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GUN OWNERSHIP: A CONSTITUTIONAL RIGHT

by Alan M. Gottlieb*

INTRODUCTION

For an area of constitutional law which has received so little modern judicial analysis, the second amendment has evoked a remarkable amount of law review commentary.¹ Undoubtedly this is because of its relevance to the longstanding and virulent national debate on gun prohibition. The Founding Fathers' attitudes on the rights of gun ownership, though readily available, are rarely mentioned in most law review treatments.² It is interesting that every one of the Founders who discussed arms emphatically endorsed their possession as a fundamental individual right.³

Beyond the refusal of modern commentators to examine relevant materials, the original meaning of the amendment is obscured by the vast gulf of time and perspective which separate us from the Founders—and our greater distance yet from the history and historians, the philosophy and philosophers who shaped the Founders' thought. The function of individuals being armed in order to preserve their liberties and the republican form of government is not a theme in modern political philosophy. But it was supremely important to all the political theorists, valued by the Founders, as Professor Halbrook shows.⁴

Moreover what the "Right to keep and bear arms" meant to the Founding Fathers cannot be understood without reference to its development in the 17th and 18th Century British experience (pg.114) which was most immediate to them. Yet, as Dr. Joyce Malcolm has noted:

Without a doubt, the belief in the virtues of an armed citizenry had a profound effect upon the development of the English, and in consequence the American, system of government. Despite its importance, however, the history of the individual's right to keep and bear arms remains obscure. British historians, no longer interested, and constitutional scholars, ill

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¹ "Except for the Third Amendment, prohibiting the quartering of soldiers in private houses, no amendment has received less judicial attention than the second." Sprecher, *The Lost Amendment*, 51 A.B.A.J. 554 (1965).

² In attacking the "collective right" theorists, it is not my intention to disparage by omission those modern commentators who endorse the individual right thesis. I am indebted to Sprecher, *supra* note 1; Hardy & Stompoly, *Of Arms And The Law*, 51 CHI-KENT L. REV. 62 (1974); Caplan, *Restoring The Balance: The Second Amendment Revisited*, 5 FORDHAM URBAN L.J. 31 (1976-77); and Halbrook, *The Jurisprudence of The Second and Fourteenth Amendments*, 4 GEO. MASON U. L. REV. 1, (1981) for their support of this thesis. See also Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381 (1960); Levine & Saxe, *The Second Amendment: The Right to Bear Arms*, 7 HOUS. L. REV. 1 (1969).

³ See A. GOTTLIEB, *THE RIGHTS OF GUN OWNERS* (1981).

⁴ Halbrook, *supra* note 2, at 8.

equipped to investigate the English origins of this troublesome liberty, have made a few cursory and imperfect attempts to research the subject.⁵

It is noteworthy that Dr. Malcolm is not a "gun nut"—or even a member of any pro-gun organization—but rather an historian whose work on this subject has been underwritten by the American Bar Foundation and the Harvard Law School.

In this connection, the recently released Report of the Senate Committee on the Judiciary, Subcommittee of the Constitution is particularly significant. With the benefit of the Halbrook and Malcolm research just mentioned, and its own staff's discovery of previously unknown evidence in the earliest records of the Library of Congress, the Subcommittee has no hesitation in concluding: (1) that the second amendment guarantees an individual right which (2) is applicable to the states through the fourteenth amendment.⁶

On its face, the second amendment's language, "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," suggests an intent to guarantee a right which people can effectively enforce.⁷ This was invariably what the Founders described on the numerous occasions in which they indicated what they meant by "militia,"⁸ (pg.115) and that is how the identical "right of the people" language which appears in the first and fourth amendments has always been construed.⁹ The following points are offered to support the contention that the language of the second amendment must be taken at face value:

1. The Founding Fathers praised the individual ownership of firearms in terms that would seem extravagant even from today's pro-gun organizations, and thus there is no reason for assuming that individuals were excluded from the right to arms the Founders wrote into the Constitution.

2. There is no support for the assumption that the right is only a collective one because all the political philosophers cited by the Founders affirmed that the individual's right to possess arms is his ultimate guarantee against tyranny.

3. By "militia," the Founders meant "all (militarily capable) males ... bearing arms supplied by themselves"¹⁰

4. When what was guaranteed by English common law (and confirmed by the English Bill of Rights of 1689) was unequivocally an individual right to keep and bear arms, there is no

⁵ J. Malcolm, *Disarmed: The Loss of the Right to Bear Arms in Restoration England* (1980) (unpublished paper) (available at Mary Ingraham Bunting Institute, Radcliffe College 1980). Dr. Joyce L. Malcolm is a Professor at Radcliffe College and a current Fellow at Harvard Law School. She spent four years working at Oxford and Cambridge Universities in Great Britain.

⁶ THE RIGHT TO KEEP AND BEAR ARMS, REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE ON THE JUDICIARY, S. Doc. No. 2807, 97th Cong., 2nd Sess. at 11-12 (1982) (hereinafter REPORT).

⁷ U.S. CONST., amend. II. It is often asserted that the Amendment's reference to a "militia" negates the possibility that an individual right was intended. In fact, in 18th Century English usage, the "militia" was the entire able-bodied adult male population—"all males physically capable of acting in concert for the common defense [and] ... bearing arms supplied by themselves." *United States v. Miller*, 307 U.S. 174, 179 (1939). See also R. TRENCH, *DICTIONARY OF OBSOLETE ENGLISH*, 159 (1958).

⁸ R. H. LEE, *LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN* 169 (Philadelphia, 1787) (a militia, when properly formed, are in fact the people themselves ...); 3 J. ELLIOTT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 386 (2d ed. Philadelphia, 1836); VA. CONST. (June 12, 1776): "That a well-regulated militia, composed of the body of the people"; Sprecher, *supra* note 1, at n.29.

⁹ "Congress shall make no law ... abridging ... the right of the people peaceably to assemble,...."; "The right of the people to be secure in their persons, house, papers, and effects,...." U.S. CONST. amends. I, IV.

¹⁰ *U.S. v. Miller*, 307 U.S. 174, 179 (1939).

cause for assuming that its American successor guarantees only an exclusively "collective right"—something that did not exist in any legal system with which the Founding Fathers were familiar.

5. Last, if the Founding Fathers had intended to guarantee an exclusively "collective right," they would not have done so in language which (in light of the English and American legal background) their contemporaries could only—and uniformly did—construe as preserving an individual right.

The evidence for the individual right interpretation is so overwhelming that the existence of an argument which (by studiously ignoring that evidence) degrades the second amendment into a meaningless "collective right" is inexplicable. The readily available explanation is that this "collective right" argument has been written under the influence of a violent antipathy to firearms and a (pg.116) profound belief that their eradication will somehow reduce violence. The effect of that belief upon the discussion of second amendment issues has been so great that a brief consideration of the criminological issues is imperatively necessary, even though it is theoretically irrelevant to the legal considerations involved.

