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THE RIGHT TO KEEP AND BEAR ARMS UNDER THE TENNESSEE CONSTITUTION: A CASE STUDY IN CIVIC REPUBLICAN THOUGHT

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INTRODUCTION

In recent years, two previously moribund subjects have received a sudden burst of scholarly attention. One is state constitutional law, a subject that until recently was almost completely ignored. Another is the constitutional right to keep and bear arms, a subject that has always received a great deal of attention among nonacademics (chiefly those opposed to gun control), but until recently has received little attention in the scholarly press. Both subjects are now the focus of much more writing, primarily because of the publication of articles by well-known authors that suggest the topics deserve attention. In the case of state constitutions, two important articles started the trend: one by Justice Hans Linde, of the Oregon Supreme Court,¹ and one by Justice William J. Brennan Jr., of the United States Supreme Court.² In the case of the right to bear arms, the initial article was Sanford Levinson's *The Embarrassing Second Amendment*,³ which concluded—perhaps surprisingly in light of its author's left-leaning stance—that the Second Amendment to the United States Constitution must be taken seriously, even by those of us in legal academia, despite a fairly widespread desire to wish it away.⁴ (pg.648)

This brief Essay combines these two trends by addressing another neglected subject: the right to keep and bear arms under the Tennessee Constitution. As far as I am able to determine, this topic has never been the subject of scholarly commentary. I hope that my contribution to this Symposium will, in its own small way, be as successful in stimulating discussion in this field as the works mentioned above have been in theirs. An examination of the Tennessee Constitution in this context may also be useful in the general debate over the meaning of the Second Amendment to the Federal

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¹ Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); see also Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984).

² William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); see also William J. Brennan Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

³ Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

⁴ See *id.* at 639-42 (discussing unwillingness of most mainstream constitutional scholars to take the Second Amendment seriously).

Constitution. Both provisions grow out of the same eighteenth-century variety of republicanism and appear to have been meant to serve the same purposes. Yet, the Tennessee Constitution's provision is drafted differently, and has been more thoroughly interpreted in the courts. As a result, its meaning is likely to be somewhat clearer to modern readers.

I. THE TENNESSEE PROVISION AND THE U.S. SECOND AMENDMENT: SOME COMPARISONS AND CONTRASTS

Though it may be unstylishly straightforward, I have always believed that the text is a good place to start when examining a constitutional issue.⁵ While not every provision of law is clear and unambiguous, we owe it to the drafters—and to ourselves, as lawyers—to begin with the language that is in front of us. Tennessee's Constitution guarantees: "That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime."⁶ A discussion of the right to bear arms, as is true with a discussion of any state constitutional provision, tends to call up thoughts of the corresponding provision in the Federal Constitution. Thus, it is also worthwhile to look at the Second Amendment to the U.S. Constitution by way of comparison. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."⁷ Immediately, important differences appear. Interpretation of the Second Amendment is not easy: as Professor Levinson notes, it is one of the murkiest constitutional provisions.⁸ Nor has there been much help from the (pg.649) Supreme Court.⁹ Nonetheless, some arguments that have been raised with regard to the Federal Second Amendment are clearly inapplicable to the Tennessee Constitution's right to bear arms clause.

The most obvious involves the federal provision's reference to the "Militia." Many gun control proponents have argued that the Second Amendment merely ensures some degree of independence for state-regulated militias (usually characterized as the modern day National Guard); thus, it does not protect individual rights to firearms ownership at all.¹⁰ Whatever the merits of this

⁵ See, e.g., Glenn H. Reynolds, *Taking Advice Seriously: An Immodest Proposal for Reforming the Confirmation Process*, 65 S. CAL. L. REV. 1577 (1992) (recommending role for Senate "advice" as well as "consent" in judicial appointments, on ground that this is what text of the constitution calls for).

⁶ TENN. CONST. art. I, § 26.

⁷ U.S. CONST. amend. II.

⁸ Levinson, *supra* note 3, at 643-44. "No one has ever described the constitution as a marvel of clarity, and the Second Amendment is perhaps one of the worst drafted of all its provisions." *Id.* From the standpoint of a modern reader, this is clearly correct. However, as the discussion below will demonstrate, the meaning of the provision was considerably less murky at the time of its framing.

⁹ There are only four cases in which the Supreme Court has done more than mention the Second Amendment in passing, and the Second Amendment issues have been rather peripheral in them. The cases are *United States v. Miller*, 307 U.S. 174 (1939); *Miller v. Texas*, 153 U.S. 535 (1894); *Presser v. Illinois*, 116 U.S. 252 (1886); and *United States v. Cruikshank*, 92 U.S. 542 (1875).

¹⁰ See, e.g., Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989).

"collective right" argument in the context of the Federal Constitution,¹¹ it is unpersuasive in the context of the Tennessee provision for two reasons.

First, the term "militia" does not appear in the Tennessee provision. Rather, the provision is aimed at the "citizens of this State," which seems to rule out any sort of governmental body. This is made clear elsewhere in the Tennessee Constitution. Article I, Section 24 provides:

That the sure and certain defense of a free people, is a well regulated militia; and, as standing armies in time of peace are dangerous to freedom, they ought to be avoided as far as the circumstances and safety of the community will admit; and that in all cases the military shall be kept in strict subordination to the civil authority.¹²

This provision does not deal with the right to bear arms. Rather this provision is the collective right clause of the Tennessee Constitution. Unlike the Federal Constitution, the Tennessee Constitution separates its militia and right to bear arms provisions. However, the present-day effect of this collective right provision is not entirely clear: Would it guarantee the right (at least subject to being "well regulated") of individuals to form private militias of the sort common in the early days of this state? Or (pg.650) would it at least produce a duty on the part of the state to maintain and regulate a militia by *requiring* ownership of arms and competence in their use?¹³ These fascinating questions are for another article and another day. But at a minimum, the very existence of this provision makes it clear that the right to bear arms clause of Article I, Section 26, does not include the protection of a collective right to have a well-regulated militia to which one may or may not belong. That right is addressed elsewhere.

Second, it seems unlikely that a provision in Tennessee's Declaration of Rights is intended to protect an institution of state power against federal power. Such a provision would be void under the Supremacy Clause of the Federal Constitutions.¹⁴ Nor—in spite of the "common defense" language of the Tennessee Constitution—would a characterization of the right as a state's right make

¹¹ For criticisms of this approach, see David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1 (1987); Don B. Kates Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); Levinson, *supra* note 3; William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994). For a fascinating treatment of the issue from an African-American perspective, see Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991).

¹² TENN. CONST. art I, § 24.

¹³ There is some historical evidence that this is what the reference to a "*well regulated* militia" means. As Don Kates notes,

The "militia" was the entire adult male citizenry, who were not simply *allowed* to keep their own arms, but affirmatively *required* to do so...

... With slight variations, the different colonies imposed a duty to keep arms and to muster occasionally for drill upon virtually every able-bodied white man between the the age of majority and a designated cut-off age. Moreover, the duty to keep arms applied to *every* household, not just to those containing persons subject to militia service.

Kates, *supra* note 11, at 214-15; see also STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 60-61 (1984) (describing role of George Mason and George Washington in organizing the Fairfax County Militia Association, an independent body opposed to the royal militia operating in the same county, and concluding that "for Mason a 'well regulated militia' consisted in the body of the people organizing themselves into independent companies, each member furnishing and keeping his own firearms, always ready to resist the standing army of a despotic state").

¹⁴ One might imagine a reading of the U.S. Constitution's Tenth Amendment that would keep this from being the case, but the Supreme Court presently appears uninterested in any such expansive reading of that amendment. See *generally* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

sense. Under our federal system, powers not granted to the federal government may be lodged in either the states or the people, making it possible, at least in principle, to argue about whether a particular provision in the federal bill of rights protects individuals or the states. Yet within a particular state, power must be lodged in either the state government or in the individual citizens; there is no other place for it to go. Thus, such a claim would also make little sense from a structural standpoint. The Tennessee Constitution's right to bear arms clause must therefore be interpreted as creating an individual right. The following Part attempts to discover its purpose.(pg.651)

II. INTERPRETING THE TENNESSEE PROVISION

If the Tennessee right to bear arms provision is textually and structurally distinct from its counterpart in the Federal Constitution, what *does* it mean? And how are we to address that question? In keeping with general principles of constitutional analysis, we can look at three main sources of enlightenment: the text, the history and intent, and the case law. I will approach matters in this order.

