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# Clearing the Smoke From the Right to Bear Arms and the Second Amendment

by

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"One loves to possess arms. . ."

Thomas Jefferson in a letter to George Washington dated June 19, 1796. [\[1\]](#)

"The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic. . ."

Joseph Story, Justice of the U.S. Supreme Court (1833). [\[2\]](#)

"The great object is that every man be armed. . . . Everyone who is able may have a gun."

Virginia patriot Patrick Henry. [\[3\]](#)

## I. Introduction

Despite raging battles in Congress, in the press and in state legislatures over gun control, the Second Amendment of the United States Constitution, the very source of every U.S. citizen's right to possess firearms, is one of the most ignored and overlooked parts of the American Bill of Rights. [\[4\]](#) Much of what has been said about the Second Amendment is hostile to the very rights so plainly guaranteed in that provision. [\[5\]](#) Law school constitutional law classes frequently study the First Amendment, "close their eyes" to the Second and move immediately on to study the Fourth Amendment. [\[6\]](#) Some have speculated that the leftist political leanings of many in the American legal academy are in large part responsible for this sorry state of affairs. [\[7\]](#)

When the Second Amendment is studied and discussed, discourse on the subject is often savage. [\[8\]](#) One commentator has stated that "[t]he intensity of passion on this issue (gun control) suggests . . . that we are experiencing a sort of low-grade war . . . between two alternative views of what America is and ought to be." [\[9\]](#) Previous writers have in fact noted the vituperousness

of the debate surrounding the meaning and scope of the Second Amendment. [10] Who has taken the pummeling? A review of the existing literature on the subject indicates that defenders of this part of the Bill of Rights have often been on the receiving end of criticism and even verbal abuse. [11] The Second Amendment is torn and bloodied from the repeated attacks it has sustained from the political Left [12] over the years.

The battle is again being joined in light of the Oklahoma City bombing in April, 1995 which has prompted calls for further gun control legislation. The recently passed Brady Bill [13] has now been supplanted by debate over Brady II, or "Son of Brady" as some have called it. [14] It is well established that in past eras gun registration was often a mere prelude to widespread disarmament and confiscation. In England during the seventeenth century, for example, gun registration laws aimed at Catholics and other dissidents feared by the throne were used first to identify and then disarm the government's opponents. [15] Prior to the outbreak of World War II, the Nazi regime also used gun registration in order to identify, disarm, and then subsequently execute gun owners. [16] When one listens to the rhetoric and reads the proposed legislation advanced by some liberal Democrats who advocate disarming the public, [17] one can understand and appreciate the concerns of gun owners and all those who take the Second Amendment's arms guarantee seriously. [18] Part and parcel of this political debate over gun control is the effort by some to limit the arms guarantee in the Second Amendment only to those bearing arms as members of the militia. [19] In this way, all others can be effectively disarmed without Constitutional impediment. Furthermore, since state militias on an eighteenth century scale generally no longer exist today, [20] what this means is that virtually the entire populace can be disarmed by the mere passage of the appropriate laws. This view of the Second Amendment, called the "state's rights" or "collective rights" view, [21] has no basis in law or support in history. It is essentially a twentieth century construct.

The Second Amendment has indeed been the victim of much disinformation over time. This Article seeks to "clear the smoke" from the air surrounding the origins and meaning of the Second Amendment and to dispel some of the wilder accusations that have been made against it, particularly by those who intentionally have sought to trivialize or severely limit this important constitutional right.

## **II. Another Attack From the 'PC' Thought Police: The "Gendered" Second Amendment**

Confronted with a constitutional right that it does not find palatable, the American Left is immediately put on the defensive by the mere existence of the Second Amendment. [22] How can strict gun control proceed and large numbers of the American public be involuntarily disarmed in the face of this constitutional right? Legal commentators unsympathetic to the Second Amendment essentially must fight a rear guard action against those who insist that the citizens' right to keep and bear arms be taken seriously. Such is the sorry state of affairs within the legal academy these days that such respected and highly esteemed publications as the Yale Law Journal sometimes are willing to print the anti-gun diatribes of non-lawyers. These articles are often long on incentive and short on legal analysis. Consider for example, Wendy Brown's 1989 article entitled *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On*

*Sanford Levinson's "The Embarrassing Second Amendment"*. [23] Ms. Brown, a professor of Women's Studies at the University of California at Santa Cruz, criticizes the Second Amendment as being "a bit 'gendered.'" In the following passage Prof. Brown relates one of her major legal and analytical insights:

Might there be something a bit "gendered" about a formulation of freedom that depicts man, collectively or individually, securing his autonomy, his woman, and his territory with a gun--a formulation signified in our epoch by Eugene Hasenpus flying over the forests of Central America, presidential review of the men in uniform charged with defending our freedom, or Ollie North's good intentions? Might there be something in this construction that seeks to banish the fragile, perishable feature of political freedom, something that reveals this construction's socially male as well as colonial character--subduing with force what it cannot discursively persuade, tame, or cohabit the universe with, and possessing with force what it cannot seduce? Might the republican formulation of freedom, for all its appeal next to liberalism, contain some ills in its gender-biased, imperial, and propertied moments, and might the express link between guns and freedom betoken such moments? [24]

As a parody of a graduate student's liberal arts paper the above passage succeeds admirably. The writing is dense to the point of incomprehensibility and the writer freely (shall I say liberally?) uses such "politically correct" words as "gender-biased," "imperial" and "propertied." Seeking "extra credit" from some imaginary teacher perhaps, the author repeatedly makes scornful references to males generally and to Western society and culture in particular. However, such writing does not advance the debate concerning the Second Amendment. One wonders how such a passage ever found its way into a law review article in the first place.

Abandoning all pretense of articulating anything resembling a legal argument, Ms. Brown concludes her Yale Law Journal article with an aimless and long-winded reverie of her summer camping trip in the Sierra Nevada:

Last summer I came out of a week-long trek in the Sierra Nevada to discover that the car my friends and I had parked at the trailhead would not start. Still deep in the wilderness, thirty miles from a paved road or gas station, I was thrilled to see sights of human life in a nearby Winnebago. These life signs turned out to be a California sportsman making his way through a case of beer, flipping through the pages of a porn magazine, and preparing to survey the area for his hunting club in anticipation of the opening of deer season. Not feeling particularly discriminating, I enlisted his aid (and fully charged battery). While his buddy and my three looked on, together we began working on getting the car started, a project that consumed our attention and combined sets of tools for the next two hours. In the course of our work, there was time to reflect upon much in our happenstance partnership. My rescuer was wearing a cap with the words "NRA freedom" inscribed on it. This was, I thought at the time, perfectly counterpoised to the injunction "Resist Illegitimate Authority" springing from my tee shirt (a token of my involvement with a progressive political foundation called RESIST). The

slogans our bodies bore appeared to mark with elegant simplicity our attachment to opposite ends of the political and cultural spectrum.

[U]pon still further reflection, I remember something that gives me pause about moving to a conclusion that I shared much of anything with this man or that I needed to defend his guns as part of a politics of resisting illegitimate authority. It occurred to me then, and now, that if I had run into him in those woods without my friends or a common project for us to work on, I would have been seized with one great and appropriate fear: rape. During the hours I spent with him, I had no reason to conclude that his respect for women's personhood ran any deeper than his respect for the lives of Sierra deer, and his gun could well have made the difference between an assault that my hard-won skills in self-defense could have fended off and one against which they were useless. And when I consider that scene, I wonder again about the gendered constitutional subject . . . Who is the gun-carrying citizen-warrior whose power is tempered by a limit on the right to bear arms? . . . Is his right my violation, and might his be precisely the illegitimate authority I am out to resist? [\[25\]](#)

In other words, those who dare to claim and defend every law-abiding citizen's constitutional right to keep and bear arms under the Second Amendment are simplistically portrayed by Wendy Brown as beer guzzling, porn consuming slobs who might be capable of raping a defenseless woman in need of assistance if not sufficiently distracted by the performance of certain manual tasks. [\[26\]](#)

While Wendy Brown's article probably represents the nadir of 'legal' writing (if it can even be called a legal piece), there are others in Ms. Brown's camp who have advanced several carefully thought out arguments that have as their ultimate objective limiting the scope and present day impact of the Second Amendment. [\[27\]](#) Without further pause, the author will set forth in succeeding sections several arguments concerning the scope of the Second Amendment in order to demonstrate the individual right of every citizen to keep and bear arms according to that constitutional provision.

### **III. Arguments Concerning the Scope of the Second Amendment**

#### ***A. In General***

The debate concerning the meaning and scope of the Second Amendment largely revolves around whether the Amendment provides a collective or individual right to bear arms. The collective or states' rights view [\[28\]](#) emphasizes the second Amendment's declared need for a "well regulated Militia" in order to maintain "the security of a free State." States' rights theorists argue that the right to bear arms is solely a collective right which was created to deter the newly created federal government from overreaching and to protect the states. Thus, individual citizens have no constitutionally protected right to "keep and bear arms" outside of service in the state militia. [\[29\]](#)

In contrast, the individual rights view [\[30\]](#) emphasizes the "right of the people" (not the states) "to keep and bear Arms." The Second Amendment provides that this right "shall not be infringed." Individual rights theorists find it significant, *inter alia*, that the right to bear arms is vested in "the people," not the states.

The states' rights theorists bear a double burden of proof. Not only must they demonstrate that the Amendment was intended to recognize and protect the right of the states to maintain militias, but they also must plausibly demonstrate that the Second Amendment does not include a personal, individual right "to keep and bear [a]rms." [\[31\]](#) In contrast, the individual rights camp can concede the importance the Second Amendment places on preserving state militias (which is the central claim of states' rights theorists) yet still maintain that the Amendment also enshrines a personal right to keep and bear arms. Viewed from the individual rights point of view, the two claims are not mutually exclusive. The personal right of citizens to possess and carry arms both aids those citizens in exercising their natural right of self-defense [\[32\]](#) and helps the state field a militia which is instantly armed and ready to fight.

The debate between states' rights and individual rights advocates raises questions concerning the proper interpretation of the text of the Second Amendment. Thus far, states' rights advocates have advanced two forms of argument to support their position. First, non-lawyers and non-legal scholars, like Ms. Brown of the University of California, prefer policy arguments to justify their limited view of the constitutional arms guarantee. As discussed above, these arguments add little to the debate because these are not legal arguments.

Second, scholars such as Rohner and Weatherup, [\[33\]](#) advance a stunted argument as to what they consider to be the "plain meaning" of the Second Amendment. However, the analysis should not end there. While it is true that statutory construction begins with plain meaning, [\[34\]](#) in all cases a legislative or conventional enactment, such as the Constitution, must be interpreted in light of, and in conformity with, the original intent of the enactment. [\[35\]](#) The more reputable states' rights theorists advance unnatural interpretations of the Second Amendment, but then neglect to square such interpretations with the intent of the Constitution's framers.