GENERAL CRIMINOLOGICAL CONSIDERATIONS

The Relationship between Handgun Prohibition and Violent Crime

There is no evidence that handgun prohibition in the United States has reduced crime. Summarizing for the Ford Foundation the pre-1976 criminological evidence, Professor Philip Cook, Director of Duke University's Center for the Study of Criminal Justice Policy, stated: "While the consistent failure of gun control proposals to pass Congress has often been blamed on lobbying efforts of the NRA, part of the problem may be that the case for more stringent gun control regulation has not been made in any scientific fashion."¹¹

Despite the enormous volume of writing on this bitterly controversial subject, historian and policy analyst B. Bruce-Briggs comments: "Yet it is startling to note that no policy research worthy of the name has been done on the issue of gun control. The few attempts at serious work are of marginal competence at best, and tainted by obvious bias."¹²

To establish whether any scientific basis exists for banning guns, the Department of Justice in 1978 allotted \$275,000.00 for a three-year study at the Social and Demographic Research Institute of the University of Massachusetts. Two of that study's authors, Professor James D. Wright and Professor Peter H. Rossi (past-president of the American Sociological Association) have frankly admitted that they began as believers in the underlying assumptions of handgun prohibition and hoped to validate them. But, having reviewed the entire body of criminological evidence—and supplemented it with their own research—they found the crucial assumptions underlying handgun prohibition to be unsubstantiated.¹³ That is to say, it could not be shown that widespread handgun

¹¹ Cook, *A Policy Perspective on Handgun Control* (1976) (unpublished paper) (available at Duke Univ.).

¹² Bruce-Briggs, *The Great American Gun War*, in *THE PUBLIC INTEREST* 37 (1976).

¹³ J. WRIGHT & P. ROSSI, *WEAPONS, CRIME AND VIOLENCE, A LITERATURE REVIEW AND RESEARCH AGENDA* (U.S. Gov't. Print. Off., 1981) (hereinafter cited as *LEAA Report*).

(pg.117) ownership causes violence (rather than being a reaction to it),¹⁴ that gun prohibitions have reduced violence anywhere,¹⁵ or that they are enforceable against those likely to commit violence.

Handgun-Long Gun Comparisons in Relation to Violence, Militia Weaponry and Self-Defense

In view of the distinction so many make between handguns and long guns, some comment is necessary on three topics: (1) the criminological disutility of banning the one but not the other; (2) the recognized status of handguns as militia or military weapons; and (3) the preferability of handguns to long guns as defensive weapons in most circumstances.

(1) Comparative Lethality and Criminal Violence

The primary argument for banning all guns is that, because they are the deadliest of weapons, their elimination would reduce homicide by forcing attackers to rely on less dangerous weapons. The handgun is a relatively small weapon whose victims have an approximately (pg.118) 85% survival rate—only marginally less than the survival rate from ice pick or butcher knife wounds.¹⁶ Professor Kleck, describing the prohibition of handguns alone as "a policy disaster," finds that wounds from a hunting rifle, or particularly a shotgun, are enormously more lethal, with victims having little chance of survival.¹⁷ Kleck recognizes that, even though we already have twice as many rifles and shotguns as handguns, disappearance of the latter would substantially reduce the number of firearms assaults. Some attackers would not acquire long guns and some assaults would not occur where substitution was impossible. The difficulty is that no reasonable projectable decline in handgun assaults would offset the enormous increase in lethality from the substitution of long guns for

¹⁴ As the *LEAA Report* notes, almost all of the studies purporting to show that gun ownership causes violence are exercises in assuming their authors' own premises through circular reasoning. *See, supra* note 13, at ch. 7. The author starts out believing that gun ownership causes violence. To support this hypothesis he then cites correlations between increased violence and increasing gun sales—without ever considering the equally possible alternation that it is rising violence that is causing increased gun ownership, not vice versa. *Id.*

Apparently the only attempt to apply modern, sophisticated, computer-assisted, mathematical techniques to this phenomenon is found in Kleck, *Capital Punishment, Gun Ownership and Homicide*, 84 *AMER. J. OF SOCIOLOGY* 882 (1978). Professor Kleck concluded that rising homicide rates are a major cause of increased gun ownership which, in turn, modestly increased homicide.

Professor Kleck has, however, found it necessary to modify his conclusions in a subsequent paper exploring the same questions from a data base which is broader and employs later data. Kleck, *The Relationship Between Gun Ownership Levels and Rates of Violence in the United States*, forthcoming in D. KATES, *FIREARMS AND VIOLENCE: ISSUES OF REGULATION* (Ballinger n.d.). Kleck now concludes that neither gun ownership in general, nor handgun ownership in particular, among the general law-abiding population, causes homicide.

¹⁵ Murray, *Handguns, Gun Control Laws and Firearms Violence*, 23 *SOCIAL PROB.* 81, 88 (1975) ("the conclusion is, inevitably, that gun control laws have no individual or collective effect in reducing the rates of violent crime."). Murray's work has been criticized, notably by De Zee, whose methodologically different study leads, however, to the same conclusion:

"The results indicate that not a single gun control law, nor all the gun controls added together, had a significant impact in providing additional explanatory power in determining gun violence. It appears then, that present legislation, created to reduce the level of violence in society, falls short of its goals." From yet a third methodological perspective, Professors Magaddino and Medoff also reach that conclusion. *See, Firearm Control Laws and Violent Crimes: An Empirical Analysis*, forthcoming in D. KATES, *FIREARMS AND VIOLENCE: ISSUES OF REGULATION* (Ballinger n.d.).

¹⁶ *See* Kates, *Some Remarks on the Prohibition of Handguns*, 23 *ST. LOUIS U. L. J.* 11, 18 (1979); Kleck, *The Assumptions of Gun Control*, *LAW AND POLICY QUARTERLY* (August 1982).

¹⁷ Kleck, *Handgun-only Gun Control: A Policy Disaster In the Making* (1981) (a paper presented to the 1981 annual meeting of the American Society of Criminology).

handguns in the remaining assaults. The "best case" estimate, which comes from Professor Zimring (the leading academic opponent of handguns), is that a ban would cause substitution of long guns in only one-third of the attacks in which handguns are now used. Accepting this estimate, *arguendo*, Kleck notes that American firearms homicide could not possibly decrease—and would probably increase by at least 25%. But if, as Kleck himself estimates, long guns would be substituted in 50-75% of all present handguns assaults, homicide would increase by 50-500%, depending upon precisely which kinds of long guns were substituted.¹⁸

(2) *Handguns are Militia Weapons*

*United States v. Miller*¹⁹ upholds the right of citizens to possess any firearms which (unlike the sawed-off shotgun involved in that case) is a recognized military or militia weapon. It has been positively established by general reference works that a handgun is a recognized militia weapon. The standard reference work on military firearms is SMALL ARMS OF THE WORLD,²⁰ which provides a nation-by-nation listing of the designated military small arms of every country as of 1976. All of the countries listed from Argentina (pg.119) through Yugoslavia have one or another handgun for their military forces. In addition, MILITARY SMALL ARMS OF THE 20TH CENTURY,²¹ devotes 39 pages to military handguns out of a total of 160 pages devoted to military handguns, rifles and submachine guns; and BRASSEY'S INFANTRY WEAPONS OF THE WORLD, 1950-1975, devotes 20 pages to military handguns.²² In short, the suitability of handguns for militia use, particularly for quasi-police activities involving the maintenance of order after a national disaster, cannot be doubted.

(3) *Handgun Superiority in Self-Defense*

Gun control advocates claim that a handgun ban does not infringe upon the individual right to self-defense because it allows access to rifles and shotguns for that purpose. The second amendment guarantees to "the people" the right to choose for themselves.²³ The public is not terrified by the mere ownership of handguns which can be used for self-defense without danger to the neighbors and which, according to a national survey specially prepared for a handgun prohibition organization, are kept in fully 25% of all U.S. households.²⁴ There are numerous reasons why a rational individual might prefer a handgun to a long gun for self-defense: While a long gun is much more likely to kill assailants, one is surely entitled to prefer a handgun which has the capacity to terminate the attack while minimizing the risk of killing them. It is likewise rational to prefer the weapon which, if discharged against assailants (or accidentally in the home), is least able to plow

¹⁸ *Id.*

¹⁹ 307 U.S. 174 (1939).

