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# THE SECOND AMENDMENT AND STATES' RIGHTS: A THOUGHT EXPERIMENT

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DON B. KATES\*\*

The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."<sup>1</sup> As Professor Sanford Levinson has noted, this Amendment is, on its face at least, one of the murkier constitutional provisions.<sup>2</sup> In recent years, the public debate over the meaning of the Amendment has become more heated, even as the scholarly literature has grown. One major feature of this debate has been disagreement over what the Second Amendment protects. The great majority of recent law review commentary sees the Amendment as recognizing a right of individuals, enforceable by them in the courts after the fashion of, say, the First Amendment.<sup>3</sup> While acknowledging that, like

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

2. "No one has ever described the Constitution as a marvel of clarity, and the Second Amendment is perhaps one of the worst drafted of all its provisions." Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 643-44 (1989).

3. E.g., Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1205-11, 1261-65 (1992); Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1162-73 (1991); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Stephen Halbrook, *What the Framers Intended: A Linguistic Analysis of the Second Amendment*, 49 LAW & CONTEMP. PROBS. 151 (1986); Don B. Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87 (1992) [hereinafter Kates, *Self-Protection*]; Don B. Kates, *The Second Amend-*

freedom of expression, the right to arms was perceived as having social values as well as individual ones,<sup>4</sup> the scholarly literature portrays the Amendment as intimately connected with self-defense, which the Founders saw as the cardinal natural right—a right of individual and collective resistance to tyranny and other forms of criminal conduct.<sup>5</sup> In contrast to the individual rights view, advocates of restricting gun ownership have championed a “states’ right” view of the Second Amendment, contending that its goal is to guarantee only the states’ right to have armed militias, usually characterized as the contemporary National Guard.<sup>6</sup>

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*ment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143 (1986) [hereinafter Kates, *A Dialogue*]; Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 203 (1983) [hereinafter Kates, *Original Meaning*]; Levinson, *supra* note 2; Robert Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125 (1986); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994); F. Smith Fussner, Book Review, 3 CONST. COMMENTARY 582 (1986) (reviewing STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984)); Joyce Malcolm, Book Review, 54 GEO. WASH. L. REV. 452 (1986) (reviewing HALBROOK, *supra*); see also James G. Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 328 (1991) (opining that a right of resistance held by the people was incorporated by the Second Amendment); Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right To Bear Arms*, 139 U. PA. L. REV. 1257, 1268-86 (1991) (stating that the right to bear arms is a distribution of political power, like taxation and voting); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991) (observing that the Second Amendment guarantees a personal right to bear arms under a republican interpretation).

4. “When James Madison and his colleagues drafted the Bill of Rights, they . . . firmly believed in two distinct principles: (1) Individuals had the right to possess arms to defend themselves and their property; and (2) states retained the right to maintain militias composed of these individually-armed citizens.” Shalhope, *supra* note 3, at 133.

5. Kates, *Self-Protection*, *supra* note 3, at 89; see JOYCE L. MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 162 (1994).

The Second Amendment was meant to accomplish two distinct goals . . . . First, it was meant to guarantee the individual’s right to have arms for self-defense and self-preservation . . . .

These privately owned arms were meant to serve a larger purpose [defense of public liberties] as well . . . .

. . . [I]t is the coupling of these two objectives that has caused the most confusion.

*Id.*

6. See Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5

We will not enter that debate in this Article. Instead, we will undertake what physicists term a "thought experiment." We will take as a given that the Second Amendment does what states' rights advocates say it does, protecting only the right of states to maintain organized military forces such as the militia and the National Guard, without creating any rights enforceable by ordinary individuals. We will then explore an issue that has been ignored even by proponents of the "states' rights" interpretation of the Second Amendment: If the Second Amendment grants rights to states, rather than individuals, what exactly are those rights, and what are the consequences for the Constitution and other aspects of state and federal relations? The answers to these questions turn out to be rather startling and likely will displease gun control advocates every bit as much as their opponents. From this conclusion we draw a few lessons on the contemporary state of popular constitutional scholarship and make a modest proposal for improving matters.

### I. STATES' RIGHTS AND INDIVIDUAL RIGHTS

We all know what it means to say that the Bill of Rights creates an individual right. It means that the provision in question—for example, the First Amendment's free-speech clause—carves out an area that is exempt from government control, except perhaps in the most compelling circumstances.<sup>7</sup> Individuals whose rights are violated because the government subjects protected behavior to control absent such compelling circumstances have the right to sue and obtain an injunction or other judicial relief against the government. The meaning of an individual right to bear arms under the Second Amendment would thus be fairly clear. An individual subjected to firearms

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(1989); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991); Warren Spannaus, *State Firearms Regulation and the Second Amendment*, 6 HAMLINE L. REV. 383 (1983).

7. See, e.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) (First Amendment rights "are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."); *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (permitting prior restraint only in exceptional circumstances akin to "publication of the sailing dates of transports or the number and location of troops").

laws not justified by highly compelling circumstances would be able to have the laws struck down by a court as unconstitutional.<sup>8</sup> Such laws would be analyzed in the same fashion as laws entrenching upon other rights protected by the Bill of Rights.

What a states' right interpretation would mean is a bit less clear. The Supreme Court has not done much with states' rights in recent years, and the term itself still suffers a certain amount of opprobrium resulting from its use (more as slogan than legal argument) in the civil rights battles of the 1950s and 1960s.<sup>9</sup> Nor is the Constitution very helpful. Typically, when describing state functions that are protected from federal interference (or, for that matter, when describing governmental authority generally) it uses the term "powers," rather than rights, as in the Tenth Amendment.<sup>10</sup>

8. A further point that is likely to be of more import to enforcement of the Second Amendment than other rights, is that the compelling interest must not be of a kind, or pursued in a manner, that is fundamentally inconsistent with the right. This point is so clear in relation to other rights that it is rarely necessary to emphasize. No matter how compelling the interests in suppressing rape, child abuse, adultery, homophobic violence, or even genocide, those interests may not be pursued by banning writings or movies on the ground that they promote beliefs or ideas that cause such behavior for "the First Amendment's basic guarantee is of freedom to advocate ideas." *Kingsley Int'l Pictures v. Regents*, 360 U.S. 684, 688-89 (1959); see *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542-44 (1992) (speech or expressive conduct cannot be proscribed because of disapproval of the ideas expressed); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 327-32 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986). "Under the First Amendment the government must leave to the people the evaluation of ideas." *Id.* at 327.

Concomitantly, within the individual right view of the Second Amendment, a law barring visitors to prison inmates from carrying weapons may well be justified as representing an interest that is at once compelling and not fundamentally inconsistent. That could not be said of banning all guns (or any guns) under the rationales commonly offered. Examples of such rationales include the assertion "that lethal violence even in self-defense only engenders more lethal violence and that gun control should override any personal need for safety," HEALTH, Mar./Apr. 1994, at 54 (quoting Betty Friedan), that "the only reason for guns in civilian hands is for sporting purposes," David B. Kopel, *Assault Ban Chicanery*, WASH. TIMES, May 5, 1994, at A18 (quoting Sarah Brady, Chairperson, Handgun Control, Inc.), and that self-defense is an atavistic usurpation of the prerogatives of the state, RAMSEY CLARK, CRIME IN AMERICA 106-07 (1970).

9. See, e.g., Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in Bostick v. Florida*, 67 TUL. L. REV. 1979, 2044 (1993).

10. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Indeed, a reading of the Constitution will demonstrate that

Presumably, however, a "state's right" is one that is also enforceable in court. Thus the Supreme Court consistently enforces the states' Eleventh Amendment "right" not to be sued in federal courts.<sup>11</sup> By the same token, if Congress were to pass a statute establishing a new state of "Calizona" out of parts of California and Arizona without the consent of the legislatures of those states, the courts likely would strike down such an action as violative of the provision in Article IV, section 3 that "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned . . . ."<sup>12</sup> The right of territorial integrity guaranteed by Article IV would hardly be a right at all if courts did not enforce it.