This Article undertakes that determination. First, it will examine the intent of the Framers, as manifested by proposed versions of the Second Amendment, letters, and other documents. Second, this Article will discuss the intellectual influences on the Framers and the historical background surrounding the drafting of the Constitution and the Bill of Rights. Third, this Article will examine the meaning that the words in the Second Amendment held in 1791, in order to determine the meaning that should be attached to those words today. Furthermore, this Article will review the scant few judicial interpretations since the amendment was adopted.

This Article also addresses one other argument that has been hurled at the Second Amendment by various states' rights and gun control advocates. Having proven (in their minds at least) that the Second Amendment only protects the use of firearms within the scope of service in state militias, at least one states' rights theorist has opined that, in any case, the militia is now totally outdated and no longer has any role to play in American life. [\[36\]](#) I strongly disagree. I believe that given the level of violence in many American cities, the widespread contempt for private property and the civil liberties of others that was shown by such incidents as the 1992 Los

Angeles riots, [37] and the limited resources of state and local law enforcement authorities to combat crime, the well organized and well supervised state or local militia is an idea whose time has indeed come.

## ***B. Intent Of The Framers***

Contemporaneous notes and documents can give us a very good idea of the intent of the Framers at the time of the drafting and adoption of what became the Second Amendment. The pro-gun views of Patrick Henry and Thomas Jefferson are demonstrated in part by the quotes that began this Article. [38] These two prominent early American politicians clearly believed in the existence of an individual right to keep and bear arms. Jefferson acted on his beliefs by including the following language in his proposed Virginia Constitution of 1776: "No freeman shall ever be debarred the use of arms." [39]

The adoption of the Bill of Rights was to a significant degree a quid pro quo for securing passage of the new constitution by the various state legislatures. [40] In the 1780s and 1790s the Federalists and the Anti-Federalists were the two major political factions in the country. [41] The Federalists, represented by people like James Madison, John Adams and Alexander Hamilton, favored the new constitution and were not concerned about the powers conferred by that document upon the federal government. The Anti-Federalists, which included Samuel Adams of Massachusetts, Richard Henry Lee of Virginia, Aaron Burr and others, desired to preserve a decentralized system of government with the states as the linchpins of the confederation. They feared that the new constitution would give the federal government too much power and the opportunity to arrogate to itself still more authority in the future. In ratifying what became the United States Constitution, several of the states officially recommended that a bill of rights be created which would enumerate and protect various individual rights from federal intrusion and encroachment. [42] An individual right to bear arms was one of the rights mentioned. [43]

The right to bear arms was clearly of paramount importance to state leaders. [44] Five state ratifying conventions recommended that the Constitution be amended to include a personal right to bear arms. [45] In contrast, only lesser numbers of state ratifying conventions recommended that such rights as due process, peaceable assembly, freedom from cruel and unusual punishment, freedom of speech, the right to confront one's accuser, and freedom from double jeopardy be included in the new constitution. [46]

Having received various proposals and recommendations from state ratifying conventions and political leaders across the country, the drafters of the federal constitution set about working on the Bill of Rights generally and the Second Amendment in particular. [47] James Madison was the primary drafter. [48] Therefore, it is his thoughts and words and those of his colleagues with whom he worked closely in this endeavor which are important to our understanding today of the meaning and scope of this Amendment. James Madison's original language read as follows:

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. [49]

Looking at Madison's original formulation, it is clear that the Second Amendment, as conceived, embodied two related yet independent objectives. First, the people had a right to be armed which "shall not be infringed." [50] Therefore, the federal government has no power to disarm them. Second, the states had the right to maintain their own militias which would implicitly serve as a counterweight to any standing army the federal government might produce. In this way, the balance of power between the state and federal governments would quite literally be maintained. By the time the final version was approved, the Second Amendment, like other parts of the Bill of Rights, had been edited to make it more succinct. [51] Nonetheless, both of the above-mentioned values were embodied in the final version. [52]

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. [53]

If those who approved the final version had only been interested in protecting the rights and privileges of the states from federal encroachment, presumably they would have substituted the phrase "the states" or "the militia" for the phrase "the people" or written something similar. It is the people's right "to keep and bear Arms," not just the states' right to maintain a militia. Furthermore, it should be noted that the U.S. Senate actually rejected a proposal to add the words "for the common defense" at the end of the phrase "keep and bear Arms." [54] This decision further underscores the fact that "the people" have an individual right to bear arms that extends beyond the citizen's duty to serve in the militia "for the common defense."

The primary documents of Madison and his contemporaries are replete with references clearly indicating that the Second Amendment was considered by the Founders as an individual right, not simply a right to be exercised collectively that was contingent upon being called to service in the militia. Madison himself wrote in his personal notes that the amendments he had written "relate 1st to private rights." [55] In referring to the need to pass a Bill of Rights to reduce Anti-Federalist concern over the magnitude and possible growth of federal power, James Madison stated that the "amendments may be employed to quiet the fears of many by supplying those further guards for private rights." [56]

Madison's good friend and ally Tench Coxe, writing as "A Pennsylvanian" in various newspapers of the day, referred to the Second Amendment as one of the individual rights guarantees by which "the people are confirmed . . . in their right to keep and bear their private arms." [57] James Madison expressly endorsed Tench Coxe's description of the Bill of Rights, including the Second Amendment. [58] Another Revolutionary-era writer, "Philodemos," stated: "Every freeman has a right to the use of the press, so he has to the use of his arms." [59] Madison's ally, Joseph Jones, stated that the proposed Bill of Rights was "calculated to secure the personal rights of the people so far as declaration on paper can effect the purpose." [60] In defending the new Constitution, John Adams supported the idea of "arms in the hands of citizens, to be used at individual discretion, . . . in private self-defense." [61] Adams' use of the phrase "private self-defense" expressly suggests a right to possess arms which has nothing to do with militia service. In the militia, one provides for the common defense. "[P]rivate self-defense," in contrast, is something that citizens usually do alone.

Members of Congress also viewed the Second Amendment as a personal right. Congressman Fisher Ames grouped the right to bear arms with other individual rights when he wrote in a letter to Thomas Dwight that Madison's draft of what became the Bill of Rights stated that "the rights of conscience, of bearing arms, . . . are declared to be inherent in the people." [62] Similarly U.S. Senator William Gray wrote in a letter to Patrick Henry that Madison had introduced a "string of amendments" that "respected personal liberty." [63] In addition, U.S. Senator Gallatin described the Bill of Rights as dealing with "essential and sacred rights" which "each individual reserves to himself." [64]

Even the Anti-Federalist writings and editorials took an identical view that the Second Amendment indeed was meant to confer a personal constitutional right to bear arms. The *Boston Independent Chronicle* reminded readers of Samuel Adams' proposal that ratification of the U.S. Constitution be conditioned upon certain personal rights, including the right of citizens to bear arms. [65] Referring to Madison's proposed draft, the paper congratulated Sam Adams on the fact that his views had triumphed and had been incorporated in the Bill of Rights. [66] The paper then called on the Federalists to acknowledge Samuel Adams' role in the creation of Madison's proposed amendments. [67]

Apart from the vote rejecting inclusion of the words "for the common defense" after the phrase "the right of the people to keep and bear Arms," [68] Congress' acceptance of Madison's draft of the Second Amendment takes up very little space in the official minutes of Congress. [69] The only debate that occurred involved the question of religious scruples and whether the federal government might somehow manipulate this exception to bearing arms in order to disarm the populace. [70] One might argue that the lack of debate over the Second Amendment within the halls of Congress provides further evidence that the Framers all knew full well what its language meant, irrespective of their regional background and diverse political interests. Their common understanding is embodied in the letters, notes, articles and editorials they left behind which have been analyzed and discussed above. [71]

### ***C. Intellectual Influences and Historical Background***

A second fruitful line of inquiry involves looking at the intellectual influences and historical events that shaped the attitudes and ideas of the Revolutionary generation. Intellectual impact is usually hard to ascertain. The great temptation in this respect is simply to discuss the works of famous political theorists alive and publishing during the eighteenth century or otherwise known to have still been highly regarded within the English speaking world even though dead by the time of the American Revolution. For example, it is known that John Locke, James Harrington and other seventeenth century English writers continued to exert great influence over the learned classes in Great Britain and America in the second half of the eighteenth century. As one commentator has said, "the degree to which eighteenth century Americans thought seventeenth century English thoughts" is an important fact to bear in mind when studying the Constitution and the Bill of Rights. [72] While helpful, this kind of "proof" of what the Founders meant by certain Constitutional provisions is ultimately not entirely satisfying.

Fortunately, in several instances one can also look at the actual books and treatises in the Founders' own personal libraries and at the references to various writers in the letters, notes and

speeches they left behind. This kind of evidence provides a stronger link between various political theorists and the thoughts and opinions of the Founders themselves. Such evidence has indeed survived, and further illuminates the meaning of the Second Amendment.

### **1. Right to Self-Defense Is a "Natural Right"**

The writings of John Adams reveal several English and Continental influences and indicate that he fervently believed in an individual right to possess arms for personal protection as well as for the common defense. In 1763, he wrote the following in the *Boston Gazette*:

Resistance to sudden violence, for the preservation not only of my person, my limbs and life, but of my property, is an indisputable right of nature which I have never surrendered to the public by the compact of society, and which perhaps, I could not surrender if I would. Nor is there anything in the common law of England . . . inconsistent with that right. [73]

In this passage, John Adams asserted that the right to self-protection is a "natural right" that predates the social compact entered into between citizen and government. This right is a fundamental one which can "never [be] surrendered" and therefore cannot be disturbed by governments. Adams' reference to the "common law of England" rapidly calls to mind William Blackstone, that great legal commentator on the English common law with which Adams and other lawyers of his generation were readily familiar. In his diary and personal papers, Adams actually listed the writers who had an impact on him when he stated, "I had read Harrington, Sydney, Hobbs, Nedham and Locke, but with very little Application to any particular Views: till these Debates in Congress . . . turned my thoughts to those Researches, which produced . . . the Constitution of Massachusetts . . ." [74] All five of these writers believed in the right of individual citizens to bear arms. [75] Thus, from these and other sources, we can gather a very clear idea of the intellectual influences at work in the mind of this influential American.

John Adams and the other prominent Americans who wrote our Constitution and Bill of Rights were lawyers trained in the English common law tradition. That legal tradition had a profound effect on early American legal history. The preeminent author concerning English common law was William Blackstone. Blackstone's name and the name of his famous Commentaries on the Laws of England recur in source materials throughout this time period. [76] In fact, one scholar has determined that Blackstone was the English writer most frequently mentioned in the writings of prominent Americans between 1760 and 1805. [77] Blackstone and other well-known common law commentators all affirmed the common law right to self-defense. [78] In fact, so great was Blackstone's influence in the Colonies, pro-Revolutionary elements present in the Colonies before the war actually referred to him by name in anonymous newspaper articles and editorials. One article in the *Boston Evening Post* asserted that it was:

a natural Right which the people have reserved to themselves, confirmed by the [English] Bill of Rights, to keep arms for their own defense; and as Mr. Blackstone observes, it is to be made use of when the sanctions of Society and law are found insufficient to restrain the violence of oppression. [79]

As Britain's military presence continued throughout the 1760s and 1770s despite the cessation of hostilities between Britain and France in North America, the colonists became increasingly concerned for their own liberties as Englishmen. [80] Relations took a turn for the worse when General Gage demanded that the citizens of Boston surrender all their arms. [81] This measure and Gage's march to seize arms and gunpowder stored in outlying towns sparked the Battle of Lexington and Concord on April 19, 1775. [82] The tension between the colonists and representatives of the British government was already clearly evident by 1769, the date of publication of the above newspaper excerpt. As the above passage shows, English legal and political theorists like William Blackstone were well-known to many Americans, including the Revolutionary leadership.