²⁰ SMALL ARMS OF THE WORLD: A BASIC MANUAL OF SMALL ARMS (E.C. Ezell ed. 11th Rev. ed. 1977).

²¹ I. HOGG & J. WEEKS, MILITARY SMALL ARMS OF THE 20TH CENTURY (1973).

²² BRASSEY'S INFANTRY WEAPONS OF THE WORLD 1950-1975 (J.I.H. Owen, ed. 1975).

²³ In fact, courts construing the individual right to arms provisions which exist in some 35 of our state constitutions have experienced no difficulty in limiting the arms thus protected to conventional, non-fully automatic, small arms—"the modern day equivalent of weapons used by colonial militiamen." *State v. Kessler*, 289 Or. 359, 614 P.2d 94, 98-99 (1980).

²⁴ *An Analysis of Public Attitudes Toward Handgun Control* (Cambridge Reports, Inc. Cambridge, Mass. June, 1978).

through stucco, plaster, etc., menacing neighbors and innocent bystanders far away.²⁵ Indeed, in most situations the handgun will be the defense weapon of choice for anyone responsible enough to take the danger of accident into consideration.²⁶ Finally, the (pg.120) handgun is the best, if not the only, defensive weapon available to those who legitimately need to conceal a weapon, e.g., shopkeepers, and to those who are not physically able to handle a long gun.

THE SECOND AMENDMENT DEFINED

The Collective Right Position

The exclusive states' right position urged by many gun control advocates sees the amendment as a modification of Art. 1, § 8, cl. 16 of the original Constitution which gives Congress the power "[t]o provide for organizing, arming and disciplining the militia," over which the states have power. The amendment is characterized as no more than a provision against Congressional misuse of its Art. 1, § 8 powers. Erroneously claiming that this was its only purpose, they assert that the amendment guarantees nothing to individuals. Instead, they picture the second amendment as a "collective right" of the entire people—a right that cannot be invoked by anyone either in his own behalf or on behalf of the people as a whole. As employed in this sense, the concept "collective right" falls victim to the most elementary principle of constitutional construction.²⁷

The Individual Right Position

The second amendment secures individuals the right to possess arms to defend their persons and to protect against attack (whether private or governmental), and a collective right (assertable by individuals) to possess arms for the purpose of militia service. This position is not at all inconsistent with a states' right interpretation of the amendment, but only with the *exclusive* states' right interpretation. The nature of the Founders' response to these concerns becomes evident when it is realized that the Founders defined the militia as "all males physically capable [and] ... bearing arms supplied by themselves."²⁸ The amendment's prohibition (pg.121) against disarming the people was simultaneously a prohibition against disarming the militia because the people and the militia were one and the same.

Once the false dichotomy created between the Founders' concern for the individual and for the states has been stripped away, the exclusive states' right position is devoid of historical support. In sum, while more than ample evidence supports the individual right position, there is not one bit

²⁵ Cf. Steinder, *Warning! Your Walls Are Not Bullet Proof*, reprinted in GUNS FOR HOME DEFENSE (Petersen 1975).

²⁶ Long guns are not only both far more deadly than handguns and far more likely to inflict an injury on someone (whether near or far away) when they are discharged, but they are more difficult to secure from inquisitive children and much easier for a child to accidentally discharge. For instance, shotguns are involved in five times as many fatal accidents each year as are handguns, although the number of shotguns in the country barely exceeds the number of handguns—and it may reasonably be assumed that the number of shotguns kept loaded at any one time is a tiny fraction of the number of handguns. Based on 1971-1973 data, the National Safety Council concludes that shotguns and rifles together are involved in 90% of all fatal gun accidents, whereas handguns are involved in only 10%. *National Safety Council Safety Education Data Sheet*, No. 3 (Revised 1974).

²⁷ See *Marbury v. Madison*, 5 U.S. (1 Cranch 137) 368, 387 (1803) ("It cannot be presumed that any clause in the Constitution is intended to be without effect....").

²⁸ 307 U.S. at 179.

of evidence that the amendment was intended exclusively for the protection of the states and not the individual citizenry.

The Bill of Rights and Direct Legislative History

The second amendment uses the phrase "right of the people" to describe what is being guaranteed. Gun control advocates assume that Madison and his colleagues improperly used this phrase and actually meant "right of the states."²⁹ Moreover, that assumption involves a host of further inconsistencies. The fact remains that the phrase—"the people"—appears in four other provisions of the Bill of Rights and always denotes a right pertaining to individuals: (1) The "right of the people" in the first amendment denotes a right of individuals (assembly). (2) In accord with this interpretation is the fourth amendment. (3) "The people" is again used to refer to individuals in the ninth amendment. (4) Last, in the tenth amendment, "the states" is specifically distinguished from "the people."

The very organization of the Bill of Rights is supportive of the individual right position. The rights specifically guaranteed to the people are contained in the first nine amendments, with the rights reserved to the states being relegated to the tenth amendment. If the Framers had viewed the second amendment as a right granted solely to the states, it would have been more likely to have appeared in the context of the tenth amendment.

This point is implicitly reinforced by Madison's handwritten notes detailing his initial plan for organizing the amendments.³⁰ He had thought to interpolate the amendments as inserts between the sections of the original Constitution being amended. Thus, if (pg.122) the right to keep and bear arms had been a limitation to the militia clause of Art. 1, § 8, he would have designated it as an insert therein. Instead, Madison planned to insert the right to keep and bear arms (along with freedom of religion, press, and various other personal and individual rights) in § 9 of Art. 1, immediately following clause 3 (which forbids bills of attainder and ex post facto laws). It can easily be inferred, therefore, that Madison viewed the amendment as guaranteeing a personal right rather than purely as a modification of the Congressional power over the militia of the states. Indeed, Madison's original notes said of the list of proposed amendments (in which the right of arms appeared in the first clause) that "they relate first to private rights."³¹

Another textual point is suggested by the 1982 Report of the Senate Judiciary Committee, Subcommittee on the Constitution: "[After the Amendment's passage in the house], [t]he Senate ... indicated its intent that the right be an individual one, for private purposes, by rejecting an amendment which would have limited the keeping and bearing of arms to bearing 'for the common defense.'"³²

Even stronger inferential support for the individual right interpretation is its endorsement by contemporary legal scholars. The earliest commentary flatly stated, "the people are confirmed by (the

²⁹ In construing a statute or constitutional provision, the language should always be accorded its plain meaning. *Williams v. United States*, 289 U.S. 553, 573 (1933); *Myers v. United States*, 272 U.S. 52, 60 (1926); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat. 304, 332-33) 562, 568 (1816). By the same token, the protections of the Bill of Rights are to be read broadly and liberally, not restrictively. *Boyd v. United States*, 116 U.S. 616, 635 (1886).

³⁰ 12 MADISON PAPERS 201 (C. Hobson & R. Rutland eds. 1979).

³¹ *Id.*

³² See REPORT, *supra* note 6.

second amendment) in their right to keep and bear their private arms."³³ Every one of the four contemporary commentaries—each written by men who personally knew Madison and/or others involved in formulating the amendment—categorically affirmed that it was meant to protect an individual right to possess private arms.³⁴

Thus neither the text nor the direct legislative history provides a scintilla of evidence for the exclusive states' right or "collective right" theory. In the absence of direct legislative history to support that position, the next best evidence would be general statements or writings which reflect the Founders' attitudes toward the individual ownership and possession of firearms and governmental regulation thereof. Though such materials are copiously available—most of them from the original debates on ratifying the Constitution to which the second amendment was immediately (pg.123) added—they are never referred to by those who take an anti-individual right position. Instead, the advocates of that position simply seem to project their own attitudes onto the Founders.

The Attitude of the Founding Fathers Mandates the Individual Right Interpretation

"One loves to possess arms," Thomas Jefferson, the premier intellectual of his day, wrote on June 19, 1796 to George Washington.³⁵ We may presume that Washington agreed for his armory was reputed to have contained as many as 50 guns, of which at least 10 were handguns, and his own writings are full of laudatory references to various firearms he owned or examined.³⁶ With regards to Jefferson, one of his nephews tells us that he believed that every boy should be given a gun at age ten as Jefferson himself had been.³⁷ In a letter to another nephew, Jefferson offered the following advice:

A strong body makes the 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.³⁸

In the month before he penned the Declaration of Independence, Jefferson wrote a model state constitution for Virginia which included the guarantee that "no free man shall be debarred the use of arms in his own lands."³⁹

Two years before he wrote the second amendment, James Madison was congratulating his countrymen on "the advantage of being armed, which the Americans possess over the people of

³³ Philadelphia Evening Post, June 18, 1789, No. 68 of v. II, at 2, col. 1.

³⁴ *Id.*

³⁵ WRITINGS OF THOMAS JEFFERSON 341 (A. Bergh ed., 1907).

³⁶ Halsey, *George Washington's Favorite Guns*, in 116 AM. RIFLEMAN, (No. 2 1968). In urging the First Congress to pass an act enrolling the entire adult male citizenry in a general militia, President Washington commented that "a free people ought not only to be armed but disciplined...." 1 PAPERS OF THE PRESIDENTS 65 (G. Richardson, ed.).

³⁷ T.J. RANDOLPH, NOTES ON THE LIFE OF THOMAS JEFFERSON (available in Edgehill Randolph Collection).

³⁸ J. FOLEY, THE JEFFERSON CYCLOPEDIA 318 (1967).

³⁹ *Id.* at 51.

almost every other nation," deriding the despotisms of Europe "that are afraid to trust the people with arms."⁴⁰

So far as it is possible to tell, such attitudes were universal among the Founders. They are expressed across the entire political (pg.124) spectrum of the Early Republic by men who were personally or politically at odds on innumerable other great issues of the day. Madison and Jefferson, for instance, though they had been friends and would be so again, were sharply divided by Madison's championship of the Constitution about which Jefferson was dubious. Another doubter was Patrick Henry, who argued against ratification on the specific ground that the Constitution contained no guarantee of the individual's right to arms:

Guard with jealous attention the public liberty. Suspect everyone who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are inevitably ruined ... The great object is that every man be armed ... Everyone who is able may have a gun.⁴¹

Virginia ratified the Constitution only after appointing a committee, headed by Patrick Henry and George Mason, to draft a bill of rights and lobby for its adoption by the new Congress. Mason also had attacked the Constitution's failure to protect the right to arms. Reminding the Virginia delegates that the Revolutionary War had been sparked by the British attempt to confiscate the patriots' arms at Lexington and Concord, Mason characterized the British strategy as an attempt "to disarm the people; that it was the best and most effectual way to enslave them."⁴² Together, Mason and Richard Henry Lee have been given preponderant credit for the compromise under which the Constitution was ratified, subject to an understanding that it would immediately be augmented by the enactment of a bill of rights. In his commentary on the Constitution, *LETTERS FROM THE FEDERALIST FARMER*, Lee discussed the right at length, stating 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."⁴³

The ever-antagonistic Adams cousins, Sam and John, were on opposite sides of the ratification controversy. But on the subject of an individual right to keep arms, they were fully in accord. In the Massachusetts convention, Sam Adams opposed ratification unless accompanied by a provision "that the said Constitution be never construed ... to prevent the people of the United States, who are (pg.125) peaceable citizens, from keeping their own arms."⁴⁴ In a book published the year before, John Adams had enthused that "arms in the hands of citizens may be used at individual discretion," for the defense of the nation, the overthrow of tyranny or "private self-defense."⁴⁵

The fact is that the necessity of an armed populace was so unanimously advocated in the early Republic that it played a central part in the arguments of both sides in the debate over the Constitution. As the Senate Committee on the Judiciary, Subcommittee on the Constitution notes,

⁴⁰ THE FEDERALIST No. 46, at 243-44 (J. Madison) (1911).

⁴¹ J. ELLIOT, *supra* note 8 at 380, 386.

⁴² *Id.* at 380.

⁴³ R. H. LEE, *LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN*, 169, 170 (Philadelphia, 1788).

⁴⁴ DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS 86-87 (G. Pierce & B. Hale, eds., Boston, 1850).

⁴⁵ 3 J. ADAMS, *A DEFENCE OF THE CONSTITUTIONS OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA AGAINST ATTACK OF M. TURGOT* 471 (Philadelphia, 1788).

the anti-federalists opposed ratification because of the lack of a bill of rights, "while the Constitution's supporters frequently argued to the people that the universal armament of Americans made such limitations unnecessary. A pamphlet written by Noah Webster, aimed at swaying Pennsylvania toward ratification, observed:

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 pretence, raised in the United States.⁴⁶

English Common Law History Mandates the Individual Rights Interpretation

Whenever possible, courts look to English common law antecedents in interpreting the provisions of the Bill of Rights, because the Constitution was written by men steeped in the Anglo-Saxon legal tradition.⁴⁷ As the Founders were well aware, the English (pg.126) common law recognized an absolute right of individuals to keep arms and a more qualified right of individuals to carry them outside the home. Indeed, from the earliest times, Englishmen were not only privileged but actually *required* to have arms because both law enforcement and the defense of the realm were the responsibility of the entire people.⁴⁸

Sir William Blackstone (1725-80), considered the definitive chronicler of English common law, had this to say of the right to keep and bear arms in his Commentaries: "Of the absolute rights of individuals: 5. The fifth and last auxiliary rights of the subject ... is that of having arms for their defense...."⁴⁹ He went on to explain that the basis for this right is the "natural right of resistance and self-preservation when the sanctions of society and laws are found insufficient to restrain the violence of oppression."⁵⁰

By the time Blackstone wrote his Commentaries, there was a well-established right to keep and bear arms both for self-protection and for defense of the realm. The English Bill of Rights of 1688 provided that "the subjects which are Protestants, may have arms for their defense suitable to their condition and as allowed by law."⁵¹

This right to arms can be traced back to Alfred the Great, who, around the year 870, developed a military establishment called the fyrd.

⁴⁶ Webster, *An Examination into the Leading Principles of the Federal Constitution*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 25, 56 (P. Ford ed., 1888).