Thus, a states' right interpretation of the Second Amendment must mean—if it is to mean anything at all—that a federal action that invades a state's protected interests can be challenged in court, and that it can be struck down where it is not justified by highly compelling circumstances. This, of course, leaves open two important questions. The first question is what state interests, exactly, are protected by a "states' rights" interpretation of the Second Amendment. The second question is what are the consequences of recognizing such rights today. In addressing these questions, we first will look at the purposes such a right might serve, then at how it might be applied today, and finally at the relationship between states and the federal government that such an interpretation implies.

## II. A STATE RIGHT TO KEEP AND BEAR ARMS

In trying to determine the purposes of a state right under the Second Amendment, the obvious place to look first is in the writings of those who champion such an interpretation.<sup>13</sup> Unfortu-

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grants of governmental authority are generally described as "powers." *See, e.g.*, U.S. CONST. art. I, § 1 (describing "legislative Powers"); U.S. CONST. art. II, § 1 ("executive power"); U.S. CONST. art. III, § 1 ("judicial Power").

11. *E.g.*, *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974).

12. U.S. CONST. art. IV, § 3.

13. *See* sources cited *supra* note 6.

nately, they provide little help. The states' right interpretation appears to be employed against the individual right interpretation in much the same fashion as a chain of garlic against a vampire, pulled out and brandished at need but then hastily tossed back into the cellar lest its odor offend.

However, even in this commentary there is some guidance. For example, gun-control activist Dennis Henigan<sup>14</sup> writes that "[t]he purpose of the [Second] Amendment was to affirm the people's right to keep and bear arms *as a state militia*, against the possibility of the federal government's hostility, or apathy, toward the militia."<sup>15</sup> He describes his interpretation of the Second Amendment as providing "that the Second Amendment guarantees a right of the people to be armed only in service to an organized militia"<sup>16</sup> and argues that James Madison interpreted the Amendment as ensuring

that the Constitution does not strip the states of their militia, while conceding that a strong, armed militia is necessary as a military counterpoint to the power of the regular standing army. . . . Madison saw the militia as the military instrument of state government, not simply as a collection of unorganized, privately armed citizens. Madison saw the armed citizen as important to liberty to the extent that the citizen was part of a military force organized by state governments, which possesses the people's "confidence and affections" and "to which the people are attached." This is hardly an argument for the right of people to be armed against government *per se*.<sup>17</sup>

So in Henigan's view, which it seems safe to regard as representative of the "states' rights" camp,<sup>18</sup> the purpose of the Sec-

14. Henigan is Director of the Legal Action Project at the Center to Prevent Handgun Violence in Washington, D.C.

15. Henigan, *supra* note 6, at 119.

16. *Id.* at 120.

17. *Id.* at 121 (citations omitted).

18. Henigan is the author of two law review articles that adopt this approach. See *supra* note 6. The late Chief Justice Warren Burger also made this argument, although not in a scholarly publication. See Press Conference Concerning Introduction of the Public Health and Safety Act of 1992, June 26, 1992, available in LEXIS, Nexis Library, ARCNWS File.

[O]ne of the frauds—and I use that term advisedly—on the American people has been the campaign to mislead the public about the Second

ond Amendment is to guarantee the existence of state military forces that can serve as a counterweight to a standing federal army. Thus, it seems fair to say, the scope of any rights enjoyed by the states under the Second Amendment would be determined by the goal of preserving an independent military force not under direct federal control.

The consequences of such a right are likely to be rather radical. In short, if the Second Amendment protects only a state right to maintain an independent military force, it creates no purely individual right to keep and bear arms, exactly as gun-control proponents argue (although it is possible that courts might derive some individual rights by way of inference). However, the consequences go far beyond that particular result. If the Second Amendment creates a right on the part of the states, rather than individuals, then by necessity it works a *pro tanto* repeal of certain limitations on state military power found in the Constitution proper, renders the National Guard unconstitutional, at least as currently constituted, and creates a power on the part of state legislatures to nullify federal gun-control laws, if such laws are inconsistent with that state's scheme for organizing its militia. Although these results may seem far-fetched, closer examination will reveal that they are inevitable results of a states' right formulation.

#### A. *An Independent State Military Power*

Advocates of the states' right view are certainly on firm ground when they describe the Framers' fear of a standing federal army. The evidence that the Framers entertained such fears is substantial and uncontradicted.<sup>19</sup> The individual rights view does not

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Amendment. The Second Amendment doesn't guarantee the right to have firearms at all. . . . [The Framers] wanted the Bill of Rights to make sure that there was no standing army in this country, but that there would be state armies. Every state during the revolution had its own army. There was no national army.

*Id.* (statement of Warren Burger). At any rate, taking Henigan as representative of his school of thought is unlikely to work any substantial unfairness, as Henigan himself makes similar use of an article by Professor Sanford Levinson. *See* Henigan, *supra* note 6, at 110.

19. *See, e.g.*, MALCOLM, *supra* note 5, at 146; 2 JOSEPH STORY, COMMENTARIES ON



deny this. It sees the right as an aspect of the natural-law right of self-defense, which was deemed to include the right to arms and which ("writ large") included the right of an armed populace to join together to resist tyranny. The difference between the two views is that the individual right approach has no particular state versus federal implications. Indeed, one additional aspect of the armed populace was their ability to join the federal government in resisting state tyranny.<sup>20</sup> But if the Second Amendment was designed to create an independent state counterweight to federal military power, then it must at the very least protect those aspects of state military forces that are independent and that serve as counterweights to federal power. Those aspects turn out to be substantial.

To begin with, a states' right version of the Second Amendment is probably inconsistent with some provisions of the pre-amendment Constitution; because it is later in time, it must thus be viewed as an implicit repeal or modification of those provisions. Three pre-amendment provisions of Article I appear inconsistent with the role of state armed forces as independent counterparts to the federal standing army.

Article I, section 8, clause 15 (the first of the Militia Clauses) grants to Congress the power:

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.<sup>21</sup>

Article I, section 8, clause 16 (the other Militia Clause) grants Congress the power:

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.<sup>22</sup>

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THE CONSTITUTION OF THE UNITED STATES 646 (Melville M. Bigelow ed., 5th ed. 1891); THE FEDERALIST NO. 8, at 67 (Alexander Hamilton) (Willmore Kendall & George W. Carey eds., 1966); THE ANTI-FEDERALISTS 57 (Cecilia M. Kenyon ed., 1966).

20. See Kates, *Self-Protection*, *supra* note 3.

21. U.S. CONST. art. I, § 8, cl. 15.

22. U.S. CONST. art. I, § 8, cl. 16.

Finally, Article I, section 10, clause 3 provides that:

No State shall, without the Consent of the Congress, . . . keep Troops, or Ships of War in time of Peace . . . .<sup>23</sup>

What is wrong with these provisions? In the states' right formulation, we know two things about them. First, they were not sufficient in themselves to address concerns that state military forces might be under too much federal control—otherwise the Second Amendment would not have been needed. Indeed, these provisions helped give rise to precisely the kind of fears that the states' right interpretation claims the Second Amendment was intended to address. Second, they are in many ways inconsistent with the states' rights theory's stated purpose of the Second Amendment, because some of the powers granted to the federal government in Article I, and some of the prohibitions imposed on the states, might destroy or impair the role of state military forces as a counterweight to the federal standing army.

The calling-out provision of clause 15 is the least suspect. Here, if the Second Amendment works any change at all, it would simply prevent the federal government from calling out state military forces in a way that would effectively end state control—for example, a perpetual call-up that would have the effect of placing the state forces under long-term federal command, destroying their independence. Note, however, that the clause does contain limitations on the *purpose* for which the militia can be called out, limiting such call-outs to execution of the laws, suppression of insurrections, and repelling invasions.<sup>24</sup>

Clause 16, having to do with organization, arming, and discipline, is on shakier ground. According to Henigan, the Framers

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23. U.S. CONST. art. I, § 10, cl. 3.