Blackstone characterized the personal right to bear arms and engage in self-defense as an "auxiliary right" that served to protect the three "primary rights" which were the rights of personal security, personal liberty and private property. [83] Blackstone believed that these were all natural rights that predated written law, but that they were further supported and protected by the laws of England at the time. [84] The right of subjects "to have arms for their defense," stated Blackstone, was one of the "absolute rights of individuals." [85]

It is clear from the surviving primary documents of the time that Blackstone's views exerted great influence on the Revolutionary generation. In particular, his belief in an individual right to bear arms quickly took root in American soil and eventually found expression after the American Revolution in the Second Amendment to the United States Constitution.

## **2. Republicanism: The Second Amendment as "Demagogue Insurance"**

Others have written about the connections between republican political theory and the origins of the Second Amendment. [86] Briefly put, civic republicanism posits the idea of the virtuous, arms-bearing citizen as the guarantor of a nation's liberties. [87] Citizens who bear arms as members of local or state militias are able to repulse or deter tyrants from seizing power. They are a republic's protection against all enemies, both internal and external. [88] Thus, the arms bearing citizenry at large, serving in the militia is, in essence, a form of demagogue insurance.

Integral to republican theory is the longstanding fear and suspicion of standing armies. [89] A professional soldiery does not reflect the interests and attitudes of a nation's citizens, according to republican thought. Standing armies consist of professional soldiers who owe their livelihood and income to the government. Unlike civilians who render periodic service in a local militia, professional soldiers do not own property and therefore do not have any source of income other than the government's military paymaster. Thus, they are more likely to serve the government's interests, regardless of whether its leaders are dishonest and corrupt or not. In fact, standing armies may even promote rapacious foreign or domestic policies if such policies enrich the army. In contrast, arms bearing, property owning citizen militiamen have a stake in the health of the republic as a whole and can be trusted to act in the republic's best interests, whether those interests call for action in support of or against the political leadership of the nation. [90] Republican thinkers place great emphasis on the "militia of the whole" or "universal militia," which consists of virtually all adult male citizens who have attained the age of majority. [91] In contrast, republican theorists cast a suspicious eye on so-called "select militias," which consist of

something less than the entire adult male citizenry since such organized military groups may more easily fall prey to special interests. [92] "Select militias" are, by definition, selected by someone or something and thus can be presumed to act on behalf of a special interest rather than the republic as a whole. Professional standing armies are a form of "special militia." Community-based "militias of the whole" are not.

Republican theory has its roots in Aristotle, Machiavelli, Beccaria, Burgh, Trenchard, Moyle and Harrington, among others. [93] The historical record is rife with instances in which the Founding Fathers quoted from such thinkers or demonstrated that they were profoundly influenced by them in drafting parts of the Constitution and Bill of Rights. [94] Scholars have emphasized the major role that republican theory played in the formulation of what became the Second Amendment. [95] In emphasizing the republican roots of that provision, some scholars have sought to limit its present day scope. [96] If the Second Amendment is essentially a republican inspired right designed to protect state and local militias from grasping tyrants (especially grasping federal tyrants), then by implication the Amendment does not confer a personal, individual right to bear arms, so the reasoning goes. [97] Republicanism speaks very clearly about community service in militias and the collective nature of arms bearing. Thus, to the degree that it reflects solely republican values, the Second Amendment would appear to be limited to a mere guarantee of arms bearing within the context of service in the militia. [98] Under this construction, individual gun owners have no constitutional right to possess arms and can be disarmed at will by the state. But the republican inspired attack on the Second Amendment does not end there. Having successfully restricted the Second Amendment to arms bearing within the context of collective service in the militia, at least one scholar, Prof. David Williams, recently proceeded to attack the militia concept as well. Since there are no state or local militias anymore, at least not in the republican sense of a "militia of the whole," the Second Amendment is essentially a dead letter. [99] At most, the militia referred to in the Second Amendment can serve, in the words of this scholar, as "a regulative ideal." [100]

This argument for radically restricting the scope of the Second Amendment fails on at least two grounds. First, it is incorrect to assume that arms bearing solely within the context of militia service means that the citizenry would be without arms at home. Pre-eminent in republican political theory is a deep distrust of centralized political authority. [101] It is inconceivable that republican theorists of the eighteenth century or any other would entrust the weapons of the entire citizenry to the government for safekeeping between roll calls. [102] In republican thought, it is governments and political leaders (or tyrants and dictators who hijack the machinery of government), not the arms bearing free citizenry, which constitute the threat to the health and very life of the republic. [103] Vesting governments with the sole right to distribute and subsequently collect and store arms when the militia is not in service would completely undermine the very purpose such a militia is designed to serve in the first place. In order to be effective, militia members must retain their weapons at all times and stand ready to fight against any party, whether inside government or outside it, who would seek to destroy the republic and their rights under it. Otherwise, the popular militia as a guarantor of political freedom and liberty would be nothing more than a charade.

So, attempts to severely limit or deny the personal, individual right to bear arms by asserting that the Second Amendment is merely a republican inspired right which guarantees arms bearing

within the context of militia service must inevitably fail. Even under a republican construction of that Amendment, arms possession by citizens when not performing militia service is plainly contemplated. Otherwise, service in a state or local militia in which the governing authority had the unchallenged right to confiscate weapons at the end of the day would make such militias little more than a tool of the governing authorities. As Madison implies in *The Federalist* Number 46, the American citizenry at large must retain their weapons in order to deter potential tyrants from seizing power. [\[104\]](#)

The argument for drastically limiting the scope of the Second Amendment, due to its origins in republican political theory, fails on another ground as well. Some scholars point out that the militia no longer exists today, [\[105\]](#) and furthermore, even if it did exist it no longer has any useful role to play in American life. [\[106\]](#) Therefore, even the right to bear arms solely within the context of collective service in the militia is dead because there are no more militias. The National Guard has been largely federalized [\[107\]](#) and, at any rate, is very much a "select militia" of part-time professional soldiers and others with a special interest in military service. [\[108\]](#) The National Guard and military reserves by no means consist of the adult citizenry in the communities in which their bases are located.

It is true that militias on the order of the Minute Men of Revolutionary America no longer exist in late twentieth century America. However, it is a fallacy to conclude that such community-based militias no longer have any useful role to play in American life. They should be more than just "a regulative ideal." [\[109\]](#) According to republican thought, arms bearing and militia service to protect the community was supposed to enhance the virtue of the citizenry. [\[110\]](#) Prof. Wendy Brown says that since we don't have virtuous citizens anymore, we shouldn't allow people to have guns let alone serve in some kind of local militia. [\[111\]](#) According to her, that would be dangerous. [\[112\]](#) The lack of a virtuous citizenry is debatable but let us concede that point for argument's sake. What is wanting is virtue-enhancing activity. If Prof. Brown and Prof. Williams have truly embraced republican theory or at least are willing to follow and confront all its implications no matter how embarrassing or uncomfortable for them, then such thinking should lead them to conclude that militias are needed now more than ever to get the virtuous qualities of our citizenry back to the level attained in former times. It seems that Brown, Williams and others who attack the Second Amendment in whole or in part from a republican perspective find republican theory valuable in establishing the primacy of the militia but inconvenient and bothersome when that very same theory also calls for the establishment of such institutions in order to instill virtue in the citizenry. [\[113\]](#) Brown and Williams fall silent on this point and never fully address this aspect of civic republicanism, most likely because it leads to a conclusion they cannot bear.

If properly constituted, trained and supervised, community based militias could conceivably serve as valuable police adjuncts or as independent forces in the neighborhood and on the streets which could act to preserve order and intimidate and deter the criminal element from committing crime. Militias are more than relics of a bygone era. They can play a valuable role in instilling a sense of pride, responsibility and community in our citizenry. They can also conceivably serve as a very efficient and cost effective means of reducing crime, much as neighborhood block watches have done. Armed citizens standing en masse outside of crack houses can serve as a powerful deterrent to drug dealers and their customers for example.

## ***D. The Meaning of "Militia" and Other Words in the Late Eighteenth Century***

### **1. The "Militia"**

The subordinate clause with which the Second Amendment begins states that the militia is the foundation of "a free State." [114] As has been previously demonstrated, the Framers had a universal militia in mind when they used this word. [115] A universal militia consisting of virtually the entire adult male citizenry was a valuable counterweight in republican theory to a potentially tyrannical federal government. [116] Thus, the Framers envisioned arms possession on a vast and extensive scale throughout the states.

The United States Supreme Court has interpreted the term "militia" expansively as well. [117] In 1939 the Court stated:

The signification attributed to the term Militia 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]nd further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves . . . . [118]

The inclusiveness of the term is further demonstrated by the first militia act ever passed by the new Congress after the ratification of the Second Amendment. [119] The Uniform Militia Act specified that every free, able-bodied white male citizen between the ages of eighteen and forty-five was to enroll in the local militia. [120] The inclusive scope of this early statute is reflected in today's law which defines the composition of the unorganized militia in very broad terms as well. [121]

The Framers clearly had a militia of the whole in mind when they used that term in the Second Amendment. For example, in *The Federalist Number 46*, James Madison referred glowingly to a militia consisting of a half million citizens under arms as an effective deterrent against any would-be autocrat. [122] Madison also contrasted the arms bearing American citizenry with the subjects of various European states whose governments "are afraid to trust the people with arms." [123] He went on to say that Americans possess "the advantage of being armed" in contrast to "the people of almost every other nation." [124] In a similar vein, Federalist Noah Webster of Connecticut stated:

Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because *the whole body of the people are armed*, and constitute a force superior to any band of regular troops that can be, on any pretense, raised in the United States. [125]

Antifederalist Richard Henry Lee of Virginia stated in his Letters from the Federal Farmer that "the yeomanry of the country . . . possess arms, and are too strong a body of men to be openly offended--and, therefore, it is urged, they will take care of themselves, that men who shall

govern will not dare pay any disrespect to their opinions." [126] In another part, Lee stated that "to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them . . . ." [127] At the time of the ratification debates in the various state conventions, Virginian George Mason asked rhetorically "Who are the Militia?" His answer was that "[t]hey consist now of the whole people." [128] The statements of these influential eighteenth century American leaders clearly indicate that arms possession was envisioned by the leaders of both major political parties at the time as a right of American citizenship. [129]

## 2. "The People"

The people, not the states, are the ones who are guaranteed the right to "keep and bear Arms" under the Second Amendment. Is this a collective right or an individual one? Must citizens gather for militia service before they can exercise this right?