⁴⁷ *Ex parte Grossman*, 267 U.S. 87, 108-09 (1925) ("The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted."). See, e.g., *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (citing both a modern legal scholar as to the common law's eschewal of double jeopardy and Blackstone as the source of the Founders' understanding of the common law); *Duncan v. Louisiana*, 391 U.S. 145, 151-52 (1968) (right to trial by jury); *Klopper v. North Carolina*, 386 U.S. 213, 223-25 (1967) (citing commentators and English documents back to the Magna Carta for the right to speedy trial at common law, and citing Coke as the source of the Founders' understanding of that common law right); *Miranda v. Arizona*, 384 U.S. 436, 458-59 (1966) (review of English precedents concerning self-incrimination); *accord* *Murphy v. Waterfront Commission*, 378 U.S. 52, 58-63 (1964); *Weeks v. United States*, 232 U.S. 383, 392 (1914); *Boyd v. United States*, 116 U.S. 616, 630 (1886).

⁴⁸ See REPORT, *supra*, note 6, at 1.

⁴⁹ 1 W. BLACKSTONE, COMMENTARIES 123.

⁵⁰ *Id.* at 129.

⁵¹ Bill of Rights, 1688, 1 W. & M., ch. 2, § 2, Schel. 6, at 3.

The fyrd consisted of three divisions: the king's troops (or house guard)—a very small force; the select fyrd—civilians who drilled at regular intervals and were paid out of the treasury while on duty; and the general fyrd—composed of every able-bodied male citizen of the kingdom, who was required to arm himself at his own expense.

This tradition of imposing a legal duty on citizens to keep arms in defense of the nation was carried forward with the Assize of Arms of Henry II (1181) and the Statute of Winchester, of Edward I. The Statute of Northampton (Edward III), which provided that "none may go armed to the terror of the populace," is often cited by [gun control advocates]. However, the ordinance really referred to bearing arms in a threatening or intimidating way, so as to terrorize the (pg.127) populace.

[In 1511,] Henry VII ... required all British citizens under the age of forty to possess and train with a long bow—the deadliest weapon of the time. His daughter, Mary Tudor, required the citizen militia to have firearms....

In the eight hundred years from Alfred the Great's general fyrd to the Glorious Revolution, there developed the concept of the male populace keeping and bearing arms as a line of national defense. This was reinforced by many statutes and [by] proclamation.⁵²

Their access to reported English decisions being distinctly limited, colonial Americans depended primarily upon the great commentators for their knowledge of fundamental common law principles.⁵³ From Sir Edward Coke they learned that one of those fundamental principles was the individual's right to possess arms for defense of his home and family. "The laws permit the taking up of arms against armed persons" even by the humblest man "for a man's house is his castle ... for where shall a man be safe if it is not in his house. And in this sense it is truly said, '*Arma in aramto sumere jura sinunt*.'"⁵⁴

It is significant that the English Bill of Rights presents proponents of the exclusively "collective right" or states' right approach no support. This, the most authoritative statement of the rights of Englishmen known to the Founding Fathers, clearly guarantees an individual right to keep arms. It is clear that the English right to arms was not "collective" in nature. Though a guarantee of arms for "their common defense" was proposed, the Lords insisted on deleting "common" so that the eventual guarantee asserts only the right of Protestants to have arms for "*their* defense." As an eminent English historian has noted, the effect was to substitute "revised wording [which] suggested only that it was lawful to keep a blunderbuss to repel burglars."⁵⁵(pg.128)

Common Law in the American Colonies Mandates the Individual Right Position

Thus Blackstone (from whom the colonists principally took their knowledge of English law) analyzed the Bill of Rights and other documents of English constitutional history as guaranteeing

⁵² See *supra* note 3 at 6, 7.

⁵³ *Benton v. Maryland*, 395 U.S. at 795 ("as with many other elements of the common law, [the prohibition against double jeopardy] was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries"); *Klopper v. North Carolina*, 386 U.S. at 225 ("Coke's Institutes were read in the American Colonies by virtually every student of the law."); *Payton v. New York*, 445 U.S. 573, 594 (1980) (Sir Edward Coke was "widely recognized by the American colonists 'as the greatest authority of his time on the laws of England'....").

⁵⁴ (The laws permit the taking up of arms against armed persons.) E. COKE, *FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND*, 161-62 (5th ed. Oxford, 1671).

⁵⁵ J. R. WESTERN, *MONARCHY AND REVOLUTION: THE ENGLISH STATE IN THE 1680'S* 339 (1972).

the subject three major rights: personal security, liberty and property; and five auxiliary rights, the most important of which ("because preservative of the rest") was the "absolute right of individuals of having and using arms for self-preservation and defense...."⁵⁶

It was British policy to arm the colonists with any and all firearms available to them:

In the colonies, availability of hunting and need for defense lead to armament statutes comparable to those of the early Saxon times. In 1623, Virginia forbade its colonists to travel unless they were "well armed"; in 1631, it required colonists to engage in target practice on Sunday and to "bring their peeces to church." In 1658, it required every householder to have a functioning firearm within his house and in 1673 its laws provided that a citizen who claimed he was too poor to purchase a firearm would have one purchased for him by the government, which would then require him to pay a reasonable price when able to do so. In Massachusetts, the first session of the legislature ordered that not only freemen, but also indentured servants own firearms and, in 1644, it imposed a stern 6 shilling fine upon any citizen who was not armed.⁵⁷

In sum, as of 1775, the American common law tradition recognized an absolute right of individual ownership of firearms.

Inconsistency of "Collective Right" Interpretation With Events and Enactments of the Revolutionary Era

One of the strongest arguments against the exclusive "collective right" theory is the sequence of events which immediately sparked the Revolution. These began with General Gage's attempt to confiscate the arms which various private organizations had stored in private houses in Lexington and Concord. The immediate response was prolonged sniper action by hundreds of individually armed colonists (the "unorganized militia") which decimated the British forces. Within the ensuing five years, most of the newly independent states which adopted constitutions had explicitly provided therein for an individual right to keep and bear arms.^(pg.129)

The "collective right" advocates deny that these enactments guarantee any individual right, pointing out that some of them say no more than the people have the right to bear arms "for the common defense against the common enemy, foreign or domestic."⁵⁸ This view, however, makes fiction out of the entire Revolutionary experience. If all that existed in 1775 was a "collective right" (belonging, for example, to the Massachusetts colony but to no individual colonist), Gage would have had every right to confiscate the colonists' arms. After all, he was not seizing the colonial government's armory but only the arms of private citizens stored in private homes. Indeed, if this characterization is correct, one must assume that, far from being outraged by Gage's confiscations, the colonists would have been delighted by them. The fact is that Massachusetts and four other states promptly enacted constitutional provisions prohibiting such confiscation.

In sum, the context in which these states' bills of rights were introduced compels the conclusion that they were intended to protect at least a *Miller*-type individual right to personally

⁵⁶ BLACKSTONE, *supra* note 48 at 121, 144.

⁵⁷ REPORT, *supra* note 6 at 3 (footnotes omitted).

⁵⁸ Sprecher, *The Lost Amendment*, 51 A.B.A.J. 665, 668 (1965).

possess militia-type weapons. Moreover, any attempt to construe these provisions as a states' right theory is patently nonsensical, as the Subcommittee on the Constitution Report notes:

State bills of rights necessarily protect only against action by the state, and by definition a state cannot infringe its own rights; to attempt to protect a right belonging to the state by inserting it in a limitation of the state's powers would create an absurdity. The fact that the contemporaries of the framers did insert these words in several state constitutions would indicate clearly that they viewed the right as belonging to the individual citizen, thereby making it a right which could be infringed either by state or federal government and which must be protected against infringement by both.⁵⁹

Contemporary Understanding of The Second Amendment

The points already made converge on a final refutation of the exclusive "collective right" position. Assume, *arguendo*, that the Founders had decided that the second amendment should *not* express their belief in the individual's right to arms, but only protect those arms actually owned by the states. How would they have expressed such an intention in light of their knowledge of their generation's manner of speaking and philosophical predispositions? (pg.130) The amendment might have read something like, "the right of the states to keep, and of their militias to bear, arms shall not be infringed." But, it seems logical, they would never have chosen the language which actually appears in the amendment to express such an intention—because their contemporaries would necessarily have misunderstood their intent. They could have read the phrase "the right of the people" to keep and bear arms in light of the "absolute right of individuals" to do so as described by Blackstone and celebrated in the combined Anglo-American common law and republican philosophical traditions most familiar to them.

[The Founders] were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary ... (W)hen they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, *confident that they could be shortly and easily understood*.⁶⁰

Significantly "right of the people" is precisely how their contemporaries and the next several generations of American legal scholars understood the amendment. It bears particular emphasis that the growth of the idea that the second amendment enunciated an exclusively states' right has solely occurred in the twentieth century. Neither Madison's contemporaries nor the next several generations of legal scholars had the slightest inkling of any such concept. The earliest commentary, appearing almost contemporaneously with the amendment, was a feature article in which a friend of Madison's interpreted the meaning of the proposed Bill of Rights to the people:

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our

⁵⁹ REPORT, *supra* note 6, at 11.

⁶⁰ *Ex parte* Grossman, 267 U.S. at 109 (emphasis added).

country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms.⁶¹

In 1803, an American edition of BLACKSTONE was published with annotations by St. George Tucker. We may assume that Tucker was learned in American common law since he was the Chief Justice of the most distinguished court of his day, the Virginia Supreme Court. Likewise we may assume his authoritative familiarity with the thought underlying the American Bill of Rights. He was not only an important member of the generation which produced (pg.131) it, but also an intimate of Jefferson and Madison (and his brother and his best friend were both members of the First Congress which enacted the amendment).⁶² Tucker added to Blackstone's description of the common law right the observation that it was incorporated in the second amendment—"And this without any qualification as to their condition or degree as is the case in the British government."⁶³

In 1825, yet another commentary of the new federal Constitution was published by William Rawle, to whom Washington had offered the first Attorney Generalship (notwithstanding the fact that, as a Quaker, Rawle had refused to fight in the Revolution).⁶⁴ So detached was Rawle from the states' right concept, that he flatly declared that the second amendment prohibited state, as well as federal laws disarming individuals.⁶⁵ Likewise Hamilton, in THE FEDERALIST viewed the people's possession of arms as guaranteeing freedom from tyranny by a state as much as by the proposed federal government: the armed people "by throwing themselves into either scale, would infallibly make it preponderate" against either a federal or a state invasion of popular rights.⁶⁶

The two preeminent American constitutional law commentators of the 19th Century were, of course, Mr. Justice Story and Thomas Cooley. Both affirmed that the Amendment guaranteed "right of the citizens to keep and bear arms."⁶⁷ Cooley, incidentally, strongly concurred with Rawle in considering the amendment to be a limitation upon rather than a guarantee of state powers.

One further point deserves special note: Literally hundreds of men who had served in the First Congress of state legislatures at the time the Bill of Rights was enacted were living 12 years later (pg.132) when Tucker's American edition of BLACKSTONE was published. Many of those men—including Madison himself—were still living 25 years later when Rawle's and Story's highly popular volumes on the Constitution first appeared. Surely Madison, Jefferson⁶⁸ and the many other

⁶¹ See *supra* note 33.

⁶² M. COLEMAN, ST. GEORGE TUCKER, CITIZEN OF NO MEAN CITY 35, 113-14, 124 (___). Tucker had attended the Annapolis convention of 1776 with Madison. *Id.* at 87. "The Jefferson papers in the Library of Congress show that both Tucker and Rawle were friends of, and corresponded with, Thomas Jefferson." REPORT, *supra* note 6 at 77.

⁶³ BLACKSTONE'S COMMENTARIES, WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT, 143 n.40, 300 (St. G. Tucker, ed., Philadelphia, 1803).

⁶⁴ D. BROWN, EULOGIUM UPON WILLIAM RAWLE 8-9, 15, 38 (Philadelphia, 1837).

⁶⁵ W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 125-26 (2d Ed. Philadelphia, 1829).

⁶⁶ THE FEDERALIST No. 28 (A. Hamilton).

⁶⁷ 3 J. STORY, COMMENTARIES ON THE CONSTITUTION 746 (Philadelphia, 1833). Thomas M. Cooley's views appear in his book entitled GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 298-99 (3d ed. 1898) and in his A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION 729-30 (8th ed. 1927).

⁶⁸ All of the legislators who passed upon the second amendment were necessarily still alive when Tench Coxe's commentary, *supra* note 33 was written, since it predated the enactment of the Bill of Rights by several months. Thomas Jefferson and John Adams, who both died on July 4, 1826, would presumably have been in a position to repudiate the commentaries of Rawle (1825) and Tucker (1803). Madison, the amendment's author, died in 1836 and therefore would have been in a position to repudiate Story (1833) as well. Without attempting comprehensively to document the longevity of the legislators who passed on the

interested parties would have objected with the commentators and commented publicly if the amendment was being wholly and consistently misconstrued by every one of them.

THE MORTON GROVE CASE: AN ASSAULT ON THE SECOND AMENDMENT

In his opinion examining the constitutionality of Morton Grove's ban on handguns, District Court Judge Decker refused to consider any of the second amendment issues previously discussed, and held that his court was bound by an antiquated Supreme Court opinion which viewed the second amendment as not limiting state power but only limiting authority of the federal government.⁶⁹ In so holding, he plainly erred since *Cruikshank* has no *stare decisis* effect as to the case. The second amendment applies to the states of its own force and therefore, application through the Privileges and Immunities Clause of the fourteenth amendment is unnecessary. As of 1982, it is plainly appropriate to limit *Cruikshank* to its precise holding rather than extrapolating from it an erroneous principle of fourteenth amendment interpretation. If broadly construed, *Cruikshank* was overruled more than 55 years ago.⁷⁰

Having swept away the false authority of *Cruikshank*, I would offer three discrete, but related, points as to why the Morton Grove gun ban violates the second amendment.(pg.133)

The Ordinance Outrages Constitutional Federalism

The Constitution contemplates one militia, and the authority to govern it is precisely divided between Congress and the states as a matter of "checks and balances." What is now called the "unorganized militia" continues to be classified as the nation's ultimate resource in times of the gravest emergency.⁷¹ It has been noted that, if the army and the federalized national guard are called overseas, all that will remain to resist invasion and keep order are the states' formal militias which provide the skeleton around which the unorganized militia can be mobilized. Its mobilization will "not prevent an atomic attack but (armed citizens) can preserve internal order after one. Thus militias (by whatever name) are as important as ever and perhaps more so, in the atom-and-missile age...."⁷²

As the "unorganized militia" remains the nation's final defense resource, the question arises whether, as a matter of federalism, that portion of it which resides within the Village of Morton Grove may be disarmed (whether wholly or partially) under color of state authority? The answer to this question is self-evident. Or so at least it seemed to the Supreme Court when it stated:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States

amendment, D. & I. MORRIS, WHO WAS WHO IN AMERICAN POLITICS (1974) states the following: U.S. Senator Albert Gallatin (d. 1849); U.S. Representative Jeremiah Smith (d. 1842); State Senator Stephan Van Rensselaer (d. 1839); U.S. Senator Paine Wingate (d. 1838); U.S. Senator Aaron Burr (d. 1836); State Senator Hugh Nelson (d. 1836); State Representative Nathan Dane (d. 1835).

⁶⁹ See *Village of Morton Grove v. Quilici*, 532 F. Supp. 1169 (N.D. Ill. 1981) *relying on* *United States v. Cruikshank*, 92 U.S. 542, 553 (1876).

⁷⁰ *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (first amendment applied to states through fourteenth amendment); *see also* *Edwards v. South Carolina*, 372 U.S. 229 (1963) (freedom of assembly).

⁷¹ 10 U.S.C. § 331-333.

⁷² Sprecher, *supra* note 58, at 667.

cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.⁷³

In short, the Morton Grove gun ban is unconstitutional in that it partially disarms the unorganized militia of the United States, thereby depriving its members of the opportunity to perform their legal duty to the United States. Having a federal duty, residents of Morton Grove have a corresponding federal right, and the necessary standing to seek relief against those who are attempting to impede them in that duty.⁷⁴

It is important to note that the *Presser* Court regarded the second amendment as creating a purely individual right. Indeed, the (pg.134) *Presser* Justices deemed the amendment inapplicable to the states precisely because they viewed the right it guaranteed as identical in quality to, and to be treated in the same manner as, other personal rights (such as expression, religion, freedom from unwarranted search and seizure, etc.) which also did not *then* apply against the states. But to the extent that the second amendment's concern for the individual right to arms for militia purposes be exalted above its concern for self-defense, the conclusion that it is applicable to the states would only be strengthened. Art. I, § 8 provides a carefully balanced division of power over the militia between the states and the federal government—a balance which neither may constitutionally alter.

The Village of Morton Grove, a minor creation of the state, emphatically has not been delegated the power to waive rights conferred upon the state itself by the federal Constitution. More important, the federal-state balance established by the Constitution is not a privilege which any particular state may waive, but rather something which each state holds in trust for each other state and the people of the United States as a whole. A state can no more legislate away its "rights" in the congressionally mandated balance of power of the militia than it can legislate away its "rights" to send to Washington two senators and the number of House members to which it may be entitled.

The Second Amendment as a Fundamental Due Process Liberty is Inescapable

Unquestionably those portions of the Bill of Rights which are expressive of the most important liberties are now incorporated against the states through the Due Process Clause of the fourteenth amendment. In deciding whether a particular provision is so fundamental, we look first to our Anglo-American common law heritage, and also to its Greek and Roman antecedents.⁷⁵ At least equal weight is accorded evidence as to how the Founders themselves viewed a right's importance.⁷⁶ The esteem in which the (pg.135) Founders held the right to keep arms has been exhaustively detailed. This right was part of their colonial common law and they knew it to have been among the most ancient in English common law, recognized by Bracton, Coke and Hawkins,

⁷³ *Presser v. Illinois*, 116 U.S. 252, 265 (1886).

⁷⁴ *Brewer v. Hoxie School Dist. No. 46*, 238 F.2d 91, 100 (8th Cir. 1956).

⁷⁵ *Cf. Benton v. Maryland*, 395 U.S. 784, 795 (1969); *Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14, 151 (1968). (Acceptance of jury trial both in English and American colonial common law and its position in Blackstone's catalog of subjects' rights cited as showing its importance. As to incorporation, the issue is a right's historical significance in the "Anglo-American scheme of liberty"—regardless of whether it might be considered fundamental in the abstract, or has been as considered in other cultures).

⁷⁶ *Cf. Klopfer v. North Carolina*, 386 U.S. at 213, 225-26; *Duncan v. Louisiana*, 391 U.S. at 152-53; *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

and exalted by Blackstone as the "absolute right of individuals" of "having and using arms for self preservation and defense."⁷⁷ Finally every ancient and modern commentator of the Revolutionary Era affirmed not only that this right had existed in Greco-Roman law, but that it was the basis for republican institutions and popular liberties. In short, if the matter were purely one of legal theory, the only impediment to the amendment's incorporation has been the historical misconception that it protects only states' rights and not those of individuals.⁷⁸

But, the real impediment to the second amendment's incorporation lies not in legal theory but, seemingly, in the fact that many present constitutional scholars detest firearms and desire their elimination from American life. Though the mere existence of the kind of anti-gun sentiment entertained by many constitutional scholars today represents a substantial change in attitude since the Founders' time, the overwhelming majority of Americans continue to believe in an individual right to keep and bear arms.⁷⁹ Moreover, as the adverse legal scholars would themselves be the first to proclaim, the provisions of the Bill of Rights remain presumptively the will of the people, and it is the duty of the judiciary to enforce them, notwithstanding the possibility that a majority of present day Americans don't like them (e.g. the privilege against self-incrimination), until and unless nullified by a subsequent expression of popular opinion through the amendatory process. Hamilton's explanation of the judicial function remains as true today as when he wrote it in THE FEDERALIST:(pg.136)

[The right of the court to pronounce legislative acts void does not] by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter, rather than the former.⁸⁰

As the Oregon Supreme Court recently stated:

We are not unmindful that there is current controversy over the wisdom of the right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.⁸¹

The Fourteenth Amendment Was Intended to Prohibit State Derogation of the Second Amendment

⁷⁷ BLACKSTONE, *supra* note 49.

⁷⁸ Cf. J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 414 (West 1978).

⁷⁹ In a 1975 national poll question regarding whether the second amendment "applies to each individual citizen or only to the National Guard," 70% of the respondents endorsed the individual right alternative, while another 3% said it applied to both. Cong. Rec., No. 189—Part II, December 19, 1975. A 1978 national poll which asked "Do you believe the Constitution of the United States gives you the right to keep and bear arms?" received an 87% affirmative response. Decision Making Information, ATTITUDES OF THE AMERICAN ELECTORATE TOWARD GUN CONTROL (mimeo, 1978). In addition, on November 2, 1982, voters in New Hampshire and Nevada approved state constitutional amendments giving individuals the right to keep and bear arms by a more than 70% affirmative vote, and, in California, voters defeated a handgun registration and freeze proposition by a 63% to 37% margin.

⁸⁰ THE FEDERALIST No. 78 (A. Hamilton).

⁸¹ State v. Kessler, 289 Or. 359, 614 P.2d 94, 95 (1980).

The evidence of legislative intent supporting the view that the second amendment protects an individual right to arms far exceeds the evidence for any of the rights which have so far been selectively incorporated into the fourteenth amendment. That amendment was enacted immediately after the Civil Rights Act of 1866, at a time when the Republicans were still dominant in Congress by reason of the exclusion of the delegations of the conquered Southern states. Section 1 of the fourteenth amendment receives no mention in the debate, beyond the statement of its sponsor, House Speaker Stevens, that it was intended to incorporate the basic principles of the Civil Rights Act, thereby placing that Act beyond repeal after the southern delegations' return.⁸² The basic principle of the 1866 Civil Rights Act had been to repudiate the legal theory and auxiliary statutory law that had accumulated in the South under slavery.⁸³

Antebellum challenges to these arms provisions by free blacks were rejected on the ground that the second amendment did not (pg.137) apply against the states and that blacks could never be considered "citizens" within the meaning of the analogous state arms guarantees.⁸⁴ The latter proposition was, of course, the basis of decision in the *Dred Scott* case, with the Chief Justice noting, in horror, that if blacks were considered citizens they would have the right "to keep and carry arms wherever they went."⁸⁵

The authors of the 1866 Act and fourteenth amendment were familiar with these decisions because they drafted language specifically overruling them in particular, and the entire blacks-as-property theory of slavery in general.⁸⁶ But, there is even stronger evidence than this inference to support the view that the authors meant to protect the individual right to keep arms. The *betes noir* of the Congress of 1866—at which these enactments were particularly aimed—were in Black Codes which the southern legislatures had enacted immediately after the war in order to keep newly freed blacks in a state of perpetual peonage. One of the most obnoxious provisions of these Codes, according to the Special Report of the Anti-Slavery Conference of 1867, stated that blacks were "forbidden to own or bear firearms," and thus were rendered defenseless against assault.⁸⁷ Congressman after congressman, including the Senate sponsors of both the 1866 Act and the fourteenth amendment, expressed their outrage at the denial of the freedman's rights to arms and their consequent intention to guarantee that right.⁸⁸ In summarizing what it would accomplish, the Act's House and Senate sponsors both cited and employed Blackstone's classification of the right of

⁸² CONG. GLOBE, 39th Cong., 1st Sess., at 2449. See generally Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 140-41 (1950).

⁸³ Kates, *Abolition, Deportation, Integration: Attitudes Toward Slavery in the Early Republic*, 53 J. OF NEGRO HISTORY 33, 37 & n.25 (1968).

⁸⁴ *State v. Newsom*, 27 N.C. (5 Ired) 250 (1844); *Cooper v. Savannah*, 4 Ga. 68, 72 (1848).

⁸⁵ *Dred Scott v. Sandford*, 60 U.S. (19 How. 393, 417) 1, 20 (1857).

⁸⁶ The first sentence of the first section of both the Act and the amendment reads "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." U.S. CONST., amend. XIV; Civil Rights Act of 1866.

⁸⁷ *Special Report on the Anti-Slavery Conference of 1867*, reprinted in H. HYMAN, *THE RADICAL REPUBLICANS AND RECONSTRUCTION* 217 (1967). See, generally, W. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA* 167, 172, 223 (1962); 8 *A HISTORY OF THE SOUTH*, 38-40 (W.H. Stephenson & E. Coulter, eds. 1947).

⁸⁸ Halbrook, *supra* note 2, at 21-24.

subjects, stating that these essential human rights were being conveyed.⁸⁹ Finally, a myriad of statements, and an official committee report, regarding the KKK Act of 1871, show an unchallenged assumption by a body largely identical (pg.138) to the Congress of 1866 that the fourteenth amendment which they had enacted five years earlier encompassed second amendment rights.⁹⁰ The authors of the fourteenth amendment saw the right to arms as no less fundamental than did the authors of the second, and intended equally to protect it.

The Second Amendment Is Relevant Today

Opponents of the individual right interpretation argue that the second amendment may simply be ignored because technological changes since 1791 has rendered an armed citizenry irrelevant for either national defense or resistance to domestic tyranny. Even if this were true, the obvious answer is that the Constitution comes with its own designated mechanism for deleting obsolescence—the amendatory process. It is simply impermissible for government to substitute for the process of constitutional amendment its own self-serving conclusion that rights guaranteed to the people are no longer relevant.

Moreover, it does not follow from the fact we now have a large standing army and an equally large National Guard, that no conceivable military emergency could require mustering the individually armed citizenry.⁹¹ Indeed, as late as Pearl Harbor, a military emergency was deemed to require mustering individually armed citizens. Because available military personnel were insufficient to repel the Japanese invasion that seemed imminent, the Governor of Hawaii called upon citizens to man check points and patrol remote beach areas. On the other side of the country, 15,000 volunteer Maryland Minute Men brought their own weapons to muster. Virginia militiamen relied perforce on their own weapons since the federal government was not only unable to supply the state arsenal, but had actually recalled the guns it had previously donated.⁹² A manual distributed *en masse* by the War Department recommended the keeping of weapons which a guerilla in civilian clothes could carry without attracting attention, were affordable and could be easily concealed. First among these was, and still is, the pistol.⁹³

Even less credible is the oft-made assertion that the amendment's central purpose has no meaning today since a citizenry possessing (pg.139) only small arms would inevitably be defeated by a despotism possessing tanks, aircraft, etc. But the military experience of our century shows many cases in which a revolutionary people having only small arms have defeated a modern army. This is how the Shah came to be expelled from Iran, General Somoza from Nicaragua and the British from Palestine and Ireland. Moreover, if a revolutionary people start out with small arms, they can obtain more sophisticated weaponry if they need it—by capture, from parties outside the country, or by maintaining the struggle to the point at which sympathetic segments of the opposing military break off and join the revolution. Anyone who claims that popular struggles are inevitably doomed to defeat by the military technology of our century must find it literally incredible that France and

⁸⁹ CONG. GLOBE, 39 Cong., 1st Sess. 117, 118 (Wilson); *id.* at 1755 (Sen. Trumbull urging reenactment over President Johnson veto).

⁹⁰ Halbrook, *supra* note 2, at 25-28.

⁹¹ See *supra* note 76 and accompanying text.

⁹² N. SCHLEGEL, VIRGINIA ON GUARD 131 (1949) (available in Va. State Lib.); Baker, *I Remember "The Army" with Men from 16 to 79*, BALTIMORE SUN MAGAZINE 46 (November 16, 1975).

⁹³ LEVY, GUERRILLA WARFARE 56 (1964).

the United States suffered defeat in Viet Nam; that the Shah no longer rules Iran or Battista, Cuba; that Portugal was expelled from Angola and Mozambique; and France from Algeria. It is quite irrelevant for our purposes whether each of these struggles was justified or the people benefited therefrom. However one may appraise these victories, the fact remains that they were achieved against regimes equipped with all the military technology which it is asserted inevitably dooms popular revolt.

Even more important for a free country is that the citizenry's possession of arms serves to actively deter any general who might consider substituting his own rule for that of the popular government. To persuade his army to follow him, the general must convince them that his rule can meet the crises confronting the nation better than a democratic government which requires a consensus within a widely divergent citizenry before it can act decisively. But when that widely divergent citizenry possesses upwards of 160 million firearms, the outcome of any coup is likely to be a savage and prolonged civil war, rather than benevolent dictatorship. David Hardy's analysis cannot be improved upon:

A general may have pipe dreams of a sudden and peaceful takeover and a nation moving confidently forward, united under his direction. But the realistic general will remember the actual fruits of civil war—shattered cities like Hue, Beirut, and Belfast, devastated countrysides like the Mekong Delta, Cypress and southern Lebanon. At such cost, will his officers and men accept it? Moreover, he and they must also evaluate its effect in leaving the country vulnerable to foreign invasion.

Because it leads any prospective dictator to think through such questions, the individual, anonymous ownership of firearms is still a (pg.140) deterrent today to the despotism it was originally intended to obviate. [While our government has a] quite good record of exerting power without abusing it ... the deterrent effect of an armed citizenry is one little recognized factor that may have contributed to this. In the words of the late Senator Hubert Humphrey: "The right of citizens to bear arms is just one more guarantee against arbitrary government, one more safe-guard against a tyranny which now appears remote in America, but which historically had proved to be always possible."⁹⁴

⁹⁴ Hardy, *The Second Amendment as A Restraint on State and Federal Firearm Restrictions*, RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT 184, 185 (D. Kates, ed., 1979).