24. In fact, when the Army wanted to use militia units to chase Mexican bandits south of the border, Attorney General Wickersham opined that this clause prohibited the use of militia units outside American borders. 29 Op. Att'y Gen. 322 (1912). Nor are fears that such a call-up might destroy the independence—or even the existence—of a state militia unfounded; they have some historical basis. As the Supreme Court noted in *Perpich v. Department of Defense*, 496 U.S. 334 (1990), “[t]he draft of the individual members of the National Guard into the Army during World War I virtually destroyed the Guard as an effective organization.” *Id.* at 345. Obviously, militia call-ups might have the same effect.

worried that congressional authority in this regard might allow the federal government to undermine or destroy the militia as an institution either by refusing to make any provision for arming, disciplining, or training the militia or by warping it into a federal rather than a state institution.<sup>25</sup> Indeed, the crux of his argument is that the Second Amendment was intended to address precisely this concern.<sup>26</sup> Thus, under a states' rights view, the authority of Congress to regulate the arming, discipline, or training of the state militia would be limited by the Second Amendment's purpose of maintaining state militias as an independent force that citizens correctly would identify as belonging to their state government, rather than as a federal institution. Accordingly, any regime providing for systems of arming, training, or disciplining state forces that is inconsistent with such a purpose would be unconstitutional. For example, a rule that state militias could be armed only from federally-controlled armories, or trained only with "dummy" or nonlethal weapons, or that they must be overseen by federal political officers to ensure loyalty to the United States, would violate the independence of state military forces and thus the Second Amendment.<sup>27</sup>

The Second Amendment also raises questions with regard to Article I, section 10's prohibition on states' maintaining troops or ships of war without the consent of Congress. If the Second Amendment is intended to preserve a measure of state military independence, then a prohibition on state military forces is surely suspect, and might be regarded as having been implicitly repealed

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25. Henigan, *supra* note 6, at 118-20.

26. *See supra* notes 15-18; *see also* Henigan, *supra* note 6, at 116-17.

The Bill of Rights was the outgrowth of the Antifederalist critique. One consistent Antifederalist theme was that the Constitution had created an excessively powerful central authority, which would lead to the destruction of the states. For example, the Antifederalists feared that the Militia Clauses of the Constitution had given the central government excessive control over the state militia, which was regarded as the guardian of the states' integrity. . . . The Virginia debate is replete with expressions of fear that federal control over the militias would destroy them.

*Id.*

27. Of course, a requirement that such forces be commanded by federal officers, rather than officers appointed by the states, would not only raise Second Amendment concerns but also would violate the specific language of Article I, section 8, clause 16 reserving the appointment of militia officers to the states.

by the Second Amendment. However, it is possible to avoid at least the "Troops" part of this problem by distinguishing between "Troops," who are probably meant to be regular professional soldiers, and the "Militia," which was always a part-time body drawn from the citizenry at large.<sup>28</sup> Thus, it is possible to read these two provisions together as protecting the independence of a state militia made up of citizens while prohibiting the maintenance of full-time, professional armed forces by the states. Given that the Second Amendment resulted in large part from a fear of standing armies, this reading makes sense and avoids any conflict between the two provisions. Unfortunately, it runs afoul of the basic philosophy behind the states' right approach.<sup>29</sup>

Both sides in the modern Second Amendment debate recognize that Madison proposed, and the Federalist First Congress passed, the Bill of Rights in response to Antifederalist criticism of the Constitution. Unlike the individual right view, however, the

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28. Compare Malcolm, *supra* note 5, at 4 ("The militia was first and foremost a defensive force and could not be taken out of the realm. Members were even reluctant to leave their own counties.") with *id.* at 23 ("With the Commonwealth threatened by internal insurrection and foreign invasion [after the English Civil War] the new rulers had ample excuse to maintain a large standing army. . . . And the country that had always depended upon an impromptu militia found itself supporting a standing army respected and feared throughout Europe."); see also THE FEDERALIST NOS. 8, 19, 20, *supra* note 19, at 67-68, 131, 135 (using the word "troops" to refer to members of a professional standing army, as opposed to the militia, which is made up of citizen-soldiers). Note, however, that this interpretation does not dispose of the question of "ships of war," which the states presumably would remain free to keep, or of the issuance of letters of marque and reprisal, also prohibited by Article I, section 10.

29. This discussion raises another crucial difference between the states' right and individual right views. The latter clearly distinguishes the "militia," as that term is used in the Second Amendment, from "troops." The individual right view rests on the 18th-century meaning of "militia"—not a formal military unit but a *system* that required each household and virtually every military-age male to own arms and mandated the appearance of military-age males for training or service when called to do so. See Kates, *Original Meaning*, *supra* note 3, at 214-18. But in the states' right view, "militia" refers to a formal military unit—a body of troops serving the state. Indeed, it is an item of faith among partisans of that view that today the "militia" means the National Guard. As discussed, if by "militia" the Amendment means a formal military body, and if the Amendment should be read as a guarantee of state power to arm such a body, the Article I, section 10, clause 3 prohibition on states keeping "troops" without the consent of Congress seems vulnerable. *Id.* These problems are inescapable in the context of a states' right approach, unless we entirely ignore the text of the Constitution and the Second Amendment.

states' right view presupposes the Amendment's hostility to parts of the Constitution to which the Antifederalists were deeply opposed. The Antifederalists had opposed ratification of the Constitution on two very different kinds of grounds. One involved deep suspicion about specific provisions, particularly those allowing a standing army and providing for federal supervision of the militia.<sup>30</sup> Entirely independent of those specifics, the Antifederalists, and many other Americans, were critical of the failure to append to the Constitution a charter of basic human rights that the federal government could not infringe under any circumstances.<sup>31</sup>

The individual right view sees the Second Amendment, and the Bill of Rights in general, as responding to this second kind of criticism. During the ratification debate, the Federalists vehemently denied that the federal government would have the power to infringe freedom of expression, religion, and other basic rights—expressly including the right to arms.<sup>32</sup> In this context, Madison secured ratification by his commitment to support the addition by amendment of a charter that would guarantee basic rights. But that commitment extended only to safeguarding the fundamental rights that all agreed should never be infringed. It did not involve conceding any issue on which the Federalists and Antifederalists disagreed, i.e., the latter's opposition to specific provisions of the Constitution. Indeed, a few days after their submission, Madison said he had "deliberately proposed amendments *that would not detract from federal powers*, among them a right for the citizenry to be armed."<sup>33</sup>

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30. See MALCOLM, *supra* note 5, at 155-59; Henigan, *supra* note 6, at 116-17.

31. MALCOLM, *supra* note 5, at 155-59.

32. *Id.*; see STEVEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 65-66 (1984); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 598 (1986).

33. MALCOLM, *supra* note 5, at 159 (emphasis added). For Madison's long record of support for stronger federal military powers, see RUSSELL F. WEIGLEY, *HISTORY OF THE UNITED STATES ARMY* 79, 88 (1967).

Significantly, Madison's own proposal for integrating the Bill of Rights into the Constitution was not to add them at the end (as they have been) but to interlineate them into the portions of the original Constitution they affected or to which they related. If he had thought the Second Amendment would alter the military or militia provisions of the Constitution he would have interlineated it in Article I, section 8,

In contrast, the states' right view points to the Militia Clause of the Second Amendment as evidence that the Amendment embodies Antifederalist opposition to the Militia Clauses of Article I. Thus, despite the general presumption that ordinarily differing provisions of the Constitution and/or its amendments ought to be harmonized whenever possible, the states' right view freights the Second Amendment with a presumption that it conflicts with, and therefore repeals, or at least modifies, some aspects of the original Constitution.

It is inescapable, then, that the states' right interpretation of the Second Amendment implies the repeal or modification of other language in the Constitution—something that Henigan admits, albeit without giving any examples.<sup>34</sup> The consequences of a states' right approach, however, go much farther than these, and much beyond the abolition of an individual right to keep and bear arms, as the following discussion makes clear.

### *B. Present Day Consequences*

If, as states' right advocates would have it, the Second Amendment creates a right of the states to possess a measure of independent military power, what are the consequences of applying that right in the present day? Our discussion must be hypothetical, as the Court never has applied the states' right approach in a Second Amendment case, but we will focus on a couple of fairly easy cases: state nullification of federal gun laws and the status of the National Guard as currently constituted.