In considering these questions, one must remember that the Bill of Rights, of which the Second Amendment is a part, consists largely of a list of personal rights of the individual against a potentially overbearing federal government. [130] Proponents of a states' rights reading [131] of the Second Amendment nonetheless attempt to interpret the arms guarantee in a collective sense only. [132] As author Don Kates has pointed out however, this kind of reading is highly improbable and extraordinarily strained:

To accept such an interpretation requires the anomalous assumption that the Framers ill-advisedly used the phrase "right of the people" to describe what was being guaranteed when what they actually meant was "right of the states." In turn, that assumption leads to a host of further anomalies. The phrase "the people" appears in four other provisions of the Bill of Rights, always denoting rights pertaining to individuals. Thus, to justify an exclusively state's right view, the following set of propositions must be accepted: (1) when the first Congress drafted the Bill of Rights it used "right of the people" in the first amendment to denote a right of individuals (assembly); (2) then, some sixteen words later, it used the same phrase in the second amendment to denote a right belonging exclusively to the states; (3) but then, forty-six words later, the fourth amendment's "right of the people" had reverted to its normal individual right meaning; (4) "right of the people" was again used in the natural sense in the ninth amendment; and (5) finally, in the tenth amendment the first Congress specifically distinguished "the states" from "the people," although it had failed to do so in the second amendment. Any one of these textual incongruities demanded by an exclusively state's right position dooms it. Cumulatively they present a truly grotesque reading of the Bill of Rights. [133]

The widespread nature of arms ownership in colonial America also constitutes evidence that the Framers of the Constitution and Bill of Rights contemplated an armed citizenry. In colonial America, even those who were exempt from service in the militia by reason of age, disability, occupation or for other reasons, were still required by law to keep arms at all times for their own defense and for local law enforcement purposes. [134]

### 3. "To Keep and Bear Arms"

The phrase "to keep and bear" presents some interesting challenges in the interpretation of the Second Amendment. Those who advocate a states' rights view of the Second Amendment invariably attempt to limit the term "bear" to carriage of a firearm during the course of militia service. [135] One states' rights commentator, Prof. Levin, has even gone so far as to ignore the companion word "keep" in asserting that the term "bear" means that the Amendment only guarantees arms possession as part of service in the state militia. [136] But a states' rights reading of this Amendment renders the above-mentioned phrase, "to keep and bear [a]rms," redundant at the very least. Given the Framers' emphasis on succinctness in fashioning the final version of the Amendment, [137] it is at the very least strange that the Framers would have let stand a windy phrase that used two terms instead of just one to denote the right to carry a firearm in the course of militia service.

A states' rights reading of the Second Amendment is plainly untenable when one investigates the actual meaning of the words "keep" and "bear" in eighteenth century parlance. "Bear" does not have solely military connotations. [138] Research clearly demonstrates that "bear" also meant simply to carry. For example, Noah Webster's dictionary of 1828 defines the term "bear" to mean "[t]o wear; to bear as a mark of authority or distinction; as to bear a sword, a badge, a name; to bear arms in a coat." [139] A Virginia game bill drafted by Jefferson and introduced on the floor of the Virginia House of Burgesses by James Madison spoke of hunters as "bearing" guns. [140] Hunters are not necessarily militia members on active duty. Thus, the Virginia game bill indicates that those who played such a prominent role in founding the nation and drafting its Constitution and Bill of Rights plainly thought that civilians could "bear" arms separate and apart from military service. [141]

The conclusion that one can "bear arms" within the meaning of the Second Amendment outside of military service is further confirmed by the usage of this term in the Pennsylvania Declaration of Rights of 1776. Article XIII states in part that "the people have a right to bear arms for the defense of themselves, and the state." [142] The right "to bear" arms clearly applies both to the idea of self-defense and the defense of the state. One can exercise one's right to self-defense outside the scope of militia service. Thus, the Pennsylvania politicians of the Revolutionary generation who drafted this declaration and took part in the birth of the new nation plainly contemplated arms bearing by citizens both inside and outside the scope of service in the state militia.

The meaning of the word "keep" would appear self-evident. The term implies a right of personal possession. There has not been any noticeable debate surrounding the meaning of this word. The fault lines of disagreement, to the degree they exist at all, surround the scope of this term. In an earlier article, Don Kates argued that "keep" implied a right of arms possession in the home while "bear" allowed citizens to carry their firearms outside the home in the course of militia service. [143] Kates has since recanted his narrow reading of the word "bear" and now concedes that one can "bear" arms outside of militia service. [144] Clearly, the two words together--"to keep and bear", strongly suggest a right of all citizens to own arms and to maintain them on one's person for self-defense as well as militia service.

## *E. Judicial Decisions*

Case law dealing with the Second Amendment is substantially underdeveloped. [145] The most recent Supreme Court case dates from 1939. [146] The rest of the Court's opinions on the subject are all from the nineteenth century [147] and make use of a doctrine of constitutional interpretation known as the nonincorporation doctrine, which has since been largely superseded. [148] One decision from 1857 which is somewhat relevant to our examination of the Second Amendment is infamous for an entirely unrelated reason. In *Dred Scott v. Sanford*, [149] Chief Justice Taney concluded that blacks were not U.S. citizens and therefore had no rights under the United States Constitution. In a portion of that opinion, Chief Justice Taney listed what he viewed as a parade of horrors if freed slaves living in the North were able to claim the rights guaranteed by the Constitution and the Bill of Rights:

It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, . . . and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. [150]

The last listed right is significant to the discussion at hand because it indicates that the Chief Justice of the U.S. Supreme Court viewed the right to bear arms as an individual right of citizens, not a collective right to be exercised only within the scope of militia service. The only other case of note is *Quilici v. Morton Grove*, [151] a case from the early 1980s in which a municipality banned the civilian possession of handguns. The ban was upheld on appeal to the United States Court of Appeals for the Seventh Circuit in 1982. The Seventh Circuit relied heavily on nineteenth century Supreme Court precedents in order to conclude that the Second Amendment does not apply to the states. In light of the *Quilici* decision, in which a federal appellate court cited and relied upon outdated precedents in order to discard the troublesome guarantees of the Second Amendment, it is appropriate to briefly consider those early, yet still-cited cases before going any further.

In *United States v. Cruikshank*, [152] *Presser v. Illinois* [153] and *Miller v. Texas*, [154] the Supreme Court held that the Second Amendment guarantees a personal right to arms only against Congressional interference. [155] The Amendment does not provide a bulwark of protection against either state or private interference with that right. The conclusion in these cases merely reflected the federal judiciary's view at the time that the Bill of Rights did not apply to the states, only to the federal government, and that it was not made applicable to the states by the Privileges and Immunities Clause [156] of the Fourteenth Amendment. [157] This nonincorporationist view of the Bill of Rights was prevalent during the post-Civil War era but has since been discarded. [158] Under what became known as the incorporation doctrine, the Court has since applied the Bill of Rights to state and local governments through the Due Process Clause of the Fourteenth Amendment. [159]

Despite the above developments, the U.S. Court of Appeals for the Seventh Circuit in *Quilici* still stubbornly insisted that the *Presser* line of cases was "good law." [160] The defendant-appellants tried to convince the federal appeals court that times had changed and that the

nonincorporationist view of the Bill of Rights found in the nineteenth century opinions discussed above were no longer necessarily controlling. Incredibly, the court responded that "the appellants offer no authority, other than their own opinion, to support their arguments that *Presser* is no longer good law or would have been decided differently today." [161] The court thereupon concluded that "the second amendment does not apply to the states." [162] In light of almost a century of judicial history starting with the *Twining* opinion in 1908, [163] the Seventh Circuit's view is plainly wrong. [164]

The defendant-appellants also attempted to advance their Second Amendment concerns regarding the Morton Grove handgun ban through an analysis of "the debate surrounding the adoption of the second and fourteenth amendments." [165] In other words, the defendant-appellants argued partly from the intent of the Framers who fashioned the Second and Fourteenth Amendments in the first place. The Seventh Circuit stated that such an "analysis has no relevance." It is very troubling to hear a federal appellate court state that the intent of the Framers is irrelevant to the interpretation of a Constitutional Amendment. One would think that the intent of the drafters would be one of the starting points of any such legal analysis.

The other prominent decision is *United States v. Miller*, [166] a 1939 case which involved a Second Amendment challenge to a federal statute which banned sawed-off shotguns and submachine guns because of their frequent use by gangsters and organized crime organizations. [167] The Supreme Court articulated a test for determining whether the statute violated the defendants' Second Amendment right to bear arms. The Court asked whether the weapon(s) at issue constituted "ordinary military equipment" that "could contribute to the common defense." [168] If so, then they were constitutionally protected. Since the defendants had not shown that the weapons they possessed, which were banned by the new federal statute, were typically used by military or militia personnel, the case was remanded to the trial court so that the defendants could make the necessary showing. Since the defendants were shady characters to begin with, they never showed up in court again and soon disappeared from public view.

The *Miller* case contains something for everyone. Probably for that very reason, it has been "misunderstood by zealous partisans" in the gun control debate. [169] On the one hand, *Miller* definitely recognizes an individual right to bear arms. It is only a question of which arms are constitutionally protected. On the other hand, the test *Miller* uses focuses on the type of weaponry used by military and militia personnel. States' rights theorists tend to emphasize the "militia-centric" nature of the Supreme Court's opinion in order to advance their view that the Second Amendment really only protects the right of states to have state militias and the right of citizens to serve in them. [170] This is a misconstruction of *Miller* since using a test which asks what weapons militias normally use is not equivalent to restricting arms bearing solely to militia members. It is unfortunate that the U.S. Supreme Court did not grant certiorari in *Quilici* [171] in order to provide litigants, academicians, practitioners and judges alike with a more recent interpretation of the meaning and scope of the Second Amendment.

## IV. Conclusion

In order to uncover the meaning and scope of the Second Amendment of the United States Constitution, this Article analyzed and discussed the intent of the Framers, relevant aspects of

early American history and the intellectual influences that shaped the thinking of the Founding Fathers. This Article also engaged in a linguistic analysis of the actual language used in the Second Amendment and investigated judicial opinions relevant to a consideration of the meaning of that constitutional provision. All of these sources strongly suggest that the Framers of the Constitution and Bill of Rights (including the Second Amendment) intended that the Second Amendment guarantee U.S. citizens an individual right to possess and carry arms for their defense and the defense of the new nation. This constitutional right extends beyond militia or similar military service and is not contingent or dependent upon such service.

Gun control advocates, disarmament advocates and those who find this part of the Bill of Rights personally repugnant have a tendency either to ignore or belittle and trivialize the Second Amendment. The popular press seems to ignore the existence of this constitutional right entirely in favor of criminological statistics like the number of youths killed by gunshots and the like. [172] Academicians sympathetic to the above-mentioned liberal constituencies have typically gravitated toward a states' rights reading of the Second Amendment in order to limit its impact on the gun control debate. If the Second Amendment's arms guarantee can be limited to service in a militia, then it is effectively a dead letter. But, as we have seen, this constitutional right extends beyond such a narrow reading.