A. *The Text*

We previously examined the text of the Tennessee right to bear arms clauses¹⁵ and that of the distinct Tennessee militia clause.¹⁶ However, it is a bad practice to interpret legal texts—and particularly constitutional texts—narrowly, without taking account of the document as a whole. As Bruce Ackerman points out, a competent tax attorney addresses a tax problem not simply by looking for a single relevant section of the Internal Revenue Code, but by looking at the overall scheme: it is only "the worst kind of tax lawyer ... who zeroes in on 'the applicable' subsection without reflecting on the purposes of the sentences, paragraphs, and larger textual structures within which it is imbedded."¹⁷ Furthermore, Ackerman is surely right when he says, "Bad tax law makes even worse constitutional law"¹⁸

It is thus worth looking at the Tennessee Constitution as a whole to see if it demonstrates why its framers considered firearms worthy of particular protection. After all, it may be useful to the state to allow individuals to own all sorts of property, ranging from steel mills to circular saws; yet, there are no constitutional provisions specifically protecting those sorts of property. What makes firearms different?

The Tennessee Constitution does not exactly tell us why firearms are different, but the theory of government it lays out might provide an answer. The first place to look, appropriately enough, is at the beginning. Article I, Section 1 provides:

That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of those

¹⁵ TENN. CONST. art I, § 26; *see supra* text accompanying note 6.

¹⁶ TENN. CONST. art I, § 24; *see supra* text accompanying note 12.

¹⁷ Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419, 1426 (1990) (reviewing ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990)).

¹⁸ *Id.* at 1427.

ends they have at all times, an (pg.652) unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper.¹⁹

Article I, Section 2 continues: "That government being instituted for the common benefit, the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind."²⁰ Finally, the constitution's penultimate provision provides:

The declaration of rights hereto prefixed is declared to be a part of the Constitution of this State, and shall never be violated on any pretense whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the bill of rights contained, is excepted out of the General powers of government, and shall forever remain inviolate²¹

From these three passages, which are the only ones in the constitution to address pointedly the first principles of governance, we can construct a coherent theory: All power originates in the people as the ultimate sovereigns. That power is delegated to governments that are constituted to promote their peace, safety, and happiness. And the people, as ultimate sovereigns, retain the ultimate power—and even the duty—to overthrow any government that fails to respect their authority. This is a classically American theory of the relationship between the government and its citizens, very much in accord with the thinking of our nation's founders,²² and is thus no surprise in a state constitution said to have been described by (pg.653) Thomas Jefferson as "'the least imperfect and most republican of the state constitutions.'"²³

With this conception of government as a somewhat mistrusted agent exercising powers delegated by its principal, the people, the role of the Declaration of Rights as a means of guarding against overreaching makes sense. Furthermore, because the ultimate power of the people is to overthrow a government that overreaches, protecting that ultimate power is an important goal of the Declaration of Rights, thus explaining why that Declaration includes a clause protecting the private

¹⁹ TENN. CONST. art. I, § 1.

²⁰ *Id.* § 2.

²¹ *Id.* art. XI, § 16.

²² After all, the Declaration of Independence sets out this same political theory:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—*That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.*

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added). As Dan Himmelfarb notes, the Declaration of Independence has received rather short shrift in terms of legal relevance notwithstanding that most of the framers of the U.S. Constitution considered it to be the source of America's founding principles. See Dan Himmelfarb, *The Constitutional Relevance of the Second Sentence of the Declaration of Independence*, 100 YALE L.J. 169 (1990). This almost willful ignorance of founding principles probably represents poor scholarship, and poor lawyering, but that need not concern us in the context of the Tennessee Constitution, as these principles are clearly set out in its text.

²³ Lewis L. Laska, *A Legal and Constitutional History of Tennessee, 1772-1972*, 6 MEM. ST. L.REV. 563, 582-83 (1976) (quoting J.G.M. RAMSEY, *THE ANNALS OF TENNESSEE TO THE END OF THE EIGHTEENTH CENTURY* 657 (Kingsport Press 1926) (1853)). Laska notes, however, that although this quotation appears in *The Annals of Tennessee*, Ramsey does not document its source. *Id.* at 583 n.90.

ownership of firearms. Firearms are, in this sense, distinct from other forms of property because they are an essential means of making the theoretical right of revolt a reality.

All of the above suggests an interesting point regarding the "common defense" language of the Tennessee right to bear arms provision. Modern readers, used to thinking about the phrase "common defense" as used in the Federal Constitution,²⁴ are likely to interpret the term as meaning *defense against external enemies*. Yet both the language of the Tennessee Constitution, and the theory of government that it embodies, suggest that it is the *people*, not the state, being defended, and that at least part of the "common defense" to which it refers is *defense of the people against a tyrannical government*.

If this is so, then it may also help determine what kinds of power the legislature should have over the private ownership, use, and carriage of firearms. In this view, the legislature may regulate firearms in ways that are consistent with its general police powers—ways that are calculated to prevent violent crime but, since the Declaration of Rights constitutes a carving-out from those general police powers,²⁵ it may not regulate firearms in ways that frustrate the ability of the populace to maintain the ability to revolt. In fact, the language of the Tennessee right to bear arms provision seems consistent with such a view of legislative powers.

The provision, remember, states: "That the citizens of this State have a right to *keep* and to *bear* arms for their common defense; but the Legislature shall have power, by law, to regulate the *wearing* of arms with a view to prevent crime."²⁶ In other words, citizens may own and practice with ("keep") weapons, and may muster and drill with ("bear") them, but the legislature may regulate the carrying ("wearing") of arms in order to prevent (pg.654) crime.²⁷ Several lessons arise from the language of this provision when it is interpreted in light of the principles contained within the constitution as a whole. First, the right to keep and bear arms is for a particular purpose: that the people may retain the power of independence from the government, even (or perhaps especially) to the point of revolt. Second, there is a distinction between the keeping and bearing of arms, and the wearing of arms, with the legislature remaining free to regulate the latter to the extent that such regulation is aimed at preventing crime.

B. The History and Intent

As a matter of pure textual interpretation, we have arrived at a rather straightforward principle regarding the right to bear arms. Pure textual interpretation is not without risks, though. As a result, it is generally good practice to check the product of textual interpretation against the

²⁴ U.S. CONST. pmb1.

²⁵ See TENN. CONST. art. XI, § 16.

²⁶ *Id.* art. 1, § 26 (emphasis added).

²⁷ According to Kates, the term "keep" was used to refer to an individual's possession of arms by right, as distinguished from a militiaman's carriage of them when mustered, which was referred to as "bearing" arms. Kates, *supra* note 11, at 219-20. This makes sense: if one *bears* arms when mustered as a militiaman (that is, for inspection, drill, or duty) then some other term must apply when one carries arms in other circumstances. The Tennessee Constitution appears to recognize this by its use of the term "*wearing*" to describe carriage of arms at other times. It also makes sense, in light of the purpose of the provision, that the wearing of arms remains subject to legislative supervision for the purpose of preventing crime, while the keeping and bearing of arms, which represent the people's protection against overreaching by the legislature, are exempt from legislative control. Otherwise, the purpose of an armed populace would be defeated.

history of the provision and what we know about the framers' intent.²⁸ Determining original intent and applying it to a particular question is rarely as easy or as straightforward as some advocates of originalism suggest,²⁹ but in many cases it is possible, and provides a useful aid to construing constitutions and statutes. In construing constitutional provisions in particular, it is useful to look at both general intent—how did the drafters understand the general question involved—and specific intent—what did they intend the provision that they drafted to mean. I will address both issues in turn.