#### *1. State Militias and Federal Gun Laws*

As we have already seen, the states' right interpretation of the Second Amendment means that state militias must be sufficiently

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near or after clauses 15 and 16. Instead, he planned to insert the right to arms with freedom of religion, the press and other personal rights in § 9 following the rights against bills of attainder and ex post facto laws. Kates, *Original Meaning*, *supra* note 3, at 223.

34. "Of course, it must be acknowledged that the Second Amendment did effect some change in the Constitutional scheme; presumably the Framers did not adopt the Bill of Rights in 1791 with the intent to leave things as they were in 1787." Henigan, *supra* note 6, at 116.

independent to serve as an effective counterweight to the federal standing army. Among other things, this requirement means that state militias must be large. Although there has been much romanticism about the effectiveness of part-time citizen soldiers, the Framers did not labor under the belief that an armed citizenry was a one-to-one match for professional soldiers. Their own Revolutionary War experience clarified this fact, which is why their discussion of the militia's usefulness tended to emphasize its size.<sup>35</sup> Unfortunately, outfitting a large force is expensive, and many states are poor—especially by comparison to the federal government. Expense was precisely the problem faced by the early Congress when it passed the Militia Act of 1792.<sup>36</sup> That act established a "Uniform Militia throughout the United States,"<sup>37</sup> consisting of every able-bodied male citizen between the ages of eighteen and forty-five and provided:

That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder

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35. See, e.g., THE FEDERALIST NO. 29, at 184-85 (Alexander Hamilton) (Willmore Kendall & George W. Carey eds., 1966).

Little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped. . . .

This will not only lessen the call for military establishments, but if circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and the use of arms, who stand ready to defend their rights and those of their fellow citizens.

*Id.* Likewise, in THE FEDERALIST NO. 46, Madison notes that a regular army that threatened liberty would find itself opposed by "a militia amounting to near a half a million citizens with arms in their hands." *Id.* at 299.

36. Act of May 8, 1792, ch. 33, 1 Stat. 271 (1792).

37. *Id.*

and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accoutred and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack.<sup>38</sup>

One well might imagine a state choosing to equip its militia in the same fashion: rather than purchasing the equipment and distributing it to citizens, it simply might require citizens to possess the requisite arms, ammunition, clothing, etc. and keep them in readiness. It is easy to imagine why a state might want to impose such requirements, not only for the cost savings (likely the main motivation), but also recognizing the advantage that when the militia is called out, its members will be already familiar with their weapons and will not need to proceed to an armory or other facility to receive weapons and supplies. Such convenience could be very useful in the kinds of major emergencies—earthquakes, hurricanes, riots, and military coups—for which the militia is intended when travel might be disrupted. In fact, some state militia laws contain such provisions.<sup>39</sup>

Under a states' right view, such an approach raises potential conflicts with federal legislation. For example, what if a state were to require its militia-eligible citizens to be equipped with "assault rifles"—that is, semiautomatic rifles of military styling (perhaps derived from military designs) and equipped with military-type features such as bayonet lugs, flash suppressors, folding stocks, bipods, or large-capacity magazines? Or, for that matter, what if a state were to require actual military weapons capable of fully automatic fire? (After all, countries like Switzerland and Israel do this as a matter of course.)<sup>40</sup> Such weapons normally

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38. *Id.*

39. See Kates, *Original Meaning*, *supra* note 3, at 249.

40. See SWITZ. CONST. art. 18 ("All members of the armed forces shall be given their first arms, equipment and clothing free of charge. The soldiers shall keep their personal arms under the conditions federal legislation shall determine."); ZE'EV SCHIFF, A HISTORY OF THE ISRAELI ARMY 50 (1985); Kates, *Original Meaning*, *supra* note 3, at 249 n.193. Indeed, the Swiss go so far as to allow private ownership of everything from howitzers to anti-aircraft guns and missiles. See DAVID KOPEL, THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES? 283, 292, 295 (1991).



cannot be possessed by individuals without running afoul of various federal firearms laws.<sup>41</sup>

Yet the states' rights approach would make such federal laws unconstitutional as applied to the members of state militias, so long as the state required, or permitted, them to keep such weapons at hand. Because the purpose of the Second Amendment is, according to the states' right interpretation, to protect the independence of state militias *vis-a-vis* the federal government, allowing the federal government to fully or partially disarm state militias would frustrate the core purpose of the amendment. Thus, most federal firearms laws would not be applicable to citizens covered by state militia laws—though no doubt the federal government would retain the power to outlaw weapons obviously unsuited for militia use such as derringers, wallet-guns, umbrella-guns, and sawed-off shotguns.<sup>42</sup>

Furthermore, because the militia is conceived as a large body of citizens (which it must be if it is to counter the federal standing army) federal gun control laws could, in effect, be nullified by state legislation that requires militia members to possess banned weapons—legislation that might well reach a majority of the state's population. Some citizens would not benefit from such an action,<sup>43</sup> but the loophole thus opened in federal gun control laws would be large enough through which to march an army—or at least a militia.

Under a states' right interpretation, the states themselves would be free to regulate, or even entirely forbid, gun ownership, subject only to general constitutional guarantees, such as due process and equal protection.<sup>44</sup> But this result would not be

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41. 26 U.S.C. § 5861 (1988) governs the sale, transportation, or possession of "destructive devices," defined in 18 U.S.C. § 921(a)(4) (1988), as including rockets, bombs, and grenades. 18 U.S.C. § 922(o) (1988), prohibits civilian purchase of fully automatic weapons, except for those manufactured prior to May 19, 1986. As to the permitted, pre-1986 firearms, purchase is subject to registration requirements and a \$200 transaction fee. 26 U.S.C. §§ 5811, 5812. Under the states' right view, this tax likely could not be applied to prohibit the purchase of fully automatic firearms by persons whom a state has licensed to possess them.

42. *Cf.* *United States v. Miller*, 307 U.S. 174, 178 (1939) (discussing suitability of sawed-off shotguns for militia use).

43. For example, infants and the elderly, as well as criminals and the insane, would not benefit from nullification. *See infra* note 47 and accompanying text.

44. *See Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250 (6th Cir. 1994)

achieved without cost: Federal power to restrict firearms ownership necessarily would be concomitantly limited. By long-established tradition, states do not arm civilians they call upon for armed service: Militiamen, civilian volunteers, and persons called for service in the *posse comitatus* are expected to provide their own arms.<sup>45</sup> At the same time, however, the great majority of states allow law-abiding, responsible adults to possess a wide variety of firearms under extensive regulation,<sup>46</sup> while felons and juveniles, for example, generally are forbidden firearms.<sup>47</sup> Given the tradition of extensive firearms regulation and of a self-armed militia, a state's failure to outlaw general possession of particular kinds of weapons could be deemed to reflect an affirmative judgment that such possession serves a policy of maintaining an armed citizenry as the state's ultimate military reserve.<sup>48</sup> If so construed, a state's mere failure to outlaw certain arms would preempt the application in that state of any federal law banning those arms. Such a "negative pregnant" application of state gun laws would give suitable deference to the imperative for state control over militia arms, which is basic to the view that the Second Amendment confers a states' right.

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(finding the definition of "assault weapon" to be unconstitutionally vague).

45. Compare *Kates, Original Meaning*, *supra* note 3, at 271-72 (discussing various state militia forces during World War II) and William O. Treacy, *Maryland Minute Men*, 6 GLADES STAR 214 (1988) (same) with *United States v. Miller*, 307 U.S. 174, 179 (1939) ("[W]hen called for [militia] service [militia] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.").

46. See, e.g., CAL. PENAL CODE §§ 12000-12809 (West 1992). A generally accepted estimate is that as of 1980 there were about 20,000 firearms laws of one sort or another already on the books. JAMES D. WRIGHT ET AL., UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICA 244 (1983). For a survey of current federal gun laws, see *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), *cert. granted*, 114 S. Ct. 1536 (1994); GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 323-58 (1991).

