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THE SECOND AMENDMENT, POLITICAL LIBERTY, AND THE RIGHT TO SELF-PRESERVATION

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A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

—*The Second Amendment*

I. INTRODUCTION

The Second Amendment to the United States Constitution has become the most embarrassing provision of the Bill of Rights. Although crime, violence, and gun control have been among the hottest topics of political controversy over the past two decades, civil libertarians have generally shown much less enthusiasm about the Second Amendment than about other provisions of the Bill of Rights. The federal courts have also been manifestly uncomfortable with the Second Amendment and, in recent times, have declined every opportunity to give it the same thorough consideration that is automatically given to by the other specific guarantees of the first eight amendments. The lower courts generally have either adopted an interpretation that is implausible on its face, inconsistent with Supreme Court precedent, and unsupported by historical evidence about the intention of the Framers, or adhered to ancient precedents that treated the Bill of Rights as being inapplicable to the states. The Supreme Court, moreover, inscrutably denies all petitions for certiorari.^(pg.104)

Despite a growing body of literature examining the original meaning of the Second Amendment and a simmering debate over the desirability and efficacy of gun control legislation, no one has attempted to develop an interpretation of the Second Amendment that fits comfortably within the Supreme Court's modern jurisprudence of individual rights. That jurisprudence can be characterized as an ongoing attempt to reconcile what is known about the original intent underlying the Bill of Rights with the desire of legislatures to respond rationally to modern problems unforeseen at the time it was drafted. Most provisions in the Bill of Rights have been interpreted so as to advance an elaborate effort by the judiciary to act as an umpire between individuals' impulses for freedom and government's concern for the maintenance of order and public safety. And yet, just when the conflict regarding the Second Amendment is perhaps at its sharpest and most poignant, the Supreme Court has remained strangely silent. Whatever one may think about the motives, character,

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psychology, or intelligence of those who desire to possess firearms, the principle that those individuals assert is profoundly serious. The claim to the tools needed for exercising one's lawful right to protect himself (and perhaps especially herself) from criminal violence should be given at least as respectful a hearing as the First Amendment claims of Nazis and pornographers or the Fourth Amendment claims of confessed murderers.

Although the Supreme Court finds time to busy itself with case after case involving the most minute adjustments in the constitutional rules of criminal procedure and the doctrines affecting obscenity, libel, and time, place, and manner restrictions on speech, the Second Amendment is simply ignored. This Article begins with a brief review of the evidence pertaining to the Second Amendment's original meaning and the case law that has since developed. After discussing the basic principles that should govern the application of the Second Amendment under modern conditions, the Article sketches a Second Amendment jurisprudence that is broadly consistent with the Court's modern treatment of the Bill of Rights. The Article suggests that this jurisprudence would preserve the essential freedoms that concerned the Framers while leaving modern legislatures ample means to foster public safety and the general welfare.(pg.105)

II. THE TEXT OF THE CONSTITUTION AND THE DEBATE OVER ITS MEANING

The debate over the original meaning of the Second Amendment has largely focused on the implications of the phrase "[a] well regulated Militia, being necessary to the security of a free State,"¹ One group of commentators treats the phrase simply as a statement of purpose and maintains that the Second Amendment provides individuals the right to keep and bear arms. Another group maintains that the Second Amendment creates an exclusively collective right—the right of the states to maintain organized military forces.

The "collective right" interpretation has become dominant among the courts and academics,² while laypersons have generally favored the "individual right" interpretation.³ The former interpretation deprives the Amendment of any application to existing or proposed forms of gun control legislation. Perhaps that is why the "collective right" interpretation is dominant among leaders of the legal profession, where restrictive regulations on the ownership and use of firearms

¹ U.S. CONST. amend. II.

² The judicial literature is reviewed *infra* Part III. For samples of the academic literature, see G. NEWTON & F. ZIMRING, FIREARMS AND VIOLENCE IN AMERICAN LIFE 113, 253-62 (1969); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-3, at 226 n.6 (1978). In 1975, the American Bar Association endorsed the "collective right" interpretation. See Comment, *The Individual Right to Bear Arms: An Illusory Public Pacifier?*, 1986 UTAH L. REV. 751, 756 & n.22 (citing ABA Policy Book).

³ In 1975, a national poll revealed that 70% of the respondents thought the Second Amendment applied to the individual citizen, and an additional 3% thought it applied to both the individual and the national guard. See 121 CONG. REC. 112 (1975). As demonstrated in this Article, this position is also supported by scholars who have investigated the origins of the Second Amendment.

are widely favored as a matter of social policy.⁴ Whatever the explanation, however, the popularity of the "collective (pg.106) right" interpretation should be surprising, since it is virtually baseless.⁵

Advocates of the collective right interpretation focus almost exclusively on the textual reference to a "well regulated Militia." They argue that the introductory phrase of the Amendment implies that the right to keep and bear arms is restricted to officially organized military units, such as the National Guard. The language of the Constitution, however, actually refutes this claim. In the eighteenth century, the term "militia" was rarely used to refer to organized military units, and, indeed, eighteenth century *legal* usage seems never to have adopted that meaning. Rather, the "militia" included all citizens who qualified for military service (*i.e.*, most adult males).⁶ This definition continues to be included in the United States Code today.⁷ There is thus no apparent reason for supposing that the term "militia" in the Constitution refers solely or even primarily to organized military units. Indeed, article I, section 8 of the Constitution clearly assumes the existence of the "Militia" in the states, but article I, section 10 *forbids* the states to "keep Troops" without the consent of Congress.(pg.107)

The fact that the Framers referred to a "well regulated" militia lends apparent support to the collective right interpretation, but the reference indicates only that the Framers intended for the militia to be regulated in some way, as for example, by being organized into formal military units *or* by being comprised of individuals already familiar with the principal instruments of military

⁴ One commentator has suggested the following explanation for the tendency of certain influential elites to disfavor individual freedom in the economic arena; his suggestion, *mutatis mutandis*, may apply with equal force to the disfavor among intellectuals of the private ownership of firearms:

Many observers have suggested that much in modern political life is explicable by the recent enormous growth in size of an intellectual class—using the term broadly to include academics, journalists, lawyers, government officials, and others whose jobs center on ideas and words—and the apparent affinity of that class for expansions of the public sector at the expense of the private sector. This hypothesis says more than that intellectuals are indispensable to the making and implementation of policy; it states that intellectuals as a class have distinctive interests and tastes, and are disproportionately able to move law in the direction of their interests and tastes.

The intellectuals' preference for government economic regulation is attributed to a desire to shift power and prestige from the business class to themselves. If this hypothesis were to some degree accurate, one would expect to see the law become less restrictive where it impinges on the intellectual class's interests. Freedom of speech is, of course, the *sine qua non* of an intellectual class.

R. BORK, *THE ANTITRUST PARADOX* 423-24 (1978).

⁵ The principal arguments and evidence about the original meaning of the Second Amendment, summarized *infra*, are concisely presented in Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 211-43 (1983). For more detailed treatments focusing on historical sources, see Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1 (1987); Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559 (1986) [hereinafter Hardy, *Armed Citizens*]. The original meaning of the Amendment, which is now the subject of a fairly large and growing body of historical research, is a necessary backdrop to the present Article, but is not the focal point of the Article.

⁶ Immediately after passing the Second Amendment, Congress defined the militia to include the whole militarily qualified citizenry and required that every member of that body possess his own firearm. First Militia Act, 1 Stat. 271 (1792). For examples of similar usages, see VA. CONST. OF 1776 art. I, § 13 ("[A] well-regulated militia, composed of the body of the people"); 3 J. ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS* 425 (2d ed. 1891) ("Who are the Militia? They consist now of the whole people.") (quoting George Mason).