The Tennessee Constitution was originally drafted in 1796; many of its provisions survive unchanged to this day. Among them are the provisions of Article I, Section 1, and Article I, Section 2 quoted earlier, and the right (pg.655) to bear arms provision, though (as we will see) that was somewhat modified in 1834 and 1870. Although historians complain that historical material explaining the Federal Constitution is somewhat vague, there is far more of it than there is with regard to the formation of the Tennessee Constitution. Still, it is possible to learn a number of lessons.

First, there is every reason to believe that the framers of the Tennessee Constitution were thoroughly influenced by the republican thought of the time. Leaving aside Thomas Jefferson's statement quoted above,³⁰ the theory of government outlined in the first two sections of the Tennessee Constitution—in which all power is delegated by the people, and in which the people retain the right to revolt if that power is abused—is precisely that of late-eighteenth-century republicanism.³¹ It thus seems fair to impute to the framers of the Tennessee Constitution the kinds of views held by their contemporaries, about which we know considerably more.

There is every reason to believe that the political leaders of our nation, whatever their views on other subjects, were rather strongly unified on the question of private ownership of arms. Federalists, such as James Madison, held out the private ownership of weapons as one reason for believing that the new federal government could be trusted not to usurp power. Madison compared the European governments, which he described as "afraid to trust the people with arms," to the new federal government, which need not be feared because Americans possessed "the advantage of being armed, which the Americans possess over the people of almost every other nation."³² Thomas Jefferson was a vigorous advocate of gun ownership, both for societal and personal reasons,³³ a

²⁸ See generally Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

²⁹ See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980) (describing methodological difficulties of "original understanding" jurisprudence); Glenn H. Reynolds, *Sex, Lies and Jurisprudence: Robert Bork, Griswold and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045 (1990) (criticizing Robert Bork's attacks on *Griswold v. Connecticut*, 381 U.S. 479 (1965), as inconsistent with the original intent of the framers).

³⁰ See *supra* text accompanying note 23.

³¹ See *supra* note 22. Indeed, as Himmelfarb notes, this theory was shared by essentially everyone, including Federalists and Antifederalists, involved in the debate over ratifying the U.S. Constitution: "Thus the opponents—no less than the proponents—of ratification viewed the Constitution in light of the political theory of the Declaration." Himmelfarb, *supra* note 22, at 185. This suggests that it was widespread enough to have influenced the Tennessee Constitution, as evidenced from the text of that document.

³² THE FEDERALIST No. 46, at 299 (James Madison) (Heirloom ed., Arlington House 1966).

³³ Jefferson is often quoted for a letter that he wrote to a nephew suggesting that proficiency with firearms builds character.

A strong body makes the mind strong....

....

... As to the species of exercise, I advise the gun. While this gives a moderate exercise to the body, it gives

model constitution that he drafted for (pg.656) Virginia in 1776 included a provision guaranteeing that "[n]o freeman shall be debarred the use of arms [within his own lands]."³⁴ And the Antifederalist Patrick Henry agreed, stating (in terms reminiscent of the Tennessee Constitution) his objection to standing armies and his view of the importance of an armed citizenry. "The great object is, that every man be armed.... Every one who is able may have a gun."³⁵ (pg.657)

These views were not based primarily on an aesthetic appreciation of firearms, but on a coherent political theory, one not well understood today. That theory had roots in two main sources: the traditions of the English Common Law, in which arms were prized both for self-defense and for the right to revolt (rights viewed as closely related) and the political philosophy of John Locke.³⁶ I

boldness, enterprise, and independence to the mind. Games played with 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.

1 THE JEFFERSONIAN CYCLOPEDIA: A COMPREHENSIVE COLLECTION OF THE VIEWS OF THOMAS JEFFERSON 318 (John P. Foley ed., Russell & Russell 1967) (1900).

³⁴ *Id.* at 51 (brackets by Jefferson). Jefferson appears to have strongly opposed the notion of disarming the populace as a means of preventing violence. In his personal compilation of great quotations, Jefferson preserved a quote from the eighteenth-century criminologist Cesare Beccaria:

"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 designated 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."

Don B. Kates Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87, 90-91 (1992) (quoting CESARE BECCARIA, *CRIMES AND PUNISHMENTS* 87-88 (Henry Paolucci trans., Bobbs-Merrill 1963) (1764)). As Kates notes, it was a part of the ideology of the time, accepted more or less across the American political spectrum, that possession of arms was a key to the development of civic virtue because it fosters self-reliance and the sort of civic virtue deemed essential to a republic.

The right of arms is [seen as] one of the first to be taken away by tyrants, not only for the physical security despotism gains in monopolizing armed power in the hands of the state, but also for its moral effects. The tyrant disarms his citizens in order to degrade them; he knows that being unarmed "palsies the hand and brutalizes the mind: an habitual disuse of physical forces totally destroys the moral; and men lose at once the power of protecting themselves, and of discerning the cause of their oppression." Thus, when Machiavelli said that "to be disarmed is to be contemptible," he meant not simply to be held in contempt, but to deserve it; by disarming men tyrants render them at once brutish and pusillanimous.

Id. at 95 (footnote omitted) (quoting JOEL BARLOW, *ADVICE TO THE PRIVILEGED ORDERS IN THE SEVERAL STATES OF EUROPE RESULTING FROM THE NECESSITY AND PROPRIETY OF A GENERAL REVOLUTION IN THE PRINCIPLE OF GOVERNMENT* 45 (Cornell Univ. Press 1956) (1792 & 1795); NICCOLO MACHIAVELLI, *THE PRINCE* (1513) (Chapter XIV)).

³⁵ 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 386 (Jonathan Elliot ed., 2d ed., Washington 1836) [hereinafter ELLIOT'S DEBATES].

³⁶ On this relationship, see Kates, *supra* note 34. As Kates notes, under the prevailing view at the time, Slavers, robbers and other outlaws who would deprive honest citizens of their rights may be resisted even to the death because their attempted usurpation places them in a "state of war" against honest men. Likewise, when a King and/or his officials attempt to divest a subject of life, liberty or property they dissolve the compact by which he has agreed to their governance and enter into a state of war with him—wherefore they may be resisted the same as any other usurper.

Id. at 90.

do not intend to lay out in detail the way in which those two sources informed that theory—this brief essay is not the place, and the task has already been admirably performed elsewhere.³⁷ Yet in essence the view parallels that extracted from the Tennessee Constitution as set forth above: that government is the product of a delegation of power from the people, that the people retain the right (even the duty) of revolt whenever that government exceeds the scope of delegation, and that widespread private ownership of arms is an important means of making that right of revolt real—along, perhaps, with the implication that so long as the ability to exercise that right remains real it is unlikely to be needed.

Thus, the powers of government are conceived of as "a great power of attorney, under which no power can be exercised but what is expressly given."³⁸ Such rights are delegated by the majority, but they are not unlimited. As summarized succinctly by Edward Corwin:

Not even the majority which determines the form of the government can vest its agent with arbitrary power, for the reason that the majority right itself originates in a delegation by free sovereign individuals who had "in the state of nature no arbitrary power over the life, liberty, or possessions" of others

....(pg.658)

Finally, *legislative power is not the ultimate power of the commonwealth*, for "the community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even their legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject."³⁹

For the community to exercise this "supreme power," it is necessary for its members to be armed—and, indeed, by being armed the community is likely to discourage even the attempt at oppression. As the Federal Farmer wrote, "[T]o 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"⁴⁰ Or, as Justice Joseph Story, conceded by writers as diverse as Professors Levinson and Bork to be an excellent source of insight into political thought at the time of the framing,⁴¹ said

The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and

³⁷ See, e.g., HALBROOK, *supra* note 13, at 7-54; JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994); Cottrol & Diamond, *supra* note 11, at 320-33; Kates, *supra* note 11, at 230-39; Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983); Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS., Winter 1986, at 125.