47. See, e.g., CAL. PENAL CODE §§ 12100-01, 12021 (West 1992).

48. In fact, the "unorganized militia" constitutes the ultimate military reserve resource of both federal and state governments for call-up in dire emergency; for example, in case earthquake, flood, other natural disaster, or riot overwhelms police in circumstances in which the National Guard and Army are overseas or otherwise unavailable, perhaps because of transportation disruption. See, e.g., 10 U.S.C. § 311 (1988); CAL. MIL. & VET. CODE §§ 121, 122 (West 1988); COLO. REV. STAT. §§ 18-8-107, 28-3-102, -103(6) & (8), -104 (1989) (classifying the male population aged 18 to 45 as the unorganized militia of, respectively, the United States, California, and Colorado, subject to call at the command of designated public officers).

If the courts accepted a negative pregnant application of state gun laws, it would, as a matter of constitutional law, confine federal gun legislation to the limited role to which it traditionally has been confined as a matter of policy—reinforcing state gun laws by prohibiting the movement of firearms in interstate commerce from those states in which they are legal to states in which they are prohibited.<sup>49</sup> This result would have many interesting implications, not the least of which would be its effect on the long-standing (and surprisingly large) American market for denatured World War II fighter planes and Soviet jet fighters, which are currently available at prices as low as \$50,000.<sup>50</sup> In the many states whose laws allow machine gun ownership, the “recreational fighter pilots” who flock to buy these denatured aircraft could re-equip them with machine guns and automatic cannon for service in the unorganized militia. Although seemingly far-fetched, this result is a natural consequence of the states’ right approach, though not, as will be discussed, of the individual right approach.<sup>51</sup>

Nor is this prospect illusory even if the negative pregnant interpretation of state gun law patterns is rejected. In addition to the states that simply do not outlaw machine guns, other states license appropriate applicants, such as security company operators, to possess them.<sup>52</sup> Such laws are currently thought to be preempted by federal legislation.<sup>53</sup> Under the states’ right view of the Second Amendment, however, such affirmative permission could be construed as preempting application to those licensees of the federal law prohibiting civilian purchases of machine guns

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49. See *Lopez*, 3 F.3d at 1348-59 (providing a history of federal firearms laws).

50. For more on this unusual market sector, see Gavin Cordan, *The Private Pilots with Jet Warplanes*, Press Assoc. Newsfile, Apr. 5, 1994, available in LEXIS, Nexis Library, CURNWS File (describing growth of private market for military jets); Neal Gendler, *An Air Affair*, STAR TRIBUNE (Minneapolis-St. Paul), June 26, 1994, at 1G (describing privately owned fighters including MiG-15s, F-86 Sabres, Saab Drakens, and even a privately owned B-57 Canberra jet bomber); Dave Hirschman, *Three Area Pilots Upsize in Jet from British Military*, COMMERCIAL APPEAL (Memphis), June 5, 1994, at 1C (reporting the existence of over 200 privately owned fighter jets in the United States, with MiG-17 and F-86 Sabre jets selling for \$50,000 or less).

51. See *infra* note 57 and accompanying text.

52. See, e.g., ARK. CODE ANN. § 5-73-209 (Michie 1993); CAL. PENAL CODE § 12230 (West 1992); MD. ANN. CODE art. 27, § 379 (1992).

53. See 18 U.S.C. § 927 (1988).

manufactured after May 19, 1986.<sup>54</sup>

It bears emphasis that the issues raised in the last two paragraphs involve only the particular means by which state preemption of federal gun laws would operate. That such preemption *would* operate cannot be doubted under the states' right approach because it is inherent in that view. Certainly, any state could preempt the operation of any contrary federal gun law within its borders by enacting laws affirmatively authorizing the military-age citizenry of the state to arm themselves with any kind of weaponry specified, including machine guns, bazookas, fighter planes, armored personnel carriers, tanks, PT-boats, and other armed ships.<sup>55</sup> Without such preemptive power, the

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54. 18 U.S.C. § 922(o) (1988) (limiting civilian purchase of fully automatic weapons to those manufactured prior to May 19, 1986, subject to registration requirements under 26 U.S.C. § 5812 (1988), and to a \$200 transaction fee under 26 U.S.C. § 5811 (1988)). Under the states' right view of the Second Amendment it is arguable that this prohibitory \$200 fee probably could not be applied to purchases of fully automatic firearms by persons whom a state has licensed to possess them.

55. The sale, transportation, or possession of "destructive devices," defined in 18 U.S.C. § 921(a)(4) (1988), as rockets, bombs, grenades missiles, and mines, is governed by 26 U.S.C. § 5861 (1988).

A further interesting question is whether localities, which are legally agencies of the state, could engage in such preemptive activity. If so, the several localities that have enacted resolutions purporting to nullify all, or most, federal gun laws by creating local militias have been doing more than simply expressing their anger. See, e.g., Mike Tharp, *The Rise of Citizen Militias*, U.S. NEWS & WORLD REP., Aug. 15, 1994, at 34 (describing efforts at organizing previously dormant militia organizations).

Some sort of government sponsorship, however, is crucial to the legitimacy of a militia, whether or not such membership has anything to do with Second Amendment rights. Although the militia was conceived as external to the state in the sense of being an institution of the people, the expectation was that the state, not private groups, would provide the foundation upon which the structure of the militia would be erected. This dual character is difficult for many modern Americans, with more European-influenced ideas of the state and its institutions, to appreciate. But perhaps the best analogy would be to the institution of the jury. The jury was traditionally intended not just as a protection for individuals, but far more importantly as a check against overweening state power, since it could always refuse to convict in cases of political prosecution. And, like the militia, the jury was intended to reflect the community, and to function in many ways independent of state direction.

But the state provides the structure within which the jury operates: no one can get together with eleven friends and proclaim themselves a jury. Similarly, although First Amendment associational rights may provide some protection for individuals who band together and call themselves a "militia," they do not thereby become the well-regulated militia that the Second Amendment describes, nor do they acquire any additional Second Amendment rights by virtue of doing so. As David Williams ex-

“right” of the states under the states’ right theory would be illusory.

Moreover, under the states’ right view, the Second Amendment guarantees a vastly greater range of weaponry (to state-authorized civilians or to the states themselves) than is implied by the individual right view. Exponents of the latter view have been at some pains to show that the Amendment extends to small arms only. Warships, tanks, artillery, missiles, atomic bombs, and so forth are excluded from its guarantee for several reasons, including the Amendment’s text,<sup>56</sup> the history of the common law

plains, “[R]epublicans did not intend to leave the universality of the militia to the chance decision of every citizen to arm herself. The state was supposed to erect the necessary scaffolding on which the militia could build itself, to muster the militia, and to oblige every citizen to own a gun.” Williams, *supra* note 3, at 593. One might argue that the state and federal governments have defaulted on this obligation, but that does not create additional rights for groups formed without government sponsorship.

There are similar problems with militia theorists’ invocation of the right of revolt. While the Framers certainly believed in such a right, they also developed a rather exacting test for when it properly might be exercised, a test that many theorists of discontent do not address. In short, as Williams summarizes:

This right of resistance is the second result of entrusting force to the militia. It is the *only* purpose of the Second Amendment explicitly mentioned during its discussion in Congress. . . .

Republicans were aware of the danger implicit in vouchsafing this right of resistance in the citizenry and sensitive to the charge that they were inciting violence. They developed a number of limits on the right: It must be a product of the “body” of the people, i.e., the great majority acting by consensus; it must be a course of last resort; its inspiration must be a commitment to the common good; and its object must be a true tyrant, committed to large-scale abuse, not merely randomly unjust or sinful in private life. An uprising that failed to meet these criteria was considered an illegitimate rebellion, rather than an act of true republican resistance.

*Id.* at 582. The failure until recently of the academic community to take the Second Amendment seriously, a topic discussed in more detail later on in this essay, may in part be responsible for many of these misunderstandings. The consequences of such confusion may be serious: Constitutional theory matters, not just in the academic world, but in the real world as well. For a considerably more detailed treatment of these issues see Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995); Glenn H. Reynolds, *Up in Arms About a Revolting Movement*, CHI. TRIB., Jan. 30, 1995, at 11 [hereinafter Reynolds, *Up in Arms*].