Sooner or later those like Washington insider and Clinton confidant Lloyd Cutler [173] will have to face up to the fact that they must successfully amend the Constitution if they are to get rid of the Second Amendment. There are no lawful shortcuts in this respect. [174] Amending the United States Constitution in order to strip Americans of the right to bear arms in defense of themselves, their communities and their nation promises to be an inconvenient and time consuming process. My only answer to such an observation is that it was designed to be that way. Various parts of the Constitution rise and fall in popularity over time. But the Constitution was designed to be immune from the fickle winds of "political correctness" or this year's hot election issue.

Americans must come to a lasting judgment that in this day and age personal firearms for civilians are no longer necessary or advisable. If consensus is ever achieved on that highly debatable point, [175] then and only then can the Constitution successfully be amended in order to abolish or radically amend the Second Amendment. Until that time, it is dangerous to our constitutional order and method of government for the Left [176] to ignore or otherwise trample upon this important constitutional right.

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[1] 9 Writings of Thomas Jefferson 341 (Andrew A. Lipscomb ed., 1903). Thomas Jefferson's reverence for firearms was also reflected in a letter he wrote to his fifteen year old nephew in which he gave the following advice:

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

The Jefferson Cyclopedia 318 (Foley ed., reissued 1967).

[2] 3 Joseph Story, Commentaries on the Constitution 746 (1833).

[3] 3 Jonathan Elliot, Debates in the Several State Conventions 45 (2d ed. 1836); Stephen Halbrook, That Every Man Be Armed 74 (1984).

[4] See L.H. LaRue, *Constitutional Law and Constitutional History*, 36 Buff. L. Rev. 373, 375 (1988); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 639 (1989) ("To put it mildly, the Second Amendment is not at the forefront of constitutional discussion.").

[5] "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.

[6] See Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1131 (1991).

[7] Prof. Sanford Levinson stated in a 1989 article:

I cannot help but suspect that the best explanation for the absence of the Second Amendment from the legal consciousness of the elite bar, including that component found in the legal academy, is derived from a mixture of sheer opposition to the idea of private ownership of guns and perhaps subconscious fear that altogether plausible, perhaps even "winning" interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation. [footnotes omitted]

Levinson, *supra* note 4, at 642.

[8] Those whose personal views clash with the rights guaranteed by the Second Amendment use some fairly virulent language in describing their opponents. Some might say that they "hit below the belt" in certain instances. *See, e.g.*, Braucher, *Gun Lunatics Silence Sound of Civilization and Handgun Nuts Are Just That--Really Nuts*, Miami Herald, July 19, 1982, Oct. 29, 1981; Grizzard, *Bullebrains and the Guns That Don't Kill*, Atlanta Const., Jan. 19, 1981; Gary Wills, *Handguns That Kill*, Wash. Star, Jan. 18, 1981; and *John Lennon's War*, Chi. Sun Times, Dec. 12, 1980 (calling gun owners "traitors" and "anti-patriots" who are arming "against their neighbors."). *See also infra*, notes 23-26 and accompanying text.

[9] B. Bruce-Briggs, *The Great American Gun War*, 45 Pub. Interest 61 (1976). The Bruce-Briggs excerpt reproduced in the text continues as follows:

On the one side are those who take bourgeois Europe as a model of a civilized society: a society just, equitable, and democratic; but well-ordered, with the lines of responsibility and authority clearly drawn, and with decisions made rationally and correctly by intelligent men for the entire nation. To such people, hunting is atavistic, personal violence is shameful, and uncontrolled gun ownership is a blot upon civilization.

On the other side is a group of people who do not tend to be especially articulate or literate, and whose world view is rarely expressed in print. Their model is that of the independent frontiersman who takes care of himself and his family with no interference from the state. . .

*Id.*

[10] *See, e.g.*, Don B. Kates Jr., *Minimalist Interpretation of the Second Amendment*, in *The Bill of Rights: Original Meaning and Current Understanding* 130, 131 (Eugene Hickok ed., 1991) (noting, like Professors Levinson and Zimring before him, the "grudging, hostile spirit in which minimalists [i.e., those hostile to an individual rights view of the Amendment] approach the Second Amendment.").

[11] *See supra* note 8.

[12] Webster's famous dictionary defines the term "Left" as follows: "1. the left side 2. [often L-] Politics as a radical or liberal position, party, etc. (often with *the*)." Webster's New World Dictionary 345 (David B. Guralnick ed., 1975). The author uses the term in the secondary sense to denote American radicals, socialists and liberals who are fundamentally hostile to gun ownership and who last made their mark as a group during the late 1960s and early 1970s while many were still college students. This generation of Vietnam War protesters, draft dodgers, perennial students and assorted Beatniks is now largely in their forties. Finding poverty not to their liking, many eventually got a job, went to law school or business school or otherwise joined what they once derisively called "the Establishment." As lawyers, Democratic politicians and college professors, they continue to advance their Leftist agenda on a variety of diverse fronts including gun control and disarmament. For a discussion of the harmful impact the Left has had on the curriculum and the quality of education at many American colleges and universities, see generally, Allan Bloom, *The Closing of the American Mind* (1987).

[13] P.L. No. 103-159, 107 stat. 1536 (1993). This new statute has been challenged on federalism grounds as violative of the Tenth Amendment's principle that powers not enumerated in the Constitution are reserved to the states or to the people. *See, e.g.*, *Koog v. United States*, 852 F. Supp. 1376 (W.D. Tex. 1994); *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994); *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994). The Brady Bill requires state and local chiefs of police to conduct background checks. The challengers allege that this requirement makes municipal officials little more than agents of the federal government in violation of the Tenth Amendment.

[14] This legislation goes by several names including Brady II, The Handgun Control and Violence Prevention Act of 1994. *See* H.R. 4300 and S. 2053; The Gun Violence Prevention Act of 1994; S. 1878 and H.R. 3932. This latest wave of legislation would severely tax gun owners, dealers and those who buy ammunition in cost saving quantities. In order lawfully to possess more than 1,000 rounds of ammunition, for example, citizens would need to pay the federal government \$300 for a federal arsenal license. In order to obtain such an arsenal license, citizens would have to be willing to open their homes to inspections by agents of the federal Bureau of Alcohol, Tobacco and Firearms ("BATF"). In addition, gun magazines that hold more than six rounds would be completely banned. .22 caliber handguns, a common weapon particularly for target practice and for women gun owners, would be banned. Gun rationing would also be introduced. Private citizens would not be able to buy or transfer more than one handgun in any 30 day period. Handgun licenses would be valid for only two years. All ammunition with a diameter greater than .45 mm would be outlawed. Federal excise taxes on guns and ammunition also would be increased substantially. Gun dealers would be subjected to harsh increases in federal fees which some liberal politicians have openly bragged are designed to put these business owners out of business. *Id. See generally* *American Rifleman* 39, 66 (October 20, 1994). Some of the more hare brained and unrealistic schemes have been proposed by state politicians hoping to jump on the gun control bandwagon. Pennsylvania State Rep. Lucien Blackwell introduced the Personal Projectile Registration Act of 1994, which would require that every bullet be registered with the state, and imprinted with a registration number engraved on every shell. Given the billions of bullets purchased every year in this country, this legislation is either unrealistic or a disguised employment act for hundreds of state workers who would be charged with the task of registering bullets. *See* *American Rifleman* 6 (August 10, 1994).

Politicians who have been involved in advancing the Left's disarmament agenda include Sen. Bill Bradley of New Jersey, Sen. Diane Feinstein of California, Rep. Charles Schumer of New York (all Democrats) and the Clinton White House. The disarmament agenda of those who generally admit only to a desire to "control" but not confiscate privately held firearms recently was made explicit by the public statements of some Democrats. Prominent Washington lawyer and senior White House advisor Lloyd Cutler recently stated in *The Washington Post* that he would only allow "persons who demonstrated a compelling need, such as police, security guards, and residents of remote, unpoliced areas" to possess handguns, but only pursuant to renewable federal licenses and the payment of certain fees to the federal government. According to Cutler, all other Americans would be required, notwithstanding the Second Amendment, to turn in their guns to the government for "a \$25 or \$50 federal bounty" regardless of the actual value of the firearm. *American Rifleman* 22 (June, 1994). In other words, ordinary Americans would be

stripped of their Constitutional right "to keep and bear Arms," and would end up having their personal property confiscated without just compensation. *See* U.S. Const. amend. II.

[15] For an excellent analysis of the English antecedents of our right to bear arms and British and early American history surrounding this right, see Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (1994).

[16] *See supra* note 15. The Nazis, for example, used a national firearms registration system eventually to confiscate all guns and, as they deemed necessary, to execute gun owners. *See* Stephen P. Halbrook, *What The Framers intended: A Linguistic Analysis Of The Right To "Bear Arms,"* 49 *Law and Contemp. Probs.* 151, 161 n.73 (1986).

[17] *See supra* note 14 (*see* Washington insider Lloyd Cutler's comments).

[18] *See supra* note 14.

[19] *See infra* notes 28-29, 36, 96-100 and accompanying text.

[20] *See infra* notes 36, 99 and accompanying text.

[21] *See infra* notes 28-29 and accompanying text.

[22] Prof. Van Alstyne of Duke University School of Law recently stated:

The Second Amendment, like the First Amendment, is . . . not mysterious. Nor is it equivocal. Least of all is it opaque. Rather, one may say, today it is simply unwelcome in any community that wants no one (save perhaps the police?) to keep or bear arms at all. But . . . it is for them to seek repeal of this amendment (and so the repeal of its guarantee), in order to have their way. Or so the Constitution itself assuredly appears to require, if that is the way things are to be.

William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 *Duke L.J.* 1236, 1250 (1994).

[23] 99 *Yale L.J.* 661 (1989).

[24] *Id.* at 663-64.

[25] *Id.* at 666-67.

[26] Incredibly, according to Ms. Brown, if such supporters of the Second Amendment are in fact distracted by such manual tasks, then they are just as likely to act as good Samaritans who are willing to give up several hours of their own time and energy in order to repair a stranger's car, so that she may safely exit the wilderness. It is unfortunate that the kind and charitable soul who selflessly assisted Ms. Brown and her friends that day did not know beforehand what little respect Wendy Brown had for him as a person. Ms. Brown's smugness and contempt for those

who would disagree with her concerning the legality of bearing arms is virtually unparalleled in the realm of legal writing. Her subtle yet repeated insinuation that gun and sports enthusiasts might in fact be potential rapists is insulting and degrading and represents a new low point in legal discourse. Her reference to "the gendered constitutional subject" (like all her other vague and ill-defined references to gender, colonialism, imperialism and the like) is virtually incomprehensible and adds nothing whatsoever to the debate regarding the Second Amendment.

[27] See, e.g., Roy G. Weatherup, *Standing Armies and Armed Citizens: An Analysis of the Second Amendment*, 2 Hastings Const. L. Q. 961 (1975); John Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 Chi.-Kent L. Rev. 148 (1971); Ralph J. Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 Cath. U. L. Rev. 53 (1966).

