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SECOND AMENDMENT SYMPOSIUM: RIGHTS IN CONFLICT IN THE 1980'S

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DEDICATION

Implicit in a discussion of the second amendment, or any topic for that matter, is the recognition of the importance of the *first* amendment: the primary prerequisite to our participation in any discussion is the realization that we have the *right to discuss*. As we read these articles written by our honored contributors, let us rededicate ourselves, as lawyers and as citizens, to the vigorous protection of our most fundamental and necessary right — the right to disagree.

This issue would not have been possible without the enormous and continuously excellent contributions by the members, editors and advisors of the Northern Kentucky Law Review. Their research, corrections, editing, suggestions, insights and encouragement transformed an idea into a successful project. They should all be proud of their efforts. In addition, I would like to thank my husband, Jim Roberts, for his constant encouragement during this year and throughout this project, with special thanks for his help with our daughter, Kerry, whose birth coincided with that of this issue.

Cynthia Millen
December, 1982

THE HANDGUN CRIME CONTROL ACT OF 1981

by *Senator Edward M. Kennedy**

On March 31, 1981, in a hotel ballroom, the President of the United States spoke to the members of the Building Trades. In that speech the President warned of the "violent crime that has surged—making neighborhood streets unsafe and families fearful in their homes."¹ President Reagan then went out from that meeting to be shot on the unsafe streets of our Nation's Capital. A two-second fusillade of bullets from a cheap handgun sent a too familiar fear into every home across the land.

Before the latest flash of gunfire fades from our conscience into the darker pages of our history, we must ask ourselves why we abide the continuing carnage of the gun and the bullet, the murderer and the assassin. This time, along with our fears and our tears and our shared feelings, must come a new sense of public purpose, a new national commitment to deal with a public question that has haunted us for nearly two decades—the question of handgun control.

With the introduction of the Handgun Crime Control Act of 1981,² we launch a new effort in our Congress to end the arms race in our neighborhoods and streets that nearly took the President's life,³ and that each year takes the lives of at least ten thousand

* (D) Massachusetts. A.B., Harvard College, 1950; International Law School, The Hague, 1958; LL.B., University of Virginia Law School, 1959. Member of the Labor and Human Resources, Judiciary, and Joint Economic Committees.

This article, slightly modified, was taken from a speech delivered on the floor of the United States Senate on April 9, 1981, where Senator Edward M. Kennedy introduced the Handgun Crime Control Act of 1981. Our gratitude is extended to Associate Editor Steve O. Thornton who was responsible for transforming this speech into proper law review form, a task involving many hours of research.

1. President's Message to the Building and Construction Trades Department, AFL-CIO, 17 WEEKLY COMP. PRES. DOC. 368 (Mar. 30, 1981).

2. S. 974, 97th Cong., 1st Sess., 127 CONG. REC. 3806-16 (1981).

3. President Ronald Reagan was wounded in the chest March 30, 1981, in an assassination attempt. The attack came at about 2:25 p.m. as he was exiting the Washington Hilton Hotel after addressing the AFL-CIO Building and Construction Trades Department.

John W. Hinkley, Jr., who was standing with reporters outside the hotel, fired six shots from a .22-caliber pistol. One of the bullets hit President Reagan in the chest. Three other persons were also wounded, including the Press Secretary to the President, James S. Brady, who was the most severely injured of that group with a bullet wound in his brain. Others injured included Secret Service Agent Timothy J. McCarthy and District of Columbia policeman Thomas K. Delahanty. 37 CONG. Q. ALMANAC 7 (1981); N.Y. Times, Apr. 1, 1981, § A, at 1, 11.

Americans⁴ and wounds or threatens hundreds of thousands more.⁵ By this time tomorrow, twenty-nine more Americans will have died in handgun murders, and hundreds more will have been assaulted in handgun crimes.⁶ Every day the relentless toll climbs higher.

Inaction is inexcusable.⁷ It is time for Congress to stand up to the gun lobby and face up to its responsibility to deal with the epidemic of handgun violence that plagues the Nation.⁸

The Handgun Crime Control Act of 1981 is narrowly and carefully drafted to achieve its goal. The reasonable steps it seeks will not impair the legitimate rights of hunters and sportsmen, or prevent law-abiding citizens from acquiring guns for self-defense.⁹

4. In 1979, the Federal Bureau of Investigation, Uniform Crime Reports for the United States, reported 13,040 murders and non-negligent homicides effectuated with the use of a firearm. The following data reflects the number of murders and non-negligent homicides perpetrated with the use of a firearm for the corresponding years: 1971, 10,680; 1972, 10,449; 1973, 11,301; 1974, 12,483; 1975, 12,117; 1976, 10,627; 1977, 11,360; and 1978, 11,976. U.S. DEPT. OF JUSTICE, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 114 (1971); 118 (1972); 8 (1973); 18 (1974); 18 (1975); 10 (1976); 11 (1977); 12 (1978); 11 (1979) [hereinafter cited as UNIFORM CRIME REPORTS].

5. In 1979, the Federal Bureau of Investigation, Uniform Crime Reports for the United States, recorded 147,360 aggravated assaults which were perpetrated with the use of a firearm. The following data reflects the number of aggravated assaults effectuated with the use of a firearm for the corresponding years: 1970, 69,060; 1971, 73,278; 1972, 80,326; 1973, 91,820; 1974, 102,471; 1975, 109,043; 1976, 119,537; 1977, 121,269; and 1978, 132,751. UNIFORM CRIME REPORTS, *supra* note 4, at 12 (1970), 12 (1971), 10 (1972), 11 (1973), 20 (1974), 20 (1975), 13 (1976), 21 (1977), 21 (1978), and 20 (1979).

6. With 13,040 murders and nonnegligent homicides committed each year through the use of a handgun, an average of over 35 handgun deaths occur each day. UNIFORM CRIME REPORTS, *supra* note 4, at 11 (1979).

With 147,360 aggravated assaults occurring each year through the use of a firearm, an average of over 400 handgun assaults occur each day. UNIFORM CRIME REPORTS, *supra* note 4, at 20 (1979).

7. Numerous measures regulating the control of handguns were introduced during the 1981 legislature year, but none reached the floor in either chamber. For years, the powerful National Rifle Association, a 1.8 million member special interest group, has been successful in preventing any significant congressional action on handgun legislation. 37 CONG. Q. ALMANAC 420 (1981).

8. Several members of Congress have offered unchecked support for the Handgun Crime Control Act of 1981. For example, Senator Daniel P. Moynihan stated:

This is not a time for florid rhetoric, but for seriousness and determination. The tragic events of Monday, March 30, [President Reagan's shooting] powerfully reinforce this Nation's awareness of a simple, awful fact: Dangerous weapons too easily come into the hands of people who for whatever reason employ them to attack other people To the extent that reasonable legislation can reduce the likelihood of more such incidents, such legislation deserves the support of every American. It has mine.

S. 974, 97th Cong., 1st Sess., 127 CONG. REC. 3814 (1981) (Statement by Sen. Moynihan).

9. S. 974, 97th Cong., 1st Sess., 127 CONG. REC. 3806-16 (1981) (Statements by Sen. Kennedy, Sen. Moynihan, and Sen. Pell).

This legislation offers the best and perhaps the only hope to end the arms race on our city streets and reduce the unacceptable rate of handgun crime that brings sudden death to thousands of innocent Americans every year.

While it is true that this legislation is opposed by a powerful special interest group whose treasury seems to be overflowing,¹⁰ our most serious opponent remains the ill-informed citizen. Confusion about the ramifications of gun control legislation is rampant. Legislators, perhaps, are most guilty of adding to this confusion by repeating the often misleading political rhetoric espoused by the powerful and wealthy lobbies opposing gun control. In all candor, however, this is not an easy issue for any officeholder or candidate.

For example, in 1980, in the Presidential primaries, I constantly met union members—men and women whose interests I have sought to represent throughout my career in public life—who opposed me because they thought I favored confiscation of hunting rifles, long guns, and sporting pistols. It was not true. But it was believed because the gun lobby had repeated it many times. Other Senators and Representatives faced a similar assault in 1980. The political action committees opposing gun control spent over two million dollars for their candidates, while those on the other side had less than a tenth as much to contribute.¹¹ That is why we have failed to control the plague of handguns, even though seven out of ten Americans have favored such control ever since 1972.¹² Surprisingly, a majority of gun owners have joined the ranks of those supporting gun control legislation similar to that passed in my home

10. *Id.* at 3807.

11. *Id.*

12. When asked the question, "Would you favor or oppose a law which would require a person to obtain a police permit before he or she could buy a gun?," approximately seven of ten persons responded by indicating they favored such legislation. The chart below indicates the distribution of answers to that question for the years 1972-1980.

	Favor	Oppose	Don't Know
1972	70	27	3
1973	74	25	2
1974	75	24	1
1975	74	24	3
1976	72	27	1
1977	72	26	2
1980	69	29	2

state, Massachusetts.¹³

With the ramifications of gun control legislation so misunderstood, it is appropriate at this juncture that I outline what the legislation I am proposing will and will not do:

It will ban the manufacture, sale and importation of Saturday night specials.¹⁴

It will require a twenty-one day waiting day period before the purchase of any other handgun,¹⁵ so that dealers may contact law enforcement authorities and verify the purchaser's eligibility to own a handgun. Current law¹⁶ prohibits sales to felons, persons with a history of mental illness, drug addicts, and persons under twenty-one, but there is no effective method to verify a purchaser's eligibility.

It will prohibit gun sales by pawnshops,¹⁷ that is, any store which receives personal property as security for the repayment of money.

It will impose a mandatory minimum jail sentence of up to five years for using or carrying a handgun during the commission of a felony.¹⁸

It will require manufacturers to keep records of all handgun

13. When asked the question, "In Massachusetts a law requires that a person who carries a gun outside his home must have a license to do so. Would you approve or disapprove of having such a law in your own State?," a majority of gun owners indicated support for such legislation. The following chart reflects the data compiled by the *Gallup Opinion Index* after asking that question in the years 1975 and 1980.

	1975		
	Approve	Disapprove	No Opinion
National Gun Ownership:	77	19	4
(a) Persons owning guns	68	29	3
(b) Persons not owning guns	85	11	4
		1980	
	Approve	Disapprove	No Opinion
National Gun Ownership:	75	20	5
(a) Persons owning guns	65	30	5
(b) Persons not owning guns	83	12	5

G.H. GALLUP, *THE GALLUP OPINION INDEX*, REPORT NO. 129, at 26, REPORT NO. 174, at 31 (1981).

14. S. 974, 97th Cong., 1st Sess., 127 CONG. REC. 3809-14 (1981).

15. *Id.* at 3811.

16. 18 U.S.C. § 921-28 (Supp. III 1976). 26 U.S.C. § 5801-02, 5811-12, 5821-22, 5841-49, 5851-54, 5871-72, 6806, 7273 (1970).

17. S. 974, 97th Cong., 1st Sess., 127 CONG. REC. 3811 (1981).

18. *Id.* at 3813.

transfers,¹⁹ so that law enforcement officers may trace handguns used in crimes.

It will require the theft or loss of a handgun to be reported to the authorities.²⁰ A fine would be imposed for failure to report the theft or loss of a handgun later used in a felony.²¹

It will prohibit dealers from selling more than two handguns to one person in a year.²²

It will transfer the law enforcement functions from the Treasury Department to the Justice Department.²³

As a result of enacting this legislation, no hunter would be denied the right to own hunting rifles or sporting pistols. It is unequivocally untrue that this piece of legislation would authorize the confiscation of hunting rifles and sporting pistols. No law-abiding citizen would lose the right to own a handgun with which he could protect his home or family. While many families rely upon the handgun for protection within the family abode, few, if any, families rely upon the Saturday night special for their safety. On the other hand, many criminals rely upon those guns as a source of instant and inexpensive firepower.²⁴

Over fifty million handguns are now in circulation in this country.²⁵ This lethal number grows by two million annually.²⁶ By the

19. *Id.* at 3811-12.

20. *Id.* at 3810.

21. *Id.* at 3812-13.

22. *Id.* at 3810.

23. *Id.* at 3813.

24. According to a study for the Florida Bureau of Criminal Justice Planning and Assistance prepared by Dr. D.E.S. Burr of the Florida Technological University, Saturday night specials are indeed more favored by criminals than by law-abiding citizens. The Burr study defined Saturday night specials as handguns costing less than fifty dollars and with a barrel length of three inches or less. A comparison was made between handguns owned by law-abiding citizens of Florida and those handguns used by felony offenders in the custody of the Florida Department of Offender Rehabilitation. The Burr study concluded that only 12% of the handguns owned by law-abiding citizens could be classified as Saturday night specials, but 68% of the handguns used by criminals to commit felonies could be classified in that category. S. 974, 97th Cong., 1st Sess., 127 CONG. REC. 3808 (1981).

25. In 1969, the National Commission on the Causes and Prevention of Violence (Eisenhower Commission) reported that Americans owned some 90,000,000 firearms at that time. Of these, approximately 24,000,000 were handguns, 35,000,000 were rifles, and 31,000,000 were shotguns. The Bureau of Alcohol, Tobacco, and Firearms estimates that as of 1980 these numbers have increased to roughly 52,000,000 handguns, 59,000,000 rifles, and 54,000,000 shotguns. CONG. RESEARCH SERVICE REP. TO THE SEN. COMM. ON THE JUDICIARY, 97th Cong., 2d Sess., FED. REG. OF FIREARMS 2 (Comm. Print 1982).

26. During the federal fiscal year of 1978, 1,888,660 handguns were manufactured in the United States. In addition to that number, 273,393 handguns were imported into our country. The total of new handguns placed in circulation in the United States for fiscal year

year 2000, there will be eighty-eight million handguns in America.²⁷ Our Nation is armed to the teeth at home. Our society is now becoming an arsenal of criminal anarchy.²⁸

In the past year alone, we have seen a thirteen percent rise in violent crime, the greatest increase in a dozen years.²⁹ The magnitude of handgun violence is often difficult to visualize. During the peak years of the Vietnam war, approximately forty-five thousand United States soldiers died. Yet in the same period, approximately fifty thousand persons were murdered in the United States by handguns.³⁰ I recognize that handgun control is hardly the whole answer to lawlessness; that is why I have advocated other measures

1978, therefore, was an astounding 2,162,053. BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, DEP'T OF THE TREASURY, ALCOHOL, TOBACCO, AND FIREARMS SUMMARY STATISTICS FOR THE FISCAL YEAR 1978, at 92 (1981).

27. Generally, as indicated above, approximately 2,000,000 new handguns enter the domestic market each year. At this rate, by the year 2000 the lethal number of handguns will reach 88,000,000. *Id.*

28. No other Western democracy has such high rates of killings by handguns as does the United States. For example, Great Britain, a country with one-quarter of our population, had 55 handgun murders in 1979. Moreover, in 1979, there were 52 handgun murders in Canada. That same year, 13,040 handgun murders were recorded in the United States. Japan, with one-half our population, suffered 171 handgun-related crimes in 1979. The United States, during that same time frame, suffered 147,360 handgun-related crimes.

Compared to the United States, other major industrial nations have very stringent controls. In Great Britain, for example, it is necessary to have a police certificate to own a handgun. Canada has recently passed a law requiring a stringent "needs" test for police permission to buy a handgun. In Japan, a prospective handgun owner must get permission from the public safety commission and go through a strict check on his background before becoming eligible to purchase a handgun.

S. 974, 97th Cong., 1st Sess., 127 CONG. REC. 3808-09 (1981).

29. UNIFORM CRIME REPORTS, *supra* note 4, CRIME IN THE UNITED STATES 353-54 (1980).

30. During the peak years of the Vietnam Conflict, 1966-1971, a total of 43,990 casualties were recorded by the United States military forces. During that same period, a total of 49,273 persons were murdered by firearms on the soil of the United States. The chart below emphasizes that the greater war, in terms of number of deaths, was being fought in the streets and communities of our own Nation.

over many years.³¹

The bill we are introducing today is a moderate bill. It is a sensible bill and one all Americans should be able to support. All Americans, including sportsmen and hunters, should be able to support a ban on Saturday night specials and cheap handguns.³² Saturday night specials are not accurate beyond a range of ten or fifteen feet. They are meant to maim or kill another human being. These inexpensive and poorly manufactured guns are now readily available because of a loophole in the law that allows their lethal parts to be imported from abroad, and then assembled and sold in this country.³³ One of those weapons almost killed our President.³⁴

	<u>United States Military casualties incurred in Vietnam</u>	<u>Murders and nonnegligent manslaughters perpetrated with firearms in the United State</u>
1965	1,369	5,000
1966	5,008	5,635
1967	9,377	7,001
1968	14,589	8,126
1969	9,414	8,823
1970	4,221	9,008
1971	1,381	10,680
1972	300	10,449
1973-78	<u>1,146</u>	<u>69,864</u>
	46,805	134,586

U.S. DEP'T. OF DEFENSE, SELECTED MANPOWER STATISTICS 375 (1979). FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., UNIFORM CRIME REPORTS FOR THE UNITED STATES 314 (1982).

31. For example, in 1979, Senator Kennedy introduced Senate Bill 1936 that would have banned the importation, manufacture, sale, and transfer of Saturday night specials. The bill also contained a unique provision that would have authorized relief for victims of handgun crimes. Similar to the Handgun Crime Control Act of 1981, Senate Bill 1936 contained a clause authorizing the transfer of the enforcement duties relating to gun control from the Secretary of the Treasury to the Attorney General. S. 1936, 95th Cong., 1st Sess., 125 CONG. REC. 15024-26 (1979).

32. The 1968 Gun Control Act prohibited the importation of a certain class of handguns, commonly known as Saturday night specials. The Handgun Crime Control Act of 1981 uses the same criteria for defining a domestically manufactured Saturday night special as the 1968 Gun Control Act used in defining a foreign manufactured Saturday night special. A "Factoring Criteria for Weapons" established by the Bureau of Alcohol, Tobacco, and Firearms of the Treasury Department would require handguns to meet certain minimum requirements before they could be manufactured and sold. The criteria is based on barrel length, frame construction, weight, caliber, safety features, and miscellaneous equipment. S. 974, 97th Cong., 1st Sess., 127 CONG. REC. 3808 (1981).

33. In 1968, after the assassinations of Martin Luther King, Jr., and Robert F. Kennedy, Congress passed two laws dealing with gun control. Title Four of the Omnibus Crime Control and Safe Streets Act and the Gun Control Act of 1968 together banned the importation of certain types of handguns. The laws, however, did not specifically ban the importation of gun parts, a loophole many foreign manufacturers discovered almost immediately. *Id*; See

All Americans, including all liberals, should be able to support a mandatory minimum prison sentence for any felon who commits a crime with a handgun. And all Americans, including the National Rifle Association, should be able to support a waiting period for the purchase of handguns to prevent them from falling into the hands of criminals and psychopaths.³⁶ If the bill containing those provisions—the bill I have fought for over the years—had been in effect at that time, the alleged attacker of President Reagan could not have bought his gun and shot the President.³⁶

There may be other solutions. I am willing to compromise on the provisions of this particular legislation. But I do not comprehend why anyone would oppose the central idea of this Act. The question is not whether we will disarm honest citizens, as some gun lobbyists have charged. Rather, the question is whether we will make it harder for those who break the law to arm themselves.³⁷ Gun control is not an easy issue, but for me it is a fundamental issue. My family has been touched by violence, and too many

also 37 CONG. Q. ALMANAC 420 (1981).

34. President Ronald Reagan was fired upon by John Hinkley, Jr., who used a .22 caliber pistol, commonly categorized as a Saturday night special. The revolver was assembled at RG Industries in Miami, Florida from parts manufactured by the Roehm Firearms Company in West Germany. The pistol has a suggested retail price of \$47.50, making it one of the cheapest handguns that can be purchased in the United States. 37 CONG. Q. ALMANAC 420 (1981); N.Y. Times, Apr. 1, 1981, § A at 11.

35. A special Justice Department task force on violent crime adopted a package of recommendations on August 12, 1981 that included proposals for somewhat tighter gun controls. Included in the recommendations was a provision to set a waiting period for the purchase of a handgun in order to allow for a mandatory records check to insure that the purchaser was not in one of the categories of persons proscribed by existing law from owning a gun. 37 CONG. Q. ALMANAC 421 (1981).

36. In the fall of 1980, John W. Hinkley, Jr., was arrested in Nashville, Tennessee for illegal possession of three handguns on a day when President Carter was to make a political appearance there. Hinkley was taken to the Nashville-Davidson County Jail where he was booked and released 35 minutes later after paying a fine of \$50.00 and \$12.50 in court costs. Four days later, Hinkley bought a pair of .22 caliber revolvers in a Dallas, Texas pawn shop for \$47.00 each. On March 30, 1981, Hinkley used one of those guns to shoot President Reagan.

Ironically, the Dallas pawn shop where Hinkley purchased the gun used on March 30, 1981, is located approximately one mile from the spot where my brother, John F. Kennedy, was assassinated. (The pawn shop, Rocky's Pawn Shop, has a sign over its front door reading, "Guns don't cause crime any more than flies cause garbage.")

Under the provisions of the Handgun Crime Control Act of 1981, the parts that comprised the gun used by Hinkley could have never been shipped into the United States. Moreover, the twenty-one day waiting period contained in the bill would have allowed the Attorney General's Office to detect Hinkley's prior arrest, violent proclivities, and history of mental illness. N.Y. Times, Apr. 1, 1981, § A at 11, 19.

37. See *supra* note 24 and accompanying text.

others have felt the same terrible force. Too many people have died.

Here in Washington, we remember Michael Halberstam³⁸ and the shot that echoed across this city.

We all know the toll that has been taken across the Nation. We all know the leaders of our public life and of the human spirit who have been lost or wounded year after year:

My brother, John Kennedy,³⁹ and my brother, Robert Kennedy,⁴⁰

Medgar Evers,⁴¹ who died so that others could live free;

Martin Luther King,⁴² the apostle of nonviolence who became

38. Dr. Michael Halberstam, a nationally known heart specialist and author, was shot and fatally wounded on December 5, 1980 by an intruder he and his wife surprised in their house in upper Northwest Washington. Halberstam, a physician of eighteen years, was the son of a physician and the brother of Pulitzer Prize winning journalist and author David Halberstam.

Ironically, in a Cable News Network broadcast aired on November 21, 1980, less than one month prior to his fatal shooting, Dr. Halberstam warned:

Handgun control has nothing to do with banning handguns, but altogether, it has to do with keeping them under control and registered. That has nothing to do with hunting. We're going to keep hunting in this country. It has everything to do with the national epidemic of sudden, violent, foolish deaths.

It may be true that guns don't kill and people do, but handguns make it a lot easier. Too easy.

Halberstam's assailant, Bernard Charles Welch, Jr., was an escapee from the Adirondak Correctional Treatment and Evaluation Center. He had served approximately 3 years of his seven to ten year sentence prior to his escape. *N.Y. Times*, Dec. 7, 1980, § A, at 1-2.

39. President Kennedy was shot while riding in a motorcade in Dallas, Texas, on November 22, 1963. He died almost immediately. Lee Harvey Oswald, arrested for the murder, was shot and killed two days later in the Dallas police station by a bystander, night club owner Jack Ruby. Ruby was convicted of murder and later died in prison. 37 CONG. Q. ALMANAC 7 (1981).

40. Senator Robert F. Kennedy was shot and killed in a Los Angeles hotel the night of the 1968 California presidential primary. He was fired upon just after midnight on June 5, 1968 and died the following day. Kennedy's assailant, Sirhan Sirhan, was sentenced to death, but the sentence was commuted to life imprisonment in 1972. He will be eligible for parole on September 1, 1984. *Id.*

41. On June 12, 1963, Medgar Evers, Mississippi field Secretary of the National Association for the Advancement of Colored People, was shot and killed by a sniper lying in ambush. Evers was struck in the back by a bullet from a high-powered rifle as he walked from his automobile to his home. He died less than one hour after being shot. *N.Y. Times*, June 13, 1963, § A, at 1, 12.

42. On April 4, 1968, Dr. Martin Luther King, Jr., the Nobel Prize-winning civil rights leader was fatally shot in Memphis, Tennessee, while leaning over a second-floor railing outside his motel room. On March 10, 1969, James Earl Ray, pleaded guilty to the murder and was sentenced to 99 years in prison.

The day prior to his tragic and untimely death, Dr. King told a crowd of 2,000 supporters that he was aware of threats that had been made against his life. Dr. King followed that statement with one for which he is often remembered: ". . . there have been some threats

the victim of violence;

George Wallace,⁴³ who has been paralyzed for nearly nine years;

And George Moscone,⁴⁴ the mayor of San Francisco who was killed in his office.

Last year alone, we lost Al Lowenstein,⁴⁵ and we almost lost Vernon Jordan.⁴⁶

Recent history marks the death of John Lennon,⁴⁷ that gentle soul who challenged us in song to "give peace a chance."

We had two attacks on President Ford⁴⁸ and now one attack on

around here. We've got some difficult days ahead, but it really doesn't matter now. I've been to the mountaintop." N.Y. Times, Apr. 5, 1968, § A, at 1, 24.

43. Alabama Governor George C. Wallace was campaigning for the Democratic Presidential nomination when he was shot in Laurel, Maryland. The May 15, 1972, shooting left Governor Wallace paralyzed from the waist down. Three bystanders were also injured. Wallace's attacker, Arthur Bremer, was sentenced to 63 years in prison, but an appeals court later reduced the sentence to 53 years. 37 CONG. Q. ALMANAC 7 (1981).

44. On November 27, 1978, George Moscone, Mayor of San Francisco, was shot to death in his office at City Hall. A few minutes later, Supervisor Harvey Milk, was shot and killed in an office on the other side of City Hall.

The gunman, Dan White, who resigned on November 10, 1978, as a city Supervisor, surrendered to the police approximately one hour after the shootings. N.Y. Times, Nov. 28, 1978, § A, at 1.

45. Allard K. Lowenstein, a former United States Representative who led the 1968 movement to block the re-election of President Lyndon B. Johnson, was fatally shot on March 13, 1980. The gunman, Dennis Sweeney, was a longtime acquaintance and political ally of his victim. Sweeney walked into Lowenstein's law office, the two men shook hands and conversed briefly. Sweeney then shot Lowenstein three or four times, walked back into the inner office and placed his nine-millimeter pistol on a secretary's desk, lighted a cigarette, and awaited his arrest.

Lowenstein served in various posts at the United Nations and was a member of the New York law firm of Layton & Sherman. N.Y. Times, March 14, 1980, § A, at 1, 23.

46. On May 29, 1980, Vernon E. Jordan, former president of the National Urban League, was shot outside a Fort Wayne motel as he was exiting a car driven by Martha C. Coleman, a member of the South Bend Urban League board of directors. Joseph Paul Franklin, an avowed racist, was charged with the shooting. Franklin was subsequently acquitted of the charges. Louisville Courier-Journal, Aug. 13, 1982, § B, at 3.

47. John Lennon, a member of Britain's most successful rock group, the Beatles, was shot and killed on December 12, 1980. The forty year old musician was shot in the back twice as he was walking into the entrance way of his New York apartment. N.Y. Times, Dec. 9, 1981, § A, at 1.

48. Gerald R. Ford, then President of the United States, escaped would-be assassins' bullets twice in one month during 1975. Both incidents occurred in California. On September 5, 1975, in Sacramento, Lynette "Squeaky" Fromme, a 26 year-old follower of convicted murderer and cult leader Charles Manson, aimed a pistol at Ford as he reached out to shake her hand. A secret service agent grabbed the gun and it did not fire. Only days later, September 22, 1975, Sara Jane Moore shot at Ford as he left a San Francisco hotel. A bystander grabbed her arm and the shot was deflected. Moore had been questioned by police and Secret Service agents the day before the shooting; she was charged with carrying a concealed weapon and then released. 37 CONG. Q. ALMANAC 7 (1981).

President Reagan.⁴⁹ It is unacceptable that all these good men have been shot down. They all sought, each in their own way, to make ours a better world. Too often, too soon, their own world came to an end.

It is unacceptable that a man who has been arrested before, who has been apprehended carrying loaded guns through an airport security check, who apparently has psychiatric problems as well as a criminal record—it is unacceptable that such a man should be able to go into a pawnshop and buy a cheap handgun imported because of a loophole in the law, and then use that gun in an attempt to murder the President of the United States.⁵⁰ It is unacceptable that there are states in the American Union today where the accused attacker of President Reagan could buy another Saturday night special.⁵¹ Above all else, it is unacceptable for us to be silent or to do nothing.

At long last, let us pursue peace in our own country.⁵² Let us recall the words of Robert Kennedy spoken the day after Martin Luther King's assassination:

The victims of the violence are black and white, rich and poor, young and old, famous and unknown. They are, most important of all, human beings whom other human beings loved and needed. No one, no matter where he lives or what he does, can be certain who next will suffer from some senseless act of bloodshed. And yet it goes on, and on, and on, in this country of ours. Why?⁵³

Thirteen years later, that same tragic question must be raised again. Now it is for all of us to answer it. We must resolve that the next generation of Americans will not have to witness the carnage next time and ask—"Why?"

49. See *supra* note 3 and accompanying text.

50. N.Y. Times, Apr. 1, 1981, § A, at 1, 11, 19.

51. Twenty-nine states do not have any statutory provision prohibiting the sale of firearms to persons with mental deficiencies. Those states are: Alabama, Alaska, California, Connecticut, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oregon, South Dakota, Texas, Vermont, Virginia, West Virginia, Wisconsin, Wyoming.

It should be noted, however, that this survey was derived from state codes. In addition to laws enacted by the state legislatures there are, of course, regulatory provisions to be considered at the county and municipal levels which may be crucial to full comprehension of the firearms picture in that area. CONGRESSIONAL RESEARCH SERVICE REPORT TO THE SENATE COMM. ON THE JUDICIARY, 97th Cong., 2d Sess., FED. REGULATION OF FIREARMS 204-05 (Comm. Print 1982).

52. See *supra* note 29 and accompanying text.

53. Address by Senator Robert F. Kennedy, April 5, 1968.

TO KEEP AND BEAR THEIR PRIVATE ARMS: THE ADOPTION OF THE SECOND AMENDMENT, 1787-1791

by *Stephen P. Halbrook**

After the Constitution was submitted for ratification in 1787, political writings and debates in state conventions revealed two basic positions: the federalist view that a bill of rights was unnecessary because the proposed government had no positive grant of power to deprive individuals of rights, and the anti-federalist contention that a formal declaration would enhance protection of those rights. On the subject of arms, the federalists promised that the people, far from ever being disarmed, would be sufficiently armed to check an oppressive standing army. The anti-federalists feared that the body or the people as militia would be overpowered by a select militia of standing army unless there was a specific recognition of the individual right to keep and bear arms.¹

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1. Relevant state constitutional provisions at this time were: "That the people have a right to bear arms for the defence of themselves and the state" *PA. CONST.* of 1776, Declaration of Rights, art. 13 (current version at *PA. CONST.* art. 1 § 21); *VT. CONST.* of 1777, ch. I, Declaration of the Rights of the Inhabitants of the State of Vermont (current version at *VT. CONST.* ch. I, art. 16); "That the people have a right to bear arms, for the defence of the State" *N.C. CONST.* of 1776, A Declaration of Rights, cl. 17 (current version at *N.C. CONST.* art. 1, § 30); "The people have a right to keep and bear arms for the common defence." *MASS. CONST.* of 1780, Pt. 1, A Declaration of Rights of the Inhabitants of the Commonwealth of Massachusetts, art. 17 (current version at *MASS. CONST.* pt. 1, art. 17, § 18). The following provision was adopted during the same period in which the Bill of Rights to the U.S. Constitution was being ratified: "That the right of the citizens to bear arms, in defence of themselves and the State, shall not be questioned." *PA. CONST.* of 1790, art. 9, § 21 (current version at *PA. CONST.* art. 1, § 21).

While their sojourns abroad prevented their active involvement in the ratification process, John Adams and Thomas Jefferson, the future leaders of the federalist and republican parties respectively, reiterated in 1787 their preferences for an armed populace. In his defense of the American constitutions, John Adams relied on classical sources in the context of an analysis of quotations from Marchamont Nedham's *THE RIGHT CONSTITUTION OF A COMMONWEALTH* (1656) to vindicate a militia of all the people:

"That the people be continually trained up in the exercise of arms, and the militia lodged only in the people's hands, or that part of them which are most firm to the interest of liberty, that so the power may rest fully in the disposition of their supreme assemblies." The limitation to "That part most firm to the interest of liberty," was inserted here, no doubt to reserve the right of disarming all the friends of Charles Stuart, the nobles and bishops. Without stopping to enquire into the justice, policy, or necessity of this, the rule in general is excellent One consequence was, according to [Nedham], "that nothing could at any time be imposed upon the people but by their consent As Aristotle tells us, in his fourth book on Politics, the Grecian states ever had special care to place the use and exercise of arms in the people, because the commonwealth is theirs who hold the arms: the sword and sovereignty ever walk hand in hand together." This is perfectly just. "Rome, and the territories about it, were trained up perpetually in arms, and the whole commonwealth, by this means, became one formal militia."²

After agreeing that all the continental European states had achieved absolutism by following the Caesarian precedent of erecting "praetorian bands, instead of a public militia,"³ the aristocratic Adams rejected the very right which won independence from England: "To suppose arms in the hands of citizens, to be used at individual discretion, except in private self-defense, or by partial orders of towns . . . is a dissolution of the government."⁴ But for the more radical Thomas Jefferson, individual discretion was acceptable for the use of arms not simply for private, but also for public

2. 3 J. ADAMS, *A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA* 471-72 (London, 1787-88). Newspaper editorialists of the time also alluded to Rome's disarming of conquered peoples. The *Massachusetts Centinel*, Apr. 11, 1787, recalled "the old Roman Senator, who after his country subdued the commonwealth of Carthage, had made them deliver up . . . their arms . . . and rendered them unable ever to protect themselves . . ." 13 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 79 (J. Kaminski & G. Saladino eds. 1981).

3. J. ADAMS, *supra* note 2, at 474.

4. *Id.* at 475.

defense. Writing in 1787, Jefferson stressed the inexorable connection between the right to have and use arms and the right to revolution as follows:

God forbid we should ever be twenty years without such a rebellion And what country can preserve its liberties, if its rulers are not warned from time to time, that this people preserve the spirit of resistance? Let them take arms The tree of liberty must be refreshed from time to time, with the blood of patriots and tyrants.⁵

I. THE CONTROVERSY OVER RATIFICATION OF THE CONSTITUTION

A. *The Federalist Promise: To Trust The People With Arms*

It was characteristic of the times that the federalists were actually in close agreement with Jefferson on the right to arms as a penumbra of the right to revolution. Thus, in THE FEDERALIST No. 28, Hamilton wrote: "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" And in No. 29, Hamilton related the argument that it would be wrong for a government to require

the great body of yeomanry and of the other classes of citizens to be under arms for the purpose of going through military exercises and evolutions, as often as might be necessary to acquire the degree of perfection which would entitle them to the character of a well-regulated militia Little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped

This will not only lessen the call for military establishments, but if circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and the use of arms, who stand

5. Letter from Thomas Jefferson to Wm. S. Smith, (—, 1787), reprinted in T. JEFFERSON, ON DEMOCRACY 20 (S. Padover ed. 1939). In his influential Letter of January 27, 1788, Luther Martin stated: "By the principles of the American revolution, arbitrary power may, and ought to, be resisted even by arms, if necessary." 1 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 382 (2d ed. Philadelphia, 1836). See also New York Journal, Aug. 14, 1788, at 2, col. 4 (the people will resist arbitrary power). A writer in the Pennsylvania Gazette, Apr. 23, 1788, criticized "the loyalists in the beginning of the late war, who objected to associating, arming and fighting, in defence of our liberties, because these measures were not constitutional. A free people should always be left . . . with every possible power to promote their own happiness." 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Mfm. Supp.) 2483 (M. Jensen ed. 1976).

6. THE FEDERALIST No. 28, at 180 (A. Hamilton) (Arlington House ed. n. d.).

ready to defend their rights and those of their fellow-citizens.⁷

In THE FEDERALIST No. 46, Madison, contending that "the ultimate authority . . . resides in the people alone,"⁸ predicted that encroachments by the federal government would provoke "[p]lans of resistance" and an "appeal to a trial of force."⁹ To a regular army of the United States government "would be opposed a militia amounting to near half a million of citizens with arms in their hands," and referring to "the advantage of being armed, which the Americans possess over the people of almost every other nation," Madison wrote: "Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms."¹⁰ If the people were armed and organized into militia, "the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it."¹¹

The Constitution's proponents agreed that it conferred no federal power to deprive the people of their rights, because there was no explicit grant of such power and because the state declarations of right would prevail.¹² The existence of an armed populace, superior in its forces even to a standing army, and not a paper bill of rights, would check despotism. Noah Webster promised that even without a bill of rights, the American people would remain armed to such an extent as to be superior to any standing army raised by the federal government:

Another source of power in government is a military force. But this, to be efficient, must be superior to any force that exists among the people, or which they can command; for otherwise this force would be annihilated, on the first exercise of acts of oppression. Before a

7. THE FEDERALIST No. 29, at 184-85 (A. Hamilton) (Arlington House ed. n.d.).

8. THE FEDERALIST No. 46, at 294 (J. Madison) (Arlington House ed. n.d.).

9. *Id.* at 298.

10. *Id.* at 299.

11. *Id.* at 300. On arms regulation by the French monarchy to prevent democracy, see L. KENNETT & J. ANDERSON, THE GUN IN AMERICA 5-16 (1975).

12. "The state declarations of rights are not repealed by this Constitution, and, being in force, are sufficient," argued Roger Sherman in the federal convention. 5 J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 538 (Philadelphia, 1845). Hamilton averred in THE FEDERALIST No. 84 that a bill of rights "would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted." THE FEDERALIST No. 84, at 513 (A. Hamilton) (Arlington House ed. n.d.). Hamilton's fear appears vindicated in view of the current restrictive interpretation that the Bill of Rights recognizes no individual right to bear arms. See, e.g., L. TRIBE, AMERICAN CONSTITUTIONAL LAW 226 n. 6 (1978).

standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States. A military force, at the command of Congress, can execute no laws, but such as the people perceive to be just and constitutional; for they will possess the *power*, and jealousy will instantly inspire the *inclination*, to resist the execution of a law which appears to them unjust and oppressive.¹³

Tench Coxe argued in his influential *An American Citizen* that, should tyranny threaten, the "*friends to liberty . . . using those arms which Providence has put into their hands, will make a solemn appeal to 'the power above.'*"¹⁴ Coxe also wrote: "The militia, *who are in fact the effective part of the people at large, will render many troops quite unnecessary. They will form a powerful check upon the regular troops, and will generally be sufficient to overawe them . . .*"¹⁵ Writing as "A Pennsylvanian," Coxe went into even more detail:

The power of the sword, say the minority of Pennsylvania, is in the hands of Congress. My friends and countrymen, it is not so, for THE POWERS OF THE SWORD ARE IN THE HANDS OF THE YEOMANRY OF AMERICA FROM SIXTEEN TO SIXTY. The militia of these free commonwealths, entitled and accustomed to their arms, when compared with any possible army, must be *tremendous and irresistible*. Who are the militia? *Are they not ourselves*. Is it feared, then, that we shall turn our arms *each man against his own bosom*. Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are *the birth-right of an American*. . . . [T]he unlimited power of the sword is not in the hands of either the *federal or state governments*, but, where I trust in God it will ever remain, *in the hands of the people*.¹⁶

13. Webster, *An Examination into the Leading Principles of the Federal Constitution in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES* 56 (P. Ford ed. 1888). See also *id.* at 48, 51-52.

14. Coxe, *An American Citizen IV* in THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra*, note 2, at 433.

15. *Id.* at 435; and in Coxe, *Examination of the Constitution*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 13, at 151.

16. Pennsylvania Gazette, Feb. 20, 1788, THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 5, at 1778-80. See also Foreign Spectator, Independent Gazetteer, Sept. 21, 1787: "[E]ven the power of a veteran army could not subdue a patriotic militia ten times its number" *Id.* at 384. A *Supplement to the Essay on Federal*

In summary, the Constitution's proponents promised that the individual right to keep and bear arms would be not simply a formal right but a fact which would render an armed citizenry more powerful than any standing army, and consequently a bill of rights was unnecessary. It was natural that the virtue of an armed populace or general militia was stressed in terms of its political value for a free society, since the ratification process involved political issues. Nonetheless the right to have weapons for non-political purposes such as self-protection or hunting—but never for aggression—appeared so obviously to be the heritage of free people as never to be questioned. In the words of "Philodemos": "Every free man has a right to the use of the press, so he has to the use of his arms." But if he commits libel, "he abuses his privilege, as unquestionably as if he were to plunge his sword into the bosom of a fellow citizen" Punishment, not "previous restraints," was the remedy for misuse of either right.¹⁷

B. *Anti-Federalist Fears: The People Disarmed, A Select Militia*

Among the anti-federalist spokesmen, the great fear was that without protection by a bill of rights, creation of a select militia or standing army would result in the disarming of the whole people as militia and the consequent oppression of the populace. This fear had been expressed by the prediction of Oliver Ellsworth in the Federal Convention that the creation of "a select militia . . . would be followed by a ruinous declension of the great body of the militia."¹⁸ John DeWitt contended: "It is asserted by the most respectable writers upon government, that a well regulated militia, composed of the yeomanry of the country, have ever been considered as the bulwark of a free people. Tyrants have never placed any confidence on a militia composed of freemen."¹⁹ DeWitt predicted that Congress "at their pleasure may arm or disarm all or any part

Sentiments, Independent Gazetteer, Oct. 23, 1787: "[T]he whole personal influence of the Congress, and their parricide army could never prevail over a hundred thousand men armed and disciplined, owners of the country . . ." *Id.* at 801. Antifederalists agreed with this thesis. Thus, the Freeman's Journal, Feb. 27, 1788, stated that "it would require more troops than even the empress of Russia can command, to chain down the enlightened freemen . . ." *Id.* at 1829. And Detector, Independent Gazetteer, Feb. 11, 1788, gave the reason: "[T]he sons of freedom . . . may know the despots have not altogether monopolized these necessary articles [powder and lead]." *Id.* at 1695.

17. Pennsylvania Gazette, May 7, 1788, THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 5, at 2579.

18. 5 J. ELLIOT, *supra* note 12, at 444.

19. THE ANTIFEDERALIST PAPERS 75 (M. Borden ed. 1965).

of the freemen of the United States, so that when their army is sufficiently numerous, they may put it out of the power of the freemen militia of America to assert and defend their liberties

George Clinton, writing as "Cato," predicted a permanent force because of "the fear of a dismemberment of some of its parts, and the necessity to enforce the execution of revenue laws (a fruitful source of oppression)" ²⁰ "A Federal Republican" foresaw an army used "to suppress those struggles which may sometimes happen among a free people, and which tyranny will impiously brand with the name of sedition."²¹ The admission by some federalists, particularly James Wilson, that a small standing army was anticipated led to a particularly fearful reaction by anti-federalists. "[F]reedom revolts at the idea,"²² according to Elbridge Gerry, for the militia would become a federal force which "may either be employed to extort the enormous sums that will be necessary to support the civil list—to maintain the regalia of power—and the splendour of the most useless part of the community, or they may be sent into foreign countries for the fulfilment of treaties" ²³ Praising the Swiss militia model, "A Democratic Federalist" rejected Wilson's argument for a standing army, "that great support of tyrants," with the following reasoning:

Had we a standing army when the British invaded our peaceful shores? Was it a standing army that gained the battles of Lexington and Bunker's Hill, and took the ill-fated [John] Burgoyne? Is not a well-regulated militia sufficient for every purpose of internal defense? And which of you, my fellow citizens, is afraid of any invasion from foreign powers, that our brave militia would not be able immediately to repel?²⁴

The most influential writings stating the case against ratification of the Constitution without a bill of rights consisted of Richard Henry Lee's *LETTERS FROM THE FEDERAL FARMER* (1787-1788) (hereinafter *LETTERS*). Since most of Lee's proposals for specific

20. *Id.*

21. *Id.* at 38.

22. *Id.* at 19.

23. Gerry, *Observations on the New Constitution in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES*, *supra* note 13, at 10.

24. *Id.* at 11.

25. Pennsylvania Herald, Oct. 17, 1787, *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION supra* note 5, at 196-97. See also Z, Freeman's Journal, Mar. 5, 1788: "[T]he people themselves freed America from foreign tyranny." *Id.* at 1925.

provisions of a bill of rights were subsequently adopted in the Bill of Rights, some with almost identical wording, the LETTERS provide an excellent commentary on the meaning of the provisions of the Bill of Rights in general and the second amendment in particular. Predicting the early employment of a standing army through taxation, Lee contended:

It is true, the yeomanry of the country possess the lands, the weight of property, possess arms, and are too strong a body of men to be openly offended—and, therefore, it is urged, they will take care of themselves, that men who shall govern will not dare pay any disrespect to their opinions. It is easily perceived, that if they have not their proper negative upon passing laws in congress, or on the passage of laws relative to taxes and armies, they may in twenty or thirty years be by means imperceptible to them, totally deprived of that boasted weight and strength: This may be done in a great measure by congress, if disposed to do it, by modelling the militia. Should one fifth or one eighth part of the men capable of bearing arms, be made a select militia, as has been proposed, and those the young and ardent part of the community, possessed of but little or no property, and all the others put upon a plan that will render them of no importance, the former will answer all the purposes of an army, while the latter will be defenseless . . . I see no provision made for calling out the *posse comitatus* for executing the laws of the union, but provision made for congress to call forth the militia for the execution of them—and the militia in general, or any select part of it, may be called out under military officers, instead of the sheriff to enforce an execution of federal laws, in the first instance, and thereby introduce an entire military execution of the laws.²⁶

In his second series of LETTERS, Lee classified as “fundamental rights” the rights of free press, petition, and religion; the rights to speedy trial, trial by jury, confrontation of accusers and against self-incrimination; the right not to be subject to “unreasonable searches or seizures of his person, papers or effects”; and, in addition to the right to refuse quartering of soldiers, “the militia ought always to be armed and disciplined, and the usual defense of the country”²⁷ Since these rights were all to be recognized in the Bill of Rights, it is appropriate to examine in detail the substance of Lee’s concept of the militia:

A militia, when properly formed, are in fact the people themselves,

26. R. Lee, *Letters of a Federal Farmer* (1787-88), in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 13, at 305-06.

27. R. LEE, ADDITIONAL LETTERS FROM THE FEDERAL FARMER 53 (Philadelphia, 1788).

and render regular troops in a great measure unnecessary [T]he constitution ought to secure a genuine and guard against a select militia, by providing that the militia shall always be kept well organized, armed, and disciplined, and include . . . all men capable of bearing arms; and that all regulations tending to render this general militia useless and defenceless, by establishing select corps of militia, or distinct bodies of military men, not having permanent interests and attachments in the community to be avoided.²⁸

Thus, Lee feared that Congress, through its “power to provide for organizing, arming, and disciplining the militia” under article I § 8 of the proposed Constitution, would establish a “select militia” apart from the people which would be used as an instrument of domination by the federal government. The contemporary argument, that it is impractical to view the militia as the whole body of the people, and that the militia consists of the select corps known as the National Guard, also existed during the time of Lee, who refuted it in these terms:

But, say gentlemen, the general militia are for the most part employed at home in their private concerns, cannot well be called out, or be depended upon; that we must have a select militia; that is, as I understand it, particular corps or bodies of young men, and of men who have but little to do at home, particularly armed and disciplined in some measure, at the public expense, and always ready to take the field. These corps, not much unlike regular troops, will ever produce an inattention to the general militia; and the consequence has ever been, and always must be, that the substantial men, having families and property, will generally be without arms, without knowing the use of them, and defenseless; whereas, *to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them*; nor does it follow from this, that all promiscuously must go into actual service on every occasion. The mind that aims at a select militia, must be influenced by a truly anti-republican principle; and when we see many men disposed to practice upon it, whenever they can prevail, no wonder true republicans are for carefully guarding against it.²⁹

Richard Henry Lee’s view that a well regulated militia was the armed populace rather than a select group, or “Prussian militia,”³⁰

28. *Id.* at 169.

29. *Id.* at 170 (emphasis added).

30. *A Slave*, Philadelphia Independent Gazetteer, Oct. 6, 1787, THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 2, at 345. Aristocratis, in THE

was reiterated by proponents and opponents of a bill of rights. As "M. T. Cicero" wrote to "The Citizens of America":

Whenever, therefore, the profession of arms becomes a distinct order in the state . . . the end of the social compact is defeated No free government was ever founded, or ever preserved its liberty, without uniting the characters of the citizen and soldier in those destined for the defence of the state Such are a well regulated militia, composed of the freeholders, citizen and husbandman, who take up arms to preserve their property, as individuals, and their rights as freemen.³¹

The armed citizens would defend not only against foreign aggression, but also domestic tyranny. As expressed by another commentator: "The government is only just and perfectly free . . . where there is also a *dernier* resort, or real power left in the community to defend themselves against any attack on their liberties."³²

While the view continued to be expressed that "a bill of rights as long as my arm" had no place in the Constitution,³³ a correspondent of the opposite persuasion noted that throughout his state people were "repairing and cleaning their arms, and every young fellow who is able to do it, is providing himself with a rifle or musket, and ammunition," but that civil war would be averted by adoption of a bill of rights.³⁴ If these views reflect the resultant

GOVERNMENT OF NATURE DELINEATED 15-17 (1788) (hereinafter ARISTOCRATIS), feared that the active militia would "quell insurrections that may arise in any part of the empire on account of pretensions to support liberty, redress grievances, and the like." THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 5, at 2524. "The second class or inactive militia, comprehends all the rest of the peasants; viz., the farmers, mechanics, labourers, & c. which good policy will prompt government to disarm. It would be dangerous to trust such a rabble as this with arms in their hands." *Id.* at 2526.

31. Charleston State Gazette, Sept. 8, 1788, at ____, col. _____. See also *id.*, Aug. 7, 1788, at 3, col. 1-2 (militia as citizenry); Letter from New York, Oct. 31, 1787, 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 390 (M. Jensen ed. 1978): "The militia [Art. I, § 8, cl. 15] comprehends all the male inhabitants from sixteen to sixty years of age The Constitution . . . puts the utmost degree of confidence in the people"

32. *On Tyranny, Anarchy, and Free Governments*, New York Morning Post, Aug. 21, 1788, at 2, col. 2.

33. *A Friend to Equal Liberty*, Philadelphia Independent Gazetteer, Mar. 28, 1788, at ____, col. _____. The Federal Gazette, Mar. 12, 1789, at 2, col. 3 opined: "[I]f it is done, it is to be hoped the friends of *turtle* and *roast beef* will stand upon a clause in the bill of rights, to secure the perpetual enjoyment of those two excellent dishes."

34. Independent Gazetteer, Apr. 30, 1788, at ____, col. _____. See also Letter from Thomas B. Wait to George Thatcher (Aug. 15, 1788), in Thatcher Papers, Vol. II (available in Boston Public Library): "The same instrument that conveys the weapon, should refine the shield—should contain not only the powers of the rulers, but also the defence of the people." "Brutus" wrote in the New York Journal, Nov. 1, 1787: "Some [natural rights] are of such a nature that they cannot be surrendered. Of this kind are the rights of . . . defending

compromise that a bill of rights would guarantee broad rights without being overly detailed, they also indicate that the demand for a bill of rights was as strong as the demand for independence a decade before. And consistent throughout the debate thereon was the general understanding that the right to keep and bear arms was an individual right.³⁵

C. Demands in The State Conventions for a Written Guarantee that Every Man be Armed

In the debates in the state conventions over the ratification of the Constitution, the existence of an armed citizenry was presumed by federalists and anti-federalists alike as requisite to prevent despotism. Issues which divided the delegates included whether a written bill of rights guaranteeing the right to keep and bear arms and other individual rights should be added to the Constitution, and whether a provision guarding against standing armies or select militias was necessary. In the Pennsylvania convention, John Smilie warned: "Congress may give us a select militia which will, in fact, be a standing army—or Congress, afraid of a general militia, may say there shall be no militia at all. When a select militia is formed; the people in general may be disarmed."³⁶ This argument assumed that the right to keep and bear arms³⁷ would be protected

life" THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 31, at 525.

35. As expressed in the Boston Independent Chronicle, Oct. 25, 1787, in a "ship's news" satire on demands for a bill of rights:

[I]t was absolutely necessary to carry arms for fear of pirates, & c. and . . . their arms were all stamped with peace, that they were never to be used but in case of an hostile attack, that it was in the law of nature for every man to defend himself, and unlawful for any man to deprive him of those weapons of self-defence.

THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 31, at 523.

36. THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 5, at 509.

37. Not only was the right to keep and bear private arms universally acknowledged, but in Pennsylvania the right of individuals to keep *public* arms was asserted. "Jacob Trusty" queried the editor of the *Freeman's Journal*, Dec. 19, 1787, as follows:

I wish you would inform me, through the channel of your paper, of the true meaning of disarming the Militia in this State at this solemn period: The county officer shows us an order of Council for to deliver them for cleaning; but we in our county have, upon second thought, resolved to clean them ourselves. Is this a trick for to push upon us the new plan of government whether we will or will not have it; no, Mr. Bailey, those gentlemen in your city who have planned it, are poor politicians, if they depend on our agreeing to give up our mush sticks.

THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 5, at 1361.

by the people combining into general militias to prevent being disarmed by select forces. In response, James Wilson contended that the Constitution already allowed for the ultimate force in the people: "In its principles, it is surely democratical; for, however wide and various the firearms of power may appear, they may all be traced to one source, the people."³⁸

In the Massachusetts convention, William Symmes warned that the new government at some point "shall be too firmly fixed in the saddle to be overthrown by any thing but a general insurrection."³⁹ Yet fears of standing armies were groundless, affirmed Theodore Sedgwick, who queried, "[I]f raised, whether they could subdue a nation of freemen, who know how to prize liberty, and who have arms in their hands?"⁴⁰ In New York, Tredwell feared that "we may now surrender, with a little ink, what it may cost seas of blood to regain."⁴¹ And in the North Carolina convention, William Lenoir worried that Congress can "disarm the militia. If they were armed, they would be a resource against great oppressions If the laws of the Union were oppressive, they could not carry them into effect, if the people were possessed of proper means of

"A Militia Man" responded in the *Pennsylvania Gazette*, Dec. 26, 1787, that the Supreme Executive Council had merely directed the lieutenants "to collect all the public arms within their respective counties, have them repaired, and make return to Council . . . for payment." *Id.* at 1362. Jacob Trusty was then asserted to be mistaken "if he thinks the militia will be duped into a broil by any antifederalist" *Id.* To this, "Trusty" responded in the *Independent Gazetteer*, Jan. 10, 1788, "that the militia of the country rather choose to repair and clean their own arms at this critical juncture, than to deliver them up to any one whatever." *Id.* at 1365. And "An Old Militia Officer of 1776" declared in the same paper on Jan. 18, 1788:

The orders, issued by Council, enjoining the delivery of the public arms at this juncture, when a standing army is openly avowed to be necessary, has occasioned no small degree of apprehension. . . . These orders . . . amount . . . to a temporary disarming of the people. When the arms will be re-delivered, must depend upon the *discretion* of our rulers But if . . . these orders originate in that spirit of domination . . . , will it not be their indispensable duty, as men, as citizens, and as guardians of their own rights, immediately to arm themselves at their own expence? This expedient will convince the enemies of liberty, that the people (their own defenders in the last resort) are prepared for the worst

Id. at 1369-70. See also *ARISTOCRATIS*, *supra* note 30, at 29-30, *id.* at 2538-39; *Independent Gazetteer*, Feb. 27, 1788, *id.* at 1833; *Pennsylvania Herald*, Feb. 5, 1788, *id.* at 1373; *Free-man's Journal*, Jan. 23, 1788, *id.* at 1371.

38. THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 5, at 336.

39. J. ELLIOT, *supra* note 5, at 74.

40. *Id.* at 97.

41. *Id.* at 404.

defense.”⁴²

But it was Patrick Henry in the Virginia convention who expounded most thoroughly the dual rights to arms and resistance to oppression: “Guard with jealous attention the public liberty. Suspect every one who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are inevitably ruined.”⁴³ Fearful of the power of Congress over both a standing army and the militia, Henry asked, “Have we the means of resisting disciplined armies, when our only defence, the militia, is put into the hands of Congress?”⁴⁴ Furthermore, “of what service would militia be to you, when, most probably, you will not have a single musket in the state? For, as arms are to be provided by Congress, they may or may not furnish them.”⁴⁵ It was to meet such objections that prompted the adoption later of the second amendment, which sought to guarantee the revolutionary ideal expressed by Henry in these words: “The great object is, that every man be armed . . . Every one who is able may have a gun.”⁴⁶ Henry’s objection to federal control over arsenals within the states would apply equally to control over private arms:

Are we at last brought to such a humiliating and debasing degradation, that we cannot be trusted with arms for our own defence? Where is the difference between having our arms in our own possession and under our own direction, and having them under the management of Congress? If our defence be the *real* object of having those arms, in whose hands can they be trusted with more propriety, or equal safety to us, as in our own hands?⁴⁷

George Mason buttressed Henry’s arguments by pointing out that pro-British strategists resolved “to disarm the people; that it was the best and most effectual way to enslave them . . . by totally disusing and neglecting the militia.”⁴⁸ Mason also clarified that under prevailing practice the militia included all people, rich and poor. “Who are the militia? They consist now of the whole people,

42. 4 J. ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS* 203 (2d ed. Philadelphia, 1836).

43. 3 J. ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS* 45 (2d ed. Philadelphia, 1836).

44. *Id.* at 48.

45. *Id.* at 51-52.

46. *Id.* at 386.

47. *Id.* at 168-69.

48. *Id.* at 380.

except a few public officers."⁴⁹ Throughout the debates Madison sought to picture the observations of Henry and Mason as exaggerations and to emphasize that a standing army would be unnecessarily consequent on the existence of militias⁵⁰—in short, that the people would remain armed. And Zachariah Johnson argued that the new Constitution could never result in religious or other oppression: "The people are not to be disarmed of their weapons. They are left in full possession of them."⁵¹

The objections of the anti-federalist pamphleteers and orators, particularly George Mason and Richard Henry Lee, prompted the state ratifying conventions to recommend certain declarations of rights which became the immediate source of the Bill of Rights. Each and every recommendation which mentioned the right to keep and bear arms clearly intended an individual right. The individual character of the right is evident additionally in those proposals made in the conventions wherein a majority of delegates voted against a comprehensive bill of rights. The latter was the case in regard to the proposals of Samuel Adams in the Massachusetts convention "that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms"⁵² Similarly, the proposals adopted by the Pennsylvania minority included the following:

That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals⁵³

49. *Id.* at 425.

50. *See, e.g., id.* at 413.

51. *Id.* at 646.

52. 2 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 681 (1971).

53. Dissent of Minority, *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 5, at 597-598, 623-24; E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 12 (1957). *See also id.* at viii-ix, 51-52. "The amendments proposed by the Pennsylvania minority bear a direct relation to those ultimately adopted as the federal Bill of Rights." B. SCHWARTZ, *supra* note 52, at 628. *See also id.* at 665. While the cited provision explicitly supports an individual right to have arms for more than militia purposes, the minority was very concerned about the specter of a select militia. "The militia of Pennsylvania may be marched to New England or Virginia to quell an insurrection occasioned by the most galling oppression, and aided by the standing army, they will no doubt be successful in subduing their liberty and independency." *THE DOCUMENTARY HISTORY OF THE RATIFICATION*

New Hampshire was the first state to ratify the Constitution and recommended that it include a bill of rights, including a provision that "Congress shall never disarm any Citizen, unless such as are or have been in Actual Rebellion."⁵⁴ Not only are these words in no way dependent upon militia uses, but the provision is separated from another article against standing armies by a provision concerning freedom of religion.⁵⁵ The New Hampshire convention was the first wherein a majority proposed explicit recognition of the individual right later expressed in the second amendment.⁵⁶ The New Hampshire and Pennsylvania proposals for the right to keep and bear arms were viewed as among "those amendments which particularly concern several personal rights and liberties."⁵⁷

George Mason's pen was at work in Virginia, which suggested the following provision:

That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided⁵⁸

Since these three propositions are stated independently of one another, it is obvious that the first is a general protection of the individual right to have arms for any and all lawful purposes, and is in no way dependent on the militia clause that follows. Madison's draft of the second amendment as later proposed with the Bill of Rights in Congress relied specifically on the recommendation by the Virginia convention.⁵⁹

The New York convention predicated its ratification of the Constitution on the following interconnected propositions:

That the powers of government may be reassumed by the people whensoever it shall become necessary to their happiness That the people have a right to keep and bear arms; that a well regulated

OF THE CONSTITUTION, *supra* note 5, at 638.

54. B. SCHWARTZ, *supra* note 52, at 761.

55. *Id.*

56. *Id.* at 758. "The right to bear arms, going back to the English Bill of Rights, received recognition in the Second Amendment to the Constitution Counting this article, seven out of twelve of New Hampshire's proposals were ultimately accepted." E. DUMBAULD, *supra* note 53, at 21 n.37.

57. A Foreign Spectator, *Remarks on the Amendments*, No. XI, Federal Gazette, Nov. 28, 1788, at —, col. —.

58. 3 J. ELLIOT, *supra* note 43, at 659. See also 3 G. MASON, PAPERS 1068-71 (1970).

59. E. DUMBAULD, *supra* note 53, at 21 and 51-52; 2 B. SCHWARTZ, *supra* note 52, at 765.

militia, including the body of the people *capable of bearing arms*, is the proper, natural, and safe defence of a free state.⁶⁰

Explicit in this language are the two independent declarations that individuals have a right to be armed and that the militia is the armed people. Similar language was adopted by the conventions of Rhode Island⁶¹ and North Carolina.⁶²

II. THE RATIFICATION OF THE BILL OF RIGHTS

A. Madison's Proposed Amendments: Guarantees of Personal Liberty

In acknowledgement of the conditions under which the state conventions ratified the Constitution, and in response to popular demand for a written declaration of individual freedoms, in 1789 the first U.S. Congress, primarily through the pen of James Madison, submitted for ratification by the states the Amendments to the Constitution which became the Bill of Rights. Relying upon the Virginia Declaration of Rights and the amendments proposed by the state conventions,⁶³ on June 8, 1789, Madison proposed in the House of Representatives a bill of rights which included the following: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."⁶⁴ That Madison intended an individual right is clear not only from this wording, but also from his notes for his speech proposing the amendment: "They [proposed amendments] relate 1st. to private rights—fallacy on both sides—especy as to English Decln. of Rts.—1. mere act of parlt. 2. no freedom of press—Conscience . . . attainders—arms to protestts."⁶⁵

60. 1 J. ELLIOT, *supra* note 5, at 327-8.

61. *Id.* at 335.

62. 4 J. ELLIOT, *supra* note 42, at 244.

63. R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS* 206 (1955); E. DUMBAULD, *supra* note 53, at viii-ix, 21, 51-52.

64. 1 ANNALS OF CONG. 434 (June 8, 1789).

65. Madison, Notes for Speech in Congress, June 8, 1789, 12 MADISON PAPERS 193-94 (C. Hobson & R. Rutland eds. 1979). In a letter to Edmund Pendleton, Oct. 20, 1788, Madison referred to proposed amendments as "those further guards for private rights . . ." 4 MADISON PAPERS 60 (C. Hobson & R. Rutland eds. 1979). In a Rough Draft of Proposed Bill of Rights that he would have presented had he not been defeated for election by Madison, James Monroe proposed "a declaration in favor of the equality of human rights; . . . of the right to keep and bear arms . . ." James Monroe Papers, N.Y. Public Library, Miscellaneous Papers.

Madison's colleagues clearly understood the proposal to be protective of individual rights. Fisher Ames wrote: "Mr. Madison has introduced his long expected amendments It contains a bill of rights . . . the right of the people to bear arms."⁶⁶ Ames wrote another correspondent as follows: "The rights of conscience, of bearing arms, of changing the government, are declared to be inherent in the people."⁶⁷ And William Grayson informed Patrick Henry: "Last Monday a string of amendments were presented to the lower House; these altogether respected *personal liberty*"⁶⁸

Ten days after the Bill of Rights was proposed in the House, Tench Coxe published this *Remarks on the First Part of the Amendments to the Federal Constitution* under the pen name "A Pennsylvanian" in the Philadelphia Federal Gazette, June 18, 1789, at 2, col. 1. Probably the most complete exposition of the Bill of Rights to be published during its ratification period, the *Remarks* included the following:

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms.⁶⁹

In short, what is now the second amendment guaranteed the right of the people to have "their private arms" to prevent tyranny and to overpower an abusive standing army or select militia.

Coxe sent a copy of his article to Madison along with a letter of the same date. "It has appeared to me that a few well tempered observations on these propositions might have a good effect It may perhaps be of use in the present turn of the public opinions in New York state that they should be republished there."⁷⁰ Madison wrote back acknowledging "[Y]our favor of the 18th in-

66. Letter from Fisher Ames to Thomas Dwight (June 11, 1789), in 1 WORKS OF FISHER AMES 52-53 (Philadelphia, 1854).

67. Letter from Fisher Ames to F. R. Minot (June 12, 1789), in *id.* at 53-54.

68. June 12, 1789, 3 PATRICK HENRY 391 (1951) (emphasis added). See also Letter from Joseph Jones to James Madison (June 24, 1789), in 12 MADISON PAPERS, *supra* note 65, at 258 (the Amendments are "calculated to secure the personal rights of the people"); Letter from William L. Smith to Edward Rutledge (Aug. 9, 1789), in 79 S. C. HIST. MAG. 14 (1968) (the amendments "will effectually secure private rights").

69. Madison's proposals had been published two days before in the same paper. Federal Gazette, June 16, 1789, at 2, col. 2.

70. Letter from Tench Coxe to James Madison (June 18, 1789), in 12 MADISON PAPERS, *supra* note 65, at 239-40.

stant. The printed remarks inclosed in it are already I find in the Gazettes here [New York]." Far from disagreeing that the amendment protected the keeping and bearing of "private arms," Madison explained that ratification of the amendments "will however be greatly favored by explanatory strictures of a healing tendency, and is therefore already indebted to the co-operation of your pen."⁷¹

Coxe's defense of the amendments was widely reprinted.⁷² A search of the literature of the time reveals that no writer disputed or contradicted Coxe's analysis that what became the second amendment protected the right of the people to keep and bear "their private arms." The only dispute was over whether a bill of rights was even necessary to protect such fundamental rights. Thus, in response to Coxe's article, *One of the People* replied with *On a Bill of Rights*, which held "the very idea of a bill of rights" to be "a dishonorable one to freemen." "What should we think of a gentlemen, who, upon hiring a waiting-man, should say to him 'my friend, please take notice, before we come together, that I shall always claim the liberty of eating when and what I please, of fishing and hunting upon my own ground, of keeping as many horses and hounds as I can maintain, and of speaking and writing any sentiments upon all subjects.'" In short, as a mere servant, the government had no power to interfere with individual liberties in any manner absent a specific delegation. "[A] master reserves to himself . . . every thing else which he has not committed to the care of those servants."⁷³

The House Committee on Amendments subsequently reported the guarantee in this form: "A well regulated militia, composed of the body of the people, being the best security of free state, the right of the people to keep and bear arms shall not be infringed;

71. Letter from James Madison to Tench Coxe (June 24, 1789), *in id.* at 257.

72. *See, e.g.*, New York Packet, June 23, 1789, at 2, col. 1-2; Boston Massachusetts Centinel, July 4, 1789, at 1, col. 2.

Coxe's *Remarks on the Second Part of the Amendments*, which appeared in the Federal Gazette, June 30, 1789, explicated what is now the ninth amendment as follows:

It has been argued by many against a bill of rights, that the omission of some in making the detail would one day draw into question those that should not be particularized. It is therefore provided, that no inference of that kind shall be made, so as to diminish, much less to alienate an ancient tho' unnoticed right, nor shall either of the branches of the Federal Government argue from such omission any increase or extension of their powers.

Id. at 2, col. 1-2.

73. Federal Gazette, July 2, 1789, at 2, col. 1.

but no person religiously scrupulous shall be compelled to bear arms.”⁷⁴ The House debated this proposal on August 17 and 20, 1789. Elbridge Gerry clarified that the purpose of the amendment was protection from oppressive government, and thus the government should not be in a position to exclude the people from bearing arms:

This declaration of rights, I take it, is intended to secure the people against the maladministration of the Government; if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed. Now, I am apprehensive, sir, that this clause would give an opportunity to the people in power to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms.

What, sir, is the use of militia? It is to prevent the establishment of a standing army, the bane of liberty. Now, it must be evident, that, under this provision, together with their other powers, Congress could take such measures with respect to a militia, as to make a standing army necessary. Whenever Government mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins. This was actually done by Great Britain at the commencement of the late revolution. They used every means in their power to prevent the establishment of an effective militia to the Eastward. The Assembly of Massachusetts, seeing the rapid progress that administration were making to divest them of their inherent privileges, endeavored to counteract them by the organization of the militia; but they were always defeated by the influence of the Crown.⁷⁵

Representative Gerry's argument was that the federal government should have no authority to categorize any individual as unqualified under the amendment to bear arms. "Now, if we give a discretionary power to exclude those from militia duty who have religious scruples, we may as well make no provisions on this head."⁷⁶ The point was that keeping and bearing arms was a right of "the people," none of whom should thereby be disarmed under any pretense, such as the government determining that they are religiously scrupulous or perhaps that they are not active members of a select militia (e.g., the National Guard).

74. 1 ANNALS OF CONG. 750 (1789). The committee on amendments made its report on July 28. *Id.* at 672.

75. *Id.* at 750.

76. *Id.*

In reply, Representative Jackson “did not expect that all the people of the United States would turn Quakers or Moravians; consequently, one part would have to defend the other in case of invasion.”⁷⁷ The reference to “all the people” indicated again the centrality of the armed populace for defense against foreign attack. After further discussion, Gerry objected to the wording of the first part of the proposed amendment:

A well regulated militia being the best security of a free State, admitted an idea that a standing army was a secondary one. It ought to read, “a well regulated militia, trained to arms;” in which case it would become the duty of the Government to provide this security, and furnish a greater certainty of its being done.⁷⁸

Gerry’s words exhibit again the general sentiment that security rested on a generally—rather than a selectly—armed populace. The lack of a second to his proposal suggests that the congressmen were satisfied that the simple keeping and bearing of arms by the citizens would constitute a sufficiently well regulated militia to secure a free state, and thus there was no need to make it, in Gerry’s words, “the duty of the Government to provide this security”

Further debate on the exemption of religiously scrupulous persons from being compelled to bear arms highlights the sentiment that not only bearing, but also the mere keeping, of arms by all people was considered both a right and a duty to prevent standing armies. The exemption would mean, objected Representative Scott, that “a militia can never be depended upon. This would lead to the violation of another article in the Constitution, which secures to the people the right of keeping arms, and in this case recourse must be had to a standing army.”⁷⁹ “What justice can there be in compelling them to bear arms?” queried Representative Boudinot. “Now, by striking out the clause, people may be led to believe that there is an intention in the General Government to compel all its citizens to bear arms.”⁸⁰ The proposed amendment was finally agreed to after insertion of the words “in person” at the

77. *Id.*

78. *Id.* at 751.

79. *Id.* at 766.

80. *Id.* at 767. Actually, the opposite may be inferred by the eventual deletion of this part of the amendment, the purpose of which was to guarantee the individual “right” to keep and bear arms rather than to create a “duty” to do so. Arguably, this deletion was meant to preclude any constitutional power of government to compel any person to bear arms rather than to exempt only the religiously scrupulous.

end of the clause.⁸¹

In the meantime, debate over the proposed amendments raged in the newspapers. The underlying fear against a government monopoly of arms was expressed thusly: "Power should be widely diffused The monopoly of power, is the most dangerous of all monopolies."⁸² The understanding that the keeping and bearing of private arms contributed to a well regulated militia was represented in the following editorial:

A late writer . . . on the necessity and importance of maintaining a well regulated militia, makes the following remarks:—A citizen, as a militia man, is to perform duties which are different from the usual transactions of civil society [W]e consider the extreme importance of every military duty in time of war, and the necessity of acquiring an habitual exercise of them in time of peace⁸³

At the same time, what was to become the second amendment was not considered to condition having arms on the needs of the citizens in their militia capacity, but was seen as having originated in part from Samuel Adams' proposal (which contained no militia clause) that Congress could not disarm any peaceable citizens:

It may well be remembered, that the following "amendments" to the new constitution of these United States, were introduced to the convention of this commonwealth by . . . SAMUEL ADAMS [E]very one of the intended alterations but one [i.e., proscription of standing armies] have been already reported by the committee of the House of Representatives, and most probably will be adopted by the federal legislature. In justice therefore for that long tried Republican, and his numerous friends, you gentlemen, are requested to republish his intended alterations, in the same paper, that exhibits to the public, the amendments which the committee have adopted, in order that they may be compared together. . .

And that the said constitution be never construed to authorize congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms⁸⁴

Although many of the proposed amendments were subjected to criticism, what became the second amendment was apparently

81. *Id.* at 767.

82. *Political Maxims*, New York Daily Advertiser, Aug. 15, 1789, at 2, col. 1. See also Letter from Patrick Henry to Richard Lee (Aug. 28, 1789): "For Rights, without having power and might is but a shadow." PATRICK HENRY, *supra* note 68, at 398.

83. Philadelphia Independent Gazetteer, Aug. 18, 1789, at 3, col. 1.

84. *From the Boston Independent Chronicle*, Philadelphia Independent Gazetteer, Aug. 20, 1789, at 2, col. 2.

never attacked, aside from one editorial which argued that the militia clause was insufficient, but never questioned the right to bear arms clause. After quoting the language of the proposal as it was approved by the House, the well known anti-federalist Centinel opined:

It is remarkable that this article only makes the observation, 'that a well regulated militia, composed of the body of the people, is the best security of a free state;' it does not ordain, or constitutionally provide for, the establishment of such a one. The absolute command vested by other sections in Congress over the militia, are not in the least abridged by this amendment. The militia may still be subjected to martial law . . . , may still be marched from state to state and made the unwilling instruments of crushing the last efforts of expiring liberty.⁸⁵

This indicates the understanding that the militia clause was merely declaratory and did not protect state rights to maintain militias to any appreciable degree. That anti-federalists of the ink of Centinel never attacked the right to bear arms clause demonstrates that it was considered to recognize a full and complete guarantee of individual rights to have and use private arms. Surely a storm of protest would have ensued had anyone hinted that the right applied only to the much objected-to select militia.

B. From the Senate to the States: The Adoption of the Second Amendment

When the Senate came to consider the proposed amendments in early September, 1789, it became evident that while the right of individuals to keep and bear arms would not be questioned, attempts to strengthen recognition of state rights over militias and to proscribe standing armies would fail. Amendments mandating avoidance of standing armies were rejected,⁸⁶ as was a proposal "that each state respectively, shall have the power to provide for organizing, arming and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same."⁸⁷

The form of the amendment adopted by the Senate, and approved by both houses on September 25, 1789, was the same as subsequently became the second article of the Bill of Rights: "A

85. Centinel, Revived, No. xxix, Philadelphia Independent Gazetteer, Sept. 9, 1789, at 2, col. 2.

86. Senate Journal, Ms. by Sam A. Otis, Virginia State Library, Executive Communications, Box 13 (Sept. 4, 1789) at 1; (Sept. 8, 1789) at 7.

87. *Id.* (Sept. 8, 1789) at 7.

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." Comparing the House resolve with that of the Senate, the former redundantly mentions "the people" twice—once as militia, again as the entity with the right to keep and bear arms—while the latter more succinctly avoided repetition by deleting the well recognized definition of militia as "the body of the people." The Senate also deleted the phrase that "no person religiously scrupulous shall be compelled to bear arms," perhaps because the amendment depicts the keeping and bearing of arms as an individual "right" for both public and private purposes, and perhaps to preclude any constitutional authority of the government to "compel" individuals without religious scruples to bear arms for any purpose. Finally, the Senate specifically rejected a proposal to add "for the common defense" after "to keep and bear arms,"⁸⁸ thereby precluding any construction that the right was restricted to militia purposes and to common defense against foreign aggression or domestic tyranny.

That the Senate's deletion of the well recognized definition of militia as "the body of the people" implied nothing other than its wish to be concise, but that its rejection of the proposal to limit the amendment's recognition of the right to bear arms "for the common defence" meant to preclude any limitation on the individual right to have arms, e.g., for self-defense or hunting, is evident in the joint recommendation by the Senate and House of the Amendment to the states. "The conventions of a number of the states having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added,"⁸⁹ was the language of Congress which prefaced the proposed amendments when submitted to the states. In short, Congress modelled the Bill of Rights, including the second amendment's implicit definition of militia as the whole people and explicit guarantee of the right to have arms to "the people," on the

88. *Id.* (Sept. 9, 1789) at 1. Another alteration by the Senate may have also been significant. In changing the House's version that a militia was "the best security" to the version that a militia was "necessary to the security" of a free state, the Senate may have sought to answer the objections like that made by Representative Gerry in the House: "A well regulated militia being the best security of a free State, admitted an idea that a standing army was a secondary one." 1 ANNALS OF CONG. 751 (1789). It is noteworthy that Richard Henry Lee was a member of the Senate at that time.

89. 2 B. SCHWARTZ, *supra* note 52, at 1164.

proposals submitted by the states, which in turn through their adoption thereof made the articles of amendment a part of the Constitution.

The adoption of the amendments by the states was by no means a foregone conclusion, and the ratification struggle ensued through 1791. Three positions emerged in the controversy: (1) the proposed amendments were adequate, (2) further guarantees were needed, and (3) freemen had no need of a bill of rights. None of the proponents of these respective positions ever called into question that keeping and bearing arms was a basic individual right. The common understanding was that the proposed bill of rights sought to guarantee personal, unalienable rights, but that unenumerated rights were also retained by the people.⁹⁰ Patrick Henry, Richard Henry Lee, and others were pleased with the bill of rights as far as it went, but wanted guarantees against standing armies and direct taxes.⁹¹ Since these same prominent anti-federalists were among

90. "The lower house sent up amendments which held out a safeguard to personal liberty in great many instances" Letter from William Grayson to Patrick Henry (Sept. 29, 1789), PATRICK HENRY, *supra* note 68, at 406. "The whole of that Bill [of Rights] is a declaration of the right of the people at large or considered as individuals [I]t establishes some rights of the individual as unalienable and which consequently, no majority has a right to deprive them of." (emphasis added). Letter from Albert Gallatin to Alexander Addison (Oct. 7, 1789), A.G. Papers, at 2, Ms. in N.Y. Hist. Soc. "But there are some rights too essential to be delegated — too sacred to be infringed. These each individual reserves to himself; in the free enjoyment of these the whole society engages to protect him All these essential and sacred rights, it would be difficult, if not impossible, to recount, but some, in every social compact, it is proper to enumerate, as specimens of many others" *An Idea of a Constitution*, *Independent Gazetteer*, Dec. 28, 1789, at 3, col. 3. See also *The Scheme of Amendments*, *Independent Gazetteer*, March 23, 1789, at 2, col. 1: "The project of muffling the press, which was publicly vindicated in this town [Boston], so far as to compel the writers against the government, to leave their names for publication, cannot be too warmly condemned." Registration of persons for exercise of basic freedoms was considered to be infringement.

91. Patrick Henry "is pleased with some of the proposed amendments; but still asks for the great disideratum, the destruction of direct taxation." Letter from Edmund Randolph to James Madison (Aug. 18, 1789), in 12 MADISON PAPERS, *supra* note 65, at 345. Jefferson was dissatisfied with the bill of rights but did not object to the arms bearing provision. Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), in 12 MADISON PAPERS, *supra* note 65, at 363-64. The bill of rights was "short of some essentials, as Election interference & Standing Army & c" Letter from Richard Henry Lee to Charles Lee (Aug. 28, 1789), in 2 LETTERS OF RICHARD HENRY LEE 499 (Ballagh ed. 1914). Most of those in the Virginia House who opposed the adoption of the amendments "are not dissatisfied with the amendments so far as they have gone" but wanted delay to prompt an amendment on direct taxes. Letter from Hardin Burnley to James Madison (Nov. 5, 1789), in 12 MADISON PAPERS, *supra* note 65, at 460. In the Virginia Senate, there was extensive criticism of the proposed free speech guarantee and other amendments as too narrow, but no one questioned the right to bear arms provision. Objections to Articles, VA. SEN. J. 61-65 (Dec. 12, 1789). Virginia

the most vocal in calling for a guarantee recognizing the individual right to have arms, it is inconceivable that they would not have objected to what became the second amendment had anyone understood it not to protect personal rights.

The view that the rights of freemen were too numerous to enumerate in a bill of rights was coupled with the argument that the ultimate protection of American liberty would be the armed populace rather than a paper bill of rights. An opponent of a bill of rights, Nicholas Collins argued that the American people would be sufficiently armed to overpower an oppressive standing army. "While the people have property, arms in their hands, and only a spark of noble spirit, the most corrupt Congress must be mad to form any project of tyranny."⁹² On the other hand, the pro-amendment view was that both the existence of a bill of rights *and* an armed populace to enforce it would provide complementary safeguards. The following editorial advances this view, and assumes not only that keeping and bearing arms contributes to a well regulated militia, but also that militia exercises in effect demonstrate the people's strength so that government would not consider infringing on the right to keep and bear arms:

The right of the people to keep and bear arms has been recognized by the General Government; but the best security of that right after all is, the military spirit, that taste for martial exercises, which has always distinguished the free citizens of these States; From various parts of the Continent the most pleasing accounts are published of reviews and parades in large and small assemblies of the militia Such men form the best barrier to the Liberties of America.⁹³

While many people were thus flexing their muscles by engaging in armed marches to ward off tyranny and secure the right to keep and bear arms, the debate over ratification of the Bill of Rights raged through 1790. Some reiterated that no bill of rights could enumerate the rights of the peaceable citizen, "which are as numerous as sands upon the sea shore" ⁹⁴ President Washing-

forestalled adoption of the bill of rights until the end of 1791. Nor did the Massachusetts General Court, which rejected the bill of rights, object to the arms bearing provision in its verbose Report of the Committee of the General Court on Further Amendments. See Report reprinted in *MASSACHUSETTS AND THE FIRST TEN AMENDMENTS* 25-29 (D. Myers ed. 1936).

92. Remarks on the Amendments, *Fayetteville Gazette*, Oct. 12, 1789, at 2, col. 1.

93. *The Gazette of the United States*, Oct. 14, 1789, at 211, col. 2.

94. "A bill of rights for freemen appears to be a contradiction in terms [I]n a free country, every right of human nature, which are as numerous as sands upon the sea shore, belong to the quiet, peaceable citizen." *Federal Gazette*, Jan. 5, 1790, at 2, col. 3. "The

ton reminded members of the House of Representatives that "a free people ought not only to be armed, but disciplined"95 Still, right to arms provisions were not necessarily associated with the citizen's militia, but were also coupled with different provisions. For instance, a widely published proposed bill of rights for Pennsylvania included a militia clause in a separate article from the following: "That the right of the citizens to bear arms in defence of themselves and the State, and to assemble peaceably together . . . shall not be questioned."⁹⁶

During the ratification period the view prevailed that the armed citizenry would prevent tyranny. Theodorick Bland wrote Patrick Henry that "I have founded my hopes to the single object of securing (*in terrorem*) the great and essential rights of freemen from the encroachments of Power—so far as to authorize resistance when they should be either openly attacked or insidiously undermined."⁹⁷ While the proposed amendments continued to be criticized due to lack of a provision on standing armies,⁹⁸ no one questioned the right to bear arms amendment.⁹⁹ Two days before Rhode Island ratified the bill of rights, newspapers in that state republished its declaration of natural rights included in its recent ratification of the Constitution: "That the people have a right to keep and bear arms: That a well-regulated militia, including the body of the people capable of bearing arms, is the proper, natural and safe defense of a free state"100

As more and more states adopted the amendments and debate thereon began to dwindle, even proponents of an anti-standing

absurdity of attempting by a bill of rights to secure to freemen what they never parted with, must be self-evident. No enumeration of rights can secure to the people *all* their privileges" Federal Gazette, Jan. 15, 1790, at 3, col. 3. This article ridiculed a bill of rights as analogous to conveying a house and lot but excepting out of the grant an enumeration of other houses and lots retained by the seller.

95. Speech of Jan. 7, 1790, Boston Independent Chronicle, Jan. 14, 1790, at 3, col. —.

96. Providence Gazette & Country Journal, Jan. 30, 1790, at 1, col. —.

97. Letter from Theodorick Bland to Patrick Henry (March 19, 1790). PATRICK HENRY, *supra* note 68, at 417-18.

98. "A well regulated militia is the best defence to a free people, a standing army in time of peace are not equal to a well regulated militia." Political Maxims, Independent Gazetteer, July 24, 1790, at 2, col. 1. "Where a standing army is established, the inclinations of the people are but little regarded." Political Maxims, Independent Gazetteer, July 31, 1790, at 2, col. 2.

99. *E.g.*, Summary of the Principal Amendments Proposed to the Constitution, post May 29, 1790 Ms. College of Wm. & Mary, Tucker-Coleman coll., Box 39b notebooks, Notebook VI, at 212-22.

100. Providence Gazette and Country Journal, June 5, 1790, at 23.

army provision conceded that an armed citizenry, as a well regulated militia, would prevent oppression from that quarter. As "A Frammer" argued to "The Yeomanry of Pennsylvania":

Under every government the *dernier* resort of the people, is an appeal to the sword; whether to defend themselves against the open attacks of a foreign enemy, or to check the insidious encroachments of domestic foes. Whenever a people . . . entrust the defence of their country to a regular, standing army, composed of mercenaries, the power of that country will remain under the direction of the most wealthy citizens . . . [Y]our liberties will be safe as long as you support a well regulated militia.¹⁰¹

CONCLUSION

In recent years it has been suggested that the second amendment protects the "collective" right of states to maintain militias, but not the right of "the people" to keep and bear arms. If anyone entertained this notion in the period in which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known surviving writing of the 1787-1791 period states that thesis. Instead, "the people" in the second amendment meant the same as it did in the first, fourth, ninth and tenth amendments, i.e., each and every free person. A select militia as the only privileged class entitled to keep and bear arms was considered as execrative to a free society as would be select spokesmen approved by government as the only class entitled to freedom of the press. Nor were those who adopted the Bill of Rights willing to clutter it with details such as non-political justifications for the right (e.g., self-protection and hunting) or a list of what everyone knew to be common arms, such as muskets, scatterguns, pistols and swords. In light of contemporary developments, perhaps the most striking insight made by those who originally opposed the attempt to summarize all the rights of a freeman in a bill of rights was that, no matter how it was worded, artful misconstruction would be employed to limit and destroy the very rights sought to be protected.

101. Independent Gazetteer, Jan. 29, 1791, at 2, col. 3.

MANUFACTURERS' AND SUPPLIERS' LIABILITY TO HANDGUN VICTIMS

by *Windle Turley**

On October 4, 1977, outside an Amarillo, Texas, high school, a small .22 caliber handgun accidentally discharged and struck 15-year-old David Clancy in the neck. The gun had been purchased by a classmate for \$10 and came with two bullets, one of which transformed David Clancy into a quadriplegic and one of the nation's quarter million annual victims of handgun violence.¹ This article considers the application of strict liability in tort as a remedy for victims of handgun violence. The focus is on the small concealable handgun as an unreasonably dangerous product when marketed to the general public. It attempts to answer the question of social policy: Who should bear the responsibility of caring for David Clancy for the rest of his life, and for the thousands of David Clancys injured every year by these products?

There is an estimated 50,000,000 handguns in the United States today;² double the number from 1968,³ and with 2-½ million sold each year,⁴ we will live with 100,000,000 of these products by the year 2000. A handgun is sold new in this country every 13 seconds,⁵ and every 2-½ minutes the product injures someone.⁶ Each 20 minutes it is an instrument of death,⁷ earning it a rank second only to motor vehicles as the cause of unnatural deaths in this country.⁸ Although handguns comprise only about 30% of the firearms in

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1. U.S. Dep't. of Justice, *F.B.I. Uniform Crime Reports* 130 (1980); Mortality Statistics Branch, Div. of Vital Statistics, Nat'l Center for Health Statistics, *Vital Statistics of the U.S.*, vol. 2, Mortality 23 (1981).

2. *Bureau of Alcohol, Tobacco and Firearms Statistics* (1980), cited in *Federal Regulation of Firearms*, Report to the Senate Judiciary Comm., at 2 (1982). [hereinafter cited as *Firearms*].

3. *Id.*; see also G. NEWTON & F. ZIMRING, *FIREARMS AND VIOLENCE IN AMERICAN LIFE* 6 (1970).

4. *Firearms*, *supra* note 2, at 6, based upon reports to Bureau of Alcohol, Tobacco and Firearms by handgun manufacturers.

5. *Id.*, obtained by dividing the number of seconds in one year by the number of handguns provided in a year.

6. *Report of the U.S. Attorney General's Task Force on Violent Crime* (1979); see also *F.B.I. Uniform Crime Reports*, *supra* note 2, at 6-21.

7. *Report of the U.S. Attorney General's Task Force on Violent Crime* (1979).

8. *F.B.I. Uniform Crime Reports*, *Vital Statistics of the United States*, *supra* note 1.

public hands, these products produce 90% of the firearm misuse,⁹ resulting in some 22,000 handgun deaths annually in this country alone.¹⁰

Although the handgun control dialogue has almost always focused upon *criminal* misuse, an examination of handgun related deaths reveals the criminal focus to be misplaced. A felonious intent to criminally misuse the handgun can be found in less than 17% of the deaths attributable to handguns.¹¹ (See Chart 1).

CHART 1
U.S. HANDGUN DEATHS IN 1979

CONDUCT	DEATHS PER YEAR	PERCENT OF TOTAL HANDGUN DEATHS	PREMEDITATED CRIMINAL MISUSE
Suicide	11,000 ¹²	50%	NO
Accidental Shootings	1,200 ¹³	6%	NO
Shootings Resulting Spontaneously During Arguments	6,500 ¹⁴	29%	NO
Homicides*	3,300 ¹⁵	15%	YES

*Many of these are thought to be "unintended" in the premeditated context.

More handgun deaths result from spontaneous aggression coupled with the ready availability of a handgun than from premeditated

9. Bureau of Alcohol, Tobacco and Firearms estimate, *Firearms*, *supra* note 2, stating that there are approximately 170 million firearms in the United States today. The 90% misuse figure is extrapolated from the annual statistics reported in *F.B.I. Uniform Crime Reports* (1980).

10. U.S. Dep't of Justice, *F.B.I. Uniform Crime Reports* 5-21 (1981); *Vital Statistics of the U.S.*, *supra* note 1.

11. U.S. Dep't of Justice, *F.B.I. Uniform Crime Reports* 12 (1979).

12. Mortality Statistics Branch, Div. of Vital Statistics, Nat'l Center for Health Statistics, *Vital Statistics of the U.S.* vol. 2, Mortality 35 (1980).

13. *Id.*, based upon estimates by the National Center for Health Statistics that handguns are used in a minimum of 62.5% of all accidental firearms deaths. An average of 2,000 accidental firearms deaths per year has been reported by the National Center for the past six years. See Mortality Statistics Branch, Div. of Vital Statistics, Nat'l Center for Health Statistics, *Vital Statistics of the U.S.*, vol. 2, Mortality (1975-1981).

14. *F.B.I. Uniform Crime Reports*, *supra* note 11, at 12.

15. *Id.*

homicides. In fact, 52% of all the murder victims in 1979 were acquainted with their assailants, and one out of every five victims was related to the offender.¹⁶

Although the product itself is relatively inexpensive,¹⁷ the cost handguns exact of our society is staggering. At Huron Road Hospital in Cleveland, the yearly cost for treatment of gunshot wounds alone amounted to nearly \$250,000 a year in the mid 1970's.¹⁸ When the cost expended for handgun injury treatment at the other major hospitals in Cleveland was added, Cleveland, Ohio, alone spent \$1.5 million annually in treating gunshot injuries. An estimated \$500 million is spent nationwide.¹⁹ While the annual cost to the nation's GNP has not been precisely determined, studies such as those from Huron Road Hospital, coupled with 22,000 lives lost per year, yield conservative estimates exceeding 20 billion dollars a year as a direct national cost.²⁰ Despite these alarming trends, handgun suppliers enjoy virtual immunity from liability for the deaths and injuries caused by their products.

THE TORT LAW THEORY

Before considering why a concealable handgun, marketed to the general public, is likely to be deemed an unreasonably dangerous product, consider the past. Historically, the first purpose of tort law is to prevent injury. Only when it fails in prevention of injury does the tort law serve its secondary purpose: to recompense the victim for wrongful losses.²¹ The development of tort law in this country during the last century has been punctuated by the stripping away of the common law immunities that once served to insulate tortfeasors from liability for their conduct. The immunities of government have been significantly eroded at the national level by

16. *Id.* at 11.

17. Of the 144 confiscated by the New York Police Department in the single month of October, 1975, slightly over 30% retailed for \$50 or less, and 40% sold for \$60-\$120. Brill, *Firearm Abuse: A Research and Policy Report*, POLICE FOUNDATION, 56-57 (1977). Given the effect of inflation, the price has increased, but the average price remains under \$300, with some changing hands for as little as \$10.

18. Ram, Geldes and Bueno, *Health Care Costs of Gunshot Wounds*, 73 OHIO ST. MED. ASSOC. J. 437 (1977).

19. *Id.*

20. National Forum on Handgun Control, United States Conference of Mayors (1975).

21. See generally, W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 6 (4th ed. 1971); Wright, *Introduction to the Law of Torts*, *CAMB. L.J.* 238 (1944). A detailed analytical consideration of how far present rules of tort liability are consistent with a basis of deterrence may be found in Williams, *The Aims of the Law of Tort*, 4 *CURRENT LEGIS. PROBS.* 137 (1951).

passage of the Federal Tort Claims Act²² at the state level by various state tort claims acts,²³ and at the local level by allowing municipalities to be sued for torts arising from activities that are "proprietary" in nature.²⁴ "Charitable" and "host-driver" immunities that once prevented hospital patients and vehicle guests from seeking restitution when negligence caused their injuries are now the exceptions.²⁵

One of the recent and most significant advances in tort law, however, was the decline and virtual emasculation of manufacturer immunity from liability for their defective products. The English rule of *Winterbottom v. Wright*,²⁶ as applied by American courts,²⁷ had disallowed suits against a product manufacturer unless the injured plaintiff had purchased the product directly from the manufacturer; an almost non-existent occurrence after the industrial revolution. With the industrial revolution came a need to protect the public from dangerous instrumentalities produced by *laissez faire* capitalism. This need prompted courts to carve away at the *Winterbottom* immunity. While initially liability exceptions were created for "dangerous instrumentalities,"²⁸ they soon began to arise in cases involving food,²⁹ beverages,³⁰ drugs,³¹ and firearms.³² *MacPherson v. Buick Motor Co.*,³³ finally abolished the privity re-

22. 28 U.S.C.A. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80 (1976).

23. For an exhaustive summary of the statutes and common law of each state with regard to sovereign immunity, see Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. Rev. 1363 (1954).

24. PROSSER, *supra* note 21, at 977-78.

25. For a detailed treatment of the overthrow of the charitable immunities in the various jurisdictions, see PROSSER, *supra* note 21, at 994-96.

26. 152 Eng. Rep. 402 (Ex. 1842) (stating, arguably in dicta, that the breach of a contract to keep a mail coach in repair after it was sold could give no cause of action to a passenger in the coach who was injured when it collapsed).

27. *Anderson v. Linton*, 178 F.2d 304, 307 (7th Cir. 1949); See also R. HURSH & H. BAILLÈV, *AMERICAN LAW OF PRODUCTS LIABILITY* § 10:3 (2d ed. 1974); and *Maryland ex rel Woodzell v. Garzell Plastics, Indus. Inc.*, 152 F. Supp. 483 (E.D. Mich. 1957) (where it was recognized that courts which applied the rule of *Winterbottom v. Wright*, as authority for the proposition that manufacturers could not be liable for negligence in the making of their goods except to their immediate vendees did so in disregard of the actual facts of the case and the nature of the holding therein).

Thomas v. Winchester, 6 N.Y. 397 (1852).

Tomlinson v. Armour & Co., 75 N.J. 748, 70 A. 314 (1908).

Jackson Coca-Cola Bottling Co. v. Chapman, 106 Miss. 864, 64 So. 791 (1914).

Blood Balm Co. v. Cooper, 83 Ga. 457, 10 S.E. 118 (1889).

Herman v. Markham Air Rifle Co., 258 F. 475 (E.D. Mich. 1918).

217 N.Y. 382, 111 N.E. 1050 (1916) (held that the manufacturer of an automobile who sold it to a dealer was liable to the ultimate purchaser for injuries to the purchaser caused by negligence in the manufacture or inspection of the vehicle. This rule was later embodied

quirement in cases in which the manufacturer *negligently* made or sold a defective product, and begat *Henningsen v. Bloomfield Motors*,³⁴ thus resulting in the birth of theories of implied warranty running with the goods to the ultimate consumer.³⁵

By 1963, the law continued to respond to technology and the stage was set for the fountainhead of strict liability for defective products in *Greenman v. Yuba Power Products, Inc.*³⁶ Greenman had sustained a head injury resulting from an object thrown by a defective lathe. Justice Traynor, writing for the California Supreme Court, advanced the view that a plaintiff injured by a product should not be required to meet the difficult task of proving a manufacturer negligent. Instead, a manufacturer who elects to market a product incurs liability when the article proves to have a defect that causes injury.³⁷ "The purpose of such [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."³⁸

Within two years, the Restatement (Second) of Torts, § 402A, was published. It imposed liability upon the seller of defective, "unreasonably dangerous" products that caused injury. The degree of care that may have been exercised by the seller in preparing or marketing the product did not affect liability.³⁹ The rationale behind § 402A was expressly set out in Comment c: "[Because con-

in RESTATEMENT (SECOND) OF TORTS § 395 (1965)).

34. 32 N.J. 358, 161 A.2d 69 (1960).

35. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099, 1126 (1960).

36. 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962).

37. *Id.* at 377 P.2d at 901; see also *Escola v. Coca-Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 150 P.2d 436 (1944) (in which Justice Traynor, 18 years earlier, had expressed his view).

38. 377 P.2d at 901.

39. The complete text of RESTATEMENT (SECOND) OF TORTS § 402A (1965) reads as follows:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

sumers must rely on the expertise of sellers], . . . public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained⁴⁰.

The social policy undergirding strict product liability is clear. First, to impose responsibility on suppliers in order to discourage distribution of dangerous products. Second, to transfer the loss occasioned by dangerous products from the often innocent victim, or the state, to the manufacturer and supplier. Thus, the cost of injury and death for that product is ultimately borne by those other consumers that exercise their freedom of choice to purchase these same products. The true product cost to society is soon known and the free market place then determines whether the product is worth that cost to society. If the cost to insure against the risk imposed by a particular product is too large, then the product in that form must ultimately be withdrawn from the public market. In strict product liability the focus is on the *product*, not on the conduct of either the supplier or the user.⁴¹ It recognizes that product design is easily controlled, while human nature and conduct can never be fully regulated.

In addressing the question of David Clancy — who should bear his loss? — the focus will center upon the product which caused David's injuries, the handgun. If the product is one that engages the theory of strict liability, i.e., one that is defective, then the answer is clear. Social policy and the common law have mandated that the handgun supplier, and through it consumers who purchase the dangerous product, should absorb the loss: first, because the manufacturer elected to place a dangerous instrumentality into the stream of commerce, and, second, because those consumers who purchase the handgun and perpetuate the industry should also pay the societal cost for the product.

Substantive Considerations for Handgun Liability

Forty-seven jurisdictions now recognize a duty on the part of the manufacturers and suppliers of products under some form of § 402A strict liability.⁴² Three developments in strict product liabil-

40. RESTATEMENT (SECOND) OF TORTS, § 402A, comment c (1965).

41. *Id.*; see also *Aller v. Rodgers Mach. Mfg. Co., Inc.*, 268 N.W.2d 830 (Iowa 1978).

42. 1 PROD. LIAB. REP. (CCH) ¶ 4016. The 402A rule or a variation of it has been adopted in all states except North Carolina, Virginia and Wyoming.

ity law have set the stage for its application to handgun suppliers.

Bystanders

First, the courts quickly extended rights of recovery under strict product liability beyond the initial consumer to bystanders and other third persons not in the chain of commerce.⁴³ Unlike many products, violent injury and death inflicted by handguns most often affects bystanders and other non-purchasers of the weapon. While a non-consumer injury presents difficult problems in warranty and some negligence cases, it poses no serious obstacle under strict product liability theories. Again the focus is on the product and whether it presented an unreasonable danger to anyone, not whether it behaved in a way other than anticipated by the purchaser.

Foreseeability

The product supplier must anticipate the environment in which its product may be used and must design its product to be reasonably safe for that anticipated environment of use.⁴⁴ Thus, the manufacturer may no longer circumscribe the ambit of its responsibility by contending the product was not used strictly as intended. Allowing the manufacturer to take such a position would amount to a complete about-face in products liability law, resulting ultimately in a return to the *MacPherson*⁴⁵ days when absolute caveat emptor prevailed. Realizing that that approach would frustrate the policy goals of strict tort liability, the 7th Circuit, in *Huff v. White Motor Co.*,⁴⁶ reversed their previous holding in *Evans v. General Motors Corp.*⁴⁷ which had held that an automobile manufacturer was not under a duty to produce automobiles designed to crash in a reasonably safe manner, because accidents were not the intended use of automobiles.⁴⁸

Following the earlier 8th Circuit decision in *Larsen v. General Motors Corp.*⁴⁹ *Huff*, held the manufacturer of a tractor-truck had a duty to design a vehicle that would crash in a reasonably safe

43. *Darryl v. Ford Motor Co.*, 440 S.W.2d 630 (Tex. 1969).

44. *Huff v. White Motor Corp.*, 565 F.2d 104 (7th Cir. 1977); see also *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968).

45. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1960).

46. 565 F.2d 104 (7th Cir. 1977).

47. 359 F.2d 822 (7th Cir. 1966).

48. *Id.* at 825.

49. 391 F.2d 495 (8th Cir. 1968).

manner, recognizing "[t]he intended use of a vehicle encompasses the normal incidents of its being driven on the streets and highways, including the potentiality of collisions."⁵⁰ The court criticized the *Evans* "intended purpose" rationale as unrealistically narrow⁵¹ in light of the obvious risks attendant to a dangerous product in its foreseeable environment against which the manufacturer could easily take precautions.⁵²

Handgun suppliers universally contend that the intended purpose of their products does not encompass murder, suicide, or accidental shootings. The alarming frequency with which these events occur, however, precludes the supplier from closing its eyes to the real world where its product functions. While the suppliers argue that the "intended purpose" of the handgun is for target-shooting, hunting, police use, or so-called self-protection, suppliers of these products must face the naked fact that handguns represent the second leading cause of unnatural death in this country.⁵³ It is, as the *Huff* Court pointed out, "unrealistically narrow" to impose liability upon the sellers of these dangerous products only for injuries and deaths resulting from their narrow "intended use."

While recoveries under a negligence theory often may be defeated by the product supplier demonstrating intervening or superseding third-party conduct,⁵⁴ such intervention in a strict liability action will not ordinarily eliminate a recovery, provided the occurrence is reasonably foreseeable to the supplier. If the intervening force is foreseeable to the defendant, which is a question of fact,⁵⁵ then a duty exists to guard against the occurrence or minimize its impact.⁵⁶ It is not required that the defendant foresee the precise

50. 565 F.2d at 110 (emphasis added).

51. *Id.* at 108.

52. *Id.* at 109.

53. *Vital Statistics of the United States*, *supra* note 1, at 28.

54. *Keet v. Service Mach. Co. Inc.*, 472 F.2d 138 (6th Cir. 1972). *See also* *Smith v. Hobart Mfg. Co.*, 302 F.2d 570 (3rd Cir. 1962), *on remand* 31 F.R.D. 581 (E.D. Pa. 1962); *M. Dietz & Sons, Inc. v. Miller*, 43 N.J. Super. 334, 128 A.2d 719 (1957).

55. *Palmisano v. Ehrig*, 171 N.J. Super. 310, 408 A.2d 1083 (1979) *cert den.*, 82 N.J. 287, 412 A.2d 793 (1980). In this case, owners of a home had taken an extended vacation. While gone, their son entered the house with friends, one of whom caused a firearm to discharge through the roof, injuring plaintiff who lived on the floor above. The court held that whether the homeowners should have foreseen the intervening acts of their son's friends was a question of fact for the jury. 408 A.2d at 1084.

56. *Huff v. White Motor Corp.*, 565 F.2d 104 (7th Cir. 1977). *See also* *Becker v. Colonial Parking, Inc.*, 409 F.2d 1130 (D.C. Cir. 1969); *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968); *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79 (4th Cir. 1962).

events, but rather that the defendant supplier reasonably anticipate such an occurrence.⁵⁷ It has been held, for example, that the supplier of a handgun should foresee that a purchaser of such a product might fire the weapon in connection with a robbery.⁵⁸

The "Defect" Question

Strict liability predicated on § 402A still requires the plaintiff to prove the existence of a "defect" rendering the product unreasonably dangerous.⁵⁹ There are at least three categories or combinations of conditions that may render a product "defective" and unreasonably dangerous. They are "manufacturing," "design," and "marketing," or some combination of these three.⁶⁰ Manufacturing defects are those conditions in products arising because they do not comport with the design standards of the manufacturer.⁶¹ Since this article focuses on handguns that are manufactured as intended, "manufacturing" defects will not be discussed here. An action based on design defect, on the other hand, examines the propriety of an entire product line,⁶² and may attack the design of a single component part or system, or may challenge the entire final product. A "marketing" defect consists of a failure to properly warn or adequately instruct consumers as to the product. The absence of adequate warnings or instructions will render the product unreasonably dangerous.⁶³ It is the "design" defect in its broad sense, combined with an inability to safely "market" concealable handguns, that forms the framework for this paper: whether small concealable handguns are unreasonably dangerous products when marketed to the general public?

57. 408 A.2d at 1085.

58. *Franco v. Bunyard*, 261 Ark. 144, 547 S.W.2d 91 (1977). *But see DeRosa v. Remington Arms Co., Inc.*, 509 F. Supp. 762 (E.D. N.Y. 1981) (in which the court said that the intervening negligence of a police officer in failing to use a safety device on a specially manufactured shotgun is not foreseeable to the manufacturer. However, it is submitted that this language represents dicta, in that the court held there existed no defect in the shotgun's design and therefore should have never reached the "unforeseeably intervening act" issue).

59. RESTATEMENT (SECOND) OF TORTS § 402A (1965) imposes liability on one who "sells any product in a defective condition unreasonably dangerous." (emphasis added). It has been suggested that the terms "defective" and "unreasonably dangerous" are meant only to describe "defect." Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 32 (1973). *See also Mitchell v. Freuhauf Corp.*, 568 F.2d 1139, 1142 (5th Cir. 1978).

60. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A(4)(f)(i) (1982).

61. Holford, *The Limits of Strict Liability for Product Design and Manufacture*, 52 TEX. L. REV. 81, 84 (1973).

62. L. FRUMER & M. FRIEDMAN, *supra* note 60.

63. *Id.*

Test for Defective Design

Motivated by the realization that many products may have both utility and danger,⁶⁴ commentators suggested and many courts now agree that the existence of a *design* defect should be determined by balancing the risk of harm presented by the product design against the utility of that design.⁶⁵ One of the first cases to adopt the risk versus utility test was *Barker v. Lull Engineering Co. Inc.*,⁶⁶ a California Supreme Court decision involving a defective high-lift loader. The court said:

[A] product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies 'excessive preventable danger' or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design.⁶⁷

A balancing of the risk versus utility in design cases has already been embraced in several jurisdictions. New Jersey,⁶⁸ Alaska,⁶⁹ Illinois,⁷⁰ Iowa,⁷¹ Massachusetts,⁷² Pennsylvania,⁷³ and Texas⁷⁴ currently apply this test in product liability cases involving allegations of design defect. Prior to the recent shift to a test balancing design risk against utility, the predominate test for defectiveness had been one of "consumer expectation."⁷⁵ Under that test, we would have asked the jury whether the handgun performed as reasonably expected. Today, however, a jury in the above jurisdictions will be asked to determine whether the handgun design presents hazards and costs to society in excess of any socially acceptable utility of its design. Even in states not yet expressly adopting the "balancing

64. *Ross v. Up-Right, Inc.*, 402 F.2d 943 (5th Cir. 1968).

65. Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C. L. REV. 643 (1978); Henderson, *Renewed Judicial Controversy over Defective Product Design: Toward the Preservation of any Emerging Consensus*, 63 MINN. L. REV. 773 (1979); Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L. J. 30 (1973); Wade, *On the Nature of Strict Liability for Products*, 44 MISS. L. J. 825 (1973).

66. 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443 (1978).

67. 20 Cal. 3d at 430, 143 Cal. Rptr. at 236, 573 P.2d at 454.

68. *Cepeda v. Cumberland Engineering Co. Inc.*, 386 A.2d 816 (1978).

69. *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871 (Alaska 1979).

70. *Rucker v. Norfolk & W. Ry. Co.*, 77 Ill.2d 434, 396 N.E.2d 534 (1979).

71. *Aller v. Rodgers Mach. Mfg. Co., Inc.*, 268 N.W.2d 830 (Iowa 1978).

72. *Back v. Wickes Corp.*, 378 N.E.2d 964 (Mass. 1978).

73. *Azzarello v. Black Brothers Co., Inc.*, 480 Pa. 547, 391 A.2d 1020 (1978).

74. *Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979).

75. *Henderson v. Ford Motor Co.*, 519 S.W.2d 87, 92 (Tex. 1974).

test," juries generally hear evidence and deliberate on the relative merits of the risks of the design versus its utility.⁷⁶

Any examination of the safety of a product design must consider the methods adopted to market the product and the character of the expected users. Some products present such a low level of risk that they can be safely marketed to the general public, even to children, with few, if any, warnings. Adult clothing and children's toys are examples. Other products present a risk of harm that can be substantially eliminated by simple warnings and instructions. Over-the-counter medications and household cleaning products are illustrative.

The third level of danger are those inherently products that may have some useful purpose, but are excessively dangerous when marketed to the general public, even with extensive warnings. The sale of these products, of which explosives and prescription drugs are examples, is restricted to limited purchasers with special training and needs. There exists a final fourth category of product design. These products are so dangerous that even with instructions and warnings, any useful purpose of the product is so far outweighed by its potential danger that it will not be sold to even a restricted market. Nuclear devices and D.D.T. are examples of this category.

76. See, e.g., *Brady v. Melody Homes Mfg.*, 121 Ariz. 253, 589 P.2d 896 (1979) (the court held that the "reasonable expectation" test should be followed, but went on to compare strict liability with negligence, pointing out that a "risk/benefit analysis" is utilized under both theories); accord *Fowler v. General Electric Co.*, 40 N.C. App. 301, 252 S.E.2d 862 (1979).

CHART 2

CATEGORY	POTENTIAL DANGER LEVEL	INSTRUCTIONS & WARNINGS NECESSARY	MARKETED TO GEN. PUBLIC	MARKETING RESTRICTED	EXAMPLES
1	Lowest	No	Yes	No	Toys, clothing, some household goods
2	Low	Yes	Yes	No	Over-counter medications, household sprays and cleaners, power tools, family autos
3	High	Yes	No	Yes	Handguns,* prescription drugs, chemicals, explosives, high performance race cars
4	Highest	N/A	No	Yes	Nuclear devices, toxic chemicals

* should be marketed in this category.

Congress,⁷⁷ state legislatures,⁷⁸ and courts throughout the country⁷⁹ have time and again inferred that handguns, at least of the

77. 18 U.S.C. § 922 (1976), known as the Gun Control Act of 1968.

78. See, e.g., CONN. GEN. STAT. ANN. §§ 29-27 through 29-38a (West Supp. 1981); D.C. CODE ANN. § 6-1812 (1981); N.J. STAT. ANN. §§ 2C: 58-1 through 58-4 (West 1982); N.Y. PENAL LAW § 400.00 (McKinney 1980).

79. See *Stoelting v. Hauck*, 32 N.J. 87, —, 159 A.2d 385, 389 (1960) (firearms are so inherently dangerous that a person of ordinary prudence will take cautious preventive measures commensurate with the great harm that may ensue from the use of the gun by someone unfit to be entrusted with it); *Mazilli v. Selger*, 13 N.J. 296, 300, 99 A.2d 417, 419 (1953) (legislative control of firearms indicates a recognition of the extreme potential for harm which may ensue from use of such dangerous instruments, especially in incompetent or unqualified hands); *Speiser, Disarming the Handguns Problem by Directly Suing Arms Makers*, NAT. L. J., June 8, 1981, at 29 (it would be difficult to imagine a more dangerous activity, or an activity of less value to the community than the sale of handguns to those who merely present a driver's license as proof of their trustworthiness); *Fisher, Are Handgun Manufacturers Strictly Liable in Tort?*, CAL. S. B. J. 16, 17 (Jan. 1981) (taken together, the extreme danger inherent in handgun design, the tremendous risk of harm, and the indiscriminate marketing of handguns to the public, may constitute a defect sufficient to make the manufacturer and distributor strictly liable in tort to the injured plaintiff).

design sold in the United States today, are by their nature inherently dangerous products. This fact alone, although acknowledged by the industry, does not impose liability on the supplier. Only when the danger is unreasonable to users and bystanders will liability be imposed.

As evidenced by Chart 2, a product design, although *acceptably* dangerous when marketed in one manner, may become unreasonably and unacceptably dangerous when marketed to another classification of consumer or without adequate warnings and instructions. Handguns, although carrying a "high" danger level in category 3, are currently marketed to the general public as a category 2 product. Since most handgun victims are either bystanders or persons emotionally beyond control, warnings and instructions are not likely to be effective.⁸⁰

The central issue is thus reached. Can concealable handguns, with generally ineffective warnings and instructions, be safely marketed to the general public? Or must the product, like certain drugs, dangerous chemicals, and high performance vehicles, have its sale restricted to trained users under controlled conditions? There appears to be ample evidence to support a limitation on the sale of handguns to a market restricted to law enforcement, military use and sport shooting clubs. The risk versus utility analysis provides a ready vehicle for imposing strict liability on handgun suppliers. In *Turner v. General Motors Corp.*,⁸¹ the Texas Supreme Court identified a number of evidentiary factors that might be considered by a jury in determining whether a product's design was defective. They included usefulness and desirability, the likelihood of injury, and alternative designs.⁸² Another consideration is the suppliers' ability to eliminate the unsafe nature of the product without seriously impairing its usefulness.⁸³ When the risk versus utility test is applied to handguns marketed indiscriminately to the general public, and factors such as those outlined in *Turner* are supported by the statistical evidence showing high risk of harm and low utility, then juries are likely to be compelled to find that the handgun, when so marketed, is an unacceptably dangerous

80. W. Turley, *Strict Product Liability: Warnings and Instruction in Texas*, presented to the University of Texas School of Law Symposium on Products Liability, November, 1977, at 18.

81. 584 S.W.2d 844 (Tex. 1979).

82. *Id.* at 849; *See also Barker*, 20 Cal. 3d at 431, 143 Cal. Rptr. at 237, 573 P.2d at 455.

83. 584 S.W.2d at 846, 849.

product.

The Restatement recognizes that some products carry a high risk of injury even when manufactured as safe as existing technology will allow. They are, however, so beneficial that producing and marketing the products is justified even in the face of such risk.⁸⁴ These products termed "unavoidably unsafe" by the Restatement⁸⁵ are frequently drugs which, although carrying a possibility of adverse reaction, are not unreasonably dangerous because their benefit to society is so substantial.

Simply because the product is designed as safe as technologically possible does not make it an acceptable, although "unavoidably unsafe" product. It is a universal rule that a product may perform precisely as it was designed and intended, yet be unreasonably dangerous so as to subject the manufacturer to a § 402A liability.⁸⁶ Even so-called unavoidably unsafe products must demonstrate a benefit that outweighs their hazards.⁸⁷ While it may be conceded that many handguns are made as safe as any handgun can be made, if the surrounding danger incident to its use outweighs any acceptable usefulness, then the handgun product is "defective" and unreasonably dangerous rather than "unavoidably unsafe."

The Supporting Evidence of Defect

The issue whether the risk of harm presented by a handgun marketed to the general public outweighs the utility of such product may now be addressed. It is important to understand that substantial design differences may exist as to products within a family

84. RESTATEMENT (SECOND) OF TORTS, § 402A, Comment (k) (1965). See also *Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121 (9th Cir. 1978), which provides an excellent discussion of Comment (k) and the general principles pertaining to unavoidably unsafe products.

85. *Id.*

86. See, e.g., *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076 (5th Cir. 1973) (a manufacturer of asbestos insulation was held liable for unintended but foreseeable cancer resulting from product); *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652 (1st Cir. 1981) (manufacturer of birth control pills, which performed as intended, held liable for foreseeable consequence of stroke by user); *d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886 (9th Cir. 1977) (manufacturer of acrylic fiber carpet held liable for resulting foreseeable fire although carpet, as such, performed as intended); *Moning v. Alfonso*, 400 Mich. 425, 254 N.W. 2d 759 (1977) (plaintiff injured by projectile fired by slingshot manufactured by defendant held entitled to jury determination of "unreasonable risk of harm" although product performed as intended); *LaGorga v. Kroger Co.*, 275 F. Supp. 373 (W.D. Pa. 1967), *aff'd*, 407 F.2d 671 (1969) (manufacturer of jacket held liable for burns inflicted when jacket ignited, although jacket performed precisely as intended).

87. See, e.g., *McLeod v. W.S. Merrell Co.*, 174 So.2d 736 (Fla. 1965); *Cochran v. Brooke*, 243 Or. 89, 409 P.2d 904 (1966); *Helene Curtis Indus., Inc. v. Pruett*, 385 F.2d 841 (5th Cir. 1967).

of products. It is unlikely a jury will find all firearms present an unreasonable danger just as various knives present different levels of danger. A butcher knife and a switchblade are both capable of killing, but under the risk versus utility analysis, only the switchblade is likely to be found "unreasonably dangerous" due to its lack of socially acceptable utility. Some rifles and shotguns, when marketed with adequate guidelines, may in fact carry a socially redeeming utility.

Indiscriminate marketing of handguns to the general public has created enormous availability of these products. There are twice as many handguns in the United States today as there were in 1969,⁸⁸ a clear indication that the Gun Control Act of 1968 has done very little to stem handgun proliferation. Any one individual who wants a handgun in this country can acquire one. For years, eminently respected social scientists, psychologists, epidemiologists, criminologists and law enforcement personnel have cited the ready availability of the handgun as a cause of injury and death in America.⁸⁹

Suicides

Of the 27,000 suicides that occur every year in this country, approximately 40% of the victims use a handgun.⁹⁰ Handguns are clearly the weapon of choice among persons ending their own lives. There is no close second. The next leading methods of suicide are poisoning and hanging, each of which comprises about 13% of all suicides.⁹¹ Given the availability of handguns in the United States, the likelihood that the mere access to a handgun constitutes part of the causal chain leading to a suicide seems clear. The correlation between a sharply increasing rate of suicide by handguns and handgun availability has been well documented.⁹² From 1970 to

88. See *supra* note 3.

89. See, e.g., Cook, *The Effect of Gun Availability on Violent Crime*, 455 ANNALS OF AMERICAN ACADEMY OF POLITICAL PATTERNS AND SOCIAL SCIENCE 63 (1981); Zimring, *Is Gun Control Likely to Reduce Violent Killings?* 35 U. CHI. L. REV. 721 (1968); Zimring, *Street Crime and New Guns: Some Implications for Firearms Control*, 4 JOUR. OF CRIMINAL JUSTICE 95, 1976; Newton and Zimring, *Firearm and Violence in American Life, Task Force Report to the National Commission on the Causes and Prevention of Violence*, U.S. Government Printing Office (1969); Brill, *Firearms Abuse: A Research and Policy Report*, POLICE FOUNDATION (1977); but see Kaplan, *The Wisdom of Gun Prohibition*, 455 ANNALS OF AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 11 (1981). This is obviously only a partial list.

90. *Vital Statistics of the U.S.*, *supra* note 1, at 30. (some published figures based in part on unpublished data).

91. *Id.*

92. Newton and Zimring, *supra* note 89, at 33-38.

1977, the average number of annual suicides increased by 5,200, and 83% of the increase was suicide by firearms.⁹³ A seriously depressed person with a handgun and the knowledge of a quick and effective way of ending his life does not need to expend nearly the time or effort to pull a trigger as to assemble enough drugs to kill. Suicide with a handgun is easier and quicker. Social scientists have noted that a substantial number of persons suffering from a suicidal impulse during emotional distress are more easily able to obtain firearms than they are able to obtain lethal drugs, most of which are governed by strict regulation for their dispensation.⁹⁴ Also, accumulating a sufficient supply of drugs or preparing for a hanging requires time during which the depressed person may reconsider the impulse. Unlike the other available methods, there are few suicide *gestures* with handguns. Persons choosing firearms as a means of suicide are more often successful in taking their lives than persons choosing, for example, barbituates. In their 1970 report to the National Commission on the Causes and Prevention of Violence, Newton and Zimring surveyed attempted and completed suicides in the Los Angeles area. Persons using firearms died 75% of the time, while those choosing barbituates died in only 15% of the cases.⁹⁵ The opportunity for intervention or rescue to interrupt the suicide process is vitually non-existent when a handgun is used.

Accidents

The availability of handguns to the general public has resulted in an average of 1,400 accidental handgun deaths per year for the past ten years.⁹⁶ So many of these victims are children, that the Surgeon General's Select Panel for the Promotion of Child Health has labeled the handgun as a primary culprit behind an epidemic of accidental deaths and injuries among children.⁹⁷

93. Mortality Statistics Branch, Div. of Vital Statistics, Nat'l Center for Health Statistics, *Vital Statistics of the U.S.*, 1970-1977. (This information was extrapolated by the author from vol. 2, Mortality).

94. Baker and Dietz, *Injury Prevention* reprinted in HEALTHY PEOPLE, THE SURGEON GENERAL'S REPORT ON HEALTH PROMOTION AND DISEASE PREVENTION, Background Papers, 64 (1979).

95. Newton and Zimring, *supra* note 89, at 33-34.

96. Mortality Statistics Branch, Div. of Vital Statistics, Nat'l Center for Health Statistics, *Vital Statistics of the U.S.*, 1971-1981. (This information extrapolated by the author from vol. 2, Mortality, § 4 Accident Mortality — "Accident caused by firearm missile.")

97. U.S. Surgeon General, *Report of the Select Panel for the Promotion of Child Health*, January 1981, at 70. See also Browning, *Handguns and Homicide*, *JOUR. OF THE AM. MED.*

The handgun has long been seen and associated with aggressive behavior in our society. The use of guns in movies, televisions, and even childrens' programs has for years deeply engrained into the minds of our nation's children the idea that the use of guns is a socially acceptable method of problem solving. Many children today have a diminished capacity to understand the irreversibility of death, and to appreciate the consequences of pulling a trigger.⁹⁸ Indeed, it has been estimated that between the ages of 5 and 15, the average American child will view the killing of more than 13,000 persons on television.⁹⁹ Given this bombardment, it is understandable that children have little appreciation for the true danger inherent in a handgun, but have extensive knowledge of how to point a gun and pull the trigger.

Despite the rapidly increasing number of handguns purchased for home use, and despite the fact that hundreds of children are accidentally shot to death each year, revolvers are not sold equipped with any type of external or manual safety that would make the handgun reasonably child-resistant. Child-resistant medicine bottle caps have saved the lives of hundreds of children each year. Today's revolver, however, enables a child to fire a handgun easier than he can remove the safety cap from mother's bottle of aspirin.

Impulsive Shootings

A handgun is also the most frequent instrumentality by which a spouse, parent, child, or acquaintance is killed or injured during a heated argument.¹⁰⁰ More than half the deaths classified as "homicides" are actually the result of quarrels leading to spontaneous or impulsive shootings, in which most victims are killed by people who knew them or were related to them,¹⁰¹ and which are shootings that occur during the heat of passion, with alcohol often involved.¹⁰² The weapon of choice, again, is the readily available

Assoc. 2198 (Nov. 8, 1976).

98. See generally, Berkowitz, *Reactions of Juvenile Delinquents to "Justified" and "Less Justified" Movie Violence*, *JOUR. OF RESEARCH IN CRIME AND DELINQUENCY* 16 (January, 1974); KRETCH, *ELEMENTS OF PSYCHOLOGY* (2d Ed. 1969); Parke, *Some Effects of Violent and Non-violent Movies on the Behavior of Juvenile Delinquents*, 10 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* (1977); Newberger, *Child Health in America: Toward a National Public Policy*, *M.M.F.Q. HEALTH AND SOCIETY*, 249 (Summer, 1976).

99. Newberger, *supra* note 98, at 257.

100. See, e.g., *F.B.I. Uniform Crime Reports*, *supra* note 11, at 10-12.

101. *Id.*

102. Zimring, *Is Gun Control Likely to Reduce Violent Killings?* 35 *U. CHI. L. REV.* 721, 723 (1968).

handgun.¹⁰³

It has been suggested that the mere presence of a gun incites a violent tendency.

. . . [S]timuli that have been repeatedly connected with a certain type of action are capable of evoking that response on later occasions. If a certain stimulus (such as a handgun) has been repeatedly connected with aggressive behavior, it will be able to elicit aggressive responses from people who are ready to act aggressively.¹⁰⁴

Thus, while it is true that the finger is on the trigger, the trigger may also be pulling the finger.¹⁰⁵

Knives, which are much more readily available (only 3 per household will yield a quarter billion knives in the U.S.),¹⁰⁶ are a distant second as a weapon of choice.¹⁰⁷ Guns have been referred to as the tool of the cowardly, for it is psychologically far easier to pull a trigger 10 or 20 feet away from the victim than to touch their body with a knife. Thus, many persons inclined to use a gun would never possess the capability to use a knife.¹⁰⁸ Although only one shot is sufficient to cause death in 70% of all handgun homicides,¹⁰⁹ the knife is not nearly as effective. Knife deaths per 100 reported knife attacks is less than 1/5 the rate of gun deaths.¹¹⁰ Despite the availability of knives as a possible substitute weapon, one must conclude the homicide rate would significantly decline were it not for the easy and ready availability of handguns.

Criminal Misuse

Although comprising less than 15% of handgun violence,¹¹¹ criminal misuse is stimulated by the product's ready availability. Handguns are used in 50% of all murders,¹¹² 23% of aggravated assaults,¹¹³ and 40% of all robberies.¹¹⁴ In 1980, handguns were the

103. *F.B.I. Uniform Crime Reports*, *supra* note 1, at 13.

104. Berkowitz, *Experimental Investigations of Hostility Catharsis*, 35 *JOUR. OF CONSULTING AND CLINICAL PSYCHOLOGY* 1 (1970).

105. Berkowitz, *How Guns Control Us*, *PSYCHOLOGY TODAY*, at 11 (June, 1981).

106. Estimate based on 1980 Census figures showing 80 million residences in the United States. U.S. Census, 1980.

107. *F.B.I. Uniform Crime Reports*, *supra* note 1, at 13, lists knives as being used in 19% of all murders, as compared with handguns which are used in 50%.

108. *See generally*, G. NEWTON & F. ZIMRING, *supra* note 3.

109. *Id.*

110. *Id.* at 728.

111. *F.B.I. Uniform Crime Reports*, *supra* note 14.

112. *F.B.I. Uniform Crime Reports*, *supra* note 1 at 13.

113. *Id.* at 21.

114. *Id.* at 19.

products used in some 220,000 robberies and 157,000 aggravated assaults.¹¹⁵ The reason handguns are popular among criminals lies in the effectiveness, availability and concealability of the weapons. Criminals need a weapon that will intimidate, yet be concealable so as to disguise the criminal purpose. At the same time it must be quickly available and effective. A handgun is a readily available product that meets these specifications.

Illusion of Utility

The risk of injury or death from the mere presence of a handgun should, by now, be apparent. But does that risk outweigh the usefulness or utility of this product when marketed over the counter to the general public? If so, then a judicial determination that it is an "unreasonably dangerous" product should be expected.

One recent poll indicates that at least 43% of all the persons owning handguns do so for "self-protection."¹¹⁶ Records show, however, that at best, a handgun creates only an illusion of safety and at worst, it endangers the life of its owner. The handgun is of almost no utility in defending one's home against burglars. A Case Western Reserve University study showed that a handgun brought into the home for the purposes of self-protection is six times more likely to kill a relative or acquaintance than to repel a burglar.¹¹⁷ When homicides and suicides are added, this figure increases fifty-fold.¹¹⁸ Since 90% of all residential burglaries are committed when no one is home,¹¹⁹ the homeowner's life is rarely endangered by burglars.

That fact alone illustrates a far greater likelihood that the handgun will be stolen rather than used for self-protection. It has been estimated that 275,000 handguns (most purchased for self-protection) are stolen each year and turned back against society.¹²⁰ Fur-

115. *Id.* at 18-21.

116. Result of Survey Conducted by Cambridge Reports, Inc., April-May, 1978, submitted to the Center for the Study and Prevention of Handgun Violence. However, a poll conducted two years earlier showed that as many as 66% keep handguns for self-defense. See Yeager, *How Well Does the Handgun Protect You and Your Family?* Report to the United States Conference of Mayors (1976).

117. Hirsh, *Accidental Firearm Fatalities in a Metropolitan County*, 100 AMER. JOUR. OF EPIDEMIOLOGY 504 (1979).

118. *Id.*

119. T. REPETTO, RESIDENTIAL CRIME 5, 17 (1974).

120. Right and Rossi, *Weapons, Crime, and Violence in America*, National Institute of Justice, U.S. Dep't. of Justice (November 1981), reported in *Federal Regulation of Firearms*, Report to the Senate Judiciary Comm. by the Library of Congress, 137 (1982); see

ther, although a burglary is committed in the United States every 10 seconds,¹²¹ there are 80,000,000 residences in this country.¹²² If one assumes a home was never burglarized twice, an assumption contrary to actual patterns, and couples this with the fact that in 9 out of 10 times the resident will not be home, statistically it will take more than 120 years for any member of your family to even have an opportunity to confront a burglar, and actual confrontation increases the likelihood of injury.¹²³

The handgun is also of questionable utility in protecting against robbery, mugging or assault. In one survey of robberies and attempted robberies, even when the victim responded with a weapon, the robbery was completed 4 out of 10 times,¹²⁴ and victims who responded with the weapons were injured twice as often as those who did not.¹²⁵ The element of surprise the robber has over his victim makes handguns ineffective against robbery.¹²⁶ The victim of a street robbery, for instance, "seldom recognizes his predicament until it is too late to defend himself except by engaging in a gun battle at great risk to his life."¹²⁷

A survey of Chicago robberies in 1975 revealed that, of those victims taking no resistance measures, the probability of death was 7.67 per 1000 robbery incidents, while the death rate among those taking self-protection measures was 64.29 per 1000 robbery incidents.¹²⁸ The victim was 8 times more likely to be killed when using a self-protective measure than not!

Although handguns possess little or no utility as self-protection devices, some may have a socially acceptable value when properly marketed under restricted guidelines. Law enforcement activities, at least in this country, still require police officers, when necessary, to carry handguns. Producing handguns for law enforcement use, however, does not necessitate or justify marketing these products over the counter to the general public. Certain high-quality handguns may be suitable for sport-shooting purposes and still others may be suitable for collecting. Even these uses, however, do not

also Brill, *Firearm Abuse: A Research and Policy Report*, POLICE FOUNDATION, 105 (1977).

121. *F.B.I. Uniform Crime Reports*, *supra* note 11, at 5.

122. U.S. Census, 1980.

123. Yeager, *supra* note 116, at 18.

124. *Id.* at 12-16.

125. *Id.*

126. G. NEWTON & F. ZIMRING, *supra* note 3, at 63-68.

127. *Id.* at 68.

128. Yeager, *supra* note 116, at 18.

justify the 22,000 deaths per year that result from marketing handguns to the general public. Sport-shooting clubs can easily continue activities under more restrictive handgun marketing plans that do not include marketing to the general public.

Conclusion

The small \$10, .22 caliber handgun that deprived David Clancy of his ability to walk has no serious utility in modern society. The intentional or accidental infliction of injury or death by lay citizens toward each other is not, in this country, an acceptable function for any product. The risk of harm, on the other hand, is substantial. When balanced against the utility, or more accurately the lack thereof, the risk of harm easily predominates. A jury should be expected to conclude the product is unreasonably dangerous if marketed to the general public.

The intervening act by David's classmate, while one of negligence, was clearly foreseeable and predictable to the seller and manufacturer. The manufacturer should therefore not be excused from liability for marketing a defective and unreasonably dangerous product simply because the gun was used, or misused, in a foreseeable manner. When a manufacturer or retailer chooses to produce a product and sell it for profit, that supplier, and through it that product's consumer, must bear the consequences for the unacceptable damage that product causes. Social policy dictates that this must be the case.

It is both proper and necessary that the courts recognize this existing duty as to handgun suppliers. The courts have already stimulated the development of much needed higher levels of safety in the automotive and aviation industries, where strong lobbies had paralyzed Congress from enacting reasonable safety standards. No lobby is stronger than the gun lobby in its commitment to sacrifice 22,000 Americans a year for a "mythical" right¹²⁹ and illusory protection.

The theory advanced herein is not a theory of absolute liability. It is merely urged that a supplier of handguns be subject to the same rules of law as the other manufacturers and suppliers of consumer products. There is no sound reason in law or in equity to grant handgun manufacturers any special immunity from responsibility for physical harm caused by their products when the risk of

129. U.S. CONST. amend. II (relating to a militia and the collective right to bear arms).

injury and death so far outweighs any social utility the product may possess.

If a product is so dangerous as to inflict widespread harm, it is ironic to exempt the manufacturer from liability on the ground that any other sample of his product would produce like harm. If we scrutinize deviations from a norm of safety as a basis for imposing liability, should we not scrutinize all the more the product whose norm is danger?¹³⁰

It would be ludicrous to assert that a small, easily concealable handgun, when marketed to the general public, is not "inherently dangerous." In fact, judges and commentators have inferred that the typical handgun is an inherently dangerous product.¹³¹

It is this writer's opinion that the estimated sixty suits that have already been filed against handgun manufacturers and suppliers premised on theories of strict liability as described above, will grow to 200 in a year. In a number of these cases the plaintiff will prevail; and these suits are likely to involve the more seriously damaged victims. Damages to quadriplegics today are measured in multiples of millions of dollars, a fact not surprising since their demonstrated economic losses often range from five to ten million dollars. The question may no longer be whether product liability laws will impact handgun suppliers, but rather how large will be their own self-imposed destruction.

As long as the handgun manufacturers and sellers seek immunity for their unreasonably dangerous products, the handgun is going to continue to represent a tragic symbol in this country. Whether it is strapped on a police officer, or is in someone's jacket, bedside table, or glove compartment, the handgun will remain a symbol of the ultimate solution to man's conflicts — the destruction of another human being.

130. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 368 (1965).

131. See *supra* note 78.

TO PRESERVE LIBERTY—A LOOK AT THE RIGHT TO KEEP AND BEAR ARMS

by *Richard E. Gardiner**

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.

In the last several decades, a vocal minority, popular with the major news media, has put forth a distorted interpretation of the second amendment to the United States Constitution for the avowed political purpose of removing an obstacle from the path leading toward their goal of depriving private citizens of some or all of their firearms. And, as with virtually all attempts to minimize those precious freedoms guaranteed each American by the Bill of Rights, that minority has twisted the original and plain meaning of the right to keep and bear arms. In this article, an unfortunately brief exposition given the fact that a complete discussion of the right to keep and bear arms would necessitate a multi-volume work, I will attempt to set out the historical development of the right to keep and bear arms so as to clarify the intentions of the Framers of the second amendment and will discuss and critically comment upon some of the more significant cases decided pursuant to that amendment.

By way of introduction to this discussion, it should be kept in mind that, in construing the Constitution, it is particularly important that the values of its Framers, and of those who ratified it, be applied, and that inferences from the text and historical background of the Constitution be given great weight. Thus, the precedential value of cases and the light shed by commentators with respect to any particular provision of the Constitution tends to increase in proportion to their temporal proximity to the adoption of the main body of the Constitution, the Bill of Rights, or any other amendments.¹ That being so, it is appropriate first to examine the development of the right to keep and bear arms prior to the adoption of the second amendment.

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1. *Powell v. McCormack*, 395 U.S. 486, 547 (1969).

I. COMMON LAW DEVELOPMENT OF THE RIGHT TO KEEP AND BEAR ARMS

The right to keep and bear arms, like the other rights guaranteed by the Bill of Rights,² was not created or granted by the second amendment. Rather, this fundamental, individual right, largely developed in English jurisprudence prior to the formation of the American Republic, pre-dates the adoption of the Constitution and was part of the common law heritage of the original colonies.³ It is thus to this common law heritage that one must look to begin to understand the right to keep and bear arms. In doing so, it is, however, important to remember that the doctrine which justifies recourse to the common law in order to better understand the guarantees of the Constitution "is subject to the qualification that the common law rule invoked shall be one not rejected by our ancestors as unsuited to their civil or political conditions."⁴ Thus, although a constitutional guarantee's "historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system."⁵

As a consequence, the common law serves only as a starting point in the interpretation of constitutional guarantees. It may not be invoked to abrogate express constitutional guarantees because "[a]t the Revolution we separated ourselves from the mother country, and . . . established a republican form of government, securing to the citizens of this country *other and greater personal rights, than those enjoyed under the British monarchy.*"⁶

One of the clearest expositions of the common law, as it had de-

2. Georg Jellinek maintained that the only individual rights found in the English Bill of Rights were the right to petition and the right to bear arms. G. JELLINEK, *THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS* 49 & n.7 (M. Farrand trans. 1901). The first of these two rights is, of course, guaranteed by the first amendment to the United States Constitution and the latter by the second amendment, a clear demonstration that the Framers appreciated the relative importance of these rights.

3. None of the rights found in the Bill of Rights is granted or created by that document. Rather, the Bill of Rights protects against infringement or abridgement those fundamental human rights which the Framers viewed as naturally belonging to each individual human being. It would be a grotesque perversion of the Framers' understanding of the concept of rights to suggest that any of the rights found in the Bill of Rights, particularly the few precious substantive rights of the first and second amendments, were created by that document.

4. *Grosjean v. American Press Co.*, 297 U.S. 233, 249 (1936).

5. *United States v. Brewster*, 408 U.S. 501, 508 (1972).

6. *Bridges v. California*, 314 U.S. 252, 264 n.7 (1941) (quoting James Buchanan as quoted in A. STANSBURY, *THE TRIAL OF JAMES H. PECK* 434 (1883)) (emphasis added).

veloped by the mid-eighteenth century, came from Sir William Blackstone who, because he was an authoritative source of the common law, was a dominant influence on the Framers of the Constitution. He set forth the absolute rights of individuals, "those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy,"⁷ as personal security, personal liberty, and possession of private property. These absolute rights were ultimately protected by the individual's right to have and use arms for self-preservation and defense.⁸ As Blackstone observed, individual citizens were entitled to exercise their "natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."⁹

Blackstone was not alone in this view. In his *PLEAS OF THE CROWN*, Hawkins noted that "every private person seems to be authorized by the law to arm himself for [various] purposes."¹⁰ Sir Edward Coke likewise wrote that "the laws permit the taking up of arms against armed persons."¹¹ This absolute and inalienable right

7. 1 W. BLACKSTONE, *COMMENTARIES* 123, 129.

Included within the right to personal security was the right to life, a right that "was so far above dispute that [colonial] authors were content merely to mention it in passing. . . . [T]he strategic importance of the right to life lay in its great corollary or defense: the law or right to self-preservation. This secondary right made it possible for a single man or a whole nation to meet force with force. . . ." M. ROSSITER, *SEEDTIME OF THE REPUBLIC* 377 (1953).

8. Blackstone observed that the three principal absolute rights were protected and maintained inviolate by five auxiliary subordinate rights, the last of which was "having and using arms." The first four were: 1) the constitution, powers, and privileges of parliament; 2) the limitation of the king's prerogative; 3) applying to the courts of justice for redress of injuries; and 4) the right of petitioning the king, or either house of parliament, for the redress of grievances. W. BLACKSTONE, *supra* note 7, at 141-44. In looking at these five subordinate rights, it is apparent that the subject matter of the first three rights coincides with the subject matter of the first three articles of the Constitution, and the subject matter of the last two rights coincides with the subject matter of the first two amendments to the Constitution. Given the Framers' familiarity with Blackstone, the similarity between the format of the Constitution and Blackstone's five auxiliary rights (which were established to protect the three principal absolute rights, as was the Constitution) can be no coincidence. Moreover, the fifth amendment guarantee that no person shall be "deprived of *life, liberty, or property*, without due process of law" (emphasis added) tracks Blackstone's three principal absolute rights.

9. *Id.* at 144.

10. 1 W. HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN*, ch. 28, § 14, at 171 (7th ed., London 1795).

11. 2 E. COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 574 (A. Johnson & T. Warner, ed., Oxford, 1812).

Each individual has, moreover, the *obligation* to defend himself or herself if he or she wishes to be protected since the police do not owe a duty to each individual to provide him

of self-defense,¹² so clearly recognized by the common law, stemmed from the natural law¹³ which permits legitimate defense of life and rights equivalent thereto, including the slaying of an unjust aggressor by the use of the force necessary to repel the danger.¹⁴ The natural law permitted such defense not only because, in the conflict of rights, the right of the innocent party should prevail, but because the common social good would also suffer if the right were not recognized.

Cicero, the great legal philosopher of republican Rome and a source for the Framers' understanding of the natural law, recognized the right to be armed to resist violent attacks and robbery:

And indeed, gentlemen, there exists a law, not written down anywhere but inborn in our hearts; a law which comes to us not by training or custom or reading but by derivation and absorption and adoption from nature itself; a law which has come to us not from theory but from practice, not by instruction but by natural intuition. I refer to the law which lays it down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. When weapons reduce them to silence, the laws no longer expect one to await their pronouncements. For people who decide to wait for these will

or her protection. See Annot., 46 A.L.R. 3d 1084 (1972). See also *Warren v. District of Columbia*, 444 A.2d 1 (D.C. App. 1981).

12. "Self-defense, 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. Thus, the right to defend one's person with deadly force has been recognized by the courts of every state and the Supreme Court. *Beard v. United States*, 158 U.S. 550 (1895). Moreover, the Supreme Court has held that arming for self-defense is proper and that a handgun is appropriate for such a purpose. See, e.g., *Gourko v. United States*, 153 U.S. 183, 191 (1894) ("the jury were not authorized to find [the defendant] guilty of murder because of his having deliberately armed himself [with a small bright pistol], provided he rightfully so armed himself for purposes simply of self-defense"); *Thompson v. United States*, 155 U.S. 271, 278 (1894) ("the purpose of the defendant in arming himself was for self-defense"); *Smith v. United States*, 161 U.S. 85 (1896) (pistol used for self-defense); and *Rowe v. United States*, 164 U.S. 546, 547-48 (1896) (self-defense where "after deceased began cutting defendant the latter drew his pistol and fired"). In *Patson v. Pennsylvania*, 232 U.S. 138 (1914), Justice Holmes referred to "weapons such as pistols that may be supposed to be needed occasionally for self-defense." *Id.* at 143.

13. Natural law concepts clearly influenced the Framers and, in particular, the architects of the Bill of Rights. Jefferson's explanation of the source of the Declaration of Independence applies equally to the Bill of Rights: "the elementary books of public right, as Aristotle, Cicero, Locke, Sidney & c." "T. JEFFERSON, LIVING THOUGHTS 42 (J. Dewey ed. 1963). See E. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955). The philosophers mentioned by Jefferson were frequently relied upon as authorities in the ratification debates and pamphlets.

14. See 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA 57, 67, 73, 103 ().

have to wait for justice, too—and meanwhile they must suffer injustice first. Indeed, even the wisdom of the law itself, by a sort of tacit implication, permits self-defense, because it does not actually forbid men to kill; what it does, instead, is to forbid the bearing of a weapon with the intention to kill.¹⁵

John Locke, too, upheld the right of potential victims to resist deadly attack with force when he observed that “the law could not restore life to my dead carcass.”¹⁶

In addition to the right of self-defense, a right which would be meaningless for most people without the right to use arms, there also existed in English law, prior to the formation of the American Republic, a positive *duty* of most able-bodied freemen to keep, and be prepared to bear and use, arms both for military and law enforcement purposes. Such a duty was deeply imbedded in English and Germanic history and indeed antedates the invention of firearms.¹⁷

In the years prior to the Norman Conquest, “every free subject in the realm, whatever his primary function, was legally bound, whenever the need arose, to take arms to defend his king and his homeland.”¹⁸ That obligation, which was necessitated by the absence of a standing army and a police force, was fulfilled by serving in the “fyrd” or people’s army, whose functions were “to safeguard the shire [county] from invasion, to suppress riots, and arrest criminals.”¹⁹

Because one of the functions of the fyrd was to repel invaders, the early Norman conquerors attempted to suppress the fyrd while consolidating their power over the defeated Saxons. In 1181, however, in an attempt to recreate the fyrd and thus reinstitute the freeman’s duty to defend his home, thereby vitiating the need to raise and maintain a standing army, Henry II (1154-1189) instituted the first Assize of Arms which required “the whole body of

15. Cicero, *In Defense of Titus Annius Milo*, reprinted in *SELECTED POLITICAL SPEECHES* 222 (M. Grant trans. 1969).

16. J. LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT* 207 (London, 1689). Locke’s concepts of “basic civil rights” were approved in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

17. This duty “is illustrated by the manumission ceremonies in which the former master of a liberated serf would place in his hands the weapons of a freeman as a symbol of his new status.” C. W. HOLLISTER, *ANGLO-SAXON MILITARY INSTITUTIONS* 27 (Oxford, Clarendon Press, 1962).

18. J.J. BAGLEY & P.B. ROWLEY, *I A DOCUMENTARY HISTORY OF ENGLAND* 152 (