56. Implicit in an individual’s “right to keep and bear arms” is a limitation on the kinds of arms an individual can possess; that is, they include only weapons that can be picked up. See Kates, *supra* note 3, at 261.

right to arms,<sup>57</sup> and the logic of the individual right position.<sup>58</sup>

Of course, none of the limitations implicit in the individual right view applies to the states' right view because the common law imposed no limitations on the kinds of arms the government might possess. If the incongruity of the Amendment describing a state as "bearing" arms can be ignored, which the states' right view necessarily does, a state is obviously no more incapable of "bearing" cannon than any other kind of arms. Moreover, if the purpose of the Second Amendment is to guarantee the existence of state military forces that can serve as "a military counterpoint to the regular standing army,"<sup>59</sup> the arms it guarantees the states logically could include even the most destructive implements of modern war. However unsettling these results may be, they inevitably result from the Antifederalist critique of the original Constitution upon which proponents of the states' right view rely.

Although it is doubtful that Mr. Henigan and other enthusiasts of the states' right approach desire this result, it seems an unavoidable consequence of arguing that the Second Amendment protects the right of states to maintain militias. One might attempt to avoid this consequence by arguing that the only militia covered by the Second Amendment is the National Guard, but, as demonstrated below, the consequences of that approach are also rather radical.

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57. See David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1, 29 (1987).

58. The individual right view sees the Second Amendment as expressing the Founders' belief that the right to arms is implicit in the cardinal natural right of self-defense. Kates, *Self-Protection*, *supra* note 3, at 89-103. The basic arms with which one might defend home and family were, and are, the same ordinary civilian small arms with which one would render militia service. In contrast, cannons and warships are not the kinds of arms with which one would repel burglars and rapists, they are not the kinds of weapons one can "bear," nor do they conform to the history of the common law right the Amendment incorporates. See David I. Caplan, *The Right of the Individual To Bear Arms: A Recent Judicial Trend*, 1982 DET. C.L. REV. 789, 804-11; Halbrook, *supra* note 3, at 157-60; Kates, *A Dialogue*, *supra* note 3, at 146-48; Kates, *Original Meaning*, *supra* note 3, at 259.

59. Henigan, *supra* note 6, at 119; see text accompanying *supra* note 15.

## 2. *The National Guard and the Second Amendment*

If the Second Amendment serves to protect the independence of state militias, or as former Chief Justice Burger calls them, "state armies,"<sup>60</sup> can the National Guard as currently constituted withstand Second Amendment scrutiny? Although the Supreme Court has never addressed this issue, the answer appears to be no because, as the Supreme Court *has* held, the National Guard is not at all independent.<sup>61</sup>

Originally, the militia was organized as the entire able-bodied male citizenry between eighteen and forty-five years of age, self-equipped, and required to turn out regularly (usually once per year) to demonstrate that it was properly equipped and armed.<sup>62</sup> Unfortunately, the militia was not adequate to the needs of an expanding nation with territorial ambitions outside its borders. There were repeated incidents in which the militia refused to invade Canada, Mexico, and various other locations, or in which federal attempts to so employ the militia were held illegal.<sup>63</sup> This produced a series of "reforms" that created a force far more effective on the battlefield and, more importantly, far better suited to employment in wars abroad.<sup>64</sup> However, in the process of transforming the traditional militia into the modern-day National Guard, these reforms transformed the National Guard into a federal, rather than state, institution.<sup>65</sup>

Under the current system, National Guard officers have dual status: They are members of both the State Guard and the federal armed forces.<sup>66</sup> They are armed, paid, and trained by the federal government.<sup>67</sup> They can be called out at will by the fed-

60. *See supra* note 18.

61. *Perpich v. Department of Defense*, 496 U.S. 334, 351 (1989).

62. *See supra* notes 38-39 and accompanying text.

63. *See supra* note 24. For a litany of complaints about the militia's unsuitability in providing the kind of "global reach" needed by a nascent superpower, see Frederick B. Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 189-93 (1940).

64. *See* Peter A. Fish, Note, *The Constitution and the Training of National Guardsmen: Can State Governors Prevent Uncle Sam from Sending the Guard to Central America?*, 4 J.L. & POL. 597, 605-10 (1988).

65. *See id.* at 612.

66. 10 U.S.C. § 311 (1988).

67. 10 U.S.C. § 101(10)(C) (1988).

eral government, and such call-outs cannot be resisted, in any meaningful fashion, by their states.<sup>68</sup> They are subject to federal military discipline on the same basis as members of the national government's armed forces.<sup>69</sup> And they are required to swear an oath of loyalty to the United States government, as well as to their states.<sup>70</sup>

This de facto federal control makes it difficult to argue that the National Guard is capable of carrying out the militia's role, central to the states' right interpretation, of serving as a counterweight to the power of the federal standing army. As one military officer states:

By providing for a militia in the Constitution, the Framers sought to strengthen civilian control of the military. They postulated that a militia composed of citizen-soldiers would curb any unseemly ambitions of the small standing army. Today's National Guard is often perceived as the successor to the militia, and observers still tout the Guard's role as the ultimate restraint on the professional military.

The reality, however, is much different. Today's National Guard is a very different force from the colonial-era militia. With 178,000 full-time federal employees and almost all of its budget drawn from the federal government, the National Guard is, for all practical purposes, a federal force. Indeed, one commentator concluded that it is very much akin to the "standing army" against which the Founding Fathers railed.<sup>71</sup>

If the National Guard is organized in a way that makes it inconsistent with the role that the Second Amendment envisions—and, under the states' right view, mandates—for the militia, there are only two possibilities. One is that the National Guard is not the militia to which the Second Amendment refers; the other is that

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68. 10 U.S.C. § 332 (1988); see also *infra* notes 72-75 and accompanying text (discussing *Perpich v. Department of Defense*, 496 U.S. 334 (1990)).

69. 10 U.S.C. § 802(a)(3) (1988).

70. See 32 U.S.C. § 304 (1988) (National Guardsmen's oath); 10 U.S.C. § 3261(a)(2) (1988) (requiring members of the Guard to take the oath).

71. Col. Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 384-85 (1994) (citing William S. Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 MIL. L. REV. 1, 2 (1992)).



the National Guard *is* that militia, but that its current configuration, however well-suited to support foreign military ventures, is unconstitutional because it is inconsistent with the Second Amendment.

The existing case law suggests the former answer. In *Perpich v. Department of Defense*,<sup>72</sup> the Supreme Court addressed the question of what limitations are imposed on the National Guard under the militia clauses. The question before the Court was whether state governors could prevent their National Guard units from being sent abroad for highly controversial training missions in Central America.<sup>73</sup> In short, the Court concluded that Congress's powers to raise armies and make war, rather than its militia powers, were implicated.<sup>74</sup> While not dispositive on the Second Amendment issue (perhaps significantly, the Court did not discuss the Second Amendment at all) this case suggests that the National Guard should be viewed constitutionally as it really is—a fundamentally federal force with a (very) thin patina of state control rather than the “well-regulated militia” that the Second Amendment deems “necessary to the security of a free State.”<sup>75</sup> That militia must be found elsewhere—and it is.

Although the National Guard may have its roots in the classical militia, it clearly has been transformed into something else entirely—a federal institution with only tenuous ties to the states. However, the National Guard is not the last word in militias, even today. While the National Guard may be an organized militia<sup>76</sup> (what the Framers would have called a “select” militia)<sup>77</sup> there exists, both at the federal and state level, a mili-

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72. 496 U.S. 334 (1990).

73. *Id.* at 336-38.

74. *Id.* at 349-51.

75. Indeed, the Court was explicit on this point:

The Governor argues that this interpretation of the Militia Clauses has the practical effect of nullifying an important state power that is expressly reserved in the Constitution. We disagree. It merely recognizes the supremacy of federal power in the area of military affairs. The Federal Government provides virtually all of the funding, the material, and the leadership for the State Guard units.

*Id.* at 351 (footnotes omitted).

76. Some commentators have suggested that the National Guard should be considered “troops” raised with consent of Congress, under Article I, section 10, rather than a militia of any sort. *See, e.g.,* Fields & Hardy, *supra* note 71.