³⁸ These are the words of James Iredell, quoted in GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 600 (1969) (quoting 4 ELLIOT'S DEBATES, *supra* note 35, at 148).

³⁹ Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365, 390 (1929) (quoting JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT* 75, 82 (Prometheus Books 1986) (1690)).

⁴⁰ LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 124 (Walter H. Bennett ed., Univ. of Ala. Press 1978) (1787 & 1788).

⁴¹ Compare Levinson, *supra* note 3, at 649 with BORK, *supra* note 17, at 5-6, 134, 154, 165, 289, 318 (both identifying Story as an excellent source of understanding regarding political thought of the framers).

arbitrary power of rulers, and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.⁴² (pg.659)

Thus, it seems clear that the political thinkers of late-eighteenth-century America were unified in their support of private ownership of arms, and considered this a centerpiece of the political theory underlying the establishment of both the nation and the State of Tennessee.

If we need more proof that the framers considered the keeping and bearing of arms as an essential means of protecting liberty, we need only consider what they did when they desired to deprive a body of citizens—slaves and free citizens of African descent—of any opportunity for liberty. They disarmed them.

The sad history of this practice is explored at length in Robert Cottrol and Raymond Diamond's *The Second Amendment: Toward an Afro-Americanist Reconsideration*.⁴³ Initially, free blacks were treated as free whites—permitted, and even sometimes required, to bear arms for their defense and the defense of communities. With time, however, they were gradually disarmed as the white community perceived them as a potential threat to the slave system.⁴⁴ As a result, they were left unable to resist the depredations of both government forces and of private individuals from whom the government refused to protect them.⁴⁵ Unfortunately, Tennessee's history is reflective of this fact.

The original right to bear arms clause in the Tennessee Constitution of 1796 was color-blind, providing, "That the freemen of this state have a right to keep and to bear arms for their common defence."⁴⁶ In keeping with its Lockean aspirations, its language was universal. The constitution of 1834 changed this. With greater unease over slavery came new language limiting the right to white citizens only.⁴⁷

After the Civil War, with black people guaranteed (at least formally) the rights of full citizenship, this language was removed. The constitution of 1870 restored the color-blindness of the original provision, but added the proviso allowing the legislature to regulate the wearing of arms,

⁴² 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1897 (Melville M. Bigelow ed., 5th ed., Boston, Little, Brown, & Co. 1891), quoted in Levinson, *supra* note 3, at 649. Significantly, this passage from Story was quoted by the Tennessee Supreme Court in one of its leading cases on the right to keep and bear arms. *See Andrews v. State*, 50 Tenn. 141, 157, 3 Heisk. 165, 183 (1871). Levinson also quotes influential nineteenth-century scholar Thomas Cooley's observation:

"The right of the people to bear arms in their own defence, and to form and drill military organizations in defence of the State, may not be very important in this country; but it is significant as having been reserved by the people as a possible and necessary resort for the protection of self-government against usurpation, and against any attempt on the part of those who may for the time be in possession of State authority or resources to set aside the constitution and substitute their own rule for that of the people. Should the contingency ever arise when it would be necessary for the people to make use of the arms in their hands for the protection of constitutional liberty, the proceeding, so far from being revolutionary, would be in strict accord with popular right and duty."

Levinson, *supra* note 3, at 649 n.64 (quoting Thomas M. Cooley, *The Abnegation of Self-Government*, THE PRINCETON REVIEW, July-Dec. 1883, at 209, 213-14).

⁴³ *See* Cottrol & Diamond, *supra* note 11.

⁴⁴ *Id.* at 333-38.

⁴⁵ *Id.* at 335-49 (describing oppression of unarmed blacks, and successful resistance by blacks who possessed arms).

⁴⁶ TENN. CONST. of 1796, art. XI, § 26.

⁴⁷ The 1834 constitution declares, "That the free white men of this State have a right to keep and to bear arms for their common defence." TENN. CONST. of 1834, art. I, § 26.

leaving the clause in its current form.⁴⁸ At the constitutional debate—what little there was—regarding this change, it was explained by Delegate John A. Gardner that the purpose was to deal with the wave of post-war crime and banditry. Gardner stated that the purpose of the amendment was to preserve both the right of the people to provide for common defense, and the right of (pg.660) individuals to self defense, while still allowing the legislature to act against crime.⁴⁹

Mr. Gardner said, that within a few years past, there has been a fearful and alarming increase in the number of high crimes—such as murders and robberies—committed by means of violence, and by the use of arms, in this State. This evil has grown into frightful propo[r]tions, and the public peace, and private security, demand the most rigorous measures o[f] repression. The members of the Legislature are impressed with the importance of this subject, but, I understand, they are restrained from providing efficient remedies, from a doubt they entertain as to the extent of their power in this direction, under the provisions of the 26th section of the Bill of Rights. This power, I consider, is secured for the common, and not for individual defense—as when the peace and safety of the people of the whole State, or of a county, or even a single neighborhood, is threatened, the people shall have arms, and a right to bear and use them to preserve the peace and good order of society. I would not, however, interfere with, or the slightest degree abridge, the citizen's right of self-defense.

My object is to suppress acts of lawless violence, and diminish the number of murders and robberies in the State; and every lover of law and order must desire this.

I wish to remove this doubt as to their powers on this subject, heretofore existing in the minds of the members of our Legislature, which doubt has stood in the way of necessary remedies being provided for the cure of this great evil.

To this end I offer this amendment, and hope the Convention will adopt it.⁵⁰

The "evils of violence" to which Gardner refers were "Klan tactics," which were carried out by the State Guard (a paramilitary force under the command of Governor Brownlow) under color of state law, and extralegally by the Ku Klux Klan and the Union Loyal League.⁵¹

It is important to note that Gardner's conception of the right to bear arms provision—even after the amendment—remains consistent with the political theory of the original Tennessee Constitution. Indeed, he specifically notes that fact, and appears to argue that his amendment merely clarifies an already existing power of the legislature. As we will see, the case law suggests that he was right, and was not merely engaging in the sort of "this is just a clarification" smoke-blowing sometimes employed by those offering new laws.(pg.661)

C. The Right to Keep and Bear Arms Cases

Though there are a number of Tennessee cases that cite the right to bear arms provision of Article I, Section 26, there are two that are of primary importance. Conveniently enough, one,

⁴⁸ See TENN. CONST. art. I. § 26.

⁴⁹ Cf. JOURNAL OF THE PROCEEDINGS OF THE CONVENTION OF DELEGATES ELECTED BY THE PEOPLE OF TENNESSEE, TO AMEND, REVISE, OR FORM AND MAKE A NEW CONSTITUTION FOR THE STATE 108 (Nashville, Jones, Purvis & Co. 1870).

⁵⁰ Reported in the NASHVILLE UNION AND AMERICAN, Jan. 21, 1870, at 1, col. 5.

⁵¹ See Laska, *supra* note 23, at 638-39, 645 & n.641.

