PHOENIX GAZETTE, July 21, 1995, at A23.

preme Court. For example, Congress gives newspaper reporters testimonial privileges from searches and seizures, which had been denied to them under the First Amendment.<sup>116</sup> Additionally, Congress protects the aged and handicapped, who were not given special protection under the Equal Protection clause.<sup>117</sup> However, it may be a bad thing for legislatures to rely on the Second Amendment to justify their refusal to enact gun control laws, ignoring the uniform federal case law and causing confusion in the public about the meaning of the Second Amendment.<sup>118</sup> Additionally, it would be disastrous for legislatures to refuse to provide for public safety because of a mistaken absolutist view of the Second Amendment.

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116. See 42 U.S.C. § 2000aa (1994). This subchapter of the Privacy Protection Act, titled "First Amendment Privacy Protection," prohibits the seizure of a newspaper's or newsperson's work product or documentary materials by a government agent unless the materials are specifically related to a criminal offense. See *id.*

117. See Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (1994); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1994).

118. See Herz, *supra* note 10.