⁷ See 10 U.S.C. § 311(a) (1982). "The militia of the United States consists of all able-bodied males at least 17 years of age and ... under 45 years of age who are or who have made declaration of intention to become citizens of the United States and of female citizens who are commissioned officers of the National Guard." *Id.*

combat.⁸ In any case, the Second Amendment does not even mention the right of the states to regulate the militia. Rather, it protects the "right of the people" to keep and bear arms. This is exactly the same phrase used in the First Amendment and in the Fourth Amendment—in both cases the phrase clearly protects individuals', not states', rights. Furthermore, the Framers' intent to distinguish the rights of the people from those of the states is expressly manifested in the language of the Tenth Amendment. To conclude that the "right of the people" is synonymous with the phrase "the right of the states" requires one to torture the text of the Constitution so badly that the document's obvious meaning is violated.⁹

Because the text of the Constitution offers little support for the collective right interpretation, proponents of that interpretation focus their attention on evidence indicating that the Framers were especially concerned about standing federal armies, which might have been a threat to political liberty if the citizenry were disarmed. Using this evidence to confirm the collective right interpretation is untenable for two reasons. First, the fact that the supporters of the Bill of Rights probably had as *one* of their foremost concerns the dangers of a federal standing army does not imply that this was their *only* fear. And it certainly does not permit (pg.108) an interpreter of the Constitution to ignore its plain language, which contains no such limitation.¹⁰ Second, even if it is assumed that the Framers were exclusively concerned with the danger of federal despotism, overwhelming textual and historical evidence indicates that they chose to guard against that danger by securing the people's private right to arms.

Establishing that the Second Amendment protects an individual's right to keep and bear arms, however, is only one small step toward developing a sound interpretation of the constitutional guarantee. The exact scope of the individual right is not expressly defined in the Constitution and is not self-evident. Is the right absolute, so that it extends to all devices that might be characterized as "arms," up to and including nuclear warheads and ICBM's? Are *all* citizens, including convicted murderers and lunatics, free to own and carry lethal weapons? If not, what restrictions are constitutionally permissible, and on what principles may those restrictions be justified?

III. SECOND AMENDMENT CASE LAW

⁸ In eighteenth century military usage, "well regulated" meant "properly disciplined," not "government-controlled." See Hardy, *Armed Citizens*, *supra* note 5, at 626 n.328.

⁹ Additional support for the "individual right" interpretation of the Second Amendment is provided by James Madison's original plan for the Bill of Rights. Rather than appending the Bill of Rights to the end of the Constitution, Madison originally intended to insert each provision into the appropriate section of the original document. Rather than inserting the provision affecting the right to keep and bear arms into article I, § 8 or article I, § 10, where the military and militia clauses are located, Madison planned to insert it (along with the provisions that became the First Amendment) into article I, § 9, which is the principal "individual rights" section of the original Constitution. Article I, § 9 includes the provisions dealing with bills of attainder, ex post facto laws, and habeas corpus. See Kates, *Second Amendment*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 1639, 1639 (L. Levy, L. Karst & D. Mahoney eds. 1986).

¹⁰ See *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). In *Dartmouth College*, Chief Justice Marshall stated:

It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception.

Id. at 644.

Until the twentieth century, the Supreme Court had few occasions to give serious attention to the Second Amendment. The federal government did not regulate firearms, the Bill of Rights had not yet been applied to the states, and the Court only occasionally mentioned the Second Amendment.¹¹ During the (pg.109) Prohibition Era, however, certain weapons (especially sawed-off shotguns and submachine guns) came to be associated with "gangsters." In 1934, Congress responded by passing the National Firearms Act, which prohibited the private possession of specified weapons. In *United States v. Miller*,¹² the Supreme Court reviewed a federal trial court's decision to dismiss an indictment under the Act on the ground that the prohibition violated the Second Amendment. This case represents the only holding by the Supreme Court actually interpreting the Second Amendment.

Reviewing the trial court's decision, the Supreme Court reinstated the indictment, pointing out that the defendants had not presented any evidence that the weapon involved in the case, a sawed-off shotgun, "[had] some reasonable relationship to the preservation or efficiency of a well regulated militia."¹³ The case is problematic in many respects, not the least of which is that the defendants, who disappeared following the trial court's dismissal of their indictments, never briefed their side of the argument before the Supreme Court. *Miller* can be read as standing primarily for the proposition that "it is not within *judicial notice* that [a sawed-off shotgun] is any part of the ordinary military equipment or that its use could contribute to the common defense."¹⁴ This holding means little by itself because commentators have since demonstrated that sawed-off or short-barreled shotguns are commonly used as military weapons.¹⁵

More importantly, however, the *Miller* analysis is incomplete, since its logic would lead to absurd results. The most problematic weapons, for the purpose of private possession, are those that are *most* obviously useful in a military context—for example, automatic rifles, artillery, portable rocket launchers, and nuclear devices.(pg.110)

Nevertheless, despite the shortcomings of the *Miller* opinion, the Supreme Court correctly concluded that the Second Amendment protects an individual's right to keep and bear arms and thus rejected the untenable collective right theory:

[The historical sources] show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense.... And further, that ordinarily when

¹¹ Few significant statements on the Second Amendment from the Supreme Court exist prior to the twentieth century. See *Miller v. Texas*, 153 U.S. 535 (1894) (dictum stating that Fourteenth Amendment does not apply Second Amendment to states); *Presser v. Illinois*, 116 U.S. 252 (1886) (Second Amendment applies only against the federal government); *United States v. Cruikshank*, 92 U.S. 542 (1875) (dictum indicating that neither First nor Second Amendment applies to state governments); *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (dictum stating that blacks cannot be citizens because otherwise they would have constitutionally protected rights to firearms).

It is worth noting that most state cases prior to the War Between the States assumed a constitutional right to keep and bear arms, applicable to all citizens, and were concerned mainly with the perceived difficulties in applying this right to freed blacks. For a review of the cases, see S. HALBROOK, *THAT EVERY MAN BE ARMED* 89-106 (1984).

¹² 307 U.S. 174 (1939).

¹³ *Miller*, 307 U.S. at 178.

¹⁴ *Id.* (citing *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840)) (emphasis added).

¹⁵ See Black, *From Trenches to Squad Cars*, AM. RIFLEMAN, June 1982, at 30, 72-73; see also *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) (criticizing *Miller's* reasoning as "outdated" in light of World War II experience with commando units, which demonstrated that virtually all small arms can be useful in modern warfare), *cert. denied*, 319 U.S. 770 (1943).

called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.¹⁶

Miller dealt with a federal law. The Supreme Court has never reviewed a case involving any of the twenty-thousand-odd state and local gun control laws.¹⁷ The lower courts have all but unanimously upheld these laws against Second Amendment challenges, but have done so on intellectually untenable grounds. Some courts have utilized the collective right theory,¹⁸ which has no established basis either in history or in Supreme Court precedent. At least in the federal courts, however, the main obstacle to judicial scrutiny of state and local laws has resulted from the courts' deference to nineteenth century cases reflecting the then prevalent assumption that the Bill of Rights did not apply to the states.¹⁹ Now that the doctrine of incorporation is so unquestioningly applied to other provisions of the Bill of Rights, this deference to nineteenth century precedent should be abandoned, and the Supreme Court should correct or justify a patent inconsistency in the case law.^(pg.111)

IV. THE MODERN APPLICATION OF THE SECOND AMENDMENT

Under modern conventions, the principal task for the Supreme Court in constitutional cases is to reconcile four different and sometimes competing factors: the language and structure of the Constitution's text; the intent of the Framers, so far as their intent can be discerned from the extant historical evidence; judicial precedent; and considerations of sound policy.²⁰ This section of the Article suggests how the reconciliation should proceed in the Second Amendment area.

A. *The Second Amendment and Political Freedom*

The language of the Second Amendment protects an individual's right to keep and bear arms. The language also indicates, however, that this private right is protected for the sake of a public good. It follows that the private right of access to firearms is constitutionally protected, at least to the extent that it reasonably contributes to political freedom.

Available evidence of the Framers' intent supports this general proposition. The specific concern foremost in the minds of the proponents of the Second Amendment was almost certainly

¹⁶ *Miller*, 307 U.S. at 179.

¹⁷ See G. NEWTON & F. ZIMRING, *supra* note 2, at 87.

¹⁸ See, e.g., *Quilici v. Morton Grove*, 695 F.2d 261 (7th Cir. 1982) (dictum), *cert. denied*, 464 U.S. 863 (1983); *United States v. Warin*, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976); *Galvan v. Superior Court*, 70 Cal. 2d 851, 452 P.2d 930, 76 Cal. Rptr. 642 (1969); *State v. Amos*, 343 So. 2d 166 (La. 1977); *Hardison v. State*, 84 Nev. 125, 437 P.2d 868 (1968); *Harris v. State*, 83 Nev. 404, 432 P.2d 929 (1967); *Burton v. Sills*, 53 N.J. 86, 248 A.2d 521 (1967), *appeal dismissed*, 394 U.S. 812 (1969).

¹⁹ See, e.g., *Quilici*, 695 F.2d at 269-70; *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971); *Cases v. United States*, 131 F.2d 916, 921-22 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943); *United States v. Tot*, 131 F.2d 261, 266 (3rd Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943).

²⁰ This is not to suggest, of course, that each of these factors is of equal weight. The text and purpose of a constitutional provision are usually given priority over the other two factors.

the dangers associated with standing armies.²¹ Europe had a long history, with which the Framers were familiar, of efforts by ambitious monarchs to strengthen their political position by achieving monopolies of the instruments of force; standing armies and gun control laws were used to this end. Like modern gun control laws, these restrictions were ostensibly for such other purposes as game conservation and crime prevention.²² Along with many others, however, William Blackstone recognized that "prevention of popular insurrections and resistance to the government, by disarming (pg.112) the bulk of the people ... is a reason oftener meant than avowed."²³

Subsequent events have weakened, without entirely eliminating, the protection against political oppression afforded by the right to keep and bear arms. Part of the reason for the weakening of this protection is that the Framers prudently declined to put direct constitutional restrictions on the federal government's power to maintain standing armies. Many in the founding generation undoubtedly hoped and expected that the federal army would remain small during peacetime, as in fact it did for a century and a half thereafter. Political events and technological advances, however, have combined to render today's federal military establishment the second strongest in the world, and our military is far more powerful than the Founders could possibly have imagined. At the same time, domestic political and cultural changes beginning with the War Between the States have greatly weakened loyalties to the individual states; this has removed the most likely cause of a major military conflict between American citizens and federal troops.

None of this implies, however, that the Second Amendment is an anachronism.²⁴ Although the War Between the States altered the political constitution of the country in many important ways, it did not alter the essential, timeless tension between the need for governmental power and the need to control that power in the interest of political liberty. This tension was recognized in the passage of the Fourteenth Amendment, which identified the *state* governments as significant threats to liberty. Similarly, political, technological, and economic factors have encouraged the state governments to become much more intrusive, threatening regulators of the lives of their citizens than they had been during the antebellum period. In light of these considerations, the Supreme Court (pg.113) has used the Fourteenth Amendment to apply most of the major provisions of the Bill of Rights to the states under a theory of "incorporation."²⁵

²¹ See S. HALBROOK, *supra* note 11, at 55-87; Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U.L. REV. 53, 55-61 (1966).

²² See, e.g., Game Act of 1671, 22 Cor. 2, ch. 25, § 3 (limiting possession of firearms to English noblemen); Militia Act of 1662 (empowering British officials "to search for and seize all arms in the custody or possession of any person or persons whom the said lieutenants or any two or more of their deputies shall judge dangerous to the peace of the kingdom"), cited in SUBCOMM. ON THE CONSTITUTION OF THE SEN. JUDICIARY COMM., 97TH CONG., 2D SESS., THE RIGHT TO KEEP AND BEAR ARMS (Comm. Print 1982).

²³ 2 W. BLACKSTONE, COMMENTARIES *412. For a brief review of the English experience with standing armies and its effect on American attitudes at the time of the founding, see Malcolm, Book Review, 54 GEO. WASH. L. REV. 452, 454-58 (1986).

²⁴ Some readers of this Article undoubtedly have a firm belief that whatever purposes the Second Amendment may have served at the time it was ratified, the "proliferation of guns" under present-day conditions have left the Amendment with no social utility. Similar views, which are much easier to assert than to support with evidence or cogent arguments, are also held by many people who think that other constitutional provisions, for example the First Amendment, do more harm than good for the nation. If and when such beliefs are shown to be well-founded, they will justify amending the Constitution under the provisions of article V. Meanwhile, the courts have a duty to enforce the provisions of the present Constitution.

²⁵ Although the court's incorporation of most provisions of the Bill of Rights into the Fourteenth Amendment's Due Process Clause may reflect a defensible political policy, it has not necessarily been justified as a legitimate exercise in constitutional interpretation. Competent scholars have strongly suggested that there is little basis, in either the text or the legislative history of the Fourteenth Amendment, for the claim that it was meant to make the federal Bill of Rights applicable to the states. See, e.g., R. BERGER, GOVERNMENT BY JUDICIARY 134-56 (1977); Currie, *The Constitution in the Supreme Court: Limitations on State Power*,

Along with extending the Bill of Rights to the states through the Fourteenth Amendment, the Court has also extended the reach of individual guarantees, especially those in the First and Fourth Amendments, far beyond the narrow purposes that the Framers specifically foresaw. Although this extension has sometimes been carried to objectionable extremes, the underlying interpretive impulse itself is not invalid. Most provisions of the Bill of Rights are phrased in relatively broad terms, and the first ten amendments together were clearly meant to protect the principal personal liberties that are essential in a free society.

Although the Framers' special concern with the dangers of standing armies should not necessarily be taken as the sole purpose of the Second Amendment, it should be the starting point for a sound analysis. This concern, however, has an interesting implication for the meaning of the phrase "[a] well regulated Militia, being necessary...." The primary purpose of the people's right to (pg.114) keep and bear arms is not to prepare them for military service, as the *Miller* court and many other courts have assumed, but is to allow them to act as a credible *counterweight* to the government's military forces.

This insight makes sense of the Constitution's overall scheme for dealing with the defense of the country. Article I already provides the federal government with virtually plenary powers to organize, train, and maintain a military establishment as efficient and powerful as it can afford; moreover, by clear implication, article I also provides for the existence of organized state-based military forces.²⁶ To all of this, the Second Amendment would add absolutely nothing if it had been designed to promote the military readiness of the nation. Does the government want to ensure that every potential soldier is trained in the use of firearms? It can do so under its article I powers. Does the government want to provide that every member of the militia keep modern military weapons in his own home, as the United States once did and as Israel and Switzerland do today?²⁷ Again, article I is sufficient.

1865-1873, 51 U. CHI. L. REV. 329, 350-53 (1984); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

Incorporation, however, is now settled law, at least with respect to those provisions of the Bill of Rights that the Supreme Court regards as important to a "scheme of ordered liberty." See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (adopting theory of "selective incorporation"). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 11-2 (1978). However one views the legitimacy of the incorporation decisions, it is hard to deny that the Court has been eloquent, and often clear, about the policy justifications for its innovations. This Article contends that the very same kinds of arguments that support the Court's extension of other provisions of the Bill of Rights to the states also apply to the Second Amendment.

It is also noteworthy that a much better historical argument can be made in favor of the incorporationist thesis for the right to keep and bear arms than can be made for the Bill of Rights as a whole, or for such provisions as the First Amendment. Because the Black Codes in the antebellum South had as an important goal the disarmament of the black population, contemporary debate over the Civil Rights Acts and the Fourteenth Amendment contains many mentions of the need to ensure that the right to bear arms be constitutionalized. For a review of the evidence, see S. HALBROOK, *supra* note 11, at 107-54.

²⁶ Article I, § 8 provides Congress with the following powers:

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

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

U.S. CONST. art. I, § 8, cls. 12-16.

²⁷ See Kates, *supra* note 5, at 216 & n.49, 249 n.193.

Viewing the Second Amendment as protection for a civilian counterweight to the government's forces avoids the assumption, which the *Miller* Court made, that civilians have a right to sawed-off shotguns if, and only if, the military issues such weapons. Private rights make sense only as a form of protection against the government itself or against dangers from which the government fails to secure the individual. It may be objected that this is a distinction without a difference because the kinds of weapons necessary for successful resistance to government troops are so lethal that it would be intolerably dangerous to allow civilians to (pg.115) have them.²⁸ This objection combines sound common sense with remarkable naivete' and ignorance about the nature of armed conflict. On the one hand, it is certainly true that the civilian population cannot be allowed to maintain, under private control, a stock of armaments and expertise sufficient to defeat either the armed forces of the United States, or even a state's National Guard, in battle. Arming civilians to this extent would obviously be impossible under modern conditions, and any attempt to do so would be patently foolhardy. Nor is this impossibility merely a function of modern technology; the Framers of the Constitution clearly intended the federal government to have the power to "suppress Insurrections" as well as to "repel Invasions."²⁹

Any use of military force, however, depends upon a calculation of both the benefits and costs of its use. The decision to use military force is not determined solely by whether the contemplated benefits can be successfully obtained through the use of available forces, but rather is determined by the *ratio* of those benefits to the expected costs. It follows that any factor increasing the anticipated cost of a military operation makes the conduct of that operation incrementally more unlikely. This explains why a relatively poorly armed nation with a small population recently prevailed in a war against the United States, and it explains why governments bent on the oppression of their people almost always disarm the civilian population before undertaking more drastically oppressive measures.³⁰ (pg.116)

Even if it is assumed that a disarmed populace is, *ceteris paribus*, more likely to be oppressed by its government than is an armed citizenry, however, it might be argued that the chance of truly serious political oppression in this country is so remote that it is not worth taking into account as a matter of constitutional law. This argument is weak on two different grounds.

First, the argument is based less on what one can know (history) than on what one can hope (that the future will bring only the best of what has occurred in the past). Second, it ignores the connection that the right to keep and bear arms has with the fundamental right of self-preservation. It always is hoped that protections such as constitutionally required elections and judicial writs will prevent government from employing the enormous forces at its command to oppress the citizenry,

²⁸ See, e.g., Zimring, *Poland's "Real" Problem*, Chicago Tribune, Jan. 13, 1982, at 15, col. 1 (arguing that gun control laws in Poland were irrelevant to the political crisis there because small arms of the kind that civilians could hope to possess would be useless against Soviet tanks).

²⁹ U.S. CONST. art. I, § 8, cl. 15.

³⁰ For this reason, certain American proponents of gun control are willing to draw flattering inferences about Communist governments that they believe are willing to allow widespread possession of arms. See, e.g., Schlesinger, *A Visit with Fidel*, Wall St. J., June 7, 1985, at 24, col. 4. "This wide distribution of weapons [in Cuba] does indicate the regime's confidence in the loyalty of the Cuban people. An unpopular dictatorship would not dare run such risks." *Id.*; see also Wicker, *Ready for Another "Splendid Little War?"*, San Francisco Chronicle, June 14, 1985, at 68, col. 5 (arguing that the Sandanista government's creation of a large, armed militia in Nicaragua disproves the contention that that government has reason to worry about a popular uprising). Interestingly, Mr. Schlesinger's views on gun ownership in the United States are rather different; he is quoted as suspecting that "men doubtful of their own virility cling to the gun as a symbolic phallus and unconsciously fear gun control as the equivalent of castration." Bruce-Biggs, *The Great American Gun War*, 45 PUB. INTEREST 37, 59 (1976).

or some disfavored minority, to such an extent that people are driven to resist the government's officers with force of arms. The experience of the many countries that have lost their democratic institutions through political revolutions or foreign invasions should, however, caution Americans against assuming too readily that nothing like that could ever happen here. Furthermore, the experience of black Americans, particularly during the Jim Crow era, when gun control laws were used to help secure their political subordination,³¹ demonstrates that the culture of this country has been capable of allowing the government to undertake serious repression of vulnerable minorities. To suppose that such repression is all in the past or that one could never find oneself among the next group suffering political oppression is to ignore the ever present potential for "instability, injustice, and confusion" which, when "introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished."³² (pg.117)

B. The Second Amendment and Self-Preservation

The foregoing argument suggests that the Second Amendment, even if intended only to protect a right to keep the sort of small arms customarily possessed by civilians, could offer some protection against the danger of political oppression. But this is neither the main reason modern civilians want to possess arms nor the main effect that private possession of arms has on the political community. People are more concerned about criminal violence and the government's failure to protect them from it.³³ Can the Second Amendment properly be interpreted to guarantee the people's right to the means of defending themselves from this threat?

The Framers do not appear to have distinguished sharply between the "personal safety" reasons for possessing weapons and the "political safety" reasons that were at the forefront of the debate that led to the adoption of the Second Amendment. One likely explanation is that, at the time of the Amendment's adoption, America retained a predominantly rural culture with a frontier ethos, and no one had any reason to expect that a popularly elected government would have any motive to interfere with its citizens' ability to defend themselves against the hazards of everyday life.³⁴

³¹ See Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. WASH. L. REV. 1, 21-24 (1981).

³² THE FEDERALIST No. 10, at 77 (J. Madison) (C. Rossiter ed. 1961). It could be argued that the equal protection clause of the Fourteenth Amendment is sufficient to protect us from discriminatory gun control laws. As a constitutional argument, this contention is without merit. First, the courts use the equal protection clause primarily to protect groups believed to have been the victims of *past* discrimination. To assume that the courts will be able and willing to protect new targets of discrimination is wishful thinking that has little or no basis in reason or experience. Cf. Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980). Second, many constitutional provisions serve some of the same purposes as other provisions. The First Amendment, for example, also helps to protect disfavored groups from discriminatory oppression. See *NAACP v. Button*, 371 U.S. 415 (1963). One does not hear it suggested that this aspect of the First Amendment is unimportant because the Equal Protection Clause *may* have been used to accomplish similar results in some cases.

³³ Much of the resistance to stringent gun control laws undoubtedly stems from the popularity of the shooting sports, especially hunting; this may explain why very few jurisdictions impose genuinely draconian restrictions on civilian access to firearms. It is difficult to imagine an argument in favor of treating the recreational use of weapons as a constitutionally protected right. The fact that many citizens may have constitutionally irrelevant motives for wanting to possess arms, however, does not undermine the validity of the constitutionally relevant reasons supporting their right to have them.

³⁴ In a kind of curious, inverse way, this is analogous to the Framers' lack of thought about whether public displays of nude dancing would be protected by the First Amendment, since nobody would have expected the government to be seriously challenged when it forbade such activities. Whether courts have been correct in extending constitutional protection to nude dancing, they have certainly been right in deciding such questions in light of the purposes of the First Amendment. The Constitution would not mean what it says if it protected only those activities that the Framers had specifically in mind when they drafted the Bill of Rights.

Objective social conditions have now changed, at least (pg.118) in some parts of the country, and the change requires us to ask whether the general purposes of the Second Amendment extend to personal self-defense.

This question can be answered in part by noting that the right of personal self-defense was already comprehended in the Framers' concept of "the common defense."³⁵ At the time of the founding, organized police forces had not yet been developed. Because the colonies also lacked standing armies, private citizens had to act not only as the primary defenders of themselves and their families, but also as police officers and soldiers when the occasion demanded; thus, there simply was no reason for people to make sharp conceptual distinctions among these three functions.³⁶ Circumstances have now changed, and caution should therefore be exercised in using modern conceptual categories to draw inferences regarding the relative silence during the founding period concerning the "personal safety" rationale for the private possession of firearms.

It is therefore useful to step back from the particulars of the Second Amendment and consider the fundamental principles of liberal democracy, which provide the key to the modern jurisprudence of the First Amendment and most other important provisions of the Bill of Rights. In liberal theory, the right to self-defense is the most fundamental of all rights—far more basic than the guarantees of free speech, freedom of religion, jury trial, and due process of law. Thomas Hobbes, the founder of liberal theory,³⁷ clearly stated the theoretical basis for this proposition:(pg.119)

THE RIGHT OF NATURE, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgment, and Reason, hee shall conceive to be the aptest means thereunto.

A LAW OF NATURE, (*Lex Naturalis*) is a Precept, or generall Rule, found out by Reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved.³⁸

A similar point can be made about racial segregation. *See, e.g.*, A. BICKEL, *THE LEAST DANGEROUS BRANCH—THE SUPREME COURT AT THE BAR OF POLITICS* 100-04 (1962) (application of Fourteenth Amendment to racial segregation statutes is not foreclosed by the fact that the Framers of that amendment did not specifically intend to outlaw such statutes). The argument is stronger in the Second Amendment context because there appears to be no legislative history indicating that the Framers specifically intended to permit government to interfere with citizens' rights to keep arms for self-protection.

³⁵ *Cf.* Locke, *Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* 289 (P. Laslett rev. ed. 1960).

Every one as he is *bound to preserve himself*, and not to quit his Station wilfully; so by the like reason when his own Preservation comes not in competition ought he, as much as he can, to *preserve the rest of Mankind*, and may not unless it be to do Justice on an Offender, take away, or impair the life, or what tends to the Preservation of the Life, the Liberty, Health, Limb or Goods of another.

Id. (emphasis in original). *See generally* Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982).

³⁶ *See* Kates, *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143, 147 & nn.22-24 (1986).

³⁷ For a detailed discussion of the reasons for considering Hobbes the founder of liberalism, see L. STRAUSS, *NATURAL RIGHT AND HISTORY* 165-202 (1953). *See also* H. MANSFIELD, *THE SPIRIT OF LIBERALISM* 43-46 (1978).

³⁸ T. HOBBS, *LEVIATHAN* 66 (1651); *see also* Locke, *supra* note 35, at 296-97.

[I]t being reasonable and just I should have a Right to destroy that which threatens me with Destruction.... [Such people may be destroyed] for the same Reason, that [one] may kill a *Wolf* or a *Lyon*; because such Men are not under the ties of the Common Law of Reason, have no other Rule, but that of Force and Violence, and so may be treated as Beasts of Prey

Id. (emphasis in original).

"Self-Defence, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society." 3 W. BLACKSTONE, *COMMENTARIES* *4.

Although liberal theorists have drawn different political implications from the centrality of the right of self-preservation, most would agree that government is instituted primarily to secure individuals from various threats to their personal safety and well-being.³⁹ The essence of all social contract theory is that individuals give up some portion of their natural rights in exchange for political rights that are supposed to better protect their interest in self-preservation and personal prosperity. The Constitution, which creates a national government of enumerated powers only and which (pg.120) contains numerous express limitations on the powers of both the federal and state governments,⁴⁰ specifies in outline form the exchange of rights and powers that has been made in this particular polity.⁴¹

It follows from this analysis that one would expect the government, before enacting regulations that interfere with individuals' ability to exercise their right to self-preservation, to justify its action by showing that the regulation plausibly contributes to the individuals' safety. This would be true as a matter of common sense even if it could not be asserted as a matter of constitutional law.⁴² But because of the Second Amendment's language and historical background, such a burden of justification can be found in the Constitution. Certainly the existence of a protected individual interest in the means to self-preservation follows at least as reasonably from the text and history of the Constitution as do the general rights to privacy and self-expression that underlie much of the Supreme Court's modern jurisprudence of individual rights.⁴³ (pg.121)

"If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government" THE FEDERALIST No. 28 (A. Hamilton) (C. Rossiter ed. 1961).

³⁹ The discussion is restricted to modern liberal theory because of its special importance in the intellectual background to the framing of our Constitution. The primacy of self-preservation, however, would probably not be denied by any major figure in Western thought. Even Aristotle, for example, who argued that the ultimate goal of the political community should be the "good life," acknowledged that communities were formed for the sake of preserving mere life. See ARISTOTLE, POLITICS 1252 b 27-30. Similarly, St. Thomas Aquinas, who emphasized the subordination of politics to divine providence, also observed that "since man must live in a group, because he is not sufficient unto himself to procure the necessities of life were he to remain solitary, it follows that a society will be the more perfect the more it is sufficient unto itself to procure the necessities of life." T. AQUINAS, ON KINGSHIP 9 (I. Eschmann rev. 1949).

⁴⁰ Even in the absence of the Second Amendment or the Bill of Rights, federal infringements on the right to keep and bear arms would be highly questionable. See THE FEDERALIST No. 84 (A. Hamilton) (C. Rossiter ed. 1961). Federal constitutional restrictions on the states' power to regulate firearms must rest on the incorporation doctrine or on some version of substantive due process.

⁴¹ It should also be noted that, because common-law terminology was so heavily relied on in the Bill of Rights, its language is often interpreted in light of that background. See, e.g., *Ex parte Grossman*, 267 U.S. 87, 108-09 (1925) ("[T]he 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."). The common law recognized a right to bear arms based on the theory of personal safety and self-preservation, and this lends further support to the supposition that the Framers would have expected the language of the Second Amendment to cover a right to the means of personal self-defense. Blackstone classified the right to have suitable arms for self-defense "when the sanctions of society and laws are found insufficient to restrain the violence of oppression" among the five "absolute rights of individuals" and noted specifically that this right is rooted in the "natural right of resistance and self-preservation." 1 W. BLACKSTONE, COMMENTARIES * 144; see also *Kates*, *supra* note 5, at 239-40 nn.151 & 154 (collecting English cases).

⁴² Under modern constitutional doctrine, every exercise of the police power must have a rational basis, and it can be presumed that gun control laws are subject, at the very least, to scrutiny under this standard. The modern "rational basis" test, however, is sufficiently deferential to legislative judgment that almost any conceivable gun control law would probably be upheld under that test. See, e.g., *Vance v. Bradley*, 440 U.S. 93, 110-11 (1979).

⁴³ One who insists on a narrow theory of original intent might argue that only the "political safety" rationale of the Second Amendment, not the "personal safety" rationale, should be accepted as legitimate. Whatever the intrinsic merits of such a narrow theory of constitutional interpretation, it is inconsistent with the modern Supreme Court's treatment of other provisions of

In many cases, the government could easily justify stringent restrictions on the possession and use of weapons. It is obvious, for example, that although nuclear weapons would help one defend oneself against threats to one's safety, one will remain safer if the government keeps these devices under the tight control of the military.⁴⁴ Similarly, if the government could bring all small arms under tight control, one might argue that the net benefits, in terms of public safety, would outweigh the loss to each individual of the advantages of having access to firearms for personal protection.⁴⁵

These general considerations do not define what kinds of gun control laws are permissible, but they are helpful in indicating the kind of analysis needed to resolve that question. The concluding section of this Article will combine the self-preservation argument with the political oppression analysis discussed previously and will propose a form of gun control compatible with the purposes of the Second Amendment.^(pg.122)

V. A MODERN SECOND AMENDMENT JURISPRUDENCE

The Second Amendment at least gives individuals a constitutional right to keep such private arms as will enable them to constitute a reasonable deterrent against government attempts to institute a repressive political regime. It would be hard to define exactly what constitutes a "reasonable deterrent," but it should be obvious that it must be more than a token. Under modern conditions, knives and slingshots are not enough; at the very least, some small and relatively inexpensive firearms, rifles and shotguns, must be allowed. Similarly, the principal purpose of the Second Amendment requires that arms be reasonably available; a system arbitrarily limiting the number of weapons in circulation to the equivalent of two percent of the population, for example, would defeat the main purpose of the constitutional right.

Draconian gun control measures, such as a total ban on the private possession of firearms, would therefore be unconstitutional. In fact, however, neither the national government nor any state

the Bill of Rights and the dominant approach to constitutional interpretation begun by Chief Justice John Marshall. Thus, such a theory is now of academic interest at best, unless one is prepared to use it in a selective and result-oriented manner. Cf. Van Alstyne, *Antinominal Choices and "The Role" of the Supreme Court*, 72 IOWA L. REV. 1281, 1293-99 (1987) (arguing that some justices improperly choose a generous or narrow interpretive approach at different times according to their policy preferences).

⁴⁴ In any case, the Framers probably did not mean to include heavy ordnance within the scope of the Second Amendment. See Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms"*, 49 LAW & CONTEMP. PROBS. 151, 159-60 (1986).

⁴⁵ This argument would become plausible only if police protection of the citizenry became much more efficient than it is now; without such improvements in police protection, too many people would be left to the mercy of the small segment of the population that commits the vast majority of violent crimes. Furthermore, there is empirical evidence suggesting that those who are most prone to commit violent crimes are more likely to be deterred by the prospect of armed resistance by their victims than by our criminal justice system. The main reason for this differential in deterrence seems to lie in the short psychological "time horizons" that characterize the typical criminal personality. See generally J. WILSON & R. HERRNSTEIN, *CRIME AND HUMAN NATURE* 173-209, 389-96 (1985). The peculiar psychological disposition of these habitual criminals was colorfully illustrated by the young man who told Jimmy Breslin that "[t]he police aren't fair" because "they come around and pick you up for things you did three months ago. If they catch you while you're doing it, that's one thing, but three months ago—that's bullshit." Tucker, Book Review, AM. SPECTATOR, Nov. 1985, at 38-39.

Besides the fact that Americans probably would not want the undesirable side effects of a massive police presence in their society, there would still be problems with such legislation because of the political oppression aspects of the Second Amendment.

has recently⁴⁶ entertained such a scheme and is not likely to do so any time soon.⁴⁷ The more pressing questions have to do with government regulations of certain types of small arms, especially handguns.

The central purpose of the Second Amendment—discouraging political oppression—offers little justification for a right to possess or carry handguns, in contradistinction to long-barreled small arms. Although one can imagine political crises in which handguns (pg.123) would be useful in preserving liberty, one must also acknowledge that it would be relatively easy in times of crisis to convert ordinary long guns into concealable arms.⁴⁸

The personal safety rationale for the right to keep and bear arms, however, does provide a basis for protecting individuals' access to handguns. The fundamental right to self-preservation, together with the basic postulate of liberal theory that citizens only surrender their natural rights to the extent that they are recompensed with more effective political rights, requires that every gun control law be justified in terms of the law's contribution to the personal security of the entire citizenry. Furthermore, because the infringement of the natural right to the means of self-preservation is direct and palpable in every firearms restriction, while the benefits of such restrictions are comparatively remote and speculative, the burden should be placed on the government to provide this justification. Here, no less than in the First Amendment area, the courts should place a "thumb on the scale" so that the inevitable balancing of interests reflects the Constitution's special protections for certain exceptionally important individual rights.⁴⁹ Indeed, the justification for taking this approach under the Second Amendment area is stronger than in the First Amendment area because the right of self-defense is more fundamentally rooted in our political traditions than are First Amendment rights.⁵⁰

In addition to its initial burden of justification, the government should, if the Bill of Rights is to be internally consistent, be required to show that it has used a reasonably tailored means of obtaining the public safety benefits of its regulations. This requirement can be defended, not only by the obvious analogies to other areas of constitutional law where the Supreme Court has dealt with

⁴⁶ Around the turn of the last century, several Southern states enacted harsh gun control laws, apparently as part of the Jim Crow mechanisms designed to keep the black population under control. *See Kates, Against Civil Disarmament*, HARPERS, Sept. 1978, at 28; Comment, *Carrying Concealed Weapons*, 15 VA. L. REG. 391, 391-92 (1909).

⁴⁷ Special questions would be posed by local ordinances banning all firearms. The ordinances would constitute state action in the constitutional sense, and the Fourteenth Amendment usually forbids municipalities from doing anything that the state itself would be forbidden to do by that amendment. But one town's gun ban would not often materially undermine the ability of the people of the state as a whole to deter political oppression. It would seem sensible to avoid difficult line-drawing problems (for example, when does one city contain a sufficient portion of a state's population, or when have enough towns instituted such bans, to pose a threat to the core purpose of the Second Amendment) by simply treating local ordinances as state action in the usual sense. Still, there is something to be said for allowing individual communities to try to maintain a gun-free environment if they wish, leaving those who find it repugnant free to live elsewhere. Similar competing arguments arise under the First Amendment, where they are typically resolved in favor of the individual right.

⁴⁸ The shorter a gun's barrel, the more difficult it is to aim the weapon accurately; the advantages of short-barreled guns lie almost entirely in their superior portability and concealability. Rifles and shotguns, except those that are too powerful to be easily controlled without the aid of a large stock, can be readily converted into effective handguns by using a hacksaw to cut off part of the barrel and stock. This modification can be accomplished in a few minutes without specialized tools or expertise.

⁴⁹ *Cf. Kalven, The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 28.

⁵⁰ That the rights of free speech and a free press have acquired a certain ascendancy in the emotions of the modern intellectual class should be of no constitutional significance.

what it considers fundamental freedoms,⁵¹ but also by the fact (pg.124) that any gun control law has some effect on the avoidance of political oppression—the central purpose of the Second Amendment. In areas of the law where the courts must balance individual interests in liberty against the collective interest in public safety, the doctrine of the less restrictive alternative serves two important purposes. First, the requirement that government must tailor the means of protecting the collective interest to that legitimate goal limits the extent to which protected liberties can be violated under the pretext of the general welfare. Second, the requirement may inhibit legislatures from inadvertently and unnecessarily sacrificing protected rights in an excessive or irrational enthusiasm for taking action against perceived social problems.

While judicial misuse of the doctrine of the less restrictive alternative can result in undue interference with the decisions of elected representatives, such misuse has not been considered inevitable. Placing these burdens of persuasion on the government need not doom legislative efforts to promote the general welfare by regulating the use of what are undeniably dangerous and often misused devices. The burdens will require legislatures to proceed with a modicum of rationality and regard for the individual interests and freedoms that the Constitution has expressly secured. In order to appreciate why this is so, it is useful to examine the simplest, and perhaps most plausible, way of eliminating the deleterious social effects of handguns: imposing a flat national ban on the private possession of these arms.

Despite the superficial attractiveness of this option, it has almost nothing to recommend it as a rational policy and therefore could not easily survive the constitutional analysis outlined above.⁵² Gun control laws can be justified only insofar as they reduce (pg.125) (1) the incidence of premeditated crimes, (2) the injuries that occur during so-called crimes of passion,⁵³ or (3) the number of

⁵¹ The seminal case in the First Amendment area is *Schneider v. State*, 308 U.S. 147 (1939). For a detailed study of *Schneider* and its progeny, see Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969). On the use of the doctrine outside the free speech area, see Struve, *The Less-Restrictive Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967); Wormuth & Merkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964).

⁵² The essential features of a rational critique of draconian gun control laws are by no means novel. Indeed, the reasoning summarized in this article was anticipated over two centuries ago by Cesare Beccaria, who is generally considered the father of the modern movement for a more liberal and enlightened system of criminal procedure.

One source of errors and injustices are [*sic*] the false ideas of utility formed by legislators.

False is the idea of utility that considers particular inconveniences before the general inconvenience, that commands feelings instead of exciting them, that says to logic: serve!

False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary ones, which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty—so dear to men, so dear to the enlightened legislator—and subject innocent persons to all the vexations that the guilty alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man. They ought to be designed as laws not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree.

C. BECCARIA, ON CRIMES AND PUNISHMENTS 87-88 (H. Paolucci trans. 1963).

⁵³ The distinction between premeditated crimes and crimes of passion is not meant to suggest that ordinary citizens are much more likely to commit the latter than the former. *Cf.* Silver & Kates, *Gun Control and the Subway Class*, Wall St. J., Jan. 10, 1985, at 26, col. 3 (citing a Kansas City study showing that 90% of domestic homicides had been preceded by a police response to a domestic beating within two years of the homicide). A recent study of the causes of domestic homicide concluded that gun control was unlikely to affect the problem. Howard, *Husband-Wife Homicide: An Essay from a Family Law Perspective*, 49 LAW &

accidental injuries attributable to firearms. A flat ban on handguns would be extremely unlikely to reduce crimes such as armed robbery or premeditated murder. Even if one assumes that all normally law-abiding citizens would relinquish their handguns to the government, pistols, or effective substitutes, would still be readily available to criminals. Long guns can easily and cheaply be converted into handguns by anyone with a vice and a hacksaw.⁵⁴ There would still be a large stock of pistols in the hands of the police, who would present a newly tempting target for thefts and bribery. And smuggling from other countries would arise to satisfy any excess demand. The price of illegal handguns might increase somewhat, but that increase is unlikely to be significant, given the fact that long guns can be converted inexpensively. Even a reduction (pg.126) in the supply of handguns might not affect the rate of such crimes as armed robbery, since handgun substitutes such as knives and machetes would become more attractive tools for accomplishing criminal acts when criminals have greater assurance that any given potential victim is unlikely to be armed with a gun.⁵⁵ It is even more obvious that neither unpremeditated violence nor accidents would be much affected by a ban on handguns. The same reasons that now induce ordinary citizens to keep handguns would cause them to keep rifles and shotguns if their handguns were taken away. Since long guns are generally more powerful than pistols, the severity of unpremeditated and accidental injuries due to firearms would probably *increase* as a result of a ban on handguns.⁵⁶

Some of the problems discussed in the previous paragraph could be cured by extending the handgun ban to all firearms, but the ban would neither be possible in fact, because of the strong and stubborn sportsmen's lobby, nor constitutionally permissible, because of the implications for the political oppression aspect of the Second Amendment. The challenge, then, is to find a less restrictive alternative for controlling handgun abuse.

When considering this problem, it is helpful to understand that although strict government controls on handguns have a long history and are now quite common, there is no evidence that they have ever significantly reduced crime or violence. This absence of evidence has not resulted from a paucity of competent people looking for it. Indeed, there is a large body of sociological literature, much of it based on the most sophisticated and arcane tools of modern quantitative social science, and none of it conclusive.⁵⁷ The difficulty with this kind of research, as with so much quantitative (pg.127) social science, is that multiple causes of crime and violence exist and, as a result, it is hard to

CONTEMP. PROBS. 63 (1986).

⁵⁴ *Contra* G. NEWTON & F. ZIMRING, FIREARMS AND VIOLENCE IN AMERICAN LIFE 127 (1969). Newton and Zimring assert that "a [regulatory] system [that did] not reduce long gun ownership, ... would not appear to risk a massive shift to the use of long guns in crime." *Id.* They offer neither evidence nor argument to support this counterintuitive proposition; one can only imagine that they regarded it as plausible because they were ignorant of the ease with which long guns can be converted into handguns.

⁵⁵ Such a shift to less efficient weapons would probably not reduce the incidence of crime, but it might induce street criminals to concentrate more on physically vulnerable victims. See Kleck, *Policy Lessons from Recent Gun Control Research*, 49 LAW & CONTEMP. PROBS. 35, 37-38 (1986).

⁵⁶ For a technical analysis, see Kleck, *Handgun-Only Gun Control: A Policy Disaster in the Making*, in FIREARMS AND VIOLENCE 167 (D. Kates ed. 1984).

⁵⁷ One of the more sophisticated attempts to find evidence of the efficacy of gun control laws is Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEG. STUD. 133 (1975). This study purported only to find suggestive evidence that the 1968 federal gun control law may have had some marginal effects in reducing violence. Even that tentative conclusion seemed to evaporate when the data was subjected to a more realistic multi-variable test. See Magaddino & Medoff, *An Empirical Analysis of Federal and State Firearm Control Laws*, in FIREARMS AND VIOLENCE 225 (D. Kates ed. 1984).

A comprehensive review of the literature led Professors Wright and Rossi, who began their research as believers in gun control, to the conclusion that there are no demonstrable causal connections between private gun ownership and the crime rate. See NATIONAL INSTITUTE OF JUSTICE, U.S. DEPT. OF JUSTICE, WEAPONS, CRIME, AND VIOLENCE IN AMERICA (1981).

isolate the effects of one possible cause over time. Still, when enormous resources have been fruitlessly expended in a search for certain effects, and when common sense tells one that such effects are improbable, a reasonable person may conclude that the effects probably do not exist. One could elaborate on the common sense reasons for expecting the usual kinds of gun control laws to fail in their stated purpose. And one could refute a great number of very widespread fallacies and superstitions about the use and abuse of weapons. But the basic insight can be stated very simply. Handguns have legitimate and important uses in addition to illegitimate uses and propensities for misuse. Further, the demand for any commodity having such characteristics is difficult to reduce through legal fiat. In order to see the point, one need only imagine an attempt to outlaw knives or painkilling drugs.

A reasonable analysis of the handgun problem should begin by recognizing that there are three distinct groups of people that are affected by government regulation of this area. First, there are people who desire to use firearms in the commission of crimes. Since firearms are useful for this purpose, these people are unlikely to be discouraged by the relatively mild sanctions that are imposed for the mere illegal possession of guns. The only way to deter those people from using guns for criminal purposes is by punishing them for the underlying crime and perhaps imposing additional penalties for using firearms in the commission of a crime. These firearm penalties would pose no Second Amendment problems. At the other extreme are responsible citizens who wish to possess guns for legitimate purposes and who carefully guard against accidents or other misuse. The government has no defensible interest in prohibiting this group of people from possessing arms. The third group comprises people who are without settled criminal designs, but who are prone to carelessness or fits of temper that result in unplanned injuries to innocent persons.

Restrictions on the private possession and use of handguns are properly aimed at the first and third groups, and should be narrowly (pg.128) tailored to avoid unnecessary infringements of the rights of those in the second group. Fortunately for the analysis, the American legal system has developed a standard mechanism for dealing with the same kind of problem in other areas of social life. That mechanism is personal liability for tortious conduct combined with mandatory insurance or bonding for people who desire to use unusually hazardous devices. Automobile regulations provide one example, but there is an even closer analogy in the regulations applied to private security guard services. Instead of presuming that security guards have no legitimate reasons for carrying guns, or erecting extremely burdensome obstacles to their doing so, reasonable licensing requirements for individual guards are typically combined with tort law rules and mandatory insurance requirements.⁵⁸

The same system could easily be applied to other individuals who want or need to possess firearms. If this were done, the private insurance market would quickly and efficiently make it prohibitively expensive for people with a record of irresponsible ownership of guns to possess them legally, but would not impose unreasonable burdens on those who have the self-discipline to exercise their liberty in a responsible fashion. Furthermore, the insurance market could effectively account for many indirect indicia of irresponsibility that would be problematic if addressed by government regulation. For example, just as young males and persons who live in neighborhoods with high accident rates have traditionally paid higher automobile insurance premiums, one would expect similar classes of persons who represent higher risks to pay more for firearms liability insurance and thus have a more difficult time obtaining it. An added benefit of the insurance requirement is that it would help curb the tendency of some people to obtain arms for insubstantial reasons. Yet another

⁵⁸ See Jacobs, *Exceptions to a General Prohibition on Handgun Possession: Do They Swallow Up the Rule?*, 49 LAW & CONTEMP. PROBS. 5, 29-30 nn.86 & 89 (1986).

advantage of private ordering would be its capacity to distinguish rationally between "high use" and "low use" firearms owners. Thus, for example, the law could be written to require relatively small amounts of insurance, say 100,000 dollars, for those who wish only to keep weapons in their homes, larger amounts, say 500,000 dollars, for those who plan to use weapons for hunting or target practice, and high requirements, (pg.129) perhaps 2,000,000 dollars or more, for those who feel a need to carry weapons in day-to-day life. Even if the law did not provide this kind of multilevel scheme, the insurance companies would have an incentive to make similar distinctions in the rates charged for whatever flat level of liability insurance the law required.

Turning over the "regulation" of firearms to the private market in this way would ensure that those who most directly benefit from the legitimate use of guns assume, to the extent humanly possible,⁵⁹ the inevitable risks that are inherently associated with such devices.⁶⁰ Such an arrangement would lead to an optimal level of gun ownership and use,⁶¹ while taking due account of both the Second (pg.130) Amendment's fundamental goal of preserving a reasonable deterrent against political oppression and the natural and constitutional interests in personal security.

VI. CONCLUSION

⁵⁹ The skeptical reader should note that this is not a claim that the proposed legislation, or any other market-oriented mechanism, can completely eliminate the misuse of firearms. No practicable regulatory system can effectively do so, either in this area or in such analogous areas as private security guard services and private automobiles. The relevant comparison is not with a magical dream world in which firearms have been disinvented or in which the current human population has been replaced with angels. Rather, just as in the First Amendment area, the task is to accommodate valuable constitutional freedoms with the need to prevent liberty from degenerating into anarchy. Vague allusions to the "imperfections of the market" are not an adequate substitute for reasoned analysis when discussing the market for firearms any more than they are when discussing the marketplace of ideas.

⁶⁰ One possible objection to the proposal presented here is that it would somehow "discriminate" against the poor, who often have the greatest need of guns for self-protection. There is some truth in this objection, but it could be applied as easily to any other commodity that is distributed by means of the price mechanism—for example, automobiles, burglar alarms, or watch dogs. In fact, if guns are as useful for purposes of self-defense as their partisans claim, poor people will find ways to afford the necessary liability insurance just as they now find ways to afford guns and automobile insurance.

It should also be noted that this proposal is an example of a gun control law that should be upheld against a constitutional challenge. Government regulation of the private insurance market would remain subject to the usual constitutional scrutiny for racial discrimination, and it should also be scrutinized for signs that it is being manipulated so as to undermine the purposes of the Second Amendment.

⁶¹ A rational, selfish person might reason that if he, for personal reasons, has decided not to possess arms himself, he will be safer if as few other people as possible possess them, since the risk of accidental or impetuous misuse varies directly, though not necessarily proportionally, with the number of guns in circulation. This argument could be fallacious, since a disarming of the civilian population could have greater effects in raising the crime rate by reducing the risks, to criminals, of engaging in violent crime than in reducing the incidence of accidental or unplanned misuse of weapons. It might also be fallacious as applied to a total handgun ban, since such a ban would lead many people to substitute relatively high-powered rifles and shotguns for relatively low-powered pistols, thereby increasing risk of serious injuries resulting from accidental discharges and stray bullets. For statistics indicating that a large increase in the number of guns in circulation, combined with a dramatic increase in the ratio of handguns to long guns, has corresponded with a 68% decrease in the per capita rate of accidental firearms fatalities, see Kates, *supra* note 5, at 263 & nn.248-51.

There is no way to know for sure whether the argument is fallacious. But even if it is correct, there is no reason for public policy or constitutional law to prefer the self-interests of those who desire universal disarmament to the self-interests of those who would like to have the means of defending themselves and their families in an emergency.

In this connection, it is worth noting that some of the nation's most outspoken gun control advocates have been reported to be among the privileged few possessing permits to carry concealed weapons in New York City: the late Arthur Ochs Sulzberger, the late Nelson Rockefeller, John Lindsay, and the husband of Dr. Joyce Brothers (she being well known for her claim that gun ownership indicates male sexual inadequacy). Kates, *The Battle Over Gun Control*, 84 PUB. INTEREST 42, 44-45 (1986); Kates, *Handgun Banning in Light of the Prohibition Experience*, in FIREARMS AND VIOLENCE 139, 154 n.44 (D. Kates ed. 1984).

The Second Amendment, which protects the individual's right to keep and bear arms, is widely regarded as either an outmoded threat to the public safety or as a narrow provision with little or no relevance to modern problems. Both views are incorrect, and they distract attention from the real challenge, which is to devise an interpretation of the Second Amendment that could be adopted by the Supreme Court in light of its modern approach to individual liberties. The Second Amendment helps to protect both political freedom and the most fundamental individual right, the right of self-defense. Using the basic principles that animate the Supreme Court's civil liberties jurisprudence, this Article suggests that reasonable government regulation of firearms is compatible with the language and intent of the Second Amendment. In contrast to the hysterical pronouncements that are often heard on both sides of the modern gun control debate, a proper interpretation of the Second Amendment would protect the legitimate uses of firearms without making the possession of guns a sacrosanct and inviolable privilege. Once the Supreme Court focuses its attention on the Second Amendment, as eventually it must, it should have less difficulty devising a reasonable approach than one might expect from given the polemics that have so far dominated public discussion of the issue.