Aymette v. State,⁵² was decided before the 1870 amendment, under the provision of the constitution of 1834, and another, *Andrews v. State*,⁵³ was decided just after the 1870 amendment, and applied the provision as it exists today. Both are important cases, not only in terms of our own state's law, but in terms of what they reveal about the general American conception of the right to bear arms.⁵⁴

Aymette v. State is an 1840 case that involved a statute that forbade the open or concealed wearing of a "Bowie knife, Arkansas tooth pick, or other knife or weapon that shall in form, shape or size resemble a Bowie knife or Arkansas tooth pick."⁵⁵ The defendant was convicted of violating this statute, and appealed.⁵⁶ On appeal, the defendant challenged the constitutionality of the statute, relying in large part on the right to bear arms provision of the 1834 constitution.⁵⁷ According to the court, his position was that

[t]his declaration ... gives to every man the right to arm himself in any manner he may choose, however unusual or dangerous the weapons he may employ, and, thus armed, to appear wherever he may think proper, without molestation or hindrance, and that any law regulating his social conduct, by restraining the use of any weapon or regulating the manner in which it shall be carried, is beyond the legislative competency to enact, and is void.⁵⁸

In answering this claim, the court examined the English and early American history of the right to bear arms, and concluded that the right to keep and bear arms did not preclude all legislative regulation of the wearing of arms.⁵⁹ As the court said,^(pg.662)

[E]very free white man may keep and bear arms. But to keep and bear arms for what? If the history of the subject had left in doubt the object for which the rights is [sic] secured, the words that are employed must completely remove that doubt. It is declared that they may keep and bear arms for their common defense. The word "common," here used, means, according to Webster: 1. Belonging equally to more than one, or to many indefinitely. 2. Belonging to the public. 3. General. 4. Universal. 5. Public. The object, then, for which the right of keeping and bearing arms is secured is the defence of the public. The free white men may keep arms to protect the public liberty, to keep in awe those who are in power, and to maintain the supremacy of the laws and the constitution. The words "bear arms," too, have reference to their military use, and were not employed to mean wearing them about the person as part of the dress. As the object for which the right to keep and bear arms is secured is of general and public nature, to be exercised by the people in a body, for their common defence, so the arms the right to keep which is secured are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment. If the citizens have these arms in their hands, they are prepared in the best possible manner to

⁵² 21 Tenn. 152, 2 Hum. 154 (1840).

⁵³ 50 Tenn. 141, 3 Heisk. 165 (1871).

⁵⁴ Nor am I the only one to think so. They are, in fact, among the few state right to bear arms cases reprinted in the very useful three volume collection by Robert Cottrol. *See* 1 GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT 2-10, 21-57 (Robert J. Cottrol ed., 1993) (reprinting *Aymette* and *Andrews*).

⁵⁵ Act of Jan. 27, 1838, ch. 137, § 2 (current version at TENN. CODE ANN. § 39-17-1307 (1991))

⁵⁶ 21 Tenn. at 153, 2 Hum. at 155.

⁵⁷ *See supra* note 47.

⁵⁸ 21 Tenn. at 153, 2 Hum. at 156.

⁵⁹ *Id.* at 154-57, 2 Hum. at 156-59.

repel any encroachments upon their rights by those in authority. They need not, for such a purpose, the use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin. These weapons would be useless in war. They could not be employed advantageously in the common defence of the citizens. The right to keep and bear them is not, therefore, secured by the constitution.

....

The legislature, therefore, have a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not contribute to the common defence.⁶⁰

Apparently concluding both that the "Arkansas tooth-pick" was a weapon not usual in civilized warfare, and that its carriage in public in the instant case constituted "wearing" rather than "bearing" of arms,⁶¹ the court upheld the statute. Thus, under the Constitution of 1834, before the addition of the provision about regulating the "wearing" of arms, the distinction appeared already to exist as a matter of judicial inference, precisely as Delegate Gardner suggested.⁶² (pg.663)

At any rate, no major shift occurred in judicial interpretation even after the change in language brought by the constitution of 1870, which is evident in *Andrews v. State*.⁶³ The defendants in *Andrews* were charged with violating a statute forbidding "any person to publicly or privately carry a dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver."⁶⁴ They argued that the statute violated their rights under the Second Amendment to the United States Constitution, and under the right to bear arms clause of the Tennessee Constitution.⁶⁵ The court, in this preincorporation day, made short work of the first claim, dismissing any suggestion that the Second Amendment to the Federal Constitution applied to the states with a reference to *Barron ex rel. Tiernan v. Mayor of Baltimore*.⁶⁶

With regard to the second question, the court was more troubled. It was unwilling to accept the Attorney General's argument that the amendment of 1870 granted the legislature unlimited power to regulate the wearing of arms-and further, that the right to keep and bear arms was a mere "political right" that existed for the benefit of the state and hence, could be regulated by the state.⁶⁷ On the other hand, it was unwilling to retreat from *Aymette's* holding that there were some activities that the

⁶⁰ *Id.* at 156-57, 2 Hum. at 158-59.

⁶¹ The opinion, which in its early stages is a model of clarity, becomes a bit uncertain at this point, reviewing both questions in rather general terms and then concluding "that upon either of the grounds assumed in this opinion the Legislature had the right to pass the law." *Id.* at 160, 2 Hum. at 161-62. Though it is impossible to know, the sudden change in manner brings to mind the sort of fuzzing-over that is sometimes needed to secure a majority.

⁶² See *supra* text accompanying note 60.

⁶³ See 50 Tenn. at 141, 3 Heisk. at 165.

⁶⁴ Act of June 11, 1870, ch. 13 (current version at TENN. CODE ANN. §§ 39-16-402, -17-1307, -17-1315 (1991 & Supp. 1993)).

⁶⁵ The defendants arguments are summarized at 50 Tenn. at 142-44, 3 Heisk. at 166-68.

⁶⁶ 32 U.S. 180, 7 Pet. 243 (1833). For the Tennessee court's discussion of this issue, see 50 Tenn. at 147-50, 3 Heisk. at 171-75.

⁶⁷ 50 Tenn. at 156-57, 3 Heisk. at 182-84. Attorney General Heiskell appears to have been making the somewhat tautological argument that the legislature could outlaw the use of arms, except by those in active rebellion. "It is insisted by the Attorney General, that the right to keep and bear arms is a political, not a civil right ... It is said by the Attorney General that the Legislature may prohibit the use of arms common in warfare, but not the use of them in warfare" *Id.* at 156, 3 Heisk. at 182.

legislature could regulate.⁶⁸ The court resolved this dilemma by examining the history and nature of the right.⁶⁹

In short, the court found that the right to *bear* arms is a political right—a right that exists primarily for the good of the political body. But the right to *keep* arms is a private, civil right enforceable by individuals against the state even though it may also serve a broader public purpose. As the court said,

Bearing arms for the common defense may well be held to be a political right, or for protection and maintenance of such rights, intended to be guaranteed; but the right to *keep* them, with all that is implied fairly as an (pg.664) incident to this right, is a private individual right, guaranteed to the citizen, not the soldier.⁷⁰

The court concluded that citizens have the right to keep military-type weapons, and to engage in the necessary practice, repair, and transportation of such weapons, even in the absence of any militia connection.⁷¹ However, the legislature retains the right to regulate the wearing of military-type weapons,⁷² and to ban non-military weapons, so long as that regulation does not amount to a prohibition and so long as it bears a well-defined relation to the prevention of crime.⁷³ The court held that as applied to repeating pistols—which the court said were military equipment—the statute was unconstitutional since it prohibited their keeping and use, but upheld the (pg.665) statute as applied to

⁶⁸ *Id.* at 158, 3 Heisk. at 185 (citing 21 Tenn. at 157, 2 Hum. at 159).

⁶⁹ *Id.* at 154-58, 162, 3 Heisk. at 180-84, 189.

⁷⁰ *Id.* at 156, 3 Heisk. at 182 (emphasis added).

⁷¹ *Id.* at 153, 3 Heisk. at 178-79. According to the court:

The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose, a man would have the right to carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it, without violating this clause of the Constitution.

But farther than this, it must be held, that the right to keep arms involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace; that in such use, he shall not use them for violation of the rights of others, or the paramount rights of the community of which he makes a part.

Id. The court noted that the militia was by then already a nearly defunct organization, preserved in the state and federal constitutions and in the statute books but otherwise of no remaining importance. *Id.* at 158, 3 Heisk. at 184. The court held, however, that this change in practice did not affect the substance of the constitutional rights. *Id.* at 158-59, 3 Heisk. at 184-85.

⁷² *Id.* at 154, 3 Heisk. at 179-80. Such weapons were defined, in essentially the same terms used in *Aymette*, as those weapons actually used by the military, including "the rifle of all descriptions, the shot gun, the musket, and repeater ... and that under the Constitution the right to keep such arms, can not be infringed or forbidden by the Legislature." *Id.* at 154, 3 Heisk. at 179; *see also* 21 Tenn. at 159, 2 Hum. at 160-61.