77. *See, e.g.,* Kates, *Original Meaning, supra* note 3, at 216-17; Malcolm, *supra*

tia of the sort that the Framers intended. Federal law continues to recognize an unorganized militia composed of males age eighteen to forty-five,<sup>78</sup> as do the laws of most states,<sup>79</sup> except that many now include women.<sup>80</sup>

Under the states' right theory, the existence of state militias of this kind would have to be protected against federal interference by the Second Amendment—even, as mentioned above,<sup>81</sup> to the extent of nullifying federal firearms laws. It is not clear whether the Second Amendment would create an affirmative duty on the part of the states to maintain state militias. However, if the state role is as important as the states' right interpretation insists, such a duty is at least plausible. With regard to most states, however, state constitutional provisions probably create such a duty anyway.<sup>82</sup> Regardless, states clearly do not serve the ends

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note 5, at 142, 156. Note also the following:

Nowadays, it is quite common to speak loosely of the National Guard as "the state militia," but 200 years ago, any band of paid, semiprofessional, part-time volunteers, like today's Guard, would have been called "a *select corps*" or "*select militia*"—and viewed in many quarters as little better than a standing army. In 1789, when used without any qualifying adjective, "the militia" referred to all Citizens capable of bearing arms. . . . [Thus] the "militia" is identical to "the people."

Amar, *supra* note 3, at 1166 (footnotes omitted).

78. 10 U.S.C. § 311 (1988); *see also* Fields & Hardy, *supra* note 71, at 42 n.160 (noting that while the United States technically continues to maintain a national "general" militia, for practical purposes this militia does not play any significant role in the national defense).

79. *See, e.g.*, ARIZ. CONST. art. XVI, § 1; IOWA CONST. art. VI, § 1; KY. CONST. § 219; N.M. CONST. art. XVIII, § 1; N.D. CONST. art. XI, § 16; OHIO CONST. art. IX, § 1; S.C. CONST. art. XIII, § 1; S.D. CONST. art. XV, § 1; UTAH CONST. art. XV, § 1; WYO. CONST. art. 17, § 1; ALA. CODE § 31-2-2 to 31-2-5 (1975); ARK. CODE ANN. § 12-61-101(b) (Michie 1987); CAL. MIL. & VET. CODE § 122 (West 1988); CONN. GEN. STAT. ANN. § 27-2 (West 1990); GA. CODE ANN. § 38-2-3(d) (1982 & Supp. 1994); IDAHO CODE § 46-102 (1977); IND. CODE ANN. § 10-2-3-1 (Burns 1992); KAN. STAT. ANN. § 48-904(e) (1983); MINN. STAT. ANN. § 190.06 (West 1992); MISS. CODE ANN. § 33-5-1 (1990); N.M. STAT. ANN. § 20-2-2 (Michie 1989); N.Y. MIL. LAWS § 2 (Consol. 1989); OR. REV. STAT. § 396.105(3) (1994); R.I. GEN. LAWS § 30-1-2 (1994); S.D. CODIFIED LAWS ANN. § 33-2-2 (1994); TENN. CODE ANN. § 58-1-104(d) (1989); WYO. STAT. § 19-2-102(a) (1977).

80. *See, e.g.*, OHIO CONST. art. IX, § 1; CAL. MIL. & VET. CODE § 554 (West 1988 & Supp. 1995); IDAHO CODE § 46-105 (1977); KAN. STAT. ANN. § 48-904(e) (1983).

81. *See supra* notes 35-58 and accompanying text.

82. *See, e.g.*, Glenn H. Reynolds, *The Right To Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. 647, 649-50 (1994).

of the Second Amendment by maintaining a National Guard. Rather, they serve the ends (however admirable) of the national government.

### III. THE STATES' RIGHT VIEW OF STATE-FEDERAL RELATIONS

Under the classical view of the Constitution, authority is delegated by the people to two kinds of governments, state and federal. State governments are not creations of the federal government, nor is the federal government the creature of the states. Both exercise authority delegated to them by the true sovereigns, the people.<sup>83</sup> The real question in assessing any governmental action is whether that action is consistent with the authority delegated by the people, or whether it exceeds that authority and is thus *ultra vires*.<sup>84</sup>

But there is another view. In this view, the state governments represent the "real" governments of the people. The federal government exists as a somewhat mistrusted agent of the states, with states retaining the power to protect their people by checking the actions of the federal government when necessary to prevent overreaching. This view seems to be that embodied by the states' right interpretation, in which state organizations are set against the federal government and in which state legislators retain the power to nullify federal firearms laws that would otherwise frustrate state prerogatives.<sup>85</sup>

83. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402 (1819); STORY, *supra* note 19, at 151, 154, 160. For a more extensive discussion of sovereignty and federalism issues, see Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

84. See, e.g., *McCulloch*, 17 U.S. (4 Wheat.) at 421 (noting that under the Constitution "the powers of the [federal] government are limited, and that its limits are not to be transcended").

85. One interesting aspect of this view is that it seems inconsistent with the view of state and federal relations generally held by those favoring gun control (who are usually, though not always, liberals). As Sanford Levinson has noted, the debate over the Second Amendment creates a peculiar inversion, with conservatives taking the approach of liberals and vice versa. See Levinson, *supra* note 2, at 643-44. Gary Kleck has also commented on this phenomenon, noting that:

When the issue is gun control, liberals and conservatives switch places. Many liberals support gun laws that confer broad power on government to regulate individual behavior, especially in private places, whereas conservatives oppose them. Some liberals dismiss the Second Amendment to

If applied across the board, this view would have rather dramatic consequences, going far beyond those outlined above. States' rights, and a view of state governments as interposed between the federal government and their citizens, after all, formed the core of the losing argument in *Brown v. Board of Education*<sup>86</sup>—and, for that matter, of the Civil War.<sup>87</sup> Yet if we are to decide that the Second Amendment embodies this general theory of the relations between the state and federal governments, there seems no reason to assume that the Framers had different intentions elsewhere in the same Constitution. Thus, unless we are to be entirely incoherent, we must seriously consider rethinking constitutional history all the way back to *Brown* and, indeed, to *McCulloch v. Maryland*. Yet it seems unlikely that we will be willing to go that far.

The view of states as the primary constituents of our Constitution, although it has an ancient (if not always honorable) history, is not one that enjoys great esteem or adherence today given the past circumstances of its invocation. Nor is it particularly consistent with either the language or the history of the Constitution. The Preamble, after all, states that the Constitu-

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the Constitution as an outmoded historical curiosity. . . . [W]hereas conservatives defend a view of this amendment that is every bit as broad as the American Civil Liberties Union's (ACLU) view of the First Amendment . . . .

Kleck, *supra* note 46, at 3-4.

Although a states' right approach to constitutional affairs generally tends to be identified with reactionary causes, it is identified here with the "progressive" cause of gun control. (Meanwhile, as Kleck notes, anti-gun control forces wax eloquent about the importance of individual rights and the dangers of overbearing law enforcement officials—complaints that are conspicuous by their absence in similar contexts, for example, the drug war. *Id.* at 4.) The conservative right, however, has almost given up on states' right arguments as a loser, and the left clings to them only in this one instance, which seems more a case of constitutional wishful thinking than serious analysis.

86. 347 U.S. 483 (1954).

87. See generally DON E. FEHRENBACHER, CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVE-HOLDING SOUTH 46-47 (1989) (describing John Calhoun's theories of state government power to nullify federal legislation, which the South Carolina legislature adopted as official state doctrine); John C. Calhoun, *A Discourse on the Constitution and Government of the United States*, in 1 THE WORKS OF JOHN C. CALHOUN 168-81 (Richard K. Cralle ed., 1851) (reissued 1968) (arguing that our system of governance is by its nature a federal government with the states, and not individuals, as its constituents).

tion was ordained and established by "We the People," not "We the States."<sup>88</sup> And the Constitution was ratified by special conventions of the people, not by state legislatures.<sup>89</sup> So there seems to be good reason to label the states' right theory "Can of Worms" and set it on the shelf.