[28] See, e.g., Maynard H. Jackson, *Handgun Control: Constitutional and Critically Needed*, 8 N.C. Cent. L.J. (1977); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 Hastings Const. L. Q. 961 (1972); John Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 Chi.-Kent L. Rev. 148 (1971); Peter B. Feller & Karl C. Gotting, *The Second Amendment, A Second Look*, 61 Nw. U. L. Rev. 46 (1966); Ralph J. Rohner, *The Right to Bear Arms*, 16 Cath. U. L. Rev. 53 (1966); John C. Santee, Note, *The Right to Keep and Bear Arms*, 26 Drake L. Rev. 423 (1977). In his book, *That Every Man Be Armed: The Evolution of a Constitutional Right* (1984), Stephen P. Halbrook states:

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

*Id* at 83.

[29] Although it has made a name for itself championing the rights of the individual, it is interesting to note that the American Civil Liberties Union ("ACLU") has taken a collective or states' rights position with respect to the Second Amendment. The national board of that organization adopted the following policy statement at its June 14-15, 1980 meeting:

The setting in which the Second Amendment was proposed and adopted demonstrates that the right to bear arms is a collective one existing only in the collective population of each state for the purpose of maintaining an effective militia . . .

Except for lawful police and military purposes, the possession of weapons by individuals is not constitutionally protected. Therefore, there is no constitutional impediment to the regulation of firearms.

The American Bar Association ("ABA") has taken a similar approach. *See* American Bar Association, Policy Book (August 1975). The ABA's stance on this and other issues such as abortion has led to some criticism from those who believe the ABA should maintain an attitude of strict neutrality on such controversial political issues.

[30] *See, e.g.*, Stephen P. Halbrook, *The Original Understanding of the Second Amendment, in* The Bill of Rights: Original Meaning And Current Understanding, 117 (Eugene W. Hickok, Jr. ed. 1991); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms"*, 49 Law and Contemp. Probs. 151 (1986); Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 Okla. L. Rev. 65 (1983); Richard E. Gardiner, *To Preserve Liberty--A Look at the Right to Keep and Bear Arms*, 10 N. Ky. L. Rev. 63 (1982); David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 Fordham Urb. L.J. 31 (1976); David Hardy & John Stompoly, *Of Arms and the Law*, 51 Chi.-Kent L. Rev. 62 (1974); Robert A. Sprecher, *The Lost Amendment*, 51 A.B.A. J. 554 (1965); Stuart R. Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 Wm. & Mary L. Rev. 381 (1960). Significantly, during the early 1980s, the Subcommittee of the Constitution of the prestigious Senate Judiciary Committee dispatched members of its legal staff to the archives of the Library of Congress to investigate the original intent behind the Second Amendment. The subcommittee subsequently endorsed an individual rights view of the Second Amendment. *See* Senate Subcomm. On The Constitution Of The Comm. On The Judiciary, 97th Cong. 2D Sess., *The Right To Keep And Bear Arms* (Comm. Print 1982).

[31] U.S. Const. amend. II.

[32] *See infra* notes 73-75, 84 and accompanying text.

[33] *See supra*, note 28.

[34] *See, e.g.*, *Asgrow Seed Co. v. Winterboer*, 115 S. Ct. 788, 793 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning."); *In re Tarvis*, 53 F.3d 416, 419 (1st Cir. 1995) ("If possible, a statute should be construed in a way that conforms to the plain meaning of its text."); *United States v. McLymont*, 45 F.3d 400, 401 (11th Cir. 1995) ("[T]he plain meaning of the statute controls unless the language is ambiguous or leads to absurd results.").

[35] *Negonsett v. Samuels*, 113 S. Ct. 119, 1122-23 (1993) ("Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive."); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985) ("The purpose of Congress is the ultimate touch stone [of the meaning of the words in a statute]."); *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 118 (1983) ("As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve."); *Garcia v. Secretary of Health and Human Services*, 46 F.3d 552, 555 (6th Cir. 1995) (must follow clear intent of Congress); *F.D.I.C. v. Raffa*, 882 F. Supp. 1236, 1242 (D. Conn. 1995) ("The goal in construing a statute is to ascertain the statute's purpose in order to give effect to the legislative will of Congress."); *Sutherland Statutory Construction* §

45.05, at 22 (5th Ed. 1992) ("It has also been stated to show that all rules of statutory construction are subservient to the one that legislative intent must prevail . . .").

[36] See David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 Yale L.J. 551 (1991). According to the author's reasoning, since militias are no longer appropriate to modern American life, guns are no longer necessary for militia service, and therefore can be confiscated at will by governments. *Id.*

[37] The 1992 Los Angeles riots are primarily remembered as an inner-city uprising against non-black ethnic groups, including members of the local Korean community. But black families and businesses were victimized by the rioters as well. During this and other crises, the minority community has been repeatedly victimized by the breakdown of civil order in America. This crime wave has included both black on black and inter-racial crimes. For example, in the Bensonhurst section of Brooklyn, 16 year old Yusef Hawkins was shot and killed "in an attack carried out by 10-30 white teenagers." Ralph Blumenthal, *Black Youth is Killed by Whites; Brooklyn Attack Is Called Racial*, N.Y. Times, Aug. 25, 1989, at A1. Similarly, 23 year old Michael Griffith "was struck and killed by a car on a Queens highway . . . after being severely beaten twice by 9 to 12 white men who chased him and two other black men through the streets of Howard Beach in what the police called a racial attack." Robert D. McFadden, *Black Man Dies After Beating by Whites in Queens*, N.Y. Times, Dec. 21, 1986, Sec. 1, at 1. The shooting of orthodox Jewish schoolchildren by Muslims in New York City, the expansion of gangs into rural and residential areas and the sheer volume of violent crime in America generally demonstrate that civil order has continued to erode. The urban poor, women and various newly arrived or otherwise disadvantaged minority groups bear the brunt of violent crime. These groups need to be armed, not forcibly disarmed, if they are to realize any sense of safety at all. To disarm the law-abiding citizenry would be tantamount to victimizing them again after they have already suffered as a group as victims of crime. Block watches in certain circumstances need to be turned into militia watches if drug dealers, pimps and unruly gang members looking for a crime to commit are to be truly persuaded to fold up their illicit operations and shove off.

[38] See *supra* notes 1, 3 and accompanying text.

[39] 1 The Papers of Thomas Jefferson 344 (Julian P. Boyd ed., 1950-82).

[40] See Don B. Kates Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 223 (1983). The Second Amendment was also a response to the Constitution's Militia Clause, which empowered Congress to call "forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions," and gave Congress the power "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. Const. art. 1, § 8, cls. 15, 16.

[41] See generally, Gordon S. Wood, *The Radicalism of the American Revolution* (1991).

[42] See Kates, *supra* note 40, at 222-23. A total of five states made this recommendation. *Id.*

[43] *Id.*

[44] For a detailed description of the attitude of the states toward the right to bear arms and the existence of such an individual right in several early state constitutions, see generally Stephen P. Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, 10 *Vt. L. Rev.* 255 (1985).

[45] See Kates, *supra* note 40, at 222.

[46] See Kates, *supra* note 40, at 222.

[47] See Van Alstyne, *supra* note 22 at 1246-47.

[48] See Van Alstyne. *supra* note 22 at 1246-47.

[49] See Edward Dumbauld, *The Bill of Rights: And What It Means Today* 207 (1957).

[50] See *supra* note 49 and accompanying text.

[51] See Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 *Law & Contemp. Probs.* 125, 136, n.75 (1986).

[52] Prof. Shalhope states:

There is nothing incongruous in the second amendment's combination in one article of such distinct, but related, ideas as that of the privately armed citizen and that of a militia composed of citizens bearing their own private arms. In this same manner the first amendment combines the distinct, yet closely related, principles of freedom of religion and separation of church and state with the more remotely related ones of freedom of speech and the press and the right of assembly and petitioning for grievances.

*Id.* at 136, n.74.

[53] U.S. Const. amend. II.

[54] Senate Journal, Sept. 9, 1789, attested by Sam A. Otis, Secretary of the Senate, Executive Communications, box 13, p.1, Virginia State Library and Archives.

[55] 12 *The Papers of James Madison* 193 (Robert A. Rutland & Charles F. Hobson eds., 1977).

[56] 12 *The Papers of James Madison*, *supra* note 55, at 307 (letter of Oct. 20, 1788, from James Madison to Edmund Pendleton).

[57] Philadelphia Federal Gazette, June 18, 1789, at 2, col. 1. Coxe published his article under the pseudonym "A Pennsylvanian" and under the title *Remarks on the First Part of the*

*Amendments to the Federal Constitution*. The piece was reprinted by the New York Packet, June 23, 1789, at 2, cols 1-2, and by the Boston Centennial, July 4, 1789, at 1, col. 2.

[58] Coxe sent a copy of his article to Madison. The latter complimented the article's explanation of his draft proposal for a Bill of Rights. *See* 12 The Papers of James Madison, *supra* note 55, at 257 (letter of June 24, 1789, from James Madison to Tench Coxe).

[59] Pennsylvania Gazette, May 7, 1788, at 3, col. 2. It is significant that this passage linked the right to bear arms with another individual right, freedom of the press and of expression. This linkage further implies that the right to bear arms is indeed an individual right of the citizenry.

[60] 12 The Papers of James Madison, *supra* note 55, at 258-59.

[61] 3 John Adams, *A Defense of the Constitution of Government of the United States of America* 475 (1787-88).

[62] 1 Works of Fisher Ames 52-53 (Seth Ames ed., 1854) (letter of June 11, 1789 to Thomas Dwight). No one would suggest that the right of conscience can only be exercised collectively.

[63] 3 Patrick Henry 391 (1951).

[64] Stephen P. Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1797*, 10 N. Ky. L. Rev. 13, 36 n.90 (1982) (quoting letter of Oct. 7, 1789).

[65] Editorial in the Boston Independent Chronicle, Aug. 20, 1789, at 2, col. 2.

[66] *Id.*

[67] *Id.* If there were any disagreement among the Framers over the meaning of the Second Amendment, it eventually would have been exposed in the give and take of partisan politics. However, for all their differences, the Federalists and Anti-Federalists never disagreed about the meaning of the Second Amendment.

[68] *See supra* note 54 and accompanying text.

[69] *See* 1 Annals of Cong. 778-80 (Joseph Gales ed., 1834).

[70] Elbridge Gerry articulated this concern, stating that "the people in power" might use the religious scruples clause to "declare who are those religiously scrupulous and prevent them from bearing arms." *Id.* Gerry's arguments were not taken up by others. *Id.* In any case, this portion of Madison's proposal did not survive the editing process of his Congressional colleagues.

[71] *See supra* notes 38-70 and accompanying text.

[72] John Phillip Reid, *In Defiance of the Law: The Standing Army Controversy, the Two Constitutions, and the Coming of the American Revolution* 4 (Morris S. Arnold ed., 1981).

[73] Boston Gazette, Sept. 5, 1763, *reprinted in* 3 The Works of John Adams 438 (Charles F. Adams ed., 1851).