⁷³ 50 Tenn. at 158-61, 3 Heisk. at 185-88.

But the power is given to regulate, with a view to prevent crime. The enactment of the Legislature on this subject, must be guided by, and restrained to this end, and bear some well defined relation to the prevention of crime, or else it is unauthorized by this clause of the Constitution.

Id. at 155, 3 Heisk. at 181. This statement makes clear that weapons legislation that is not plainly based on prevention of crime—instead being motivated by, say, a fear of accidents or a sense that guns give some people the "willies"—would not be constitutional. That makes sense when we remember that the right to bear arms clause removes weapons regulation from the general police power of the legislature, and substitutes only a single permissible ground, crime prevention, for such legislation. *See* TENN. CONST. art. XI, § 16; *see also supra* notes 19-22 and accompanying text.

the other, nonmilitary weapons.⁷⁴ This case remains the leading case in Tennessee today, and its principles continue to prevail.⁷⁵

III. SOME ANALYSIS IN LIGHT OF CURRENT PROBLEMS

So where does this leave us? Strangely enough, in a place that is unlikely to satisfy either pro- or anti-gun partisans. As a matter of black-letter law, the Tennessee constitutional provision means almost precisely what it says. Citizens are free to own military-type weapons,⁷⁶ to practice with them, to transport them for purposes of maintenance and practice, and to make reasonable nonviolent use of them. The legislature, however, remains free to prohibit ownership of nonmilitary weapons, and to regulate the wearing of military weapons, so long as the regulations are reasonable and bear a close relation to the purpose of preventing crime.

This leads to one seeming paradox. Assault weapons, those repeating arms that make up the primary weapons of today's military forces throughout the world, are far more military in character than the predominantly bolt-action rifles and shotguns typically employed by hunters. If, as the case law holds, the state constitution protects primarily military weapons, then arguably there is less constitutional protection for hunting weapons than for the far more controversial assault weapons. This result likely will please neither most pro-gun advocates, who I suspect tend to be hunters, nor antigun crusaders, who seem especially opposed to the idea of military-type weapons in civilian hands. However, the main purpose of including a right to bear arms provision in the Tennessee Constitution (and quite likely in the United States Constitution as well) was to preserve a substantial degree of military power in the citizenry at large, so as to prevent tyranny—not to protect hunters. So there is really no paradox at all: although today's *political* debate on gun ownership seems often to turn on the question of "legitimate sporting and hunting uses," that aspect of gun ownership is irrelevant to the constitutional analysis, except to the extent that it overlaps with the purpose of keeping individuals competent at the use of arms. (In practice, of course, that overlap is likely to be substantial. Hunting weapons by their very nature are likely to have sufficient military utility to fall within the provision's protections, as illustrated by the *Andrews* court's reference to rifles "of all descriptions, the shotgun, the musket, and the repeater" as (pg.666) being protected.⁷⁷ Nonetheless, the point remains: constitutionally, guns that are "only good for killing people" are the ones that ought to be most protected, because maintaining among the citizenry at large just that ability to "kill people" is precisely the reason for the provision. Revolutions, after all, tend to involve killing, as does resistance to government oppression, of which our forefathers were well aware from firsthand experience.

This is also why limitations on the *wearing* of arms are constitutionally permissible. Though there is no question that at the time of the framing of the Tennessee provision self-defense was considered to be a fundamental right, probably even trumping the principles of the constitution, and that the classical notion of self-defense is more closely related to the larger question of maintaining

⁷⁴ 50 Tenn. at 159-60, 3 Heisk. at 186-87.

⁷⁵ See LEWIS L. LASKA, THE TENNESSEE STATE CONSTITUTION: A REFERENCE GUIDE 57-58 (1990); 25 TENN. JUR. *Weapons* § 4 (1985).

⁷⁶ The United States Supreme Court has implicitly endorsed the Tennessee approach to the "military use" question. See *United States v. Miller*, 307 U.S. 174, 178 (1939) (citing *Aymette* for point that Second Amendment protects weapons that are "part of the ordinary military equipment").

⁷⁷ 50 Tenn. at 154, 3 Heisk. at 179.

a right to revolt than most modern commentators recognize,⁷⁸ the self-defense envisioned by the framers was generally that of the home, not the person abroad in society. As both the *Aymette* and *Andrews* courts noted, when abroad in society we must generally look first to the social contract for our defense.⁷⁹

The law as it exists is thus unlikely to please those Rambo wannabes who—like the defendant in *Aymette*—believe that they have a right to festoon themselves with any and all weapons and stroll about clanking like an extra in a bad war movie, because it clearly allows the legislature to enact sensible regulations regarding the wearing of arms. It is also unlikely to please those who, like Attorney General Heiskell in *Andrews*, believe that the legislature should be able to pass whatever laws it chooses regarding arms.⁸⁰ Yet the Tennessee Supreme Court's interpretation of the right to (pg.667) bear arms provision presents a reasonable compromise: every citizen is allowed to possess arms that will be entirely suitable for the defense of home and liberty, to practice shooting, to transport arms for repairs, to purchase ammunition, and to do everything needful to the exercise of the citizen's rights. And, because so many do so, all of us have less to worry about in terms of governmental tyranny and oppression.

This last point may seem odd to many. Do privately owned weapons really preserve freedom? Would not individual citizens, with only the equivalent of infantry light arms, be hopelessly outgunned in confrontation with professional soldiers armed with tanks, cannon, and aircraft? Would an oppressive government—or a *Seven Days in May*⁸¹ style cabal—be deterred in the slightest by an armed citizenry? What good are rifles, even assault rifles, when the government has nuclear weapons? Haven't times changed so much that the notion of a right to bear arms is simply obsolete?

These objections may seem profound to many, but in fact we do not take objections based on technological advances seriously in the context of other constitutional rights. No one seriously

⁷⁸ This is a point made by Don Kates, *supra* note 34. It is also taken quite seriously in both *Andrews* and *Aymette*.

⁷⁹ 50 Tenn. at 160-64, 3 Heisk. at 188-92; 21 Tenn. at 158-59, 2 Hum. at 160-61. Once again, however, note that any such regulation must bear a well-defined relation to the prevention of crime; lacking such a basis, it is outside the legislature's power.

⁸⁰ I would be remiss if I did not note that this appears to be the opinion of more recent Attorneys General as well—at least, recent opinions of the Tennessee Attorney General evidence such a view. See 90 OP. TENN. ATT'Y GEN. 32, 103 (1990); 89 OP. TENN. ATT'Y GEN. 54 (1989). However, I do not consider those opinions particularly persuasive, as they appear founded upon little analysis, and no consideration at all of the historical basis for the right. For example, in Opinion 89-54 the Attorney General opined that a ban on military-style assault weapons is not prohibited by the Tennessee Constitution. However, that opinion, which is little more than a page in length, contains no analysis beyond the statement that assault weapons are not "the usual arms of the citizen of the country," in the language of *Andrews*, and thus concludes that they are not protected. There is no attempt to reconcile this conclusion with the language from the same case—which is even quoted in the opinion—that the arms protected are "the arms in the use of which a soldier should be trained," or with language from *Aymette*, also quoted in the opinion, that the arms protected are "such as are usually employed in civilized warfare, and that constitute the ordinary military equipment." Similarly, in Opinion 90-103, the Attorney General appears to believe that the only weapons protected are those that existed in 1871 (a technologically stagnant view that would be unimaginable in, say, the context of free speech cases), and that burdens on "sports and recreational" uses are constitutionally significant. 90 OP. TENN. ATT'Y GEN. 103, at 8-9. In neither opinion is any reference made to the intended purpose of the clause in terms of maintaining an independent military power on the part of the people. Indeed, in Opinion 90-32, the Attorney General appears to believe that the purpose of the Tennessee Constitution's right to keep and bear arms clause is to prevent the legislature from disarming the organized military forces of the state. This makes no sense at all, as no constitutional provision is needed to prevent the government from disarming itself. As the language of the relevant Tennessee constitutional provisions makes quite clear, the framers were not concerned with the danger of a disarmed government, but rather with one that possessed a monopoly of violence. The failure to consider this purpose, or even to read the *Andrews* and *Aymette* opinions with fidelity, undercuts the persuasiveness of these opinions sharply, notwithstanding the prestige and authority of their source.