Under the individual right view, on the other hand, the Second Amendment is seen as protecting precisely what its language describes: a "right of the people,"<sup>90</sup> with the militia seen as an organization of the people—regulated to some degree by the state, but there to serve the interests not of the state (or the States) but of the people. This view, unlike the states' right view, is consistent with both the text of the Second Amendment and the interpretive approach taken with regard to the rest of the Constitution. It also avoids the kind of state-federal confrontations that the states' right approach seems likely—and even intended—to create.

The only problem with the individual right approach is that it requires precisely what advocates of the states' right approach wish to deny: an individual right to keep and bear arms. But criticism of a constitutional provision on the basis that it grants people rights that one does not like—though an approach also possessed of a long, if not distinguished, history—is not very persuasive. The purpose of the Constitution, after all, and especially of the Bill of Rights, is not to make it easy for us to do what we want. For those unhappy with the notion of an individual right to arms, the solution is to amend the Constitution through the procedures set out in Article V, not to amend the Constitution through specious interpretive schemes.<sup>91</sup>

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88. U.S. CONST. pmb1.

89. See U.S. CONST. art. VII (calling for ratification by "Conventions of nine States"). For a general history of the ratification process, see DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 175-218 (1990).

90. U.S. CONST. amend. II. Compare the Second Amendment's use of the phrase "right of the people" with the use of the same phrase in the First, Fourth, and Ninth Amendments.

91. Regarding the right against self-incrimination, the Supreme Court has stated: "If it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to [amend] it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion." *Ullmann v. United States*, 350 U.S. 422, 427-28 (1956) (quoting *Maffie v. United States*, 209 F.2d 225, 227 (1st Cir.

## IV. CONCLUSION

Our thought experiment has thus produced two noteworthy results. The first is the realization that the states' right interpretation of the Second Amendment, if taken seriously, would produce rather radical consequences—consequences that (perhaps deliberately) have not been discussed by its proponents. In light of those radical consequences, and the interpretation's general inconsistency with the rest of the Constitutional scheme, the states' right theory looks like a dud.<sup>92</sup> What is amazing is that it has achieved such currency, at least in the popular constitutional debate.

And that is the second lesson. Although the states' right interpretation has obtained very little in the way of scholarly support in journals that require footnotes,<sup>93</sup> it has been widely circulated in the popular press, even by respectable scholars who should (and, one suspects, do) know better.<sup>94</sup> And this suggests a rather

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1954)).

The other problem with specious interpretive schemes is that the law of unintended consequences applies with a vengeance where constitutional law is concerned. Indeed, the modern "militia movement" appears to have arisen primarily as a response to anti-gun arguments that the Second Amendment only protects militias. See generally Glenn H. Reynolds, *Up in Arms* supra, note 55, at 11; *Patriot Games*, TIME, Dec. 19, 1994, at 48.

92. It would be possible, of course, to avoid these problems by proclaiming that the Second Amendment protects only a right of the states and then concluding that the right does not "do" anything, but such an approach is so obviously deficient as to merit no rebuttal. As Henigan notes, and as its presence in the hotly debated and highly important Bill of Rights rather obviously indicates, the Second Amendment was certainly intended to do something. Henigan, *supra* note 6, at 116. Although there may be debate about *what* it was intended to do, unquestionably, the Second Amendment has a purpose.

To doubt that the Second Amendment does anything, or to argue that it is now obsolete and should be ignored might be called the "inkblot approach" after Robert Bork's similar treatment of the Ninth Amendment, which he likened to a Rorschach "inkblot" whose meaning could not be deciphered by judges. See *The Bork Disinformers*, WALL ST. J., Oct. 5, 1987, at 22. Bork's treatment of the Ninth Amendment was rightly ridiculed as an abdication of judicial—and intellectual—responsibility, and a similar approach to the Second Amendment deserves the same degree of scorn.

93. Cf. sources cited in *supra* notes 3, 6.

94. For example, an advertisement, signed by 27 law professors smart enough to know better, appeared in the *New York Times*. That advertisement said that the Second Amendment protects only state militias "i.e., the National Guard." The adver-

unfortunate fact: the constitutional currency has become rather debased. In the Reagan era, right-wing scholars and spokespeople were trying to narrow constitutional rights through specious interpretations. Now, with political power having shifted, the disease has spread to those on the left. Meeseism, it would seem, respects no ideological bounds.

This state of affairs is unfortunate, and for those of us who at least try to take the Constitution seriously, it is frustrating. And, because the Constitution is our blueprint for living together without killing or tyrannizing each other, it may even be dangerous. Interpreting the Constitution faithfully is hard work and is certain to generate some answers that the interpreter does not like—at least, it is certain to do so if the interpreter is being honest.<sup>95</sup> We thus should be suspicious of those whose theories generate only results that they like, whatever their ideological stripe.<sup>96</sup> Although it is certainly true that constitutional interpretation is an inexact science, and that there may be a wide range of “right” answers to constitutional questions, it is also true that some answers are better than others: more in accord with principles of craft, more consistent with the constitutional scheme, or better grounded in history.<sup>97</sup> By this standard, the

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tisement also suggested that any belief to the contrary was a “fraud” that no respectable constitutional scholar endorsed. N.Y. TIMES, May 2, 1994, at A9. Compare *id.* with Glenn H. Reynolds, Letter to the Editor, N.Y. TIMES, May 12, 1994, at A24 (quoting published articles by eminent professors of constitutional law who support the interpretation that the Second Amendment creates an individual right, and does not simply protect the National Guard).

95. See, e.g., H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 677 (1987) (“Rule 8: If your history uniformly confirms your predilections, it is probably bad history.”).

96. “When, despite this distance [between 1787 or 1870 and the present] [the Framers] seem to confirm our deepest wishes, we must suspect that our portrait of them is in fact a mirror of ourselves.” *Id.* at 677-78.

97. See Glenn H. Reynolds, *Penumbra Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1347-48 (1992) (arguing that there are good reasons for paying closer attention to the text and the intent of the Framers, not in order to constrain judges, but rather, because “paying attention to the text and to what its drafters were trying to accomplish is what the craft of lawyering is all about”); Glenn H. Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110, 114 (1991) (noting that “it [is] unlikely that the Court will ever reach a truly ‘final’ answer to very many questions that come before it”); Glenn H. Reynolds, *Sex, Lies and Jurisprudence: Robert Bork, Griswold, and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045, 1108 (1990)

states' right argument fails. But by the more modern standard, of newspaper advertisements and political talking-head shows, that matters little. It may well be that there is a "Gresham's Law" of pop constitutionalism, with the bad scholarship (if that is the word) driving out the good.

The solution to this problem is beyond the scope of this Article, which has merely served to illustrate its existence in one particular context. But having already made use of the "thought experiment" technique, perhaps we could take another lesson from the world of scientists, where publication of research is seen as a test of its authors' seriousness. Instead of allowing law professors to opine freely based on some general sense of their expertise, perhaps we should challenge them by asking if their views are supported by published articles—their own, or other people's. This rather minimal requirement, that arguments be set out in writing and supported by research, would nonetheless provide a substantial amount of discipline to the world of talking-head constitutionalism. It also would ensure to some degree that those who make constitutional arguments in the public arena have spent some time thinking them through first. That too, to judge from current circumstances, would be a step forward.

Until the happy day arrives when this proposal is adopted, we can at least criticize talking-head constitutionalism in the law reviews, with the hope that such criticism will percolate back into the general society. (Such criticism, after all, is a major reason for having law reviews.) The Constitution, and especially the Bill of Rights, is a package deal: It is all or nothing, and for each of us there are likely to be parts we dislike. Where such parts exist, the answer is either to live with them or to amend the Constitution, not to interpret pieces of it out of existence. There always will be a market for those who feel otherwise just as there always will be a market for "miracle" diets that purport to let people eat all they want and not exercise. But the Constitution, unlike the diet industry or the mass media, is not founded on giving the people what they want. We forget that at our peril, and as the mass-marketing of the states' right interpretation of the Second

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("[N]o additional judicial discipline would be imposed by the adoption and honest implementation of 'original understanding' jurisprudence.")



Amendment demonstrates, we appear perilously close to forgetting it now.