[74] 2 John Adams, *Diary and Autobiography* 358-59 (1961). Thus, Adams was undoubtedly aware that Thomas Hobbes had stated that "a covenant not to defend myself from force by force is always void," and that the right "to defend our selves" is the "summe of the Right of Nature." Thomas Hobbes, *Leviathan* 88, 95 (1964). John Locke stated in his own famous treatise on government that individuals "have a right to defend themselves and recover by force what by unlawful force is taken from them." John Locke, *Of Civil Government* 174 (1955). *See also* Algemon Sidney, *Discourses Concerning Government* 157 (1698) ("the body of the People is the public defense, and every man is armed and disciplined.").

[75] *See* Halbrook, *supra* note 44 at 305.

[76] Professors Cottrol and Diamond stated in 1991 that "Blackstone's views greatly influenced late 18th century American legal thought . . . Blackstone also greatly influenced 19th century American legal thinking." Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 322 n.46 (1991).

[77] *See* Donald Lutz, *The Relative influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 Am. Pol. Sci. Rev. 194 (1984). Sales of Blackstone's famous common law work sold well in the American colonies. About 2,500 copies had been sold by the start of the Revolution in 1775, with 1400 advance orders received before the first American edition became available in 1771-72. *See* Edwin S. Crowin, *The "Higher Law" Background of American Constitutional Law* 85 (Ithaca 1928) (1974).

[78] Reference to the great common law commentators known to the Founders shows Hawkins, Bracton and Coke all affirming the existence of a common law right to possess arms for home defense, while Blackstone included that right among those he classified as the five 'absolute rights of individuals' at common law." Kates, *supra* note 40, at 240 (footnote omitted).

[79] "A Journal of the Times," Boston Evening Post, March 27, 1769, printed May 25, 1769. William Blackstone himself said that the individual right to have arms is founded upon a "natural right of resistance and self-preservation." 1 William Blackstone, *Commentaries* 121, 143-44.

[80] *See generally*, Wood, *supra* note 41.

[81] *See generally*, Wood, *supra* note 41.

[82] *See* Halbrook, *supra* note 30, at 118-20.

[83] *See* 1 Blackstone, *supra* note 79, at 121-45.

[84] *See* 1 Blackstone, *supra* note 79, at 121-45.

[85] *See* 1 Blackstone, *supra* note 79, at 144.

[86] See, e.g., Williams, *supra* note 36. Prof. Shalhope stated in a 1986 article that "[w]ithin the last several decades scholars have recognized the centrality of republicanism, a distinctive universe of ideas and beliefs drawn primarily from the libertarian thought of the English commonwealth men, in shaping the attitudes of late eighteenth-century Americans." Shalhope, *supra* note 51, at 126 (footnote omitted).

[87] See Levinson, *supra* note 4, at 647-51; Shalhope, *supra* note 51, at 126-33; Williams, *supra* note 36, at 552-56, 563-86. Virtuous citizens are a necessary prerequisite in order for a militia to function properly on behalf of the best interests of the republic. At the same time, service in the militia was recognized by republican theorists as a virtue enhancing activity that instilled responsibility, maturity, and a respect for others and for the community in individual militia members. See generally, Williams, *supra* note 36.

[88] Republican theorists clearly contemplated the armed citizen-warrior fighting against external aggressors as well as those who unlawfully seize political power from within. See generally Williams, *supra* note 36. Two famous seventeenth century republican thinkers stated:

[A] general Exercise of the best of their People in the use of Arms, was the only bulwark of their Liberties; this was reckon'd the surest way to preserve them both at home and abroad, the People being secured thereby as well against Domoestick Affronts of any of their own Citizens, as against the Foreign Invasions of ambitious and unruly Neighbors.

John Trenchard & Walter Moyle, *An Argument Shewing, That a Standing Army Is Inconsistent With a Free Government, and Absolutely Destructive to the Constitution of the English Monarchy* 7 (London 1697).

[89] See Levinson, *supra* note 4, at 647 ("Harrington and his fellow republicans viewed a standing army as a threat to freedom."); Shalhope, *supra* note 51, at 128-29; Williams, *supra* note 36, at 572-74. Standing army "could become a tool of executive usurpation." *Id.* at 572.

[90] James Harrington's contribution to republican theory consisted of his notion that land ownership was an important guarantor of a virtuous and independent citizenry. According to Harrington, freeholders who bore arms could be counted on to act in a politically independent manner during times of crisis in a republic because they have their own means of wealth and therefore are not susceptible to the domination and control of a landlord or overseer. Arms bearing is the other foundation of a virtuous, self-reliant and politically independent citizenry. See James Harrington, *The Political Works of James Harrington* (John G.A. Pocock ed., 1977).

[91] See Williams, *supra* note 36, at 577-79. Because the militia consists of virtually every citizen, it can be presumed to act for the common good. Contemporary Americans clearly envisioned the new militia as consisting of all adult male citizens. For example, George Mason of Virginia asked rhetorically at the time of the debates in the Virginia convention over ratification of the Constitution: "Who are the militia? They consist of the whole people . . ." Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 425-26 (2d ed. Philadelphia, J.B. Lippincott 1836). Patrick Henry stated during the

same convention that "the great object is, that every man be armed . . . . Everyone who is able may have a gun." *Id.* at 380. In *The Federalist* No. 46 (James Madison), James Madison alluded to the militia's inclusiveness when he stated that an abusive federal army would have to confront "a militia amounting to near half a million citizens with arms in their hands."

[92] *See* Williams, *supra* note 36, at 577-79.

[93] *See generally*, Shalhope, *supra* note 51; Williams, *supra* note 36.

[94] *See generally*, Shalhope, *supra* note 51; Williams, *supra* note 36. Such instances are too numerous to mention. *See, e.g., supra* notes 72-93 and accompanying text. There appears, however, to be general agreement among most scholars that the Second Amendment in particular, and the Bill of Rights in general, was a republican inspired, Anti-Federalist response to a Constitution laden with liberal ideology. *See, e.g.,* Amar, *supra* note 6 (Bill of Rights is a republican response to the text of the Constitution.); Williams, *supra* note 36, at 570-71 (The 1790s were a time of transition with republican ideology giving way to a liberal one among the nation's political leadership. However, the Second Amendment was an expression of the republican tradition.). The traditional republican fear of standing armies stands out quite prominently in the text of the Second Amendment. The Amendment speaks of militias as being the best means of maintaining political liberty and a free nation, and proceeds to set forth the right of citizens to be armed. These are all republican concerns. Thomas Jefferson was apparently an admirer of Beccaria as evidenced by Jefferson's notes in his *Commonplace Book*. *See* Shalhope, *supra* note 51, at 153-54. Beccaria's theories of government were also well known to John Adams. *Id.* at 154 n.21. In fact, Adams quoted this thinker at the trial of British soldiers in the aftermath of the Boston Massacre. Beccaria speaks fervently about the folly of allowing a government to disarm a nation's citizens. *Id.*; Cesare Beccaria, *An Essay on Crimes and Punishments . . . With a Commentary Attributed To Mons. De Voltaire* 160-62 (London 1775).

[95] *See, e.g.,* Levinson, *supra* note 4; Shalhope, *supra* note 51; Williams, *supra* note 36.

[96] *See, e.g.,* Williams, *supra* note 36.

[97] *See* Williams, *supra* note 36, at 555 ("The militia" is "a precondition for the right to arms. Without a militia the right is meaningless.").

[98] *See* Williams, *supra* note 36, at 555.

[99] *See* Williams, *supra* note 36, at 554 ("As we today have no such universal militia and no assurance that contemporary arms-bearers will be virtuous, the Second Amendment itself is . . . outdated.").

[100] *See* Williams, *supra* note 36, at 554-55. In other words, although the concept of the militia is dead, and therefore the Second Amendment is dead because all it talks about is the militia, the republican tradition as embodied (or perhaps embalmed?) in both can serve as "a regulative ideal" which can help us "in constructing a modern version of republicanism" in order to instill civic virtue. *Id.*

[101] See Williams, *supra* note 36. In America this attitude found expression among Anti-Federalists in particular as a deep distrust of the new federal government and, to a lesser degree, the state governments.

[102] Indeed, Cesare Beccaria denounced disarmament laws since they only embolden tyrants and criminals and leave citizens comparatively defenseless. See generally Cesare Beccaria, *An Essay on Crimes and Punishments* (1764). Thomas Jefferson quoted Beccaria on this point with approval in his *Commonplace Book*, a personal book of ideas he kept on philosophy and government, among other subjects. See Halbrook, *supra* note 16, at 153-54. John Adams was also influenced by Beccaria. *Id.* Adams believed that citizens had the right of arms "to be used at individual discretion . . . in private self-defense." 3 John Adams, *A Defense of the Constitution of Government of the United States of America* 475 (1787-88). The late eighteenth century political philosopher Joel Barlow stated that disarmament "palsies the hand and brutalizes the mind: an habitual disuse of physical force totally destroys the moral; and men lose at once the power of protecting themselves, and of discerning the cause of their oppression." Joel Barlow, *Advice to the Privileged Orders in the Several States of Europe* 16-17 (London 1792, Ithaca: Great Seal books, rept. 1956). Barlow was a friend of James Madison. See Kates, *supra* note 10, at 133.

[103] See generally Williams, *supra* note 36.

[104] The Federalist No. 46, p. 299 (James Madison, Alexander Hamilton, John Jay) (Hierloom ed., Arlington House 1966). In that essay, Madison referred to "the advantage of being armed, which the Americans possess over the people of almost every other nation." In contrast, "the several kingdoms of Europe . . . are afraid to trust the people with arms." *Id.* These passages clearly indicate that the Founding Fathers contemplated that citizens at large would have the right to be armed in America.

[105] "[W]e today have no such universal militia . . . ." Williams, *supra* note 36, at 554.

[106] Republicanism "might push us in unexpected, even embarrassing, directions" since it seems to call for the creation and maintenance of popular militias in which "ordinary citizens participate in the process of law enforcement and defense of liberty rather than rely on professional peacekeepers." Levinson, *supra* note 4, at 650-51. Prof. Levinson is "embarrassed," and perhaps even terrified, by the thought of ordinary citizens taking responsibility for protecting themselves, their own homes and apartments and their neighborhoods, but I am certainly not. See *infra* notes 107-14.

[107] For a history of Congress's authority over the National Guard, including legislation pertaining to that military body, see *Perpich v. Dept. of Defense*, 496 U.S. 334, 339-47 (1990).

[108] Given republicanism's distrust of powerful, centralized governments like the federal government, if anything, one would think that the federal government's present day control over the National Guard constitutes a strong argument under republican theory for creating popular militias to counter the threat from the federal standing army.

[109] Williams, *supra* note 36, at 554.

[110] Williams, *supra* note 36, at 579-81.

[111] *See* Brown, *supra* note 23, at 663. Reflecting on republicanism's commitment to fostering a virtuous citizenry, Prof. Brown states "I cannot imagine a less appropriate appellation for the contemporary American citizenry, which bears a shared commitment to almost nothing, least of all a common good." *Id.* Prof. Williams appears to concede this point as well with his lackluster comment that today we have "no . . . assurance that contemporary arms-bearers will be virtuous." Williams, *supra* note 36, at 554.

[112] Brown foresees a parade of horrors if Americans are permitted to exercise their constitutional right to bear arms. She worries about "America's nonprivileged and nonwhite," violence among the urban poor and about hunters with guns who might want to rape her at gunpoint in the woods. Brown, *supra* note 23, at 664-67.