⁸¹ See FLETCHER KNEBEL & CHARLES W. BAILEY II, *SEVEN DAYS IN MAY* (1962) (fictional account of a secret military scheme to overthrow the United States government).

argues that freedom of speech does not include broadcasting, telephones, or electronic amplification, or that freedom of the press does not include word processors, laser printers, or photocopy machines. The world of political discourse has changed far more profoundly than the world of arms, and yet we have responded to those changes by *expanding* individual rights, not by contracting them. I fail to see why the right to bear arms should be different.⁸² Although my own (pg.668) constitutional scholarship would likely be characterized as liberal,⁸³ it is my opinion that when this country has gone wrong, it has been because it departed from the principles of its framing—for example, in disarming and otherwise oppressing African-Americans, or by succumbing to wartime hysteria and censoring opposition literature or imprisoning Americans of Japanese descent—not when it has stuck to them. In this sense, I suppose that I am profoundly conservative.

And at any rate, objections based on changes in military technology are not only bad law; they appear to be wrong on the facts. In my lifetime, the only real military victory that the United States has had, the Persian Gulf War, came against an opponent armed with tanks, cannon, and aircraft. Whenever we, with our sophisticated weapons, have come up against irregulars with light arms, from Vietnam to Lebanon to Somalia, we have basically gotten our clocks cleaned. The disastrous Soviet experience in Afghanistan suggests the same lesson. On the basis of experience, the case that an armed citizenry has become militarily impotent, and hence irrelevant, is not very persuasive, except perhaps to the already persuaded.

But perhaps the real question is not technology, but politics. Maybe we have reached such a stage of comfortable freedom and political stability that the likelihood of oppression is so low, and the need for revolution or resistance so far-fetched, that the very purpose behind the right to bear arms is now gone. This would be a compelling argument, were it true, rendering the right to bear arms a mere historical curiosity, like the Titles of Nobility Clauses in the Federal Constitution.⁸⁴ Once again, however, the facts appear otherwise. It is true that (pg.669) our framers (of both the Tennessee and Federal Constitutions), coming out of war, revolution, and multiple changes of government, wrote against a more violent and uncertain background than most modern Americans

⁸² Nor are the real social costs of widespread gun ownership necessarily an argument against recognizing the constitutional right; we certainly do not entertain such arguments in the context of other constitutional rights, like freedom of the press. *Mein Kampf* and the *Communist Manifesto* have undoubtedly led to far more deaths (by tens of millions) than privately owned arms, but we would not suppress them on that account. As Professor Levinson notes:

If one does accept the plausibility of any of the arguments on behalf of a strong reading of the Second Amendment, but, nevertheless, rejects them in the name of social prudence and the present-day consequences produced by finicky adherence to earlier understandings, why do we not apply such consequentialist criteria to each and every part of the Bill of Rights? As Ronald Dworkin has argued, what it means to take rights seriously is that one will honor them even when there is significant social cost in doing so. If protecting freedom of speech, the rights of criminal defendants, or any other part of the Bill of Rights were always (or even most of the time) clearly costless to the society as a whole, it would truly be impossible to understand why they would be as controversial as they are.... "Cost-benefit" analysis, rightly or wrongly, has come to be viewed as a "conservative" weapon to attack liberal rights. Yet one finds that the tables are strikingly turned when the Second Amendment comes into play.

Levinson, *supra* note 3, at 657-58 (footnotes omitted).

⁸³ See, e.g., Robert P. Merges & Glenn H. Reynolds, *News Media Satellites and the First Amendment: A Case Study in the Treatment of New Technologies*, 3 HIGH TECH. L.J. 1 (1988); Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333 (1992); Reynolds, *supra* note 29.

⁸⁴ U.S. CONST. art. I, § 9, cl. 8 (forbidding federal government from creating titles of nobility); see also *id.* art. I, § 10, cl. I (extending prohibition to the states). Though this point may cut both ways. As Charles Black pointed out to me when I was a law student, the Titles of Nobility Clause is one of the few constitutional provisions that can be said to have worked perfectly. Its apparent obsolescence is thus in a sense the strongest possible evidence of its importance.

can imagine. Since the framing, we have enjoyed far more stability, peace, and prosperity than the framers could have hoped for. But this undeniable fact does not undercut the notion that the framers knew what they were doing—instead, it rather strongly suggests the opposite, that they did a very good job indeed. These good results should make us rather cautious about making wholesale changes in their plan: after all, we have enjoyed all of this freedom, stability, and prosperity with an armed citizenry, something that the framers, at least, considered a crucial guarantor of just such things. Perhaps the armed citizenry was irrelevant, but how can we know? Are we willing to take the chance?

Furthermore—and I struggle every year to convince my constitutional law students of this—the peace and stability that Americans have enjoyed constitute a substantial aberration in the normal course of human events. The background of war, revolution, and violence against which our institutions were formed represents much more the norm of human existence than the domestic peace and stability that Americans have enjoyed in this century. From Cambodia to Yugoslavia, from Liberia to Haiti, the history of this century has largely been one of violence, instability, and the oppression and often annihilation of those too weak to resist. We may try to convince ourselves that something in the North American soil or climate renders us immune to these destructive forces, but it appears more likely that our relative tranquility has resulted from a combination of luck and well-crafted institutions. This, too, should make us less willing to make wholesale changes in those parts of our system of governance that were in fact designed to deal with precisely these kinds of problems; luck does not last forever, and even in the United States, there have been some substantial institutional breakdowns.

Nor is our own era as peaceful and stable as we would like to believe. In different ways, both the Rodney King beating and the L.A. riots suggest the dangers of overreliance on police and government authorities to maintain public order. And for minorities and those without political clout, the public authorities have always been unreliable: sometimes enemies, sometimes simply indifferent, but rarely the sturdy protectors that they generally are for the wealthy and powerful.⁸⁵ So there may be, even today, a role for an armed citizenry.

That is the lesson that the Tennessee Constitution holds for us, and we are likely to live under its right to bear arms provision for some time, given the (pg.670) notorious difficulty of amending that document.⁸⁶ Nor are the prospects for an "amendment by judicial reinterpretation" all that favorable: the case law is simply too clear, and any change at this late date would probably be perceived as political action by the judiciary.⁸⁷ We are likely stuck with the judgment of our forefathers on this subject.

That may not be so bad, and I have a suggestion or two as to how to use their wisdom, rather than deny it. I propose that we consider bringing the militia back, though perhaps in a twentieth (or

⁸⁵ Professors Cottrol and Diamond report an incident that took place in Memphis, Tennessee, in 1891 in which a black militia unit for two or three nights guarded approximately 100 jailed blacks who were deemed at risk of mob violence. When it seemed the crisis had passed, the militia unit ceased its work. It was only after the militia unit left that a white mob stormed the jail and lynched three black inmates. Cottrol & Diamond, *supra* note 11, at 354 (citing IDA B. WELLS BARNETT, *CRUSADE FOR JUSTICE: THE AUTOBIOGRAPHY OF IDA B. WELLS* 50 (Alfreda M. Duster ed., 1970)).

