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THE PAST AND FUTURE OF THE INDIVIDUAL'S RIGHT TO ARMS

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*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. —The Second Amendment*

The Second Amendment to the United States Constitution is among the most well drafted provisions of the Bill of Rights. It is also one of the most misunderstood. After almost two centuries during which it provoked virtually no controversy or serious commentary, the Second Amendment has become one of the most emotionally evocative elements of the entire written Constitution. An extensive and growing academic literature has arisen, but that literature has been preoccupied with an unnecessarily confusing debate over a question that is unambiguously answered by the

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constitutional text. And scholars have almost entirely ignored important and thorny questions that are left unanswered by that text. These shortcomings in the academic literature are not merely of academic interest. The Supreme Court has developed no meaningful jurisprudence of the Second Amendment, but will almost certainly have to do so eventually. When that process begins, the Court will need the assistance of commentary that answers the easy questions correctly while clarifying the genuinely difficult issues that remain.

The easy questions have to do with whether the Second Amendment protects an individual right to arms or a kind of "collective" right of state governments to maintain organized military forces. The serious literature on the subject is virtually unanimous in concluding that the Constitution establishes an individual right. That literature, however, has focused excessively on legislative history and the general intellectual climate of the late eighteenth century, without sufficient attention to the constitutional text itself. The textual arguments, which are presented in their complete form for the first time in this Article, deal mainly with the relation between the prefatory allusion to a "well regulated militia" and the operative guarantee of the people's right to keep and bear arms. There is no conflict or tension between these elements of the Second Amendment. One important feature of a well regulated militia is that it is not overly regulated or inappropriately regulated. The operative language simply forbids one form of inappropriate regulation: disarming the people from whom the militia must necessarily be drawn. The textual arguments in favor of the individual right interpretation are strongly confirmed by the Constitution's legislative history. When read properly, however, the legislative history's main function is to show that the Second Amendment's prefatory language was perfectly adapted to a purpose having nothing to do with limiting or qualifying the grammatically inescapable language establishing an individual right to keep and bear arms.

Answering the easy questions about the nature of the right to keep and bear arms, however, does not take one very far in analyzing concrete questions about the constitutionality of actual gun control laws. The most serious difficulties, which were not anticipated by the Framers of the Second Amendment, have arisen

largely from two subsequent developments. First, technological progress has created weapons that are far more powerful than anything the Framers could have dreamed of. Second, the Supreme Court has developed an approach to the Bill of Rights, especially through its doctrine of Fourteenth Amendment incorporation, that limits the usefulness of appeals to the original meaning of the Second Amendment.

Here again, the existing academic literature falls short. Discussions of incorporation involving the Second Amendment, for example, have focused almost exclusively on the intentions of those who framed and ratified the Fourteenth Amendment. This "intentionalist" approach to incorporation, however, has been firmly rejected by the Supreme Court, which has adopted a very different method for deciding which provisions of the Bill of Rights shall be applied against the states. This article is the first to apply the Court's stated principles to the question—a question that the Court itself has not yet answered—whether the Second Amendment should be applied to the states through Fourteenth Amendment due process.

An even more difficult set of issues has been created by technological and political developments since the eighteenth century. Technological advances have created a sharp distinction between military weapons and the less lethal weaponry customarily kept by civilians for self-defense. This change, along with the firmly established practice of maintaining large peacetime standing armies, has created the need for legal distinctions that the Framers had no cause to consider. For them, there was no difference between military and civilian small arms. Nor was there any sharp line between the Second Amendment's two purposes: deterring tyranny and safeguarding the individual's means of defense against criminals. Today, the second purpose has assumed much greater practical importance relative to the first, and it is inconceivable that the courts would prohibit the government from restricting civilian access to standard military weapons. Any useful analytical framework must offer the courts a way to make principled distinctions among different kinds of weapons and among the different purposes they can serve.

In deciding which weapons are protected by the Second Amendment, and what restrictions the government may place on the

possession and use of those weapons, the courts will find virtually no direct guidance in the text or history of the Constitution. This article proposes that these issues be resolved by applying doctrines drawn from the jurisprudence of the First Amendment. I illustrate this approach with three timely examples: the recent federal statute banning certain "assault weapons"; the District of Columbia's very severe restriction on the private possession of handguns; and the common restrictions on carrying weapons in public.

Before turning to the Second Amendment itself, however, it will be helpful to examine briefly the British experience with a constitutional right to arms. That experience began before our own, and it has taken a very different course. The contrasting evolution of these two rights from their common origin will help show why, although some Second Amendment questions are easy, the difficult questions are ultimately more important.

I. THE NATURAL AND ENGLISH HISTORY OF GUN CONTROL

- Former Chief Justice Warren Burger, who had been known to answer a knock at his door by appearing with a gun in his hand, also said that "If I were writing the Bill of Rights now there wouldn't be any such thing as the Second Amendment."¹
- Senator Edward M. Kennedy, for decades a leading supporter of severe restrictions on the private possession of firearms, inadvertently revealed his own reliance on guns when his private bodyguard was charged with carrying illegal weapons in the nation's capital.²
- Columnist Carl Rowan, a persistent advocate of bans on the private possession of firearms, became a laughingstock when he was prosecuted for using an unregistered pistol to gun

¹ *MacNeil/Lehrer NewsHour*, Dec. 16, 1991 available in LEXIS, Nexis Library, Arcnws File; *Guns and the Law*, PHOENIX GAZETTE, Feb. 22, 1990, at A10.

² *Kennedy Guard Arrested For Guns*, CHI. TRIB., Jan. 15, 1986, § 1, at 9; Elsa Walsh, *Bodyguard's Gun Charges To Stand*, WASH. POST, Oct. 16, 1987, at C2.

down a teenager who trespassed in his backyard swimming pool.³

- Arthur Schlesinger, Jr., who believes that Americans' desire to own guns is the result of a psychological dysfunction,⁴ also sees Fidel Castro's willingness to permit widespread possession of guns in Cuba as a sign of social health.⁵
- Pop psychologist Joyce Brothers has contended that the "gun epidemic" in America results largely from the "castration anxiety" suffered by immature men. Meanwhile, Dr. Brothers's own husband was one of a privileged few New York City residents to possess a license providing the legal right to own a handgun.⁶
- Recently enacted federal legislation forbids private citizens from owning certain so-called "assault weapons," apparently on the theory that these arms do not have legitimate civilian purposes. But the new law creates an exception for *retired* police officers, who could hardly have any more need for such weapons than other law-abiding citizens.⁷

³ Nancy Lewis, *Rowan Won't Be Retried on Gun Charges: D.C. Corporation Counsel Says Jurors Were Confused in Case of Unregistered Weapon*, WASH. POST, Oct. 6, 1988, at B1. After his trial on charges of violating the District of Columbia gun control law ended with a hung jury, Rowan told a news conference that he still supported enacting a federal law "that makes it extremely difficult for anyone but a law-enforcement officer to have a gun." *Rowan Says He Still Favors Gun Control*, BOSTON GLOBE, Oct. 7, 1988, at 13.

⁴ See Barry Bruce-Briggs, *The Great American Gun War*, 45 PUB. INTEREST 37, 59 (1976) (quoting Schlesinger as suspecting that "men doubtful of their own virility cling to the gun as a symbolic phallus and unconsciously fear gun control as the equivalent of castration").

⁵ Arthur Schlesinger, Jr., *A Visit with Fidel*, WALL ST. J., June 7, 1985, at 24 ("This wide distribution of weapons [in Cuba] does indicate the regime's confidence in the loyalty of the Cuban people. An unpopular dictatorship would not dare run such risks.").

⁶ Don B. Kates, Jr., *The Battle Over Gun Control*, 84 PUB. INTEREST 42, 44-45 (1986); Don B. Kates, Jr., *Handgun Banning in Light of the Prohibition Experience*, in FIREARMS AND VIOLENCE 139, 154 n.44 (Don B. Kates, Jr. ed., 1984); Carol R. Silver & Don B. Kates, Jr., *Self-Defense, Handgun Ownership, and the Independence of Women in a Violent, Sexist Society*, in RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT (Don B. Kates, Jr. ed., 1979).

⁷ 18 U.S.C. § 922(v)(4)(C) (1994). For an interesting discussion of some difficulties that can result from creating gun-control exemptions for various categories of police officers, see James B. Jacobs, *Exceptions to a General Prohibition on Handgun Possession: Do They*

Incidents like these are not mere isolated instances of hypocrisy. The fear of violent death, a passion so deep that Hobbes could plausibly take it as the underlying motive for the creation of civil society itself, nags at us all with two messages: arm yourself or those you control and disarm those whom you do not control. People who control governments therefore always have a motive to deprive their opponents and potential opponents of access to weapons. Opposition to the government may take many forms, such as refusing to obey the laws against murder, rape, and robbery; or adhering to an officially disfavored religion; or attempting to wrest political power away from those who currently possess it. This, in turn, suggests that "gun control" laws at any particular time and place, and the patterns of obedience to those laws, will largely be a function of the calculations that individuals in and out of government make about the relative threats to their own lives posed by the current regime and by their fellow citizens. Everyone will have a motive to induce the government to disarm those who pose a threat to his own life. Some factions in each society will be more successful than others in using the government for this purpose. And no one will be able to obtain complete and permanent assurance that the government will protect him from a violent death or refrain from inflicting such a death upon him.

A. ENGLISH ORIGINS

The history of the English right to arms, which has recently been summarized with great lucidity by Joyce Lee Malcolm,⁸ very much

Swallow Up the Rule?, 49 LAW & CONTEMP. PROBS. 5 (1986), which concludes that as long as police and private police continue to rely on handguns as necessary for self-defense the majority of private citizens will remain convinced they need handguns in order to protect themselves. See also Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1, 43-44 (1992) (arguing that providing armed security for those in power in government while disarming general public is not consistent with constitutional traditions).

⁸ JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994). My summary of the English origins of the right to arms relies heavily on Professor Malcolm's apparently meticulous research. My interpretation of the events she describes, however, differs from hers in several important respects.

reflects the simple Hobbesian calculus sketched above.⁹ The story begins in the Middle Ages, when the weakness of the Crown made popular participation in peacekeeping an almost inevitable part of English life. When the Crown's authority increased significantly during the sixteenth and seventeenth centuries, what we now think of as the "militia tradition" was already rather well developed. This tradition—in which citizen-soldiers are mustered as needs be to defend the community against violent threats from enemies within or without—developed for the most prosaic and least principled reason imaginable: it was cheap. The Crown lacked the financial resources to maintain a permanent army or police force, and participation in the militia was simply a kind of tax on those who were required to serve.¹⁰

This arrangement was not calculated to make anyone very happy. Like taxpayers everywhere, those who were obliged to spend their own money on arms, and their own time in training, resented the imposition. Much evasion of the tax necessarily occurred, along with political maneuvers aimed at shifting the incidence of the tax onto someone else.¹¹ On the other side, the Crown could not have been satisfied with such a makeshift instrument of policy. Although the King had the authority to call out the militia and to specify their objectives, he could not always rely on the independent local aristocrats to interpret and execute his orders faithfully. Similarly, the King and gentry could not always rely on militiamen to put down disturbances because those men were sometimes sympathetic to those they were supposed to suppress. The militia, moreover, was not available for foreign operations, so regular armies had to be raised on an *ad hoc* basis for wars in Europe.

⁹ That calculus, of course, is not the whole story, any more than the fear of violent death was Hobbes's whole explanation of political society. It is a very large part of the story, however, and this should come as no surprise. Indeed, it would be surprising to discover that human efforts to regulate instruments designed to inflict violent death did not largely result from self-interested efforts to avoid being harmed by others' use of those instruments.

¹⁰ MALCOLM, *supra* note 8, at 1.

¹¹ Thus, for example, Professor Malcolm reports that all able-bodied men from 16 to 60 were legally liable for militia service, but that it became routine to select small groups of men—typically poorer farmers and craftsmen—for the unpopular job of receiving special (and thus more time consuming) training. *Id.* at 4.

Despite the disadvantages on all sides, however, this was all the kings could afford for a long time. The stability of the arrangement finally broke down during the reign of Charles I, when the Crown and Parliament began to contend with each other for control of the militia. The subsequent civil war, during which the English experienced life with a professional army in their midst, left the population with both a dread of military rule and an abundance of weapons in their own hands. Upon his restoration in 1660, therefore, Charles II was faced with a delicate problem as he undertook the task of trying to recover control of the sword. In pursuit of this goal, he instituted two major innovations. First, he began using the militia to disarm his political opponents; second, he created a separate military organization consisting of volunteers loyal to him, which was independent of the ordinary militia.¹² The scheme was apparently successful in allowing Charles to assert meaningful control over the population, but it only succeeded through the connivance of the royalist gentry, who also connived to ensure that it was not *too* successful. By repeatedly refusing to provide the Crown with the funds needed for a real army, Parliament kept the King in a state of dependence that was undoubtedly meant to assure that he would only use the sword against enemies that he and they had in common.

During this period, the underlying political struggle resulted in two especially significant pieces of legislation. First, the Militia Act of 1662 authorized militia officers to disarm English subjects at their discretion.¹³ Second, the Game Act of 1671 for the first time in English history made the possession of guns by the vast majority of the population illegal. While there is apparently no documentary proof of the intent behind this second legal innovation, it was probably meant to allow the gentry to disarm their tenants and neighbors whenever such disarmament might seem necessary or

¹² *Id.* at 35-38.

¹³ 13 Car. II, ch. 6 (1662) (Eng.). This legal innovation would later come to be regarded as a significant tool for an assault on English liberties, in large part because many members of the convention that adopted the Declaration of Rights in 1689 had themselves been subjected to the humiliation of being personally disarmed. MALCOLM, *supra* note 8, at 115-16. See also *infra* notes 20-31 and accompanying text (describing evolution and substance of 1689 Declaration of Rights).

desirable.¹⁴ Although the Game Act of 1671 was apparently never enforced by the gentry, both this statute and the Militia Act of 1662 remained on the books during the tumultuous years leading up to the Glorious Revolution.

When James II succeeded Charles in 1685, he inherited a militia that had been purged of the Crown's opponents, along with a separate and substantial military force.¹⁵ James's ambitions, however, were greater than those of Charles. James was a Catholic, and he was determined to convert England to his own religion. It was widely believed at the time, moreover, that he meant to create an absolute monarchy like that of Louis XIV and to impose his religion through a standing army.¹⁶ Whatever the exact extent of James's true ambitions, he certainly took steps that were consistent with his contemporaries' worst fears, beginning with the disarmament of the Protestant militia in Ireland. Two serious rebellions in England subsequently gave him the occasion for demanding and receiving from Parliament substantial new revenues for military purposes. He then used these funds to double the size of an army that was already large by historical standards.¹⁷ He also attempted to divert resources from the militia to his own army and sought to bring the militia under Catholic domination.¹⁸ Finally, James frequently used his forces to disarm those considered suspicious. In what may have been the most extreme example of this policy, the King seized upon the Game Act of 1671 to order a general disarmament in the northern and western counties.¹⁹ Although this order was probably not carried out, it showed what the King might do if the militia were dominated by Catholics or if the Crown's own army grew strong enough.

The overthrow of James II provoked the subsequent adoption of the Declaration of Rights by the Convention Parliament and its prompt acceptance as the Bill of Rights by William and Mary.²⁰ The evolution of the arms and militia articles of this document can

¹⁴ MALCOLM, *supra* note 8, at 69-76.

¹⁵ This force comprised 24 independent companies that included 9215 men. *Id.* at 95.

¹⁶ *Id.* at 106.

¹⁷ *Id.* at 99.

¹⁸ *Id.* at 101.

¹⁹ *Id.* at 105.

²⁰ 1 W. & M., ch. 2, sess. 2 (1688) (Eng.).

be traced through three principal drafts. The earliest of these drafts complained of the existing legislation relating to the militia and denounced the keeping of standing armies during peacetime as illegal. It also demanded the restoration of arms that had been seized from Protestants, on the ground that "the Subjects, which are Protestants, should provide and keep Arms for their common Defence" ²¹ The next draft sought to eliminate complaints that would require curative legislation and to present only statements of the ancient rights of Englishmen. This draft, however, also recharacterized the right to arms: rather than stating that Protestant subjects "should" provide and keep arms, which accurately reflected the original concept of militia service as a duty, the new draft said that Protestant subjects "*may* provide and keep Arms, for their common Defence." ²² In the final draft, this evolution away from the language of duties continued: the phrase "may provide and keep Arms for their common Defence," with its connotations of the individual's duty to provide himself with military equipment in order to serve the King in defending the community, was altered to read "may have Arms for their Defence." ²³ With the removal of the references to "providing" arms and to the "common" defense, the final draft was substantially less evocative of the old concept of militia service as a tax.

Along with the transformation of the traditional duty into a right, however, came two corollary restrictions: one categorical and one based in legislative discretion. As introduced into the English Constitution, article 6 of the Bill of Rights states:

That the subjects which are Protestants may have arms for their defence suitable to their Conditions and as allowed by Law. ²⁴

The religious restriction, which had been included even in the first draft of the Declaration, suggests that this was not thought to be an unalienable right belonging to all mankind—or even to all

²¹ MALCOLM, *supra* note 8, at 117.

²² *Id.* at 118 (emphasis added).

²³ *Id.* at 119 (quoting JOURNALS OF THE HOUSE OF COMMONS, 1688-1693, 10:21-22).

²⁴ 1 W. & M., ch. 2, sess. 2 (1688) (Eng.).

Englishmen—as a natural right of birth. It was, on the contrary, an outgrowth of specific fears that the Crown might seek to impose Catholicism in England. And, in a final confirmation of the Hobbesian logic that seems to have driven the entire history of arms control in England up to this point, Parliament promptly passed a bill “for the better securing the Government by disarming Papists and reputed Papists.”²⁵

The new right to arms, moreover, seems in a sense to have inured more to the benefit of Parliament than of the individual English subject. The phrases “suitable to their Conditions” and “as allowed by Law” make it clear that the newly created constitutional right of individuals was one that might vary according to the social class to which one belonged and was one that Parliament could circumscribe without any specified restraint. This is not a right that yet bears a close resemblance to the sort of individual rights associated with the natural rights tradition or with the American Bill of Rights.²⁶

As so often happens when political compromises are frozen into law, Article 6 of the Bill of Rights eventually became invested with

²⁵ MALCOLM, *supra* note 8, at 123 (quoting 1 W. & M., ch. 15, sess. 1, (1688) (Eng.)). The act permitted local justices of the peace to allow Catholics to keep such weapons as were necessary for the defense of their houses or persons, which Professor Malcolm takes to mean that Catholics were thought to have a *right* to arms for this purpose. *Id.* Professor Malcolm's interpretation does not seem precisely correct. The statute by its terms absolutely forbids Catholics from having access to arms *beyond* those necessary for the defense of their houses and persons. It is much less clear that it grants them a right to keep even “necessary” arms, since its language only provides local officials with the *discretion* to allow individual Catholics to possess such weapons.

²⁶ Professor Malcolm insists on the importance of the shift from the older notion of a citizen's obligation to arm himself for the “common defense,” which was still reflected in preliminary drafts of the Declaration of Rights, to an individual right of self-defense. This change may appear more important in retrospect than it would have seemed at the time. On the evidence that Professor Malcolm herself presents, the shift apparently resulted from a compromise with William of Orange, who was *hostile* to the expansion of popular liberties. In context at the moment of its adoption, a reference to the “common defense” might have seemed to imply, not service to the Crown, but rather a guarantee of popular power to resist the Crown. *Id.* at 120-21. Apparently in order to avoid that political implication—an implication consistent with the natural rights theory that was later imputed to England's Bill of Rights—the final draft became more vague about the purpose that the right to arms was meant to serve. This point is worth more emphasis than Professor Malcolm gives it because it suggests that the very shift in language that on its face most clearly seems to imply a move in the direction of natural rights theory was in fact prompted by concerns of an *opposite* kind.

a purpose that was apparently absent at its creation. By the mid-eighteenth century, English law really had absorbed a popular right of Protestants to keep arms. This right, which was respected by Parliament and the courts even in the face of disturbing episodes of civil unrest, was treated as an ancient right of Englishmen.²⁷ This was evidently an illusion, as no such legal right had been articulated before 1689. More importantly, however, the eighteenth century saw the transformation of the political compromise set out in the Bill of Rights into a corollary of the natural right of self-preservation and a necessary deterrent against political oppression. This would have been the natural result of efforts to explain *why* the supposedly ancient right to arms had existed time out of mind.

Although the course of this transformative process has apparently not been studied in detail,²⁸ the best evidence of its outcome lies in Blackstone's inclusion of the right to arms in the English constitution, along with his statement that the right is rooted in "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."²⁹ Blackstone made no distinction between the "violence of oppression" that may result from government's

²⁷ Professor Malcolm summarizes the history of this period as follows:

By the late eighteenth and early nineteenth century, Parliament, the courts, and legal opinion were in agreement on the right of Protestant Englishmen to be armed and the place of this right in their nation's delicately balanced constitution. And if, during the ferocious Gordon riots, extraordinary measures had been taken to disarm some Londoners, care was taken that this not be drawn into precedent or detract from the constitutional right. The right of individuals to be armed had become, as the Bill of Rights had claimed it was, an ancient and indubitable right.

Id. at 134.

²⁸ Professor Malcolm, for example, seems to fall into the fallacy of attributing purposes to the authors of the Bill of Rights that were really only imputed to them by later generations:

The vague clauses about arms "suitable to their conditions and as allowed by law" left the way open for legislative clarification and for perpetuation of restrictions such as that on ownership of handguns. But though the right could be circumscribed, it had been affirmed [in 1689]. The proof of how comprehensive the article *was meant to be* would emerge from future actions of Parliament and the courts.

Id. at 121 (emphasis added).

²⁹ 1 WILLIAM BLACKSTONE, COMMENTARIES *139.

failure to control common criminals and the oppression that government itself may undertake. He emphasized, moreover, that the right to arms was among the five indispensable auxiliary rights "which serve principally as barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property."³⁰ With Blackstone, the theory of natural rights had fully replaced the real driving forces of 1689 as the accepted explanation for the Englishman's right to arms.

Although a coherent theory supporting the right to arms had been developed and may well have achieved a consensus by the time Blackstone wrote his treatise,³¹ the scope of the right was not nearly so well defined. The language of the Bill of Rights, which proclaims a right only to such arms as "are suitable to their Conditions and as allowed by Law," was echoed in Blackstone's statement which characterized the constitutional right as a "public allowance, under due restrictions" of the natural right of self-preservation.³² Thus, the scope of Parliament's authority to regulate the possession of arms was not precisely or closely confined. It appears that no more precise definition developed because the need for one did not arise. One might reasonably assume that English Protestants were entitled to keep those arms necessary to carrying out the purposes of the right, which included deterring oppressive government and assuring that the people would have the tools needed to resist the imposition of tyranny. In the eighteenth century, these political purposes would have been served by the same kinds of weapons that people wanted to possess for other legitimate purposes involving the natural right of self-

³⁰ *Id.* at *136.

³¹ Edward Gibbon, for example, could declare in 1776: "A martial nobility and stubborn commons, possessed of arms, tenacious of property, and collected into constitutional assemblies, form the only balance capable of preserving a free constitution against enterprises of an aspiring prince." EDWARD GIBBON, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* ch. 3, at 46 (J.B. Bury ed., The George Macy Cos. 1946) (1776). Note that Gibbon insisted that both the nobility and the commons should be armed, but indicated that only the nobility need have a "martial" character. This implies that it is sufficient to rely on the natural self-interest of commoners—their stubbornness and their tenacity about their own property—to provide the spirit that would make their possession of arms politically salutary.

³² 1 BLACKSTONE, *supra* note 29, at *139.

preservation, such as defending oneself and one's family against robbers.

This, in brief, is the right and the theory with which the Framers of the Second Amendment were familiar. Many of them may well have believed that both the right to arms and its individualistic theory had been accepted in England long before 1689. If Professor Malcolm's historical research is reliable, which I have little reason to doubt it is, they were wrong.³³ But, so what? They may well have been misinformed about many aspects of English life and history that might have a bearing on one or another provision of the American Constitution. If anything about English history matters in interpreting the Second Amendment, it is the fact—a fact made virtually indubitable by all that was said about it by those who were responsible for its adoption—that Americans accepted the basic theory set out by Blackstone: that a free citizen's right to arms is founded in the natural right of self-preservation and that an armed populace is an extremely important safeguard against tyranny. If one knew only two things—what Blackstone said and that Blackstone was considered the authoritative expositor of the English constitution—one would know virtually all the English law that is helpful in interpreting the Second Amendment.³⁴

³³ But see David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to Arms*, 93 MICH. L. REV. 1333, 1352-53 (1995) (suggesting that Convention of 1689 may have been seeking to give formal legal recognition to long-standing tradition of right to arms).

³⁴ The significance of Blackstone's views has been emphasized for many years in serious discussions of the Second Amendment. See, e.g., STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 53-54 (1984) (citing Blackstone for proposition that right to arms is basic personal right); DAVID T. HARDY, *ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT* 49-50 (1986) (same); David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1, 23, 29 (1987) [hereinafter Hardy, *Historiography*] (emphasizing influence of Blackstone's common-law assessment of right to arms on colonists and Framers of United States Constitution); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 240-42 (1983) [hereinafter Kates, *Original Meaning*] (same); Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87, 93-94 (1992) [hereinafter Kates, *Ideology of Self-Protection*] (describing Blackstone's appraisal of right to arms as influential on early American views); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 120 n.41 (1987) (noting importance of Blackstone's interpretation in determining meanings of common-law terminology used in Bill of Rights); Robert A. Sprecher, *The Lost Amendment*,

Actually, it is not so clear how necessary even this much English history is in understanding the Second Amendment.³⁵ James Madison's notes indicate that he consciously departed from the English Bill of Rights when he was drafting the Second Amendment because he believed the English guarantee was *inadequate*.³⁶ When he made his initial proposal for a bill of rights to the House of Representatives, Madison said: "In the declaration of rights which [England] has established, the truth is, they have gone no farther than to raise a barrier against the power of the Crown; the power of the Legislature is left altogether indefinite."³⁷ Thus, the whole idea of the American Bill of Rights was to confine the federal legislature within bounds unknown to Parliament.

Whatever the exact scope of the English right to arms may have been, and whatever its historical foundations were, the Americans who framed the Second Amendment did not set out to replicate it on these shores. The relevance of Blackstone may therefore lie more in his prominence as an expositor of the implications of the natural right of self-defense than in his role as an authority on English law.³⁸

51 A.B.A. J. 554, 555-56 (1965) (citing Blackstone's inclusion of right to arms among absolute rights of man).

³⁵ For reasons that I will explore below, *infra* notes 128-133 and accompanying text, the basic facts about the English origins of the right to arms may be important in applying the Supreme Court's Fourteenth Amendment jurisprudence. That matter is separate, however, from understanding the Second Amendment itself.

³⁶ Kates, *Original Meaning*, *supra* note 34, at 237 n.144.

³⁷ 1 ANNALS OF CONGRESS 436 (Joseph Gales, Sr. ed., Gates and Seaton 1834) (1789).

³⁸ Professor Malcolm mentions one study of eighteenth century thought which found that Montesquieu, Blackstone, and Locke were the three authors most often cited by major American writers. MALCOLM, *supra* note 8, at 142, 214 n.44. Although Professor Malcolm takes no note of the fact, all three of these authors emphasized the primacy of the natural right of self-defense. See 3 BLACKSTONE, *supra* note 29, at *4 ("Self-defence therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society."); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 16 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690) ("[I]t being reasonable and just, I should have a right to destroy that which threatens me with destruction: for, by the fundamental law of nature, man being to be preserved as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred: and one may destroy a man who makes war upon him, or has discovered an enmity to his being, for the same reason that he may kill a Wolf or a lion . . ."); MONTESQUIEU, THE SPIRIT OF THE LAWS bk. X, ch. 2, at 138 (Anne M. Cohler et al. eds. & trans., 1989) ("The life of states is like that of men. Men have the right to kill in the case of natural defense; states have the right to wage war for their own preservation.").

B. THE PASSING AWAY OF THE ENGLISH CONSTITUTIONAL RIGHT

Comparing the British and American rights is useful today primarily because of the divergent paths they took in the twentieth century, rather than because of their common origins in the seventeenth century. In England, the right to arms for self-defense has effectively been abolished.³⁹ The Blackstonian theories that underlay it have been discarded, and what is now the privilege of owning firearms has been ever more drastically circumscribed. In the United States, however, the Second Amendment remains in the Constitution, gun ownership is widespread and subject to much less regulation than in England, and the old Blackstonian theories are passionately advanced by a numerous and often articulate portion of the population.

How big is this difference, and what difference does it make? The abolition of the constitutional right to arms in England was caused by ordinary political forces much like those that had led to its creation in 1689. The British government became extremely concerned about the possibility of violent civil unrest after World War I, and feared that this might even lead to a Bolshevik revolution. Perhaps assisted by a general moral revulsion brought on by the brutality of the trench warfare in Europe (and an apprehension about the brutalizing effects this experience may have had on the returning soldiers), Parliament enacted legislation forbidding the possession of guns without a license from the police, who were directed to turn down any applicant who was "for any reason unfitted to be trusted with firearms."⁴⁰ Although the licenses were granted liberally at first, the police gradually became more grudging in the exercise of their discretion. It is now very

³⁹ Professor Malcolm declares that "[t]he right to be armed . . . is no longer a right of Englishmen" because, although firearms can be obtained in Great Britain, "there is no right to have them." MALCOLM, *supra* note 8, at 165, 220 n.2. This assertion is not precisely correct. Subject to many restrictions and regulations, English civilians may keep certain firearms for recreational purposes without violating the law. What the English have lost is the right to keep arms for the purpose of self-defense. See DAVID B. KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES?* ch. 3 (1992) (tracing history of British gun laws and explaining their present status).

⁴⁰ MALCOLM, *supra* note 8, at 170-71, 222 nn.36-37.

difficult for ordinary citizens to own rifles and pistols.⁴¹

Why did the English people acquiesce, without any serious resistance, in the abolition of their traditional right to arms? Even if one assumes, as Professor Malcolm suggests, that Parliament's action in 1920 was a spasmodic response to the threat of Bolshevism, the people's actual access to firearms at first remained largely intact because the police did not withhold the legally required licenses. Only after several decades of gradually more

⁴¹ KOPEL, *supra* note 39, at 60. Mr. Kopel makes the point, which Professor Malcolm does not, that England regulates shotguns less strictly than handguns and rifles, without regard to comparative lethality. *Id.* at 78. This seems to have happened because rifles and pistols are thought of as weapons that one possesses for use against human beings, whereas shotguns are associated with the one form of hunting that is still socially important in England (bird shooting). *Id.* Thus, although there are still a considerable number of legally owned firearms in Great Britain, the people of that nation seem to have abandoned the theory that citizens have a right to own weapons for the purpose of self-defense. It is in this respect that the English attitude toward weapons is most different from that in America.

Professor Malcolm observes that civil unrest, sometimes serious, had previously occurred in England without leading to the abolition of a right that had long been considered a fundamental element of the English constitution. She seems to attribute the response of the government in 1920 to a disgraceful loss of trust in the English people, which was unjustified by the threat of Bolshevism. MALCOLM, *supra* note 8, at 172, 175. She is left uneasy about the possibility that the British governing classes may yet take advantage of the people's disarmament to reduce them to chains, and she hints darkly at the future by quoting Nietzsche on the "democratic contrivances" that serve as "quarantine measures against that ancient plague, the lust for power." *Id.* at 176. Professor Malcolm quotes part of a relatively innocuous aphorism from *Human, All-Too-Human* (which she drew from an anthology of quotations by famous writers). Nietzsche's name, however, inevitably conjures his great and well-known contempt for modern political illusions. Leaving aside the question of whether the extreme concern over Bolshevism in 1920 was rational or not, it is worth noting that Nietzsche's views on democracy may be somewhat different than Professor Malcolm's. Elsewhere in *Human, All-Too-Human*, for example, Nietzsche makes the following observations: "The governments of the great States have two instruments for keeping the people dependent, in fear and obedience: a coarser, the army, and a more refined, the school." 7 THE COMPLETE WORKS OF FREDERICK NIETZSCHE 152 (O. Levy ed., 1974). And again:

The robber and the man of power who promises to protect a community from robbers are perhaps at bottom beings of the same mould, save that the latter attains his ends by other means than the former—that is to say, through regular imposts paid to him by the community, and no longer through forced contributions. . . . The essential point is that the man of power promises to maintain the equilibrium against the robber, and herein the weak find a possibility of living.

Id. at 200-01. Thus, although Nietzsche might agree that the disarmament of the English people is a symptom of a political disease, it seems unlikely that he would agree that the disease could adequately, or perhaps even usefully, be treated by re-arming the populace.

aggressive application of official discretion to deny licenses (and the enactment of some additional statutory controls) has the English right to procure the tools of self-defense largely withered away.⁴² No one suggests either that the atrophy of what was once thought to be among the most important securities for liberty was resisted by any important segment of public opinion, or that any significant portion of the public now sees any good reason to recover its ancient right.

In 1689, the great object of loathing and fear was the standing army. In the circumstances of those times, an armed populace could serve as a source of manpower for a citizen militia that could deal with legitimate emergencies, thus depriving the Crown of an excuse for keeping large standing armies. An armed populace could also provide a reasonably credible deterrent against a monarch who might be tempted to launch an attack against English liberties or such English institutions as the Protestant religion. A century later, when Americans adopted the Second Amendment, the ability of the citizen militia to obviate the need for a standing army was much more dubious.⁴³ By the end of World War I, when the English lost their constitutional right to arms as a formal matter, military technique and technology had advanced even further. Had Great Britain sought to rely on the old militia system, her government's ability to protect the population from foreign threats would have been much reduced. England chose not to attempt such a course, and that choice was not obviously foolhardy. Indeed, in retrospect, the events of the 1930s suggest that the greatest threat to English liberties arose from that nation's failure to maintain an adequate military establishment, which is precisely the opposite of the conclusion that one might draw from looking at seventeenth century history alone.

⁴² MALCOLM, *supra* note 8, at 175.

⁴³ Although there remained in America considerable mistrust of standing armies, and significant sentiment for maintaining the militia as an alternative to such establishments, the Framers of our Constitution were simply unwilling to trust the common defense to the militia. They had seen how poorly the militia had performed in comparison with regular troops during the Revolutionary War, and they insisted on providing the new federal government with virtually unrestricted discretion to raise and keep armies of whatever size Congress would prove willing to finance.

The decision to keep up an army, however, necessarily caused the popular right to arms to recede in significance, for a populace equipped with the customary small arms of the time necessarily became a much less credible deterrent to misuse of the government's military establishment than it would have been in 1689, or even in the constitutional heyday of the English right to arms during the eighteenth and nineteenth centuries. It is, I think, an undeniable fact that the right to keep arms simply cannot provide as significant a contribution to the maintenance of political liberty in the twentieth century as it could when military technology and technique were more primitive. Although its remaining significance may justify its retention, developments in the real world have caused the significance of this device to decline, both in absolute terms and in comparison with other safeguards against tyranny.

II. THE SECOND AMENDMENT AND THE NATIONAL GUARD

Unlike the English, Americans have a written Constitution that guarantees the right of the people to keep and bear arms. And unlike the English, Americans still have their guns. But there is little evidence to suggest that the Second Amendment has had any significant role in preserving the right to arms in our country. That may change in the future, but historical evidence about the right's origins in English history is not likely to contribute much to such a development. To see why, and to set the stage for an analysis that might have some practical effect, let us consider the main elements of the controversies that have arisen about the proper interpretation of the Second Amendment.

To an amazing degree, the literature on this subject has been consumed by a single, narrow question: whether the Second Amendment guarantees an individual right to keep and bear arms or only a collective right of state governments to maintain military establishments like our modern National Guards. As is usually the case when there has been no definitive judicial resolution of a constitutional question, the arguments can be divided into two principal categories: arguments directly from the text of the Constitution and arguments based on historical evidence about how that text was understood by those who framed and adopted it. With respect to the Second Amendment, the evidence in both

categories overwhelmingly supports the "individual right" interpretation. This is simply not a hard or a close question. Indeed, the textual argument alone is so strong that it is virtually conclusive even without any reinforcing historical evidence. Unfortunately, the wide dissemination of the states' right theory makes it necessary to go through the arguments in some detail in order to clear the way for the more difficult questions that remain.

A. THE CONSTITUTIONAL TEXT

It is worth emphasizing at the outset that the operative language of the Second Amendment is no more ambiguous or unclear than other provisions of the Bill of Rights. It states with unmistakable clarity that "the right of the people to keep and bear Arms, shall not be infringed."⁴⁴ The phrase "the right of the people" is identical to the phrase used in the First Amendment with respect to peaceable assembly and to the phrase used in the Fourth Amendment with respect to unreasonable searches and seizures. All three amendments were framed together, and no one has ever doubted that the First and Fourth Amendments established individual (rather than governmental) rights. Nor has anyone ever explained why the Framers of these three provisions would have used the identical language in a fundamentally different sense in the Second Amendment.⁴⁵ The Bill of Rights also clearly demonstrates on its

⁴⁴ U.S. CONST. amend. II.

⁴⁵ Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990):

"[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." See also U.S. Const., Amdt. 1 ("Congress shall make no law . . . abridging . . . *the right of the people* peaceably to assemble") (emphasis added); Art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year *by the People of the several States*") (emphasis added). While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

face that its framers were not so linguistically impoverished that they needed, or were inclined, to use the word "people" to mean "state governments." The Tenth Amendment proclaims that certain powers are "reserved to the States respectively, or the people,"⁴⁶ thus clearly distinguishing between the two.⁴⁷ To believe that the word "people" in the Second Amendment refers to the state governments requires one to assume that the Framers of the text were unbelievably sloppy or whimsical in their use of language.⁴⁸ If one is going to make assumptions like that, one might just as well go all the way and assume that the Second Amendment uses the word "arms" to mean the upper limbs of the human body.

Unlike the First and Fourth Amendments, the Second Amendment includes a prefatory phrase that sets forth its purpose. It is this prefatory language that has generated—or been used to generate—the confusion that leads to the states' right theory. This confusion, however, cannot survive attention to the unambiguous meaning of the constitutional language.

This passage does not quite imply that Second Amendment rights belong to individuals, but it sensibly presumes that "the people" is not used in wildly different senses at different points in the Bill of Rights.

⁴⁶ U.S. CONST. amend. X.

⁴⁷ This proposition has been rejected by one advocate of the view that "what may properly be done about the control of the private ownership of arms in this Country is a political, not a constitutional, issue." George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631, 693 (1992). Professor Anastaplo contends that "the states" and "the people," as used in the Tenth Amendment, may be virtually equivalent. *Id.* at 689-90. No explanation is given for this startling proposition, which is simply advanced on the authority of William Crosskey. *Id.* at 690 n.72. When one looks into Crosskey for the explanation, however, one comes upon an argument that the terms "states" and "people" were used in apposition in the Tenth Amendment to refer to *the people of each state*. WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 705-06 (1953). Crosskey expressly denies that the Tenth Amendment could have reserved any powers to the state legislatures because "reservations" were only good in favor of grantors (which the Constitution's Preamble tells us are "the people"). *Id.* at 705. But if the word "states" in the Tenth Amendment does not refer to the state governments, how much less can the term "the people" in either the Tenth Amendment or Second Amendment refer to those governments? Thus, Crosskey's reading of the Tenth Amendment would actually *strengthen* the textual argument for the individual-right interpretation of the Second Amendment, not weaken it. No wonder Professor Anastaplo provides only a citation to Crosskey rather than an explanation of what Crosskey said.

⁴⁸ As Don Kates has pointed out to me, one might in the alternative draw the absurd conclusion that the First Amendment right of assembly protects only groups organized by the state governments and that the Fourth Amendment only protects state officials and state buildings.

The Second Amendment reads in full: "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."⁴⁹ The meaning of the prefatory phrase, and its relation to the operative clause, is not appreciably less clear than the meaning of the operative clause itself. To see why this is true, however, it helps to know one small but crucial bit of linguistic history: the word "militia" was rarely used in the eighteenth century to refer to standing military organizations, and was apparently *never* so used in legal contexts. Rather, the militia was consistently *contrasted* with such organizations, as in Article VI of the Articles of Confederation:

[N]or shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.⁵⁰

The original Constitution employed the same usage, sharply distinguishing the militia from "armies," "land forces," or "troops."⁵¹ Standing military organizations derived from the militia were customarily referred to by such terms as "select militia" and were generally considered perversions of the true militia.⁵² When used alone, the term "militia" referred to the

⁴⁹ U.S. CONST. amend. II.

⁵⁰ ARTICLES OF CONFEDERATION art. VI, ¶ 4.

⁵¹ U.S. CONST. art. I, § 8, cls. 12, 14, 15, 16; § 10, cl. 3.

⁵² *E.g.*, STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 69-72 (1984); Kates, *Original Meaning*, *supra* note 34, at 216 & nn.51-52. The practice of distinguishing between standing military organizations and the militia is still maintained in statutory law today. The current statute divides the militia into two classes: the "organized militia" (which comprises the National Guard and its naval counterpart), and the "unorganized militia" (which comprises all other members of the militia). 10 U.S.C. § 311(b) (1994).

whole class of citizens *potentially* subject to military duties, *as it still does today in strict legal usage*.⁵³ As the Supreme Court has recognized:

The signification attributed to the term Militia [in the Second Amendment] appears from the debates in the Convention, the history and 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. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.⁵⁴

⁵³ The first Militia Act, for example, which was enacted shortly after the ratification of the Second Amendment, required every free able-bodied white male citizen between the ages of 17 and 45 (with certain limited exceptions) to be notified of his militia duties and to:

provide himself with a good musket or firelock, a 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 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, accoutered 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.

Act of May 8, 1792, ch. 33, 1 Stat. 271, 271 (codified as amended at 10 U.S.C. § 311(a) (1994)). Similarly, the current statute provides:

The militia of the United States consists of all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.

10 U.S.C. § 311(a) (1994). Colonial laws, moreover, typically imposed an obligation to keep and carry arms even on people who were not subject to militia service. *Kates, Original Meaning*, *supra* note 34, at 214-16.

⁵⁴ *United States v. Miller*, 307 U.S. 174, 179 (1939). The Court did not provide a citation for the phrase that it enclosed in quotation marks ("A body of citizens enrolled for military discipline."). This phrase does not conflict with the preceding sentence in the passage from *Miller*, for "enrollment" in the militia does not imply or depend on actual military service or training. Under the first Militia Act, for example, those subject to militia duty were enrolled by the local commanding officer, and then notified of that enrollment by a non-commissioned officer. § 1, 1 Stat. 271, 271 (1792). Whether the members carried out their duties or not, they were still "enrolled." Under the statute in effect at the time *Miller* was decided (as in

To suppose that the reference to a "militia" in the Second Amendment suggested organizations like our National Guards is simply anachronistic.⁵⁵ But even if one succumbs to such an anachronism, one *still* cannot derive an interpretation of the Second Amendment under which the right to arms is limited to members of the National Guard, for the Amendment simply does not say or imply that the right is so limited.⁵⁶

The prefatory phrase articulates the ultimate purpose of the Second Amendment, namely the "security of a free state," and it names one subsidiary means to that goal, to wit a "well regulated militia." The Amendment does not say or imply that either a well regulated militia or a populace that has been protected from disarmament is *all* that is necessary for the security of a free state. Nor does the Amendment say or imply that a populace protected from disarmament is *all* that is necessary to ensure a well regulated militia. In fact, of course, the Second Amendment does not specify any regulations for the militia at all. That is certainly not

the statute in force today), enrollment was accomplished by the operation of law alone, and most members of the militia were probably not even aware that they belonged to such a body. National Defense Act, ch. 134, § 57, 39 Stat. 166, 197 (1916); 10 U.S.C. § 311(a) (1994). Thus, neither the *Miller* opinion nor any of the various militia statutes can be used to shore up the insupportable notion that the Second Amendment protects only a right to serve in the National Guard. For a contrasting view, see Robert A. Goldwin, *Gun Control Is Constitutional*, WALL ST. J., Dec. 12, 1991, at A15, which falsely asserts that the first Militia Act required citizens to enroll in the militia, wrongly conflates the militia with the National Guard, and mistakenly concludes that the Second Amendment protects a right to enroll in the National Guard rather than a right to keep and bear arms.

⁵⁵ It may be possible to stretch the term "militia," as used in the Militia Clauses of Article I, to apply to the modern National Guards in some contexts and for some purposes. See, e.g., *Perpich v. Department of Defense*, 496 U.S. 334, 348 (1990) (stating that State Guard unit, whose members could be ordered to active federal duty, qualified as "a militia" for Article I purposes). Assuming the permissibility of this interpretation of the militia provisions in Article I, however, it has no bearing on the interpretation of the Second Amendment, for the reasons set out below, *infra* notes 60-68 and accompanying text.

⁵⁶ Indeed, it would be easier to argue that Article I prohibits the federal government from using tax monies for programs that people in 1789 would not have thought promoted the general welfare than to argue that the Second Amendment's prefatory language limits the right to arms to those serving in the militia (however defined). Article I limits Congress's power of taxation by specifying the uses to which tax monies may be put, thereby implying that other uses are forbidden: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . ." U.S. CONST. art. I, § 8, cl. 1. The grammatical structure of the Second Amendment is very different, and it assuredly does not say: "The people shall have the right to keep and bear arms while serving in a well regulated militia."

surprising, for Article I of the Constitution had already set forth a comprehensive statement allocating responsibility for regulating the militia.

How then can the operative language of the Amendment have any relation at all to the purposes set out in the prefatory phrase? Though apparently overlooked by all the courts and commentators that have interpreted the Second Amendment, the answer is completely obvious as soon as one thinks of it. A well regulated militia is, among other things, one that is not *overly* regulated or *inappropriately* regulated. The Second Amendment simply forbids one form of *inappropriate* regulation: disarming the people from whom the militia must necessarily be drawn.

In order to see why this is a completely obvious construction—and in fact the only reasonable construction—of the relation between the prefatory and operative clauses of the Second Amendment, it may be helpful to imagine for a moment that the Constitution contained the following provision:

A well regulated stock market being necessary to the prosperity of a free state, the right of the people to set the prices at which they buy and sell securities shall not be infringed.

This would leave the government with the power to impose all kinds of regulations on the markets: disclosure requirements, bans on insider trading, registration requirements for securities dealers, and so forth. But the one thing the government *could not* do would be to impose price controls on securities. The Second Amendment is strictly analogous. There are all kinds of things the federal government can do to regulate the militia, such as requiring everyone to own a military carbine or requiring everyone to undergo military training. The federal government can also go in the other direction, for it effectively has the power to abolish the militia as a meaningful alternative to the standing army.⁵⁷ In fact, the federal government has done exactly that through the National Guard system, which requires those who enlist in it to

⁵⁷ The text of the Second Amendment clearly indicates that its Framers hoped this would not occur. Just as clearly, the Second Amendment refrains from expressly forbidding it.

join both their state organization and the federal standing army.⁵⁸ But the one thing the government is forbidden to do is infringe the right of the people, who are the source of the militia's members, to keep and bear arms.

Thus, the operative language of the Second Amendment unambiguously establishes an individual right to keep and bear arms, and nothing in the prefatory language of the Amendment compels or implies the notion that the operative language establishes a right belonging to the state governments.⁵⁹ But that is not the only reason for rejecting the states' right interpretation. That interpretation is also affirmatively absurd.

The states' right interpretation implies that the right to keep and bear arms applies only to those members of the militia who are organized into military units by their state governments. Apart from the fact that there is no reason to suppose that the word "militia" was used in this narrow sense by those who framed the Second Amendment, the states' right interpretation would seem to imply that the word "people" actually refers to the "militia," so that the text should read: "A well regulated militia being necessary to the security of a free State, the right of the *militia* to keep and bear arms shall not be infringed."⁶⁰ But why would the draftsmen have

⁵⁸ For a history of the transformation of the state militia organizations into components of the federal armed forces, see James Biser Whisker, *The Citizen-Soldier Under Federal and State Law*, 94 W. VA. L. REV. 947 (1992).

⁵⁹ There is apparently some evidence that for those involved in the adoption of the Second Amendment the phrase "well regulated militia" may have been almost a term of art, meaning a force that met three criteria: it must be drawn from the whole body of the people; it must be outside the control of the central government, with officers elected by its members; and the members must own their own arms. James H. Warner, *Guns, Crime, and the Culture War*, Heritage Lecture 393 (May 27, 1992).

⁶⁰ One commentator has said that "we can sensibly read the phrase 'the people' in the [Second] Amendment's main clause as synonymous with 'the militia,' thereby eliminating the grammatical and analytic tension that would otherwise exist between the two clauses." Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1261 (1992). As evidence for his conclusion, Professor Amar notes that one of the preliminary drafts of the Second Amendment read: "A well regulated militia, composed of the body of the People, being the best security of a free state, the right of the People to keep and bear arms, shall not be infringed." *Id.* at 1261 n.293 (citing EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 214 (1957)). Professor Amar's inference is illogical. It is certainly true that those who drafted the Second Amendment hoped that the government would maintain a militia "composed of the body of the people." They implied exactly that in the draft Professor Amar quotes. It does not follow that they believed that

used two different words, within the space of one short sentence, to refer to the same entity? If this bald rewriting of the text is rejected, as it obviously must be, the states' right interpretation can only be saved by interpreting "the people" to mean "the state governments." This is equally absurd, however, because governments cannot *bear* arms. While a government might be thought capable of keeping arms, only an individual can bear them.⁶¹ And if this were not proof enough, the states' right interpretation's assumption that the Second Amendment protects state military organizations from federal interference is flatly inconsistent with Article I's prohibition against the states keeping troops without the consent of Congress.⁶² Can anyone honestly believe that this provision of the original Constitution was repealed by the Second Amendment?

"the people" could be *defined* by the government's decisions regarding the composition of the militia. To suppose that they did, one would have to believe not only that the constitutional right to arms could be legislated out of existence by governmental abolition of the militia, but that "the people" would thereby also be legislated out of existence. Apart from being illogical, Professor Amar's inference is a response to a problem—"the grammatical and analytic tension" between the two parts of the Second Amendment—that has been created by anachronistic impositions on the constitutional text by modern courts and commentators. If one avoids these inappropriate impositions on the text, one also avoids the problem that Professor Amar was trying to solve.

⁶¹ Nor can one escape the argument by contending that the phrase "bear arms" has military connotations that suggest that the Second Amendment was directed only at preserving a right to have weapons while serving in an organized military force. While the phrase certainly does have military connotations, it was also used outside military contexts, as can be easily seen in the Pennsylvania Anti-Federalist proposal, quoted *infra* in the text accompanying note 141. In any event, even if one assumed that people could "bear arms" only in a government-sponsored military unit, the phrase "keep arms" seems to have had specifically *civilian* connotations. Kates, *Original Meaning*, *supra* note 34, at 219-20. One commentator contends that "to-keep-and-bear is a description of one connected process," which referred to the militia's "permanent readiness." Garry Wills, *To Keep and Bear Arms*, N.Y. REVIEW OF BOOKS, Sept. 21, 1995, at 62, 67-68. Mr. Wills, however, fails to support his assertion with a single quotation in which the phrase "to keep and bear arms" had ever been used in this way. His assertion can therefore charitably be described as mere speculation. See also WARREN FREEDMAN, *THE PRIVILEGE TO KEEP AND BEAR ARMS: THE SECOND AMENDMENT AND ITS INTERPRETATION* 27 (1989) (asserting—without evidence—that "the militia 'keep' arms in that the arms are not private property but belong to the governments; an individual, not a member of the militia, would 'possess' arms, at most").

⁶² U.S. CONST. art. I, § 10, cl. 3. Cf. *Patton v. United States*, 281 U.S. 276, 293 (1930) ("The first ten amendments and the original Constitution were substantially contemporaneous and should be construed *in pari materia*."), *overruled on other grounds by Williams v. Florida*, 399 U.S. 78 (1970).

Thus, no matter which way one turns the argument, the states' right interpretation dissolves into nonsense when one tries to square it with the constitutional language.⁶³ In addition to the manifest irreconcilability of the states' right interpretation with the language of the Constitution, the purpose attributed to the Second Amendment by the states' right interpretation has implications that are so radical that they simply could not have gone unnoticed or unremarked upon during the process of framing and ratifying the Amendment. That purpose, we are apparently expected to believe, was to prevent the federal government, through hostility or apathy, from eliminating the state military organizations that served as a counterweight to the power of federal standing armies.⁶⁴ But this must imply that the Second Amendment silently repealed or amended the provision of Article I of the Constitution that gives the federal government plenary authority to organize, arm, and discipline the militia, subject only to the states' rights to appoint the militia's officers and to train the militia according to the congressionally prescribed discipline.⁶⁵ This provision of Article I has allowed the federal government to virtually eliminate the state militias as independent military forces by turning them into adjuncts of the federal army through the

⁶³ One commentator has tried to avoid this problem by calling the Second Amendment a "narrow" individual right, meant only to ensure the individual was not prevented "from functioning as a militiaman in the organized state militia." Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 64, 82 (1995). This suggestion is fatally flawed because participation in the militia has always been a legal obligation or a duty, rather than a right. It is true that today one may choose to enlist in the organized *segment* of the militia, namely the National Guard. Membership in the militia itself, however, is and always has been completely mandatory. It simply makes no sense either as a matter of language or common sense to call mandatory membership in a governmentally defined militia an "individual right."

⁶⁴ See, e.g., Warren E. Burger, *The Right to Bear Arms*, PARADE MAG., Jan. 14, 1990, at 4 (arguing that militia was an instrument of state government intended to balance federal government's power). The former Chief Justice's article, which is typical of the states' right literature, assumes that a well regulated militia is a "state army," *id.* at 6, which was necessary to prevent the establishment of a standing national army, *id.* at 4-5. Essentially the same argument is offered at greater length in 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, 18-34 (1989), and more concisely in LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 11 (1991).

⁶⁵ U.S. CONST. art. I, § 8, cl. 16.

National Guard system.⁶⁶ This transformation, which is not forbidden by the language of either Article I or the Second Amendment, is manifestly inconsistent with the purpose attributed to the Second Amendment by the states' right theory. Thus, that theory implies that our modern National Guard system must be unconstitutional.⁶⁷ Similarly, the states' right interpretation would seem to imply that state gun regulations preempt those of the federal government. Thus, for example, if a state decided to regulate its militia by requiring or authorizing all of its adult citizens to arm themselves with fully automatic battle carbines, such legislation would have to override the current federal restrictions on such weapons. Indeed, if one truly took the purpose attributed to the Second Amendment by the states' right theory seriously, it might well follow that *all* federal gun control regulations are invalid because control over the private possession of arms lies exclusively in the state governments.⁶⁸

⁶⁶ By providing a large portion of the funding for the National Guard and requiring the members of the state units that benefit from this funding to enroll in the federal reserves, Congress has effectively abolished the state military organizations as independent forces. See *Perpich v. Department of Defense*, 496 U.S. 334, 345 (1990) ("Since 1932 all persons who have enlisted in state National Guard units have simultaneously enlisted in the National Guard of the United States.").

⁶⁷ Ignoring the logical consequences of his own assumptions, former Chief Justice Burger seems to have arrived at the impossible conclusion that Congress repealed the Second Amendment when it replaced the "state armies" with the National Guard. Burger, *supra* note 64, at 6 ("[I]t has become clear, sadly, that we have no choice but to maintain a standing national army while still maintaining a 'militia' by way of the National Guard, which can be swiftly integrated into the national defense forces."). In any event, he went on to suggest that the Constitution now protects the right to keep and bear arms only to the extent that it also protects the right to own fishing rods and automobiles. *Id.* Although his *Parade Magazine* article is written in a confused and somewhat ambiguous style, the former Chief Justice subsequently stated his conclusion very clearly. Disdaining to answer any of the contrary legal arguments with which the academic literature is filled, Burger announced: "[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 Amendment. The Second Amendment doesn't guarantee the right to have firearms at all." Warren E. Burger, Press Conference Concerning Introduction of the Public Health and Safety Act of 1992 (June 26, 1992), available in LEXIS, Nexis Library, Archws File. This accusation of fraud, an accusation made "advisedly," was not substantiated by any evidence.

⁶⁸ The points made in this paragraph are adapted from Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995).

B. LEGISLATIVE HISTORY

Given the strength of the textual argument, it should come as no surprise that the historical evidence concerning the understanding of the text at the time it was framed and adopted confirms that the Second Amendment was meant to establish an individual right to keep and bear arms. The threat against which the Second Amendment was primarily (though not exclusively) directed was that the federal government might use military power to oppress the people. This threat was created by the original Constitution, which put virtually no formal limit on the new government's ability to raise and maintain armies.⁶⁹ The Framers of the Constitution judged that threat tolerable because they believed the militia system was simply inadequate for the defense of the nation. Once that decision was made, the Framers had to decide how best to reduce the threats to liberty that were inevitably created by the federal government's unlimited power to maintain a standing army. The obvious solution was to maintain a strong militia, thereby taking away the federal government's excuse for keeping large armies during peacetime.

How could the Constitution ensure the maintenance of a strong militia? If control over the militia were left in the states, the resulting lack of uniformity in training and equipment would ensure that it could never be a really effective fighting force. But if control of the militia were lodged in the federal government, the trained militia could become little more than an instrument of federal policy, hardly distinguishable from a standing federal army. This, of course, is exactly what our modern National Guard has become. Or the militia could be allowed by the federal government to fall into desuetude, deprived of training and discipline, so that it would be unable to act effectively when it was most needed for the defense of liberty. This is precisely what has in fact happened to the portion of the modern militia that is outside the National

⁶⁹ The Constitution does contain a two-year limit on appropriations for maintaining armies, which does not apply to the navy. U.S. CONST. art. I, §§ 12-13. Unlike armies, navies would not have been of much use to a government bent on oppressing its own population. As we can see today, however, the two-year limit on appropriations has not actually put any limit at all on the government's ability to maintain exceedingly large and powerful standing armies.

Guard system. The Constitution comes down firmly in favor of federal control, for it leaves with the states only the appointment of militia officers and the responsibility for training the militia according to federal rules.⁷⁰ This decision was deliberately taken by the Convention in the hope that the federal government's ability to maintain an effective militia system would take away the excuse for large peacetime armies.⁷¹ But it must have been clear to Madison and the others who favored this approach that it was based rather more on hope than on legally effective constraints.

The fact is that there was no way out of the conundrum that the Convention faced. Requiring the federal government to rely exclusively on the militia for the defense of the nation would have imperiled the national security because militia units could not be expected to provide a match for regular troops. But allowing the federal government the necessary discretion to maintain an effective force for the defense of the nation inexorably created the risk that this force would be used to oppress the citizens and attack their liberties. The Second Amendment is primarily an attempt to ameliorate the unhappy consequences of this insoluble dilemma. If it was impossible to prevent the federal government from substituting a standing army for the militia, or from transforming the militia into something very like a standing army, it was at least possible to prevent the federal government from disarming the populace from which the militia is drawn. An armed populace—even if it could not serve to deter tyranny as effectively as a legal prohibition against federal standing armies—would still constitute a highly significant obstacle to the most serious kinds of governmental oppression.⁷²

⁷⁰ U.S. CONST. art I, § 8, cl. 16.

⁷¹ MALCOLM, *supra* note 8, at 153.

⁷² It obviously does not follow from this proposition that the Second Amendment creates an individual right of insurrection against the government, any more than the Commander-in-Chief Clause confers on the President a right to use the armed forces for illegal purposes. One commentator has wrongly contended that the individual-right interpretation of the Second Amendment "amounts to the startling assertion of a generalized constitutional right of all citizens to engage in armed insurrection against their government." Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107, 110 (1991). Apart from the fact that Mr. Henigan does not quote anyone who makes this assertion, the logic that he wrongly thinks should require it would also require *him* to assert that the states' right theory (which he endorses) implies that the state governments have a

All of the historical evidence about the intent of those responsible for the adoption of the Second Amendment is consistent with this account.⁷³ The animating purpose of the provision was to establish a bulwark against political oppression by the federal government, and the means chosen was a prohibition against the federal

constitutional right of insurrection against the federal government. Although he does not mention it, Mr. Henigan must know this, for he tries to draw support for his states' right theory by quoting extensively from Luther Martin, a leading Anti-Federalist, who complained about the Militia Clauses in the original Constitution because "the militia, the only defence and protection which the State can have for the security of their rights against arbitrary encroachments of the general government, is taken entirely out of the power of the respective States, and placed under the power of Congress." *Id.* at 117 (quoting 3 RECORDS OF THE FEDERAL CONVENTION 208-09 (Max Farrand ed., 1974)). If Mr. Henigan's logic were sound, which it is not, it would seem that the Confederate states were simply exercising their constitutional rights under the Second Amendment when they fought to establish a separate nation. *See also* Wills, *supra* note 61, at 62, 69-71 (asserting that "wacky scholars" claim Second Amendment creates public right to armed insurrection, but failing to identify or quote any such wacky scholars).

As this Article was going to press, there appeared a much more complex and sophisticated variation on the theme of Second Amendment insurrection. David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879 (1996). Professor Williams argues that the Second Amendment protects a right of revolution, which can only be exercised by a unified and virtuous people, but that the Second Amendment does not protect a right to engage in civil war, which occurs when a self-interested faction takes up arms. Believing that this right of revolution is the only right protected by the Second Amendment, and believing further that a unified and virtuous people almost certainly does not exist and probably never did exist, Professor Williams concludes that the Second Amendment has no application to our society. Professor Williams's article deserves a more detailed commentary than I can offer here, but two highly questionable elements of his argument may be identified. First, his argument depends on the proposition that the Second Amendment has nothing whatsoever to do with enabling citizens to protect themselves against criminal violence. Although he alludes briefly to the contrary position, he does not refute the arguments that have been made in its behalf. *See id.* at 894 n.59. Second, and no less important, Professor Williams makes no distinction between a natural right of revolution, which many of the Framers may well have endorsed, and a constitutional or Second Amendment right of revolution, which has no textual basis at all. Contrary to Professor Williams's suggestion, *see, e.g., id.* at 913-14, there is no conflict between rejecting the notion of a constitutional right of violent revolution and accepting the notion that the Second Amendment was meant in part to help deter federal officials from engaging in oppressive acts that might provoke violent responses from those who were oppressed. Nor does the possibility (or even the certainty) that the Second Amendment will enable some individuals to use weapons for purposes repellent to the Framers—such as insurrection or armed robbery—imply that the Second Amendment can apply only in a world where such misuses could not occur.

⁷³ The evidence has been amassed in a number of sources. The most important include HALBROOK, *supra* note 52; MALCOLM, *supra* note 8; Hardy, *Historiography*, *supra* note 34; Kates, *Original Meaning*, *supra* note 34.

government's disarming individual citizens.⁷⁴ There is nothing surprising about this, for the Americans had recent experience with conditions that required near universal arming of the citizenry, even beyond those citizens who were subject to militia duty.⁷⁵ Ideally, an armed populace should be organized into a well regulated militia, and the prefatory clause of the Second Amendment reflects this hope.⁷⁶ The Second Amendment, however, was

⁷⁴ It is therefore a mistake to leap from the indubitable fact that the Framers' main concern was with preventing misconduct by the federal government and from the textual and historical evidence showing that they hoped for the preservation of the traditional militia, to the conclusion that the means chosen to serve these goals was something other than—and indeed inconsistent with—the means set out in the constitutional text. For an example of this error, see Ehrman & Henigan, *supra* note 64, at 18-34 (asserting that because Framers' concerns focused on militia as means to avoid federal government tyranny over state governments, Second Amendment was not intended to protect individual right to possess arms outside military context).

⁷⁵ As Professor Malcolm points out, the Americans who set about framing new governments after the Revolutionary War faced a somewhat different set of circumstances than those out of which the Declaration of Rights arose in 1689. While they had remained colonies, the Americans had been forced by the harsh conditions in which they lived to resurrect the English militia tradition in a very robust form. As in England, men in a designated age group were liable for service in the militia, with narrow exceptions for clergy, religious objectors, and blacks. MALCOLM, *supra* note 8, at 139. The colonists, however, went beyond the English model, often requiring *all householders* to be armed (whether or not they were subject to militia duty) and sometimes even requiring citizens to carry their weapons in specified circumstances, such as during trips to church or while making journeys of more than two miles. *Id.* For further detail, see Kates, *Original Meaning*, *supra* note 34, at 214-16.

⁷⁶ Some of the more liberal leaders of the founding generation probably thought that the republican ideal of the citizen militia amounted largely to romantic nonsense, inconsistent with the principle of the division of labor. Alexander Hamilton, for example, wrote that "[t]he project of disciplining all the militia of the United States is as futile as it would be injurious if it were capable of being carried into execution." THE FEDERALIST No. 29, at 184 (Alexander Hamilton) (Clinton Rossiter ed., 1961). If Hamilton and other liberals believed that the inherent inefficiency of the republican militia ideal would eventually lead to its demise, they were proved right. Even as late as 1833, however, a commentator as sober as Joseph Story could express serious misgivings about this outcome. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1890, at 746 (1833). In any event, Hamilton's views only confirm that while the Second Amendment may have embodied a *hope* for something impracticable, it *requires* something perfectly feasible. Indeed, Hamilton believed that something well beyond the requirement of the Second Amendment was feasible. In the midst of his strongest criticism of the militia ideal, Hamilton also wrote: "Little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped; and in order to see that this be not neglected, it will be necessary to assemble them once or twice in the course of a year." THE FEDERALIST No. 29, *supra*, at 185.

intended to ensure that even if the government neglected or perverted the militia, it could not go even further in eliminating obstacles to tyranny by disarming the people from whom the militia must be drawn.

A skeptical reader—even one who feels compelled to acknowledge that the prefatory language of the Second Amendment does not alter or qualify its prohibition against infringing the individual's right to keep and bear arms—is entitled to object that there is still something a little mysterious and troubling about that prefatory language. This uneasiness is justified, for the argument I have provided does not yet offer an intellectually *satisfying* account of the Amendment read as a whole. It is quite fair to ask why Madison's initial draft of a bill of rights would have included a prefatory statement of purpose *only* in the provision dealing with the right to arms, and why that distinctive feature would have been preserved through successive drafts and included in the final version that was proposed by Congress to the states.⁷⁷

⁷⁷ It should be noted, however, that the evolution of the text shows that emphasis on the militia decreased as the text went through the congressional process. The preliminary versions were *less* clear about the individual nature of the right to arms than the final version, for they included more details relating to the kind of militia that the Framers hoped would be promoted by protecting the right to arms.

- Madison's initial draft read: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person." 1 ANNALS OF CONGRESS 434 (Joseph Gales ed., 1789).
- The House version (devised by a committee of James Madison, Roger Sherman, and John Vining) read: "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms." *Id.* at 749.
- The Senate made further revisions and adopted the text that is now a part of the Constitution: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend II.

All of the major changes that were made during the congressional process increased the clarity with which the Second Amendment protects an individual right: dropping the conscientious objector clause; eliminating the reference to a "well armed" militia; and omitting the reference to a militia composed of the body of the people. The fact that these potentially confusing phrases were deliberately dropped by the First Congress confirms that Congress knew exactly what it was doing when it proposed for ratification the unambiguous text that is now part of the Constitution. What Congress did was to replace confusing wordiness with elegant precision. The result was a proposal to which no one at the time

Fortunately, there is a fully satisfying explanation, which emerges from the political situation that Madison faced when he set about drafting his bill of rights. Among those demanding a bill of rights, there were two somewhat different camps. On one side were those with relatively liberal views, like Thomas Jefferson and Samuel Adams, who focused on the importance of protecting individual citizens from being disarmed.⁷⁸ The liberal view was easy to satisfy since there was apparently no one at all who advocated allowing such a power to the federal government, and this utterly noncontroversial sentiment is reflected in the operative clause of the Second Amendment. A somewhat greater challenge was presented by the more traditional republicans, like George Mason and Richard Henry Lee, whose principal concern was to ensure that the federal government not undermine the militia by causing it to decay.⁷⁹ The insoluble conundrum that the Convention faced when it drafted the Militia Clauses ensured that this group could not be fully satisfied without endangering the new government's ability to protect the national security. The prefatory language of the Second Amendment conveys a *rhetorical respect* for the views of this second group, but without giving *legal effect* to their preference for a militia over standing armies. And lest there be any doubt about the fact—a fact unambiguously reflected in the constitutional language—that the more liberal, individual-right position was to be *fully* satisfied, the Senate *rejected* a proposal to qualify the individual right by adding the words “for the common defense” to the Second Amendment.⁸⁰

could or did object, and which subsequent objectors have been forced to ignore or rewrite precisely because it does not suffer from the muddled draftsmanship of the preliminary versions. For a sharply contrasting (but unexplained) interpretation of the changes made during the drafting process, see MALCOLM, *supra* note 8, at 161 (asserting that “streamlining the language and omitting explanatory phrases” reduced text’s clarity).

⁷⁸ William S. Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 MIL. L. REV. 1, 38-39 (1992) (“A militia statement standing alone likely would have been unacceptable to liberal groups such as the Pennsylvania minority, Samuel Adams and his supporters, the New Hampshire majority, and possibly Jefferson himself—all of whom had advocated an individual right to arms and none of whose efforts had so much as mentioned the militia.”).

⁷⁹ On the views of the more traditional republicans, see, for example, Hardy, *Historiography*, *supra* note 34, at 49-51.

⁸⁰ *Id.* at 39. Adding this phrase to the Amendment would not have implied that the federal government had the authority to disarm individual citizens, but it might have suggested that the Second Amendment’s only purpose was to shore up the traditional militia

This political analysis is illuminated and confirmed by specific events that occurred at the Constitutional Convention.⁸¹ Near the end of the Convention, several delegates expressed qualms about the distribution of military power among the state and federal governments. George Mason proposed that the clause giving the federal government authority to provide for organizing, arming, and disciplining the militia be prefaced with the following words: "And that the liberties of the people may be better secured against the danger of standing armies in time of peace"⁸² James Madison himself spoke in favor of this proposal, arguing that the proposed addition would not actually restrict the new government's authority over the militia, but would constitute a healthy expression of disapproval for the keeping of armies.⁸³ The only recorded objection, which was voiced initially by Gouveneur Morris, was that this language set "a dishonorable mark of distinction on the military class of Citizen."⁸⁴ Whether because of this objection or some other, Mason's motion failed. When one reads the Second Amendment with this history in mind, it is immediately apparent that Madison neatly succeeded in accomplishing what he had seen as the virtue of Mason's suggestion at the Convention, while avoiding the problem that Gouveneur Morris had pointed out. Professor Malcolm puts it well: "A strong statement of preference for a militia must have seemed more tactful than an expression of distrust of the army."⁸⁵

This history makes it plain how the Second Amendment's operative language both contributed to the likelihood of the federal government's maintaining the kind of militia that the Framers

system. The facts that such qualifying language was never even considered in the House of Representatives, and that it was rejected when proposed in the Senate, offer powerful—though redundant—evidence against those who would recur to the "militia purpose" of the Second Amendment to justify interpreting the constitutional language in a way inconsistent with its terms.

⁸¹ Professor Malcolm recounts these events with admirable clarity, although she does not make the connection that I do between these events and the underlying political differences between liberals and more traditional republicans. MALCOLM, *supra* note 8, at 154-55, 163-64.

⁸² *Id.* at 154 (citing JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 639 (Adrienne Koch ed., 1966)).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 164.

thought best *and* provided an outer limit to the federal government's ability to regulate the militia in ways the Framers thought worst. To see how perfectly well-adapted the language of the Second Amendment is to this aim, imagine that the original Constitution did not include the Patent and Copyright Clause.⁸⁶ Then imagine that the following constitutional amendment was adopted:

A well regulated system of commerce being necessary to the progress of science and useful arts, the right of the people to control their writings and discoveries during their lifetimes shall not be infringed.

It would be perfectly clear from this text that its draftsmen hoped to promote the production of intellectual goods by encouraging trade in such goods. It would be equally clear that the means chosen to reach this goal was the constitutional protection of specified property rights in intellectual goods. Now suppose that Congress subsequently used its powers under the Commerce Clause⁸⁷ to erect substantial barriers to foreign and interstate trade in intellectual property. Under these circumstances, the draftsmen's *hopes* would not be fully realized. But this fact would in no way prevent the operative language of the amendment from making *some* contribution to preventing inappropriate commercial regulations. Nor would it prevent the operative language from making a significant contribution to the progress of the arts and sciences. Still less would the congressionally created trade barriers provide any reason for "interpreting" the amendment to protect only a collective or states' right to freedom from federal elimination of intrastate commerce in intellectual property. Least of all, perhaps, would either the congressionally created trade barriers or any expressions of a preference for free trade by the framers of the

⁸⁶ U.S. CONST. art. I, § 8, cl. 8 (Congress shall have power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

⁸⁷ *Id.* at cl. 3 (Congress shall have power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). For purposes of this analogy, the Commerce Clause serves the same function as the Militia Clauses, *id.* at cls. 15-16, which give Congress near plenary authority to regulate the militia.

amendment, or both together, provide a reason for denying that the operative language of the amendment protects individual property rights.

As William Van Alstyne has observed: "Perhaps no provision in the Constitution causes [the modern reader] to stumble quite so much on a first reading, or second, or third reading, as the short provision in the Second Amendment" ⁸⁸ The clumsiness of the modern reader, however, can be cured if one simply uses standard interpretive tools and avoids imposing anachronistic prejudices on the text. ⁸⁹ The historical evidence about the original understanding of the Second Amendment merely confirms what the text says, and helps us to understand more completely why the text says what it says.

Although the contribution made by the historical evidence should not be overstated, it is significant that the evidence is completely consistent with the individual-right language in the Amendment itself. Indeed, it appears that *every known piece of evidence* confirms that the Second Amendment was intended to do exactly what its plain words say it does: secure an individual right to keep and bear arms. ⁹⁰ So far as I know, advocates of the states' right

⁸⁸ William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1236 (1994).

⁸⁹ It is thus extremely misleading to say: "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). This kind of offhand remark may not be out of place in an essay designed as a thought-provoking challenge to "our" views of the Amendment" (i.e. the views of the "elite bar" or "an elite, liberal portion of the public"). *Id.* at 642. One is particularly hesitant to demand precise formulations from an author whose views are accompanied by the modest disclaimer that "[i]t is not my style to offer 'correct' or 'incorrect' interpretations of the Constitution." *Id.* Professor Levinson's admirably provocative synopsis of prior scholarship, however, has become the most widely cited commentary on the Second Amendment, which means that it must be subjected to somewhat greater scrutiny than might otherwise be appropriate.

⁹⁰ See, e.g., HALBROOK, *supra* note 52, at 83 ("If anyone entertained this ["states' right"] notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis."). See also Don B. Kates, Jr., *Gun Control: Separating Reality from Symbolism*, 20 J. CONTEMP. L. 353, 360 (1994) ("The very concept that the Second Amendment only guarantees that states will have the right to maintain a militia, while denying individuals the right to bear arms, is an invention of this century's gun control debate."). In fact, the Framers of the Second Amendment may well have considered adopting the states' right theory, and *rejected*

theory have never produced one single shred of evidence that anyone involved with the Second Amendment's adoption said that it established a right belonging to the state governments. Surely, this failure to produce *any* historical support is simply fatal to a theory that requires turning the constitutional text itself on its head.

C. THE SUPREME COURT AND THE LEGISLATIVE HISTORY

Given the overpowering strength of the arguments in favor of the individual-right interpretation, it should come as no surprise that the Supreme Court has never rejected it. In fact, the Court implicitly accepted it in the opinion that comes closest to addressing the issue. Until the twentieth century, the federal government did not regulate firearms, the Bill of Rights had not yet been applied to the states, and the Court only occasionally mentioned the Second Amendment.⁹¹ During Prohibition, however, certain weapons came to be associated with gangsters. Congress responded with the National Firearms Act of 1934, which required the registration of specified firearms such as short-barreled shotguns and machine guns. In *United States v. Miller*,⁹² the Supreme Court reviewed a federal trial court's dismissal of an indictment against two individuals charged with transporting an unregistered short-barreled shotgun across state lines. This case represents the

it. There is a draft bill of rights in the handwriting of Roger Sherman (who was on the House drafting committee with James Madison and John Vining), which did not specify a right to keep and bear arms, but which did provide that the "militia shall be under the government of the laws of the respective States, when not in the actual Service of the united [sic] States" Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 65 (1989); MALCOLM, *supra* note 8, at 160. The existence of this draft strengthens the point that Messrs. Halbrook and Kates have made, for it suggests that the states' right approach to the militia problem may have been consciously rejected in favor of the individual-right approach that is unambiguously set forth in the Second Amendment.

⁹¹ For early comments about the Second Amendment, see *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897) (indicating that Second Amendment was not thought to be infringed by laws against carrying concealed weapons); *Miller v. Texas*, 153 U.S. 535 (1894) (concluding that Second Amendment applies only against federal government); *Presser v. Illinois*, 116 U.S. 252 (1886) (same); *United States v. Cruikshank*, 92 U.S. 542 (1875) (same); *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (arguing against notion that blacks could be citizens on ground that this would imply that they have constitutionally protected right to firearms).

⁹² 307 U.S. 174 (1939).

Supreme Court's only attempt to interpret the Second Amendment.⁹³

The Supreme Court rejected the trial court's conclusion that the prohibition on transporting an unregistered shotgun across state lines violated the Second Amendment. Reasoning that the "obvious purpose" of the Amendment was to "assure the continuation and render possible the effectiveness" of the militia, the Court noted that the defendants had not proved that a short-barreled shotgun "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia"⁹⁴ The Court's notion of a "well regulated militia" becomes apparent in the next sentence, which reads: "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."⁹⁵

Although the Supreme Court's decision is based, as we shall see, on an untenable assumption about the purpose of the Second Amendment, it does clearly acknowledge that Second Amendment rights belong to individuals, not state governments. Had the Court accepted the states' right theory, it would have simply asked whether the defendants were members of the National Guard or otherwise authorized by a state militia law to possess a shotgun with a short barrel. The fact that the Court decided the case by reference to the nature of the weapon involved, without even raising a question about the defendants' military status under state law, implies that the Second Amendment establishes an individual right that can be asserted without reliance on state militia statutes.⁹⁶

⁹³ In *Lewis v. United States*, 445 U.S. 55, 65-66 n.8 (1980), the Court casually invoked *Miller* in an opinion that upheld a federal statute prohibiting the possession of firearms by felons.

⁹⁴ *Miller*, 307 U.S. at 178.

⁹⁵ *Id.*

⁹⁶ Soon after *Miller* was decided, the United States Court of Appeals for the First Circuit observed that the Supreme Court's reasoning would extend the protection of the Second Amendment to all modern weapons that can be shown to have a military use (including machine guns, trench mortars, etc.), even when possessed by private persons who are not "present or prospective members of any military unit." *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943). Rather than accept this conclusion, the First Circuit rejected it on the ground that "we do not feel that the Supreme Court in this case was attempting to formulate a general rule applicable to all cases. The rule which it laid down was adequate to dispose of the case before it and that we think was as far as the Supreme Court intended to go." *Id.* Rather than accept the Supreme Court's authoritative

This does not necessarily mean that the Court will never accept the intellectually untenable "states' right" or "National Guard" interpretation. Even if the Supreme Court reaffirms the obvious truth that the Second Amendment guarantees an individual rather than a states' right, however, the Court could still interpret the right so narrowly as to leave it with little practical significance. To see why, we must now turn to the much more difficult questions that remain unanswered once one acknowledges that the Second Amendment establishes an individual right to keep and bear arms.

III. THE CHANGING ROLE OF THE SECOND AMENDMENT

A. SUBSEQUENT TECHNOLOGICAL DEVELOPMENTS

The first, and perhaps most obvious, set of questions that remain concerns the type of arms that citizens have a right to keep and bear under the Second Amendment. Does it, for example, cover every device that could be useful in defending oneself against those who might threaten one's life, including the government? If so, those who can afford to purchase nuclear weapons, tanks, artillery, and other modern instruments of armed combat must be allowed to exercise their liberty. One might answer this *reductio ad absurdum* by arguing that the Framers of the Second Amendment did not mean to include heavy ordnance (or other military devices

guidance, the *Cases* court went on to adopt the states' right theory of the Second Amendment, and lower courts have subsequently persisted in following the *Cases* theory. See, e.g., Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 981-98 (1996) (discussing lower court interpretations of *Miller*); Herz, *supra* note 63, at 73-77 (same); Lund, *supra* note 34, at 110 & n.18 (same). That theory, however, was not adopted or implied by the Supreme Court in *Miller*, as some federal judges have recently, tentatively, and implicitly begun to acknowledge. See *United States v. Atlas*, 94 F.3d 447, 452 (8th Cir. 1996) (Arnold, C.J., dissenting) (noting that possession of gun is not by itself a crime and observing that "though the right to bear arms is not absolute, it finds explicit protection in the Bill of Rights"); *United States v. Gomez*, 81 F.3d 846, 850 n.7 (9th Cir. 1996) (arguing that 18 U.S.C. § 922(g)(1), which prohibits convicted felons from possessing firearms, might violate Second Amendment were it not subject to a justification defense), *amended on denial of reh'g*, 92 F.3d 770 (1996) (reflecting withdrawal by two panel members of their concurrence in footnote 7 of court's opinion); *United States v. Lopez*, 2 F.3d 1342, 1364 n.46 (5th Cir. 1993) (suggesting that some applications of "Gun-Free School Zones Act of 1990," 18 U.S.C. § 922(q), might raise Second Amendment concerns), *aff'd on other grounds*, 115 S. Ct. 1624 (1995).

that an individual citizen could not "bear") within the meaning of the term "arms" as used in the Second Amendment.⁹⁷ Assuming the validity of this argument, a wide array of very potent destructive devices would seem to remain within the constitutional ambit: fully automatic carbines (*i.e.* "assault rifles"), hand-held antiaircraft weapons (like the Stinger missiles that proved so important for the Afghans' resistance to the Soviets), portable rocket launchers like those used by infantry against tanks, land mines, flamethrowers, mortars, and maybe even some chemical and biological weapons.

The experience of the Framers—who lived before the invention of small devices with such enormous destructive power—did not require them to make fine distinctions, or any distinctions at all, about the kinds of portable weapons that would be suitable for civilians to keep in their possession. It is a little more surprising that the *Miller* Court, writing in 1939, could have been so insensitive to this change of circumstances. Even at that time, however, the bolt-action rifles and semi-automatic pistols customarily carried by the infantry were scarcely distinguishable from the arms commonly used by civilians for recreational hunting and self-defense.⁹⁸ *Miller* clearly indicates that weapons must have a military application in order to come within the protection of the Second Amendment, and it strongly suggests that such application is *sufficient* to bring them within the guarantee: "Certainly it is not within judicial notice that this weapon [a short barreled shotgun] is any part of the ordinary military equipment or that its use could contribute to the common defense."⁹⁹ What more

⁹⁷ See, e.g., Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms,"* 49 LAW & CONTEMP. PROBS. 151, 157-60 (1986) (discussing which "arms" are protected by Second Amendment).

⁹⁸ See THE DIAGRAM GROUP, *WEAPONS: AN INTERNATIONAL ENCYCLOPEDIA FROM 5000 B.C. TO 2000 A.D.*, at 134, 139 (1980) (describing standard small arms used by American infantry just prior to World War II). The *Miller* Court was evidently unaware that short-barreled shotguns are frequently used in military operations (though not with nearly the frequency of rifles), and that these weapons therefore "could contribute to the common defense" in the Court's apparent sense of that phrase. See, e.g., *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) (describing use of short-barreled shotguns in specialized military units).

⁹⁹ *Miller*, 307 U.S. at 178 (emphasis added). The Court appended to this sentence a citation to a state court decision construing the *Tennessee Constitution*, which by its terms secured to the "free white men of this State a right to keep and bear arms for their common defense." See *id.* (emphasis added) (citing *Aymette v. State*, 21 Tenn. 152, 155, 2 Hum. 154,

obviously has a military application than the standard tools of the modern infantryman, such as battle carbines capable of fully automatic fire, mortars, and grenades?¹⁰⁰

Miller's undefended assumption about the purpose of the Second Amendment is incorrect. Analytically, there are three possible ways that the right of individual citizens to keep and bear arms could contribute to the "security of a free state": by creating a ready source of armed men for military service; by curbing the tyrannical impulses of government; and by reducing the threat of criminal violence. The *Miller* Court apparently assumed—without any analysis of the constitutional text or any indication that the matter had been given the slightest thought—that the first of these three alternatives is the sole purpose of the constitutional right to arms.¹⁰¹ In fact, however, this is the one alternative that *cannot*

158 (1841)). The Tennessee court held that this state constitutional provision did not protect weapons that would be "useless in war" (namely a certain type of knife "usually employed in private broils, and which are efficient only in the hands of the robber and the assassin"). *Aymette*, 21 Tenn. at 156, 2 Hum. at 158. The *Miller* Court did not explain or try to defend its insupportable imputation to the U.S. Constitution of the textual limitation ("for their common defense") contained in the Tennessee Constitution.

¹⁰⁰ This argument holds even if one interprets *Miller*, contrary to its apparent sense, as implying that the Second Amendment covers only those weapons that are "part of the ordinary military equipment."

¹⁰¹ *Miller's* implicit rejection of the anti-tyranny and personal-defense purposes of the Second Amendment is unmistakably clear not only from the passages already quoted, but also from the fact that the Court quoted the Militia Clauses of Article I, and then said: "With obvious purpose to assure the continuation and render possible the effectiveness of *such forces* the declaration and guarantee of the Second Amendment were made." 307 U.S. at 178 (emphasis added). The Militia Clauses consist entirely of grants of authority to Congress except to the extent that they reserve to the states the powers of appointing officers and training the federally regulated militia. U.S. CONST. art. I, § 8, cl. 16. As we have seen, however, the Second Amendment could not, and has not, assured the preservation and effectiveness of the traditional militia.

The most likely reason for the *Miller* Court's demonstrably mistaken conclusion is sheer inattentiveness and lack of information. The opinion in the case is extremely brief; it contains no analysis of the Constitution's language or structure; and its holding is based on an *inability* to take judicial notice of a fact that would have changed the outcome of the case (namely, that short-barreled shotguns have useful military applications). The negligence reflected in the opinion may have been fostered by the Court's irresponsible decision to hear only one side of the case. The defendants had disappeared following the district court's dismissal of the indictment against them, and the government then brought an appeal to the Supreme Court. Rather than appointing counsel to defend the district court's decision on behalf of the defendants, the Supreme Court simply chose to let the government's arguments go unchallenged. Those arguments apparently contained distorted and incomplete characterizations of the authorities upon which they relied, just as one might expect from

be the purpose of the Second Amendment. Article I of the original Constitution already provided authority for Congress to take whatever steps it thought necessary to ensure that there would be an armed body of men ready for military service at any time. Under this authority, Congress could require all potential recruits to arm themselves with standard military weapons at their own expense and to undergo military training to ensure that they would be ready to serve.¹⁰² Thus, the Second Amendment adds absolutely nothing to Congress's pre-existing authority to ensure the "preservation and efficiency" of the militia. Nor, as we have seen, can the Second Amendment be interpreted to subtract from Congress's pre-existing authority by shifting some of it to the state governments. Thus, the *Miller* Court was wrong to assume that the purpose of the Second Amendment is to prepare citizens to serve in the government's armies.

I predict without reservation that the Supreme Court will not follow *Miller's* logic. I make this prediction not solely or even primarily because *Miller's* assumption about the purpose of the Second Amendment is demonstrably wrong, but rather because the consequences of *Miller's* logic will be highly unappealing to the Justices as a policy matter. The Supreme Court is simply not going to tell the federal government that it is powerless to interfere with the citizenry's access to all the weapons (or even most of them) that modern soldiers customarily carry into battle. The Court's refusal to do this will be quite reasonable, just as the reason of the thing would prohibit *limitations* of the Second Amendment's protection to the black powder muskets and pistols that the Framers were thinking about in the eighteenth century. Technological progress has raised new questions that the Court will not be able to answer by looking only at the Constitution's text and history. If a meaningful Second Amendment right is ever recognized by the Court, it will have to be based on a theory that is consistent with the Constitution's text and history, but that *also* yields answers to questions about which the text and history are silent or ambiguous.

an advocate who lacked an opponent. See David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31, 44-48 (1976) (discussing government's advocacy in *Miller*).

¹⁰² Congress, in fact, did exactly this in the first Militia Act, 1 Stat. 271 (1792), which remained on the books until early in the twentieth century.

The need for such a theory is illustrated by the unsuccessful efforts that two leading Second Amendment commentators have made to derive a rule of decision from the Constitution itself. Don B. Kates, Jr. has argued that the Second Amendment covers only those arms that are "suitable" to *all* of the self-defense functions that citizens would have exercised in the eighteenth century (individual self-defense, military operations, and law enforcement), thus excluding "specialized military weaponry" as well as guns that are not "standard police or military weapons."¹⁰³ This proposed rule, which is not dictated by the language or history of the Second Amendment, seems to imply that the only guns protected by the Second Amendment today are the kind of pistols issued to most soldiers and police officers. Mr. Kates's rule, moreover, would apparently cause the constitutional right to arms to evaporate completely if the government decreed (for technical or political reasons) that the police and military would henceforth use only specialized military and police weaponry. This cannot be. The proposed test, moreover, is analytically imprecise because most guns *can* be used for all three purposes (and in that sense are "suitable" for each) even though the *degree* of a particular weapon's suitability may vary from one context to another.¹⁰⁴

A somewhat different rule has been suggested by Stephen P. Halbrook, who contends that "dangerous and unusual" weapons (such as grenades, bombs, and bazookas) are not covered by the Second Amendment, apparently because they tend to wreak indiscriminate destruction on the innocent and the guilty alike.¹⁰⁵ This argument seems to assume that no citizen would ever be

¹⁰³ Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143, 148 (1986) [hereinafter Kates, *Second Amendment*].

¹⁰⁴ Mr. Kates has also proposed a more elaborate legal rule, under which the Second Amendment applies to weapons that are (1) of the kind in common use among law abiding people today; (2) are useful and appropriate for military, law enforcement, *and* self-defense purposes; (3) are "lineally descended" from weapons known to the Founders; (4) can be physically carried by an individual; *and* (5) are not so "dangerous and unusual" as to be "apt to terrify the people." Kates, *Original Meaning*, *supra* note 34, at 258-61. Under this test, virtually any politically unpopular weapon could be banned, as Mr. Kates himself suggests when he argues that the Constitution would permit prohibitions on loaded rifles and shotguns (at least in urban areas), and even on pistols and pistol ammunition that are thought to be too "high-powered." *Id.* at 261-64. In the end, this test is analogous to a First Amendment rule allowing the government to suppress "offensive" speech.

¹⁰⁵ Halbrook, *supra* note 97, at 160.

attacked by someone who was protected by armor. The argument also seems to assume that aggressors are always surrounded by innocent people who would be endangered by the use of devices like grenades or bazookas. Both assumptions would likely prove false in the very circumstances that most immediately concerned the Framers of the Second Amendment: attempts at political oppression by the government. The distinction between "dangerous and unusual" weapons and those that are "safe and common," moreover, is quite fuzzy.¹⁰⁶ Any firearm can endanger innocent people if used carelessly or if used in inappropriate circumstances. Even if we hope that occasions for the responsible use of grenades and bazookas will be rare or nonexistent, as we surely do, those occasions may be among the most significant in serving the purpose that was foremost in the minds of those who gave us the Second Amendment.

Whatever one thinks of the legal rules proposed by Messrs. Kates and Halbrook as a policy matter, neither of them can be derived from the language or history of the Second Amendment. Nor, to be sure, does the Constitution itself offer us an alternative bright-line rule. If and when the Supreme Court begins facing the difficult question that Kates and Halbrook are addressing, it will have to look beyond the text and history of the Constitution.

B. FOURTEENTH AMENDMENT INCORPORATION

Questions like those just raised about the scope of the Second Amendment are made especially pressing by the issue of its application to state gun control laws. The Second Amendment, like the other guarantees of individual liberty in the Bill of Rights, at first acted only as a restriction on the federal government.¹⁰⁷

¹⁰⁶ Contrary to Mr. Halbrook's suggestion, moreover, the distinction is not one that the Framers of the Second Amendment can be assumed to have carried over from the common law. At common law, citizens were merely forbidden to *display* "dangerous and unusual" weapons in a manner "terrifying [to] the good people of the land." 4 BLACKSTONE, *supra* note 29, at *148-49. They were not forbidden to keep such weapons, however.

¹⁰⁷ The Supreme Court accepted this understanding of the original meaning of the Bill of Rights at an early date. See *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (holding that Bill of Rights applies only against federal government). Because the Court has not swerved from its interpretation, see *infra* notes 111-112 and accompanying text, I leave aside the possibility that some of the first eight amendments to the Constitution might have

There was little need for the Framers to be concerned about the details of the inevitable tradeoffs between individual freedom and public safety because the Constitution left the states free to balance those competing goals in whatever ways they thought fit. Every state was left free by the federal Bill of Rights to establish an official religion, to require a government license in order to publish a newspaper, to abolish the right of trial by jury, to take private property without just compensation, and to deprive citizens of life, liberty, or property without due process of law. Similarly, the states were left free to regulate the private possession of weapons in whatever way seemed appropriate to them. The Framers could therefore have reasonably expected that new issues, like those raised by technological developments in weaponry, could and would be addressed by the state governments as they arose. So long as the states were left with their virtually unbounded regulatory powers, moreover, there would be little danger to public order arising from strict (*i.e.*, faithful) interpretations of the Constitution's efforts to disable the central government. If something really needed to be done to prevent disorders arising from an excess of liberty, and if the Bill of Rights forbade Washington to do it, the states could take care of the problem.¹⁰⁸

That state of affairs has now been drastically altered. When the Supreme Court began invoking the Due Process Clause of the Fourteenth Amendment to apply provisions of the Bill of Rights against state governments, it was compelled to begin deciding a wide range of questions that had not arisen earlier, and that might never have arisen but for this process of "incorporation." Even after the enormous transfer of responsibility to the central government beginning in the 1930s, it is still the states that engage in most of the regulatory actions that tend to generate hard questions

been meant to apply from the start against the states as well as the federal government.

¹⁰⁸ As a matter of constitutional design, there is much to be said in favor of restoring this state of affairs. See, *e.g.*, Nelson Lund, *Federalism and Civil Liberties*, KAN. L. REV. (forthcoming 1997) (arguing that competitive forces generated by mechanism of federalism is more likely to produce optimal level of civil liberties than is Supreme Court supervision of states through Fourteenth Amendment incorporation and substantive due process). But because the Supreme Court has not given even the slightest hint that it would ever revise its interpretation of the Fourteenth Amendment in a way that "unincorporated" the Bill of Rights, I will not pursue the arguments in favor of such an interpretation here.

under the Bill of Rights. The effect has been profound: when the Supreme Court interprets a provision of the Bill of Rights in a way that leads to a dangerous curtailment of government power, there is no longer a safety valve in the system, for the Court's decision disables the states as well as the federal government. The direct result is that the Court has increasingly, and almost necessarily, begun to act more like a legislative body than like a court of law interpreting the written commands of the sovereign. Because its decisions about the limits of government power apply to the federal and state governments alike, the Court now engages in an endless process of adjusting and readjusting the permissible bounds of liberty in a variety of sensitive contexts.

When engaged in this process, which takes place under the aegis of substantive due process as well as under the Bill of Rights, the Court has sometimes offered openly political judgments in support of its decisions, along with considerable sensitivity to public opinion.¹⁰⁹ More commonly, the Court has engaged in a manifestly policy-driven balancing of costs and benefits that has often become rather detached from either the text or history of the constitutional provision that is invoked to justify the results.¹¹⁰ If the Court comes to be dominated by judges committed to a more

¹⁰⁹ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 865-69 (1992), where the Court acknowledged with remarkable candor how very sensitive it is to the preservation of its own political capital. It can hardly be a coincidence that the holding in *Casey* closely mirrored public sentiment, as expressed in the latest opinion polls:

In the latest poll by CNN-USA Today-Gallup Organization Inc., taken just after the Court announced its decision in the Pennsylvania case, a third of Americans said they felt that abortion should be "legal under any circumstances." Only an eighth of the respondents thought abortion should be "illegal in all circumstances." Almost half said abortion should be "legal only under certain circumstances." Strong majorities of 71-81 per cent endorsed each of the restrictions the Court upheld (counseling, a 24-hour waiting period and parental consent for minors).

William Schneider, *A Legal Victory or Political Setback?*, 24 NAT'L J. 1666 (July 11, 1992).

¹¹⁰ See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (holding governmental display of Christmas nativity scene unconstitutional, but display of menorah constitutional when menorah is placed near Christmas tree); *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (granting commercial speech only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values"); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (finding adherents of Amish religion exempted by Constitution from compulsory education laws); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (ruling that broadcasters enjoy less First Amendment protection than print media).

restrained judicial role than those who have taken the lead during the past few decades, these phenomena may diminish somewhat. Unless Fourteenth Amendment incorporation is discarded, however, and the Bill of Rights again taken only as a set of restraints on the federal government, the underlying task of balancing individual liberty against public safety will continue to be performed by the Court, though perhaps a little less flamboyantly. And no provision of the Bill of Rights more obviously requires a balancing of these interests than the Second Amendment.

Before the Court faces the necessity of undertaking this balancing process, however, it will have to decide that the Second Amendment does apply to the states. In the years since the incorporation process began, the Supreme Court has refused, without explanation, to address the issue of Second Amendment incorporation.¹¹¹ In this respect, the Second Amendment is unique.¹¹² It would not be hard to read a certain hostility or contempt for the Second Amendment into the Court's neglect, but that interpretation is not absolutely compelled by the Court's behavior.¹¹³ As a legal matter, the incorporation issue remains

¹¹¹ On at least three occasions, the Court has declined to address the issue. *Hickman v. Block*, 81 F.3d 98 (9th Cir.), *cert. denied*, 117 S. Ct. 276 (1996); *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); *Burton v. Sills*, 248 A.2d 521 (N.J. 1967), *appeal dismissed*, 394 U.S. 812 (1969).

¹¹² The Court has considered incorporating the Seventh Amendment and the grand jury indictment provision of the Fifth Amendment, and refused to do so. See *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La.) (holding that Seventh Amendment does not apply to states), *aff'd sub nom.* *Mayes v. Ellis*, 409 U.S. 943 (1972); *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211 (1916) (same); see also *Hurtado v. California*, 110 U.S. 516 (1884) (finding Fifth Amendment indictment provision not applicable to states); *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972) (endorsing *Hurtado*); *Albright v. Oliver*, 114 S. Ct. 807, 812 (1994) (recalling *Hurtado's* holding with apparent approval). Since the process of incorporation began, the Court has apparently not had an occasion to decide whether the Excessive Fines and Excessive Bail Clauses of the Eighth Amendment or the Third Amendment should be applied against the states. See *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989) (reserving issue of whether Excessive Fines Clause is incorporated); *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (apparently assuming that Excessive Bail Clause is incorporated); *Van Alstyne*, *supra* note 88, at 1239 & n.12 (noting paucity of Third Amendment cases). All other provisions of the first eight amendments have been incorporated.

¹¹³ On the same day that certiorari was denied in a case squarely presenting the Second Amendment incorporation issue, *Quilici*, 464 U.S. 863 (1983), *denying cert. to* 695 F.2d 261 (7th Cir. 1982), for example, the Court granted a petition challenging the constitutionality of a statute that forbade loitering for the purpose of engaging in or soliciting deviate sexual

completely open, and the Court has said nothing that would prevent its giving that issue the same serious attention it has bestowed on other provisions of the Bill of Rights.

Assuming that the Court will eventually take up the issue, should the Second Amendment be applied against the states? If the Court has the slightest regard for doctrinal consistency, it will have no choice except to incorporate the Second Amendment. It is true that the approach taken in prior incorporation cases has been so vague and variable that one could not safely make any *predictions* one way or the other.¹¹⁴ But unless the Court radically revises its stated principles, it will not be able to avoid incorporation.

To see why, consider those principles. Surprisingly, the meaning or intent of those who adopted the Fourteenth Amendment appears to be irrelevant.¹¹⁵ The only provision of the Fourteenth Amend-

intercourse, *New York v. Uplinger*, 464 U.S. 812 (1983), and agreed to hear a case involving the claimed constitutional right of protesters to sleep in a public park, *Watt v. Community for Creative Non-Violence*, 464 U.S. 812 (1983). Given the relative triviality of the First Amendment issues raised in these cases, one might suspect that the Court regarded the Second Amendment itself with disdain. That suspicion, however, should not ripen into a conclusion unless the Court actually rejects Second Amendment incorporation, which it has not done.

¹¹⁴ This judgment may seem harsh, but it is hardly idiosyncratic. *Cf., e.g., Carter v. Kentucky*, 450 U.S. 288, 309 (1981) (Rehnquist, J., dissenting) (discussing "the mysterious process of transmogrification by which [a guarantee of the Bill of Rights] was held to be 'incorporated' and made applicable to the States by the Fourteenth Amendment"); *Adamson v. California*, 332 U.S. 46, 69 (1947) (Black, J., dissenting) ("This decision reasserts a constitutional theory spelled out in *Twining v. New Jersey*, 211 U.S. 78, that this Court is endowed by the Constitution with boundless power under 'natural law' periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental liberty and justice.'"); Paul M. Bator, *Some Thoughts on Applied Federalism*, 6 HARV. J.L. & PUB. POL'Y 51, 58 (1982) ("[T]he way we arrived at incorporation was intellectually shoddy. It was just announced, as though it were a *coup d'etat*; suddenly we had incorporation."); Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1614 (1995) ("[T]he incorporation theory is a strange amalgam of history and fiction."); Henry V. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 935 (1965) ("[T]he present Justices feel that if their predecessors could arrange for the absorption of some [provisions of the Bill of Rights] in the due process clause, they ought to possess similar absorptive capacity as to other provisions equally important in their eyes.").

¹¹⁵ If it were considered relevant, it would be easy to show that the Framers were far more concerned with protecting the right to arms than with protecting such other rights as those covered in the First Amendment. The animating purpose of the Fourteenth Amendment was to ensure the abolition of the Black Codes that had been introduced in the South after slavery was abolished and especially to remove any doubts about the

ment that might have been intended to accomplish something like incorporation is the Privileges or Immunities Clause. But the Court indicated early on that it saw in this clause only one purpose: to stop the states from discriminating against black citizens.¹¹⁶ Decades later, when the Court decided to apply the First Amendment against the states, it ignored the Privileges or Immunities Clause and invoked the Due Process Clause instead.¹¹⁷ This provision of the Fourteenth Amendment, of course, is utterly incapable of providing any guidance for the simple reason that it says nothing at all about the substantive provisions of the Bill of

constitutionality of the Civil Rights Act of 1866. Prominent in the Black Codes were provisions that severely restricted blacks from arming themselves. *E.g.*, HALBROOK, *supra* note 52, at 108-09; Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. CIV. RTS. L.J. 67, 71 (1991). Accordingly, the congressional debates over the Fourteenth Amendment and the various civil rights bills of the period contain frequent references to the importance of protecting the freed slaves from being disarmed by the state governments. For a review of the evidence, see HALBROOK, *supra* note 52, at 107-53.

It is completely clear, moreover, that whatever tools the Fourteenth Amendment was meant to provide for securing the right to arms, it was emphatically not meant to shore up the state militias, which had actively been used to disarm the black population. The same Congress that proposed the Fourteenth Amendment addressed the militia problem a few months later by enacting a bill that *disbanded* the southern militias. *Id.* at 138 (citing Act of 2 March 1867, CONG. GLOBE, 39th Cong., 2d Sess.). This bill was passed only after it was amended, in response to objections expressly based on the Second Amendment, to remove a provision for "disarming" the militias (and therewith the body of individuals from which the militias are drawn). *Id.* at 135-38. If any of the guarantees listed in the Bill of Rights was considered "fundamental" in the sense that it needed protection from the state governments (and from technically private stand-ins for those governments, like the Ku Klux Klan), it was the right to arms.

¹¹⁶ See *Slaughter-House Cases*, 83 U.S. 36, 81 (1873) ("We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [the privileges or immunities] provision.").

¹¹⁷ See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (assuming in dictum that due process protects freedoms of speech and press from state interference); *Stromberg v. California*, 283 U.S. 359, 368 (1931) (relying on precedent to invoke due process as basis for invalidating state law infringing freedom of speech). The Court's original "incorporation" decision was extremely narrow, implying nothing about the First Amendment or the other provisions of the Bill of Rights that now enjoy the judiciary's special favor. *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 236 (1897) ("[I]f, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the State to public use and without compensation of the private property of the citizen.").

Rights.¹¹⁸ This might not have rendered the intent of the Fourteenth Amendment's Framers completely irrelevant if the Court had concluded from the legislative history that they meant to incorporate the Bill of Rights *en bloc* against the states. The Court, however, has never accepted this contention.¹¹⁹ Rather than investigate the intentions of those who adopted the Fourteenth Amendment, the Court has asked whether particular provisions of the Bill of Rights are "fundamental" in the sense that they are entailed in a "scheme of ordered liberty."

This legal test was set forth in *Palko v. Connecticut*,¹²⁰ where the Court said that the test for incorporation is whether a particular immunity is "implicit in the concept of ordered liberty,"¹²¹ meaning that the immunity must be "of the very essence of a scheme of ordered liberty."¹²² As an example, the Court offered the First Amendment: freedom of thought and speech, said the Court, "is the matrix, the indispensable condition, of nearly every other form of freedom."¹²³

¹¹⁸ There are many ways to see this. Apart from the fact that substance and process are by definition opposed, perhaps the easiest arises from the fact that the language of the Due Process Clause of the Fourteenth Amendment is identical to that of the Fifth Amendment's Due Process Clause. If the language of due process somehow "incorporates" some or all of the substantive provisions of the Bill of Rights, those other provisions must have been surplusage in the first place.

¹¹⁹ This theory was strongly urged upon the Court by Justice Black. *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting). His theory has subsequently been the subject of considerable academic disputation, but the Court has never adopted it.

The literature favoring "total incorporation" includes MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993); William W. Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); see also Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) (arguing that all privileges and immunities of citizens recognized in Bill of Rights became applicable against states by virtue of Fourteenth Amendment). A few of the works casting doubt on the incorporation thesis include RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 134-56 (1977); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 342-51 (1985); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

¹²⁰ 302 U.S. 319 (1937).

¹²¹ *Id.* at 325.

¹²² *Id.*

¹²³ *Id.* at 327.

Eventually, the *Palko* test came to be too constraining for a Court that wanted to forbid the states from doing a variety of things that anyone could easily see are not part of the "very essence" of ordered liberty. In *Duncan v. Louisiana*,¹²⁴ the Court expressly jettisoned *Palko*'s insistence that a right be essential to ordered liberty, and replaced it with a requirement that the right be "necessary to an Anglo-American regime of ordered liberty."¹²⁵ This alteration of the standard was articulated in the realm of criminal procedure, but the Court did not suggest that some different standard would apply elsewhere. Thus, *Duncan* did not exactly abandon the "ordered liberty" test, but merely confirmed that the Court had broadened its view to include all those components of the Bill of Rights that had traditionally been regarded as fundamental in the peculiar context of Anglo-American civilization.

Even under the more stringent *Palko* test, the text of the Constitution itself demands the incorporation of the Second Amendment. The Second Amendment, unlike any other provision of the Bill of Rights, includes a prefatory phrase expressing its sense of the fundamental importance of the Amendment. Moreover, *that phrase contains language whose meaning is virtually identical to that of the language in the Supreme Court's incorporation test*: the Supreme Court's reference to those rights that are entailed in a "scheme of ordered liberty" is nothing but a slightly reworded version of the Second Amendment's reference to what is "necessary to the security of a free State." It is as though the Court had taken its legal test for incorporation from the Second Amendment itself, and this stunning similarity gives the right to arms a much stronger textual claim to being "fundamental" in the Court's stated sense of the term than any other provision of the Bill of Rights.¹²⁶

The case for incorporating the Second Amendment is made even stronger by *Duncan*'s revision of the *Palko* test. It might well be

¹²⁴ 391 U.S. 145 (1968).

¹²⁵ *Id.* at 149 n.14.

¹²⁶ This assumes, of course, that the text of the Constitution must have *some* relevance in deciding whether particular provisions of the Bill of Rights apply against the states. It is not perfectly clear that the Supreme Court would accept this assumption, but it seems better to give the Court the benefit of the doubt on this question than to assume that the Constitution's text, i.e. the Constitution itself, is left completely out of consideration.

possible to conceive of a scheme of ordered liberty that did not include the right to keep and bear arms, and thus to argue that the Second Amendment need not be incorporated under *Palko*.¹²⁷ After *Duncan*, however, the question is whether the history of a right in England and America demonstrates that it has a fundamental place in *our* scheme of ordered liberty.¹²⁸ The right to arms meets this test under any honest reading of the text. Like the right to a jury trial in criminal cases, which was at issue in *Duncan* itself, "[i]ts preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689."¹²⁹ And, like the right to jury trial, the right to arms "came to America with English colonists, and received strong support from them."¹³⁰ When the Second Amendment was adopted, almost half the states with bills of rights included provisions protecting the right to arms,¹³¹ and *no* state had laws infringing that right. Even today, forty-three states have constitutional provisions expressly protecting a right to

¹²⁷ Of course, one could say the same thing about all the other provisions of the Bill of Rights, including the First Amendment. The Court has claimed that its incorporation decisions have been "dictated by a study and appreciation of the meaning, the essential implications, of liberty itself." *Palko*, 302 U.S. at 326. But students of liberty at least as sophisticated as those who have served on the Supreme Court have contended that some of the freedoms protected by the First Amendment are actually *inconsistent* with a properly ordered scheme of liberty. Among other examples, see PLATO, *THE LAWS*; JEAN-JACQUES ROUSSEAU, *LETTER TO M. D'ALEMBERT ON THE THEATRE*.

¹²⁸ One might argue that the test developed in *Palko* and *Duncan* should only be used when considering questions of criminal procedure dealt with in the Fifth and Sixth Amendments, since that was all that was actually at issue in those cases. *Palko*, however, treated the test that it set forth as one that is generally applicable, 302 U.S. at 325-28, and *Duncan* presented its own discussion as a restatement of "cases applying provisions of the first eight Amendments to the States," 391 U.S. at 149 n.14. Perhaps more important, the Court seems never to have offered any other test for incorporation, so there seems to be no alternative to which one might recur.

¹²⁹ *Duncan*, 391 U.S. at 151. The English precursor of the American right to arms was not quite so hoary as the rights included in the Magna Carta, but its English roots were obviously far deeper than rights—such as those protected by the First Amendment's free speech, free press, and religion clauses—that had no place at all in the English constitution.

¹³⁰ *Id.* at 152.

¹³¹ Donald S. Lutz, *The States and the U.S. Bills of Rights*, 16 S. ILL. U. L.J. 251, 259 tbl. III (1992).

arms,¹³² and *no* jurisdiction has attempted to ban guns completely. The right protected by the Second Amendment meets the Court's test of what is "fundamental" far more easily than other rights that have already been incorporated, some of which were never even included in the fundamental documents of the English constitution.¹³³ Unless we have a thimblery for a Supreme Court, the incorporation of the Second Amendment must inevitably occur.

The right to keep and bear arms is also "fundamental" in the sense that it is worth protecting today. This is the proposition perhaps most in need of being established, for it is hard to believe that the Supreme Court will submit to even the most compelling legal arguments unless the Justices also believe that the law they are enforcing is socially salutary. It is true that the military requirements of a modern great power have made it impractical for us to substitute the militia for a standing army. It is also true that developments in the technology of small weaponry have made it much more dangerous than it once was for civilians to have access to all the weapons they would commonly be expected to use during military operations. But, as the next section of this article will show, it is *not* true that a citizenry armed with conventional weapons such as rifles, shotguns, and pistols is incapable of deterring governmental misconduct. It is even more emphatically *not* true that the Second Amendment's contribution to the underlying fundamental right of self-defense has been eliminated by technological or societal changes since the eighteenth century. On the contrary, our modern governments have proved no more able or willing to protect law-abiding citizens from criminal predators than their predecessors were. That enduring fact provides the seed from which an intellectually serious Second Amendment jurisprudence might grow.

¹³² For a compilation of state constitutional provisions, see Dowlut, *supra* note 90, at 84-89.

¹³³ Conspicuous examples include both religion clauses of the First Amendment, the First Amendment rights of speech and press, the Fifth Amendment's prohibition against uncompensated takings of private property, and several of the Fifth and Sixth Amendment rights of the criminally accused. See Lutz, *supra* note 131, at 253 tbl. I (listing documents that first protected Bill of Rights guarantees).

IV. A FUTURE FOR THE SECOND AMENDMENT?

Should the Supreme Court ever focus seriously and honestly on the Second Amendment, and on whether it should be incorporated against the states, it will need to confront the analytically undeniable fact that an armed populace does create a deterrent to government oppression, even in a world where such an unorganized militia would have no hope of defeating the government's military establishment in battle. The mere existence of a large stock of arms in private hands inevitably raises the expected costs of governmental repression, and thereby makes it less likely to occur. This insight emphatically does not depend on the assumption that the federal government must be kept militarily inferior to the unorganized militia.¹³⁴ On the contrary, it requires only a recognition of the simple fact that decisions about the use of military force are rationally determined, *not* by the feasibility or even the probability of ultimate success but rather by the *ratio* of an operation's expected benefits and expected costs (with the magnitude of the prospective costs and benefits discounted by the probability of their being incurred and attained respectively). Anyone who doubts that proposition should spend a moment trying to figure out why the United States lost the Vietnam War and why the Soviets failed to subdue Afghanistan.¹³⁵

¹³⁴ Such an assumption would be manifestly inconsistent with the Constitution itself, which expressly contemplates that the federal government will "suppress Insurrections." U.S. CONST. art. I, § 8, cl. 15.

¹³⁵ Lund, *supra* note 34, at 115. One commentator has disputed this proposition, contending that an armed populace can make no contribution at all to the preservation of political liberty in the modern world. Colonel Charles J. Dunlap, Jr., USAF, *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643 (1995). Colonel Dunlap denies the relevance of the many examples where strong military powers have been rebuffed by weaker adversaries. Unlike governments contemplating the advisability of foreign adventures, he contends, "[t]yrants rarely engage in or are deterred by the rational calculations that underpin the cost-benefit/deterrence theory." *Id.* at 668 (footnote citing Hitler and Saddam Hussein omitted). This proposition is highly questionable as an empirical matter, and it is certainly untrue that domestic political oppression has historically been the exclusive province of madmen. Colonel Dunlap also makes the facially more plausible suggestion that the cost of suppressing armed civilians has become so low for modern military organizations that it is effectively negligible. *Id.* at 667-71. In attempting to provide evidence for this suggestion, however, Colonel Dunlap makes two errors. First, he relies on the fact that many popular insurgencies have failed in recent times. This, however, does not prove that suppressing the insurgencies was essentially cost

Anyone who thinks the anti-tyranny function of the Second Amendment is completely irrelevant today should also spend some time considering the historical experience of black Americans. At least until quite recently, one of the chief purposes of many gun control laws was to help secure the political subordination of the black population.¹³⁶ That goal was successfully achieved for a long time, but it might not have been so easy if blacks had enjoyed the same right of access to firearms that the white population conferred on itself. That, at any rate, is certainly what Chief Justice Taney thought when he wrote, in the *Dred Scott* case, that one of the reasons free blacks could not possibly be citizens of the United States was that such citizenship would give them "full liberty . . . to keep and carry arms wherever they went."¹³⁷

It is certainly true that the Second Amendment can no longer contribute as much as it once might have to its most obvious original purpose—diminishing the threat to liberty posed by large standing armies. But because the possibility of having to accept even minor casualties can influence the government's decisions about the use of its awesomely powerful military and paramilitary forces, an armed populace can and does continue to create some

free. It is thus inappropriate for Colonel Dunlap to cite the British experience with the Irish Republican Army as though it supports his conclusion, and it is nothing short of amazing that he cites the Russian experience with the Chechens. Second, Colonel Dunlap assumes that the only relevant examples are those that involve sustained warfare between a nation's government and a portion of its citizenry. As the incidents at Waco and Ruby Ridge illustrate, however, armed political resistance can occur in smaller doses. These examples also demonstrate that armed resisters can inflict politically significant casualties on government forces even while suffering a military defeat. Despite the government's military victory in these incidents, its subsequent behavior has been significantly altered, as we saw in the handling of the "Freemen" in Montana. See, e.g., Jan Crawford Greenburg & V. Dion Haynes, *New FBI Rules Beat Freeman—Reforms Value Mind Over Muscle*, CHI. TRIB., June 16, 1996, § 1, at 3 (attributing peaceful resolution of Freeman conflict to reforms implemented after bloody clashes at Waco and Ruby Ridge); David Johnston, *Surrender Is a Victory for a Strategy of Patience*, N.Y. TIMES, June 14, 1996, at A22 (describing peaceful surrender by Freeman as validation of FBI's new "emphasis on negotiation rather than military style tactics" after Waco incident).

¹³⁶ See, e.g., CLAYTON E. CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE 97-140 (1994); Don B. Kates, Jr., *Toward a History of Handgun Prohibition in the United States*, in *RESTRICTING HANDGUNS*, *supra* note 6, at 12-15; Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 335-58 (1991) (stating that in order to prevent rebellion Southern states limited rights of free black people and slaves to bear arms).

¹³⁷ *Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1856).

deterrent against the threat of oppressive government. If that were all it did, however, the Supreme Court might well treat the Second Amendment as a useless relic, perhaps by concluding that the kinds of gun control laws that are popular today increase public safety more than they diminish the people's ability to deter the imposition of tyranny. And if legislatures were to continue to impose increasingly draconian restrictions on the private possession of firearms, one can easily imagine the Court acquiescing again and again in the gradual disarmament of the people, until its by-then well settled jurisprudence had completely emptied the Second Amendment of any meaning at all.

If the Supreme Court avoids this mistake, it will not be simply in response to the impressive efforts that modern scholars have made to prove that the Framers of the Second Amendment believed an armed citizenry was a good thing and meant to establish an individual right to be armed in the Constitution. Rather, the Court would have to understand why judicial enforcement of the Second Amendment is required by principles that the Court itself espouses, and especially why enforcement of this provision of the Constitution has a real contribution to make in preserving the American scheme of ordered liberty.

This understanding of the right to arms requires a kind of support that is very different from the legal arguments that dominate the academic literature. Once one accepts the initial principle established earlier in this article—that the Second Amendment protects individual rather than states' rights—two main propositions need to be established. First, that the original purpose of the Second Amendment was not confined to discouraging political oppression. Second, that its broader purpose can be served by protecting the individual right to arms even under modern conditions. When one looks at modern gun control laws in light of these principles, it becomes apparent that we should have serious doubts about many statutes that are usually thought to be constitutionally unexceptionable. If the Supreme Court acknowledges these doubts, it will be natural, and quite feasible, to develop a coherent and principled jurisprudence based on constitutional doctrines developed under other provisions of the Bill of Rights.

A. THE PURPOSES OF THE SECOND AMENDMENT INCLUDE PERSONAL SECURITY

The first element of the argument supporting vigorous enforcement of the Second Amendment—that its purpose is not exhausted by its anti-tyranny function—can be established by two related kinds of evidence. First, those responsible for the adoption of the Second Amendment generally accepted the individual right of self-defense as the natural basis for the right to arms.¹³⁸ Like Blackstone, and no doubt heavily influenced by him and other natural rights theorists, the people who gave us the Second Amendment drew no fundamental distinction between an individual's right to defend himself against a robber or a marauding Indian and that same individual's right to band together with others in a state-regulated militia.¹³⁹ The inseparability of these concepts was

¹³⁸ This proposition has been challenged on the ground that the Second Amendment is "meaningless" outside an anti-liberal "republican" tradition, in which participation by all citizens in a "universal militia" fosters virtue and a disinterested defense of the community. David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991). This is wrong for several obvious reasons. First, if it were true, the Second Amendment should have been written to specify a duty rather than a right. Second, Professor Williams asserts that "[t]he republican tradition does not support a personal right to own arms for self-defense." *Id.* at 586. Deprecating the contrary evidence without refuting it, see *id.* at 587 n.198, Professor Williams fails to produce a single piece of evidence suggesting that any Anti-Federalist or any other kind of republican ever denied the existence of an individual right to keep and bear arms for personal self-defense. Third, Professor Williams himself finally admits that the republican ideal that he believes is the necessary presupposition of the Second Amendment *never existed*:

From the beginning, then, the republican defense of the Second Amendment sought to deny reality, because it assumed a universal militia when there was none. Advocates of the individual rights interpretation of the Amendment thus have substantial precedent for refusing to recognize that we do not have such a body. Indeed, these commentators might argue that if we really wanted to follow the example of early republicans, we would guarantee a right to arms while willfully ignoring the absence of a universal militia.

Id. at 596. Retreating in the face of his own terrifying argument, Professor Williams suggests instead that judges should use the Second Amendment to justify upholding campaign finance laws, proportional representation schemes, or takings of private property that would otherwise violate the Constitution. *Id.* at 599. At this point Professor Williams has come full circle, from the meaninglessness of the Second Amendment to the meaninglessness of the rest of the Constitution as well.

¹³⁹ It is therefore a mistake to assume that personal self-defense would have been peripheral to the purpose of the Second Amendment in the view of those who adopted it. It is an even greater mistake, and a morally questionable one at that, to suggest that there are

reflected in two early state constitutions, which provided: "That the people have a right to bear arms for the defence of *themselves and the state*" ¹⁴⁰ The breadth of the purpose of the right to arms was also apparent in the very first proposal for a bill of rights, which came from an Anti-Federalist minority at the Pennsylvania ratifying convention. The right to arms provision in this proposal reads:

That the people have a right to bear arms for the defence 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 the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil power. ¹⁴¹

no constitutionally significant differences between self-defense and recreation, or between either of them and criminal behavior. This mistake is reflected in the following passage:

The second amendment, the right to bear arms, tends to enter our consciousness through claims about why criminals should be allowed to walk around with pistols. Alternatively, it emerges there through arguments made by gun clubs or even neighborhood watch groups who urge that there should be no state laws preventing us from carrying guns for hunting, for recreation, or for self-protection against the criminals carrying pistols.

But the second amendment is a very great amendment, and coming to know it through criminals and the endlessly disputed claims of guns clubs seems the equivalent of our coming to know the first amendment only through pornography.

Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257, 1268 (1991). Even if one accepts Professor Scarry's tendentious analogy between pornography and the personal use of arms, a Court that can make distinctions between protected pornography and unprotected obscenity should have no difficulty in seeing the difference between keeping a weapon to protect oneself from criminals and keeping a weapon in order to pursue criminal activities.

¹⁴⁰ PA. CONST. OF 1776, art. XIII (emphasis added); VT. CONST. OF 1777, art. XV (emphasis added).

¹⁴¹ Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599, 609 (1982) (quoting EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 174 (1954)). The reference to "killing game," of course, did not reflect a passion for sport. Apart from the fact that hunting was an important source of food at the time, the Americans would have been acutely aware, from Blackstone if from nowhere else, of the

The Pennsylvania minority report became an influential Anti-Federalist document, and it appears to have reflected typical republican concerns.¹⁴² Virtually every proposal for a bill of rights included a right to arms (which appeared with twice the frequency of demands for protecting the freedom of speech), while language praising the militia was adopted only in Virginia and two states that held conventions after Virginia.¹⁴³

Second, the eighteenth century militia did not serve merely as a military force in the modern sense. One of the militia's functions in eighteenth century America was to serve as an informal police force in a society that did not have organized government agencies designed to apprehend criminals. More important, the armed defense of oneself and one's family against criminals was regarded as a legitimate and necessary defense of the community itself, in much the same way that private prosecutors were expected to help enforce criminal laws.¹⁴⁴

The development of modern police forces has not eliminated this function. Although we seldom call out the traditional militia to keep the peace any more, this practice has in fact survived into modern times.¹⁴⁵ More important, the police do not and cannot

English game laws behind which the "preventing of popular insurrections and resistance to the government, by disarming the bulk of the people . . . [was] a reason oftener meant, than avowed. . . ." 2 BLACKSTONE, *supra* note 29, at *412.

¹⁴² See, e.g., Robert Dowd, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 77 (1983) (emphasizing influence of minority proposals like Pennsylvania report in Bill of Rights); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 603 (1986) (noting Madison's use of Pennsylvania's demands to draft Bill of Rights). The Pennsylvania document has been characterized as an unfortunate and ill-considered sample of Anti-Federalist sentiments in Pennsylvania, but its subsequent influence in other states has apparently not been challenged. Wills, *supra* note 61, at 62, 65-66.

¹⁴³ Hardy, *Historiography*, *supra* note 34, at 54.

¹⁴⁴ See, e.g., Kates, *Ideology of Self-Protection*, *supra* note 34, at 87, 89-90, 92 (indicating that absence of organized police forces and standing armies forced citizens to perform duties of defender of family, police officer and soldier); Kates, *Second Amendment*, *supra* note 103, at 147-48 (same); Lund, *supra* note 34, at 118 (same).

¹⁴⁵ In 1946, for example, the Governor of Virginia called upon the unorganized militia to break a strike by employees of the Virginia Electric and Power Company. Thomas M. Moncure, Jr., *Who is the Militia? The Virginia Ratification Convention and the Right to Bear Arms*, 19 LINCOLN L. REV. 1, 17 (1990).

protect law-abiding citizens from criminal violence.¹⁴⁶ The impotence of our governments in the face of criminal violence is so obvious that it is simply preposterous to maintain that those individuals with the means and the will to arm themselves are not thereby enhancing their ability to exercise their natural right of self-defense. This thought may not occur to wealthy people who can shelter themselves in low-crime enclaves and who care not at all about their less fortunate neighbors. But no one knows it better than the police, who scrupulously preserve their own right to carry firearms on *and off duty* (and often after they retire as well) even

¹⁴⁶ Individual members of the Supreme Court have occasionally commented on this utterly obvious fact. Some years ago, for example, when a then-unknown serial killer was stalking black children in Atlanta, one Justice noted that members of a housing project self-defense patrol had been arrested for carrying firearms, despite their complaints that "[w]e cannot stop [the killers] by consulting psychics, by having seances, by prayer vigils or by lighting little candles or forms of distracting activity that is not directly connected to the problems we face." *Coleman v. Balkcom*, 451 U.S. 949, 961 n.2 (1981) (Rehnquist, J., dissenting from denial of certiorari). Justice Rehnquist went on to observe one of the obvious ironies:

When our systems of administering criminal justice cannot provide security to our people in the streets or in their homes, we are rapidly approaching the state of savagery [in which freedom is the possession of only a savage few] which Learned Hand describes. In Atlanta, we cannot protect our small children at play. In the Nation's Capital, law enforcement authorities cannot protect the lives of employees of this very Court who live four blocks from the building in which we sit and deliberate the constitutionality of capital punishment.

Id. at 961-62. One may well doubt that giving greater discretion to the government's law enforcement apparatus would prove an adequate substitute for the right protected by the Second Amendment. As illustrated by the well-publicized incidents at Waco and Ruby Ridge, for example, even the most respected police agencies are capable of astonishingly abusive conduct. *See, e.g.*, JESS WALTER, *EVERY KNEE SHALL BOW; THE TRUTH & TRAGEDY OF RUBY RIDGE & THE RANDY WEAVER FAMILY* 179-83, 186-89, 297-98, 368 (1995) (discussing FBI decision to order use of deadly force by long-range snipers without threat of death or grievous bodily harm from targeted subjects, and Government's subsequent settlement of wrongful death suit for \$3.1 million); Stephen Braun, *Will Smoke in Waco Ever Clear?*, L.A. TIMES, Apr. 23, 1993, at A1 (reporting FBI decision to expose young children to poison gas in hope that children's agony would induce their mothers to surrender to police); Peter Pringle, *The Waco Siege: Waiting Game Ends in a Fiery Furnace*, INDEPENDENT, Apr. 20, 1993, at 2 (same). Even apart from such relatively unusual events, it appears that police officers who shoot at criminals are 5.5 times *more likely* than civilian shooters to hit an innocent bystander. KOPEL, *supra* note 39, at 380. Whatever the relative contributions that could be made by giving greater discretion to government officials and to private citizens, however, it is hard to doubt that something is seriously wrong when citizens are reduced to protecting their children by holding prayer vigils and lighting little candles.

while some of them advocate disarming those whom the police cannot protect.¹⁴⁷

B. ENFORCING THE SECOND AMENDMENT CAN ENHANCE PERSONAL SECURITY

What is less obvious, but no less important, is that violent crime is not reduced by civilian disarmament laws. The founder of modern criminology, Cesare Beccaria, offered the essential insight that explains this phenomenon over two centuries ago:

False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes Such laws make things worse for the assaulted and better for the assailants;

¹⁴⁷ Police officers may be acting rationally, in accord with the Hobbesian logic, summarized *supra* p. 6, when they advocate legislation that increases the chance that police officers will be the only armed individuals who are present during any given incident. At least in the short term, such legislation may slightly reduce the physical risk of police work, and it certainly makes it easier for the police to impose their own will, whether legitimately or illegitimately, on those whom they encounter on and off the job. In the long run, of course, these expectations may not be valid, and many police officers no doubt also recognize that civilian members of their own families may be endangered by disarmament statutes.

More subtly, gun control laws serve the bureaucratic interests of high-ranking police officials by diminishing the ability of civilians to defend themselves against criminals. This diminished capacity for self-help should increase the value of and the demand for police services, and thus should promote budget increases for police bureaucracies and enhance the prestige of those who operate them. The expectation of these effects, in turn, should cause support for stringent gun control laws to be stronger among high-ranking police bureaucrats than among rank-and-file officers. Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 84 n.12 (1996).

Nothing in this analysis, of course, implies that it is inappropriate for police officers to be armed while off duty, especially if they are expected to intervene in an official capacity when they observe crimes in progress. But neither should we ignore the possibility that the willingness of police officers to accept the principle that they are never fully "off duty" may be a sign of how highly they value the right to be armed at all times.

they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man.¹⁴⁸

Thousands of experiments with firearms restrictions in American states and localities over a long period of time have now provided a rich source of empirical evidence against which Beccaria's conclusion can be tested. When evaluated using the standard tools of quantitative social science, this evidence does not indicate that American gun control laws restricting the availability of firearms to the general population reduce violent crime.

This fact deserves the utmost emphasis, although it is not practicable to attempt a detailed summary of the empirical studies here.¹⁴⁹ The conclusions of these studies should not be surprising, for they can only seem counterintuitive to those who fall into the fallacy identified by Beccaria, of wishing to "take fire from men because it burns, and water because one may drown in it."¹⁵⁰ Firearms can be used for both illegitimate purposes and for legitimate purposes. Restrictions on civilian access to firearms cannot even claim to make any sense unless they can plausibly be expected to reduce illegitimate violence more than they reduce

¹⁴⁸ CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 87-88 (Henry Paolucci trans., 1963) (1764). Beccaria's analysis was recently and concisely echoed by one of America's leading experts on the operation of the criminal justice system:

Then, of course, there is gun control. Guns are almost certainly contributors to the lethality of American violence, but there is no politically or legally feasible way to reduce the stock of guns now in private possession to the point where their availability to criminals would be much affected. And even if there were, law-abiding people would lose a means of protecting themselves long before criminals lost a means of attacking them.

James Q. Wilson, *What To Do About Crime*, COMMENTARY, Sept. 1994, at 25, 28.

¹⁴⁹ For the most comprehensive and scrupulous review of the evidence see GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA (1991). Based on his own research and a massive study of prior data, Professor Kleck concludes: "Neither the present work nor past research, considered as a whole, offers much support for the view that general levels of gun ownership have any net effect on the rate of any major category of violence." *Id.* at 430.

¹⁵⁰ BECCARIA, *supra* note 148, at 87. For analytically sophisticated elaborations on Beccaria's insight, see Bruce H. Kobayashi, *Strict Liability, Gun Control and Sin Taxes*, in TAXING CHOICE: THE POLITICAL ECONOMY OF FISCAL DISCRIMINATION (W.F. Shughart, II ed., forthcoming 1997); Daniel D. Polsby, *The False Promise of Gun Control*, ATLANTIC MONTHLY, Mar. 1994, at 57.

legitimate acts of self-defense and law enforcement.¹⁵¹ Illegitimate violence comes about in three main ways: (1) an individual procures a gun in order to use it in crime; (2) an individual procures a gun for legitimate purposes, but ends up misusing it spontaneously; and (3) a gun obtained for legitimate purposes kills or injures someone through an accident.

The problem associated with the first category is extremely unlikely to be ameliorated by firearms restrictions that apply to the general population, essentially for the reason identified by Beccaria.¹⁵² The demand for guns by criminals is highly inelastic, while the supply is very elastic indeed. Criminals simply are going to obtain firearms so long as the cost of obtaining them does not exceed the benefits the criminal expects them to bring. How could gun control laws change this cost-benefit ratio? If the penalties for possessing firearms were raised to a very high level, many potential *victims* would certainly be disarmed. A significant fraction of criminals, however, would continue to arm themselves in the expectation of violent encounters with other criminals (as in the drug trade) or with the police. At the same time, we would expect to see guns used less frequently in some crimes that involve preying on civilians, such as burglary and robbery, because the potential victims would themselves be less likely to be armed. That, however, does not mean that these crimes would themselves decrease. On the contrary, substitution effects would occur. Other weapons, such as knives and clubs, would be used instead of guns

¹⁵¹ I set aside as a possible justification for civilian access to firearms the legitimate uses of guns for recreational purposes, although recreational shooting might well make an important contribution to developing the skills that people need when called on to carry out the purposes of the Second Amendment.

I should also note that the following analysis assumes that the goal of gun control laws is or should be to reduce the net number of victims of illegitimate violence. This could be questioned on the ground that the Second Amendment necessarily weights the interests of those who are willing to arm themselves for their own defense more heavily than the interests of those who rely on others to protect them. The following analysis also abstracts from the possibility that citizens have a moral obligation to provide themselves with the tools of self-defense and to use those tools when necessary, a thesis powerfully argued in Jeffrey R. Snyder, *A Nation of Cowards*, 113 PUB. INTEREST 40 (1993). The point of the present discussion is not to challenge either of these arguments, but to show why typical gun control statutes are difficult to defend even apart from the analytic framework suggested by the Second Amendment or the moral framework advocated by Mr. Snyder.

¹⁵² *Supra* text accompanying note 148. See also JAMES D. WRIGHT ET AL., UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICA 137-38 (1983) (arguing that gun control laws could not prevent criminals from obtaining firearms).

to commit the same crimes. There might, in addition, be some substitution of burglaries for robberies. Similarly, stringent gun control laws might well cause the criminals who commit crimes like robbery to be more careful to seek physically weaker victims like women and the elderly.¹⁵³ No one has ever explained why such substitution effects should count as a gain in social welfare, especially when potential victims would also be more vulnerable to those criminals who would continue to use firearms.

In theory, general restrictions on the possession of firearms by civilians could reduce the incidence of violence arising from the other two categories. Accidents, however, are a trivially small cause of firearms deaths.¹⁵⁴ That leaves the so-called "crimes of passion"—unplanned murders that would not occur if the perpetrator did not happen to have ready access to a firearm. The effect of gun control laws on this category of crime is extremely difficult to isolate, for a variety of reasons. First, the criminal justice system's statistical records do not distinguish systematically between planned and unplanned crimes. Second, many apparently spontaneous murders in which a gun was used, especially those resulting from domestic disputes, might have been committed with other weapons if a gun had been unavailable.¹⁵⁵ Third, the number of spontaneous murders prevented by gun control laws would be partially offset, or more than offset, by murders (including some spontaneous murders) that took place only because the gun control laws themselves caused the victims to be unarmed when they were attacked.

The virtual inevitability of substitution effects and offsetting effects suggest that there is no particularly good reason to expect that general restrictions on firearms would reduce the overall incidence of gun violence. In fact, the empirical evidence has not shown any such reductive effect, while it *has* shown that crime

¹⁵³ Gary Kleck, *Policy Lessons from Recent Gun Control Research*, 49 LAW & CONTEMP. PROBS. 35, 37-38 (1986).

¹⁵⁴ Less than 5% of gun deaths in 1987 were the result of accidents, and this amounts to fewer than 1500 per year. Even these numbers may be inflated because suicides are easily misclassified as accidents. See KLECK, *supra* note 149 (arguing that his statistics show small number of gun-related accidents).

¹⁵⁵ The most intuitively plausible examples of "crimes of passion" are those arising from domestic disputes. During a period in which the stock of privately owned handguns was rising dramatically, the rate of spousal homicide actually fell. Polsby, *supra* note 150, at 60.

victims are quite successful in using firearms to defend themselves.¹⁵⁶ It may be possible to devise regulations that would reduce the incidence of spontaneous murders and negligent shootings without significant negative offsetting effects, but such regulations might also be distinguished for constitutional purposes from the usual restrictions that apply indiscriminately to the general population.¹⁵⁷

This does not imply that a well armed populace is a panacea for the problem of violent crime. The same merciless realities that prevent the usual forms of gun control from accomplishing their stated purposes also ensure that civilian access to firearms can continue to co-exist quite easily with a high rate of crime. It does imply, however, that the government is on very weak ground when it offers vague and speculative social welfare goals to justify depriving a complaining individual of the right to have tools that are manifestly helpful in serving that individual's interest in defending himself (and especially herself, since women are generally more physically vulnerable to violent attacks than men and much more likely to be the victims of certain violent crimes).¹⁵⁸

C. CONSTITUTIONAL PROBLEMS IN POPULAR FORMS OF GUN CONTROL

The judicial obligation to enforce the Second Amendment is not contingent on someone's proving that an armed citizenry is a cure-

¹⁵⁶ KLECK, *supra* note 149, at 429:

The ownership and use of guns, even just among violence-prone people, have a complex mixture both of positive and negative effects on the rate of violent incidents and the seriousness of their outcomes, effects that often largely cancel each other out. The picture is complicated even further by the fact that the use of guns by crime victims to defend themselves is effective both in preventing completion of the crime and in preventing injury to the victim.

¹⁵⁷ For more detailed discussions of this possibility, see KLECK, *supra* note 149, at 432-45; Lund, *supra* note 34, at 124-30.

¹⁵⁸ A very carefully constructed survey generated a conservative estimate that guns are used in self-defense well over two million times each year, which is three to five times *higher* than the rate at which guns are used by criminals. Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 164, 170 (1995). Moreover, it is well established that crime victims who resist by using guns or other weapons dramatically improve their prospects of escaping the encounter unharmed. *Id.* at 151-52 and sources cited therein.

all for crime, any more than the obligation to enforce the First Amendment depends on *its* ability to eliminate lies and corruption from the public discourse. In terms suggestively reminiscent of Beccaria's critique of gun control laws, Justice Brennan eloquently explained why it is a mistake to think that freedom should be abolished merely because some people are bound to misuse it:

The constitutional protection [provided by the First Amendment] does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." As Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." . . . [T]o persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the *probability of excesses and abuses*, these liberties are, *in the long view*, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.¹⁵⁹

Someone who strongly disapproved of our raucous and often degrading marketplace of ideas could easily believe that the freedoms of speech and press protected by the Court's First Amendment jurisprudence do not have enough social utility (even "in the long view") to outweigh the excesses and abuses to which they frequently lead. The constitutional test, however, does not depend on its acceptability to people who take that position, even if they are very numerous or politically influential. As the quotation above suggests, and as hundreds of decisions over the course of many decades confirm, the courts have never demanded that First Amendment rights be held to such a standard. Instead, the Court has declared that the Constitution creates a strong presumption in favor of individual freedom, and has imposed a

¹⁵⁹ New York Times v. Sullivan, 376 U.S. 254, 271 (1964) (emphasis added) (citations omitted).

heavy burden of justification on governments that impose restrictions on speech or the press.

The differences between the First and Second Amendments are obvious enough, but the similarities are more important. In both cases, the Constitution establishes a rule that protects a human activity that its Framers regarded as a natural right: thought and self-governance in the one case and self-defense in the other. In both cases, the Constitution reflects a determination that the social benefits of giving legal protection to the instruments needed for the pursuit of those goals will outweigh the inconveniences arising from their misuse. In both cases, the erection of this barrier against the state governments will necessarily involve the courts in the business of balancing the public welfare against the interests of those individuals whose liberty the government wants to restrict. In neither case, however, does the accretion of this power to the courts justify them in striking the balance differently than an honest reading of the Constitution suggests.

Supreme Court Justices, it is true, are drawn from a class of people who are among the least vulnerable to violent criminals. The reputations of individual Justices, moreover, are highly dependent on the good will of the journalists and academics who depend on the freedom of speech for their livelihoods and social ascendancy. This may make it easier for members of the Court to appreciate the value of the First Amendment than to see why the Second Amendment still matters. If they gave the matter the disinterested attention that we have a right to expect from our judicial magistrates, however, the Justices should acquire serious doubts about the constitutionality of many currently popular restrictions on firearms.¹⁶⁰ I will conclude with brief discussions

¹⁶⁰ This may not be a vain hope. Many years ago, Robert Bork suggested that the "intellectual class," whose lifeblood is the freedom of speech, may have succeeded in transforming the law in a way designed to shift power and prestige from the business class to itself. ROBERT H. BORK, *THE ANTITRUST PARADOX* 423-24 (1978). The Supreme Court now seems to have caught up with Bork's insight. After several decades of *Takings* Clause cases that indulged an airy presumption of the constitutional validity of government regulation of commercial activity, the Court recently pointed out that cases arising under the First and Fourth Amendments did not support such a presumption. "We see no reason why the *Takings* Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2320 (1994). A

of three examples, not in an effort to carry out the impossible task of offering a comprehensive exposition of an undeveloped jurisprudence,¹⁶¹ but to illustrate that serious legal questions need to be raised about statutes whose constitutionality is too often taken for granted.

First, consider the recently enacted ban on certain so-called "semiautomatic assault weapons." This law applies to nineteen guns specifically identified by make and model, and to any other rifle (except some that are specifically *exempted*) that both accepts a detachable magazine and possesses any two of the following characteristics: a folding or telescoping stock, a bayonet lug, a flash suppressor, a pistol grip, or a grenade launcher.¹⁶²

This statute is so fundamentally irrational that it is not clear that it could survive an honest application of the rational basis test, let alone the far more stringent scrutiny that is always used to review infringements of fundamental rights other than the right to keep and bear arms.¹⁶³ The irrationality of the statute lies primarily in the fact that it restricts access to certain weapons on the basis of essentially cosmetic features, leaving functionally identical arms unaffected. There is no general principle related to public safety that one can use to distinguish two otherwise identical carbines, one of which has a pistol grip and folding stock and the other of which has a grenade launcher but none of the other four

Court that regards the Takings Clause as a meaningful part of the Constitution might think the same of the Second Amendment.

¹⁶¹ Cf. Van Alstyne, *supra* note 88, at 1239 (footnotes omitted):

[The existing Second Amendment case law] is roughly of the same scanty and utterly underdeveloped nature as was characteristic of the equally scanty and equally underdeveloped case law (such as it then was) of the First Amendment in 1904, as of which date there was still to issue from the Supreme Court a single decision establishing the First Amendment as an amendment of any genuine importance at all.

¹⁶² 18 U.S.C. § 921(a)(30), 922(v) (1994). The statute includes similar rules defining certain pistols and shotguns as "assault weapons." 18 U.S.C. § 921(a)(30)(C)-(D).

¹⁶³ For a detailed discussion of the rational basis test in the context of various "assault weapon" prohibitions other than the new federal statute, see David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. CONTEMP. L. 381 (1994). See also Bruce H. Kobayashi & Joseph E. Olson, *In re 101 California Street and a Tale of Two Statutes: A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of Firearms Defined as "Assault Weapons"*, STAN. L. & POL'Y REV. (forthcoming 1997) (criticizing California court for treating that state's "assault weapon" statute as ground for altering tort law doctrines that would otherwise apply to manufacturers of such weapons).

suspect attachments. Nor can one rationally explain why a carbine that has a folding stock and a flash suppressor should become illegal when a bayonet lug is added, but should then become legally innocuous when either the folding stock or the flash suppressor is removed.

Ironically, this "assault weapon" statute is so deeply arbitrary that it cannot itself actually undermine the purposes of the Second Amendment in any appreciable way. It bans only a limited class of weapons configured with certain random accouterments, leaving essentially identical arms unrestricted and leaving citizens free to keep any of the accouterments ready to be attached to the weapon if need be.¹⁶⁴

This does not imply, however, that courts should uphold the regulation. As the Supreme Court has recognized in the analogous area of the First Amendment, leaving legislatures free to engage in whimsical infringements on fundamental rights prepares the way for more serious assaults on individual liberty. Just as no court would interpret the First Amendment to allow Congress to ban the use of words that contain diphthongs, even if perfectly adequate synonyms for all such words remained available, so the courts should decline to authorize equally trivial but irrational infringements on the right to arms.

A Court that takes its constitutional responsibilities seriously would also be likely to invalidate laws that affect less bizarrely defined classes of weaponry. Consider, for example, the law in Washington, D.C., where virtually all civilians are forbidden to possess any handgun that was not registered prior to September 24, 1976.¹⁶⁵ Because citizens are permitted to possess rifles and

¹⁶⁴ The statute also contains a grandfathering feature that will leave large numbers of the newly banned weapons in circulation. 18 U.S.C. § 922(a)(3)(C) (1994).

¹⁶⁵ D.C. Code Ann. §§ 6-2311-2312 (1995). Like the federal "assault weapon" statute, the D.C. Code contains a glaring special-interest exception for *retired* police officers. *Id.* §§ 6-2311(a)(2), 6-2312(b). *Cf.* Jacobs, *supra* note 7 (discussing generally exceptions in statutes prohibiting handguns and resulting inefficiency of these statutes).

Because the District of Columbia is not a state, a challenge to this law would not require the Court to face the question of Fourteenth Amendment incorporation, although it might require an analysis of the Exclusive Legislation Clause, U.S. CONST. art. I, § 8, cl. 17, and the Territorial Regulation Clause, U.S. CONST. art. IV, § 3, cl. 2. *Cf.* *Cases v. United States*, 131 F.2d 916, 920 (1st Cir. 1942) ("The applicability of the restriction imposed by the Second Amendment upon the power of Congress to legislate for Puerto Rico, or for that matter for

shotguns, though only if they comply with onerous registration requirements¹⁶⁶ and only if they keep them unloaded and disassembled,¹⁶⁷ the infringement on the right to keep and bear arms is not absolutely complete.¹⁶⁸ The infringement is nonetheless substantial, for handguns have important functional advantages in self-defense, primarily arising from their concealability, portability, and maneuverability in confined spaces like those in which many city residents live. Moreover, to the extent that handguns can be and are replaced by rifles and shotguns, the likely effect of the law is to *increase* the number of deaths from gunfire because shoulder-fired weapons are generally much more lethal than handguns.¹⁶⁹ For that reason, it is unlikely that the government could present any plausible argument for concluding that the handgun ban is narrowly tailored to serve a compelling government interest.

To see how problematic the constitutionality of this law is, imagine that the D.C. Code decreed that cable television was banned from that city because the corrupting nature of television programming was contributing to the city's notoriously high rate of violent crime. This would not be an irrational statute. The government has an obvious and legitimate interest in reducing such crime, and there is research indicating that television programming

any territory, raises questions of no little complexity."). *See also* District of Columbia v. John R. Thompson Co., 346 U.S. 100, 105-07 (1953) (noting similarity of powers granted under Exclusive Legislation and Territorial Regulation Clauses).

¹⁶⁶ D.C. Code Ann. §§ 6-2313-2320.

¹⁶⁷ *Id.* § 6-2372. The statute contains exceptions for certain politically influential interest groups, including police officers and business owners.

¹⁶⁸ The D.C. law is also less dangerous to liberty than a nationally applicable handgun ban would be, since the D.C. law does not eliminate the citizen's option of retreating to a jurisdiction that places fewer restrictions on the right to arms. The existence of the "retreat option," however, is given no significance by the courts in cases arising under the Bill of Rights.

¹⁶⁹ Rifles and shotguns of the kind typically used for hunting are much more powerful than ordinary handguns, a characteristic made possible by their greater weight and by the fact that they are braced against the shoulder when fired. As a result, people shot with handguns die from their wounds at a rate of approximately 5-10%, whereas shotgun wounds produce death rates of approximately 80%. Gary Kleck, *Handgun-Only Gun Control: A Policy Disaster in the Making*, in FIREARMS AND VIOLENCE: ISSUES IN PUBLIC POLICY (Don B. Kates, Jr. ed., 1984).

may be a contributing factor to high crime rates.¹⁷⁰ Indeed, the evidence to support this conclusion may be significantly stronger than any evidence suggesting that Washington's gun ban could have an ameliorative effect on the rate of violent crime.¹⁷¹ It is inconceivable that any court would uphold such a ban on cable television, and it is not the least bit obvious that the Supreme Court would have any greater justification for upholding the existing gun control law.¹⁷²

Finally, consider the restrictions that our governments commonly place on carrying weapons in public. If the courts took the right of self-defense as seriously as they should, and thought through its implications with respect to the tools needed to exercise that right when it matters, they would have to confront the fact that the Second Amendment protects both the right to keep arms and the right to bear them.¹⁷³ That does not mean that the government can put no restrictions on the people's right to carry weapons about in public, any more than the First Amendment forbids government from imposing reasonable time, place, and manner restrictions on the exercise of the freedom of speech. It does mean, however, that the government should face a heavy burden when called upon to

¹⁷⁰ See, e.g., Brandon S. Centerwall, *Exposure to Television as a Risk Factor for Violence*, 129 AM. J. EPIDEMIOLOGY 643 (1989) (discussing studies that indicate strong relationship between television and violent crimes); Kenneth D. Gadow & Joyce Sprafkin, *Field Experiments of Television Violence with Children: Evidence for an Environmental Hazard?*, 83 PEDIATRICS 399 (1989) (explaining findings from experiment to determine short-term effect of violent television on child social behavior).

¹⁷¹ The empirical evidence suggests, if anything, that the D.C. regulations may have led to an increase in the homicide rate in that jurisdiction. Kobayashi, *supra* note 150.

¹⁷² The District of Columbia's gun control law has been upheld against a Second Amendment challenge. *Sandridge v. United States*, 520 A.2d 1057 (D.C. 1987). In doing so, the court adopted the untenable states' right theory of the Second Amendment and rejected the analysis in the Supreme Court's *Miller* opinion—under which the Second Amendment protects an individual right to keep and bear just those weapons that have a relationship to the preservation or efficiency of the militia—on the ground that the implications of *Miller*'s analysis are “inconceivable and irrational.” *Id.* at 1058-59. One judge went so far as to adopt a theory so patently sophistical that it sounds rather like a jest: the Second Amendment was meant to ensure “the security of a free State,” and therefore does not apply in the District of Columbia because the District is not a “state.” *Id.* at 1059 (Nebeker, J., concurring). The Supreme Court denied certiorari and thereby missed a chance to decide whether it thought any of this made sense. 484 U.S. 868 (1987).

¹⁷³ Approximately nine out of ten violent crimes occur outside the home. U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1991, at 75 (1992).

justify such restrictions, which often operate to deprive the people of access to weapons in just those circumstances when they are most needed.

This burden might be quite difficult to meet. An important body of evidence began to develop after the state of Florida dramatically loosened its restrictions on the carrying of concealed weapons in 1987. Although it has long been true that American jurisdictions with the most restrictive gun controls have also tended to have the highest crime rates, it has also been plausible to suppose that the restrictive laws were a result rather than a cause of the high crime rates. Like many states with high crime rates, Florida had traditionally left considerable discretion to issue concealed-carry permits in local government officials, and most urban areas issued very few permits. In 1987, the state adopted a new system, in which an applicant who passed a background check and took a training class was automatically issued a permit upon payment of a small fee. Early indications suggested that infinitesimal numbers of concealed-carry permit holders used their guns for criminal purposes, and that overall criminal violence may well have dropped because of the new law.¹⁷⁴ In fact, there is apparently direct evidence that Florida criminals began to target tourists specifically because they knew that tourists are less likely than residents to be armed.¹⁷⁵ This direct evidence tended to confirm the results of a careful study of the attitudes of imprisoned felons, who reported both considerable sensitivity to the odds of their victims being armed and numerous occasions on which they had refrained from committing a crime because of the prospect that the chosen victim might be armed.¹⁷⁶

Florida's well-publicized success with liberalized carry laws encouraged nine other states to adopt similar reforms, and it has now become possible to make meaningful statistical estimates of the effect that concealed-carry laws have on crime rates. A very detailed and sophisticated new study by John R. Lott, Jr. and

¹⁷⁴ See KLECK, *supra* note 149, at 411-14 (discussing case study of effect of Florida's new gun carry laws); WAYNE LAPIERRE, GUNS, CRIME, AND FREEDOM 33-37 (1994) (citing decreased crime rate following enactment of Florida's concealed carry law).

¹⁷⁵ LAPIERRE, *supra* note 174, at 22-23.

¹⁷⁶ JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 141-59 (expanded ed. 1994).

David B. Mustard uses cross-sectional time-series data at the county level to confirm a strong connection between giving law-abiding citizens the right to carry a concealed weapon and a large deterrent effect on violent crime.¹⁷⁷ The Lott and Mustard study, which is far more successful in controlling for relevant variables than previous gun control studies, dramatically confirms Beccaria's theoretical insight¹⁷⁸ and refutes long-standing conventional wisdom. When the chances of encountering an armed victim go up, violent crime goes down, and this effect is particularly pronounced in urban areas with high crime rates.¹⁷⁹ While it may be true that high rates of violent crime provoke stricter gun control laws, those laws in turn drive the rates even higher. If the entire nation had adopted concealed carry laws like Florida's in 1992, the evidence indicates, at least 1414 murders and 4177 rapes would have been prevented.¹⁸⁰ In the face of such evidence, it is hard to see why courts should allow governments to rely on slogans and prejudices as a reason for stripping potential victims of their right to protect themselves from violent predators.

This is not to say, of course, that empirical social science can offer meaningful assistance with every question that will arise concerning the costs and benefits of gun control laws. If the Second Amendment were treated like the First Amendment, cases involving restrictions on the right to carry weapons in public would present the courts with some difficult questions, and they would surely make some mistakes. That, however, is simply one more way in which the Second Amendment resembles the First Amendment.

¹⁷⁷ John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, J. LEGAL STUD. (forthcoming 1997) (current version available at <http://www.law.lib.uchicago.edu/faculty/lott/guns.html>).

¹⁷⁸ *Supra* note 148 and accompanying text.

¹⁷⁹ Consistent with the general theory of incentives, the Lott-Mustard study finds that decreases in violent crime were accompanied by increases in crimes involving stealth. When criminals were deterred from violent crimes by an increased risk of encountering an armed victim, they apparently responded (at least to some extent) by engaging instead in crimes that involved less risk of confrontation with the victims. Even in the unlikely event that there was a perfect one-for-one substitution, however, this substitution would be socially beneficial inasmuch as violent crimes are considered more serious than non-violent property crimes. *Id.*

¹⁸⁰ *Id.*

V. CONCLUSION

The Second Amendment unambiguously and irrefutably establishes an individual right to keep and bear arms. This conclusion, which is dictated by the language of the Constitution, is confirmed by an abundance of historical evidence. Nor is it contradicted by anything yet discovered in the Constitution's legislative history or in the historical background that illuminates the intentions of those who adopted the Bill of Rights.

The precise scope of the Second Amendment's guarantee, however, and its proper application in a world that has changed enormously since 1791, cannot be determined solely by reference to the Constitution's text and history. Subsequent developments in the technology of weapons and in military technique have rendered the armed citizen wholly impractical as a substitute for standing armies and much less potent as a deterrent to despotism. At the same time, the increased destructive potential of small arms has raised new questions about the type of "arms" that may appropriately be left in civilian hands and about the regulations that may constitutionally be imposed on civilians' use of their weapons. These questions will assume real importance if the Supreme Court takes up the Second Amendment with the same serious attention that it has given to the First Amendment and other provisions of the Bill of Rights.

Despite all the changes that have occurred, the Second Amendment can continue to serve its fundamental purpose. That purpose is to secure the natural right of self-defense, which is no less threatened when government deprives its citizens of the tools for resisting criminal predators than it would be if the government itself turned outlaw. This simple but momentous insight is the key that opens the door for a serious Second Amendment jurisprudence, and it thus gives the constitutional scheme of ordered liberty its best hope of surviving in the crucible of litigation.