[113] In contrast to Brown and Williams, Prof. Levinson follows republican theory to the bitter end and acknowledges that civic republicanism would seem to call for citizens to take a much more active role in what are normally thought of as police or military duties. Republicanism's prescriptions take Levinson in "embarrassing directions," but he at least is willing to follow such theories to their logical conclusion. *See* Levinson, *supra* note 4, at 650. Williams explores the republican implications of the Second Amendment but rejects out of hand the notion of creating modern day militias and, instead, suggests using the militia concept merely as "a regulative ideal." *See* Williams, *supra* note 36, at 554.

[114] "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.

[115] *See supra* notes 86-95 and accompanying text; *see also infra* notes 117-29.

[116] *See supra* notes 86-95 and accompanying text.

[117] *See* United States v. Miller, 307 U.S. 174, 179 (1939).

[118] *Id.* at 179.

[119] It should be noted that legislation passed by Congress immediately after adoption of a constitutional amendment is entitled to great weight in subsequently interpreting that amendment. *See, e.g.,* J.W. Hampton Jr., & Co., v. United States, 276 U.S. 394, 412 (1928).

[120] *See* First Militia Act, 1 Stat. 271 (1792).

[121] *See* 10 U.S.C. § 311 (1992) (all able-bodied males between ages 17-45).

[122] See The Federalist No. 46, at 319 (James Madison) (Heritage Press ed. 1945) ("To [a federal standing army] would be opposed a militia amounting to near half a million citizens with arms in their hands . . .").

[123] *Id.*

[124] *Id.*

[125] Noah Webster, An Examination Into the Leading Principles of the Federal Constitution (1787), in Pamphlets on the Constitution of the United States 56 (P. Ford, ed.; 1988; rept. New York: Da Capo, 1968) (emphasis added). The phrase "the whole body of the people are armed" would seem to suggest arms possession above and beyond militia membership.

[126] R. Lee, Letters of a Federal Farmer (1787-88), in Pamphlets On The Constitution Of The United States 305-306 (P. Ford, ed.; 1988; rept. New York: Da Capo, 1968).

[127] Letters From The Federal Farmer To The Republican 124 (Walter H. Bennett ed., 1978).

[128] Debates In The Convention Of The Commonwealth Of Virginia, *reprinted in* 3 Jonathan Elliot, Debates In The Several State Conventions 425 (3d. ed. 1937).

[129] See *supra* notes 38-71 and accompanying text; see also Levinson, *supra* note 4, at 649 ("there was no cleavage between the" Madisonian Federalists and the Anti-Federalists like Lee).

[130] See Van Alstyne, *supra* note 22, at 1246-47 ("[T]o meet the objections of those in the state ratifying conventions unwilling to leave the protection of certain rights to mere inference from the doctrine of enumerated powers, objections raised in the course of several state ratification debates, the Bill of Rights was promptly produced by Madison . . ."). Amendments I-IX address individual rights; Amendment X addresses the right of the States vis-a-vis the federal government. See U.S. Const. amend. I-X.

[131] See *supra* notes 28-29 and accompanying text.

[132] See, e.g., *supra* notes 36, 97-104.

[133] See Kates, *supra* note 40, at 218.

[134] Kates, *supra* note 40, at 215-16 (footnotes omitted).

[135] See, e.g., Brief of Amicus Curiae, Handgun Control, Inc., In Opposition to Certiorari at 10, *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983) ("The language of the second amendment suggests that its purpose is limited to protecting organized and effective state militias. The terms 'arms' and 'bear arms' have always been associated with organized military activity.").

[136] See Levin, *supra* note 27, at 148.

[137] *See supra* note 51 and accompanying text.

[138] In fact, commentator Don Kates later recanted his assertion that "to bear" referred solely to arms bearing within the context of militia service. In 1986, he stated:

My Michigan article [*see supra* note 40] took the position that the right to bear arms off one's own premises (though no less "individual" than the right to keep them in the home) extended only to individuals carrying them in the course of militia service. This conclusion was based upon a historical/linguistic analysis which I leave to Professor Halbrook's reply, since I must concede that his evidence invalidates my position.

Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 *Law & Contemp. Probs.* 143, 149 (1986) (footnote omitted). For Prof. Halbrook's analysis, *see* Halbrook, *supra* note 16, at 152-57.

[139] Noah Webster, *An American Dictionary of the English Language* (1828) ("Bear"). Edition not printed with page numbers. Therefore, citation is by word only. Webster's definition has no express connection to military service or activity.

[140] *See A Bill for Preservation of Deer* (1785), in 2 *The Papers of Thomas Jefferson* 443, 444 (Julian P. Boyd ed. 1950-82) (Hunters to be fined for hunting deer out of season if they "shall bear a gun" outside their own property within a year of first violation. Violators must go to court for "every such bearing of a gun.").

[141] Thomas Jefferson played a prominent role in writing the Declaration of Independence and helping to draft the Constitution. James Madison also played a prominent role in drafting and proselytizing in favor of the Constitution. Madison was also the primary drafter of the Second Amendment.

[142] Pa. Dec. of Rights, art. XIII, *The Proceedings Relative to Calling the Conventions of 1776 and 1790* 56 (Harrisburg, 1825).

[143] *See* Kates, *supra* note 40, at 267 ("Smith's research . . . indicates that, while the statutes used "keep" to refer to a person's having a gun in his home, they used "bear" only to refer to the bearing of arms while engaged in militia activities.").

[144] *See supra* note 138.

[145] One commentator recently went so far as to say that Second Amendment jurisprudence "is mostly just missing in action." Van Alstyne, *supra* note 22, at 1239. At another point the same commentator stated that "the Second Amendment has generated almost no useful body of law." *Id.*

[146] *United States v. Miller*, 307 U.S. 174 (1939).

[147] *See infra* notes 152-54 and accompanying text.

[148] See *infra* notes 152-59 and accompanying text.

[149] 60 U.S. 393 (1857). The *Dred Scott* decision was later overruled by Section 1 of the 1866 Civil Rights Act, Act of April 9, 1866, ch. 31, 14 Stat. 27, which stated "that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are . . . citizens of the United States." This clause later became part of the Fourteenth Amendment. See U.S. CONST. amend. XIV.

[150] 60 U.S. at 417.

[151] 532 F. Supp. 1169 (N.D. Ill. 1981), *aff'd*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

[152] 92 U.S. 542 (1876).

[153] 116 U.S. 252 (1886). "[T]he [second] amendment is a limitation only upon . . . the National government, and not upon . . . the States." *Id.* at 265.

[154] 153 U.S. 535 (1894). "[I]t is well-settled that the restrictions of the [second and fourth] amendments operate only on the Federal power and have no reference whatever to proceedings in state courts." *Id.* at 538.

[155] See *Kates*, *supra* note 40, at 247 ("In both [*Presser* and *Miller*] the Court treated the second amendment right similarly to first and fourth amendment rights, subjecting all three to the contemporary doctrine that individual rights were protected only against the federal government and not against the states.").

[156] "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States . . . ." U.S. Const. amend. XIV, § 1.

[157] See *Slaughter-House Cases*, 83 U.S. 36 (1873) (Holding that Bill of Rights had not been made applicable to the states by virtue of the Privileges and Immunities Clause of the 14th Amendment). In this manner, the federal judiciary basically eviscerated the fourteenth Amendment and the attempt by Radical Republicans in the post-Civil War Reconstruction Era to provide a Constitutional guarantee to Southern blacks against the excesses of state government in that region of the country.

[158] Prof. Van Alstyne states that "[t]he shaky foundation of these [nineteenth century] cases . . . has long since been recognized--and long since repudiated by the Court in general." Van Alstyne, *supra* note 22, at 1239, n.10. Referring to the Seventh Circuit's 1982 decision in *Quilici*, *supra* note 151, he goes on to lament that certain "lower courts continue ritually to rely upon" these otherwise superseded cases. *Id.* In a 1986 law review article, Don Kates noted "the unblushing mendacity with which [the states' rights camp] treats 19th-century decisions." See *Kates*, *supra* note 138, at 144 n.8. States' rights theorists, contends Kates, have disingenuously argued that these pre-incorporation decisions actually stand for the proposition that the Second Amendment does not recognize a personal right to possess arms. *Id.*

[159] For a general discussion of the incorporation doctrine, *see* Michael K. Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986). The incorporation of Constitutional rights via the Due Process Clause first made its appearance in a Supreme Court case as dictum in *Twining v. New Jersey*, 211 U.S. 78, 99 (1908) ("[I]t is possible that some of the personal rights safeguarded by the first eight Amendments against the National action may also be safeguarded against state action."). Other cases have included *Duncan v. Louisiana*, 391 U.S. 145, 147-50 (1968) ("[M]any of the rights guaranteed by the first eight amendments . . . have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment."); *Mapp v. Ohio*, 367 U.S. 643, 650-55 (1961) (holding the Fourth Amendment search and seizure protections applicable to the states through the Fourteenth Amendment); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding the First Amendment freedom of speech binding on the state through the Fourteenth Amendment.)

[160] *Quilici v. Morton Grove*, 532 F. Supp. 1169 (N.D. Ill. 1981), *aff'd*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

[161] *Id.*

[162] *Id.*

[163] *See supra* note 159.

[164] *See supra* notes 160-62 and accompanying text.

[165] *Quilici*, 695 F.2d at 270.

[166] 307 U.S. 174 (1939).

[167] *See* National Firearms Act, Ch. 757, 48 Stat. 1236 (1934).

[168] 307 U.S. at 178.

[169] *See Kates, supra* note 40, at 249; *see generally, id.* at 248-251.

[170] *See Kates, supra* note 40, 249 n.193.

[171] *See supra* note 151.

[172] *See, e.g., supra* note 8.

[173] For Cutler's comments on gun control, *see supra* note 14.

[174] Justice Frankfurter was critical of those who complained about or attempted to circumvent the dictates of the Bill of Rights. Speaking of those who complained that the privilege against self-incrimination was an obstacle to law enforcement, this Justice said: "If it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to take it out of

the Constitution, not to whittle it down by the subtle encroachments of judicial opinion." *Ullmann v. United States*, 350 U.S. 422, 427-28 (1956) (quoting *Maffie v. United States*, 209 F.2d 225, 227 (1st Cir. 1954)).

[175] Profs. Cottrol and Diamond graphically demonstrated in a thoughtful, well-researched and compelling article how gun control has been used throughout American history in part to disarm and victimize blacks. Only by availing themselves of their right to keep and bear arms have many blacks been able to defend themselves and their families from racial violence that has taken place before the eyes of indifferent or unsympathetic state authorities. *See generally* Cottrol & Diamond, *supra* note 76. Cottrol and Diamond make the apt observation that "a society with a dismal record of protecting a people has a dubious claim on the right to disarm them." *Id.* at 361. On the wisdom of gun control generally, *see* Daniel D. Polsby, *The False Promise Of Gun Control*, *The Atlantic Monthly* (March, 1994 at 57).

[176] For a definition of this term, *see supra* note 12.