⁸⁶ See TENN. CONST. art. XI, § 3 (procedures for amending Tennessee Constitution)

⁸⁷ See generally Michael G. Colantuono, Comment, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL. L. REV. 1473 (1987) (arguing that state constitutions should be hard to amend, and should not be amended by judicial reinterpretation, because the traditional revision processes, though cumbersome, reflect the sovereignty of the people and preserve the integrity of the political and judicial processes).

maybe twenty-first) century form. It has by now become so commonplace as to be beyond trendy to state that our nation has lost sight of community values. A widespread "communitarian" movement, with its own journals,⁸⁸ books,⁸⁹ and so on, now exists in our country and its spirit has been echoed repeatedly in speeches and writings of our current President.⁹⁰ There is also a strong sense that the real answer to crime is community involvement, ranging from law-enforcement approaches like the "Police Corps's"⁹¹ or "community policing"⁹² to farther-reaching efforts to involve the entire community in crime prevention.⁹³

Since the root of our contemporary crime problem probably has more to do with our decaying social fabric and with the reluctance of individuals (pg.671) to accept civic duties than with the availability of firearms, perhaps it is time to begin addressing the problem at its root. In the days prior to the invention of professional police forces in the early part of the nineteenth century, responding to crime was not seen as vigilantism, but as a civic duty—one backed by sanctions. The cry of "Stop Thief!" was not simply a cartoon cliché, but had the legal consequence of compelling all within its hearing to aid in arresting a thief. Individuals took turns on the "watch and ward," patrolling cities and towns at night. Everyone was seen as having a real stake in the maintenance of public order.⁹⁴

Today, with the increasing professionalization of law enforcement, the stock phrase is not "Stop Thief!" but "Don't get involved." People, often encouraged by law enforcement professionals possessing a natural desire to protect their professional turf, have followed that advice with a vengeance. The Kitty Genovese case, in which bystanders and neighbors ignored a brutal stabbing, was news at the time; now it is news when a bystander intervenes.⁹⁵ Reversing this trend would probably do more to address our crime problem than either compulsory handgun licensing, or anti-assault weapon legislation.

Of course, unlike those legislative options it would require work from citizens, and from politicians, and that may be my suggestion's biggest flaw. I have no doubt that if all able-bodied citizens were required to put in a few days per year walking the streets of their neighborhoods, crime would drop substantially. Citizens could be called together for training and equipment inspection

⁸⁸ For example, Amitai Etzioni's journal, *The Responsive Community*, whose subtitle stresses that it is about "Rights and Responsibilities."

⁸⁹ See, e.g., ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985); *COMMUNITY IN AMERICA: THE CHALLENGE OF HABITS OF THE HEART* (Charles H. Reynolds & Ralph V. Norman eds., 1988).

⁹⁰ See, e.g., President William J. Clinton, Radio Address to the American People (Oct. 23, 1993), in 29 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 2157 (1993) (calling for "community policing networks so that they'll know their neighbors and they'll work with people not simply to catch criminals but to prevent crime in the first place. We want to put more power in the hands of local communities").

⁹¹ See, e.g., Adam Walinsky et al., *The New Police Corps*, 1 YALE L. & POL'Y REV. 395 (1983); see also Jack Wenik, *The New Police Corps: A Response*, 1 YALE L. & POL'Y REV. 412 (1983).

⁹² See, e.g., Neal R. Pierce, *The Case for Community Policing*, 23 NAT'L J., 2982 (1991); George F. Will, *Policing a Chicago Enclave*, NEWSWEEK, May 17, 1993, at 76; James Q. Wilson & George L. Kelling, *Making Neighborhoods Safe*, ATLANTIC MONTHLY, Feb. 1989, at 46; Gordon Witkin & Dan McGraw, *Beyond 'Just the Facts, Ma'am'*, U.S. NEWS & WORLD REP., Aug. 2, 1993, at 28.

⁹³ See, e.g., REUBEN GREENBERG & ARTHUR GORDON, *LET'S TAKE BACK OUR STREETS!* (1989).

⁹⁴ See Kates, *supra* note 34, at 91-104 (describing colonial practice); Malcolm, *supra* note 37, at 290-95 (describing legal responsibilities under English law).

⁹⁵ For an interesting summary of the Genovese murder and its effect on at least one state jurist in a "defense of a third person" case, see *Hughes v. State*, 719 S.W.2d 560, 565 (Tex. Crim. App. 1986) (en banc) (Teague, J., concurring) (conurrence entitled, "A Requiem Dedicated to the Kitty Genoveses of This Country").

("mustered") and could be required to provide themselves with the necessary equipment, whether that included firearms or not. This would produce direct results—in terms of law enforcement on the streets—lightyears beyond current proposals to add additional professional police, and at far lower cost. However, I wonder whether politicians will be willing to endorse such a requirement, in a society that struggles to get people to show up for jury duty.

This difficulty in securing public service is one reason why the militia system initially declined.⁹⁶ Everyone wants to be a free rider, and I have (pg.672) no illusions about the enthusiasm of the average citizen for tramping about the streets in midwinter in search of crime. But the burden is not that great, and the statutory authority for imposing it is already on the books, both at the state⁹⁷ and federal levels.⁹⁸

Further, it may be that people will surprise us with their public-spiritedness: they sometimes do. When my own usually quiet neighborhood was faced with a sudden crime wave a couple of years ago, the rather unmilitary (but formidable) women of the Garden Club organized neighborhood patrols, and a neighborhood association that continues to provide security. People were rather quick to pitch in. The crime wave ended—in part because of that program, which led to several arrests, and in part because one armed householder a few blocks from me shot an intruder one night. (The intruder escaped, but the burglaries stopped.) So resistance to a modern militia-based program might not be that great, at least so long as citizens' concern with crime remained real. And even if politicians are unwilling to organize the citizenry, the citizenry may well respond to increasing crime rates, and the increasing inability of law enforcement authorities to respond to it, by organizing themselves. If they do so, the militia clause, along with the right to bear arms clause, will probably protect their right to bear arms in the classic sense.

We have spent the last hundred years or so expecting steadily less from citizens in terms of public involvement and civic responsibilities. Not (pg.673) surprisingly, most citizens have managed to live down to these expectations. Instead of trying to find new ways to protect people, and society,

⁹⁶ For example, see *Andrews*, 50 Tenn. at 157-58, 3 Heisk. at 184:

Mr. Story adds, in this section: "Yet though this truth would seem to be so clear, (the importance of a militia,) it can not be disguised that among the American people, there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How is it practicable," he asks, "to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt, and thus gradually undermine all the protection intended by this clause of our national bill of rights."

We may for a moment, pause to reflect on the fact, that what was once deemed a stable and essential bulwark of freedom, "a well regulated militia," though the clause still remains in our Constitutions, both State and Federal, has, as an organization, passed away in almost every State of the Union, and only remains to us as a memory of the past, probably never to be revived.

Id. (quoting 2 STORY, *supra* note 42, § 1897). So far, of course, Story has been proved right in his prediction, but it remains in our power to prove the *Andrews* court wrong.

⁹⁷ TENN. CODE ANN. § 58-1-301 (1989) (allowing Governor, with advice and consent of general assembly, to call out militia "at any time that public safety requires it"). *But see* TENN. CONST. art. III, § 5 (providing that militia shall not be called into service, except in case of rebellion or invasion, and then only when the general assembly shall declare by law that the public safety requires it).

⁹⁸ 10 U.S.C. § 311 (1988) (defining militia of the United States); 10 U.S.C. § 333 (1988) (providing that the President may call out the militia if, "in a State, any ... domestic violence ... so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution"). If the crime problem is as severe as we are told, it would appear to justify a militia call-out at least in those localities where citizens are unable to walk the streets and otherwise engage in constitutionally protected liberties of movement and association for fear of crime that the duly constituted authorities have been unable to address. Such localities might include the District of Columbia, or Los Angeles, for example.

from irresponsibility through regulation, perhaps it is time to start expecting more from people: more involvement, more responsibility, more simple goodness. We might find that people will manage to live up to these expectations, as they have lived down to the current ones. The framers of our constitutions, at both the state and federal levels, certainly thought so, and the state of our society today suggests that they may have known something that we have forgotten. Perhaps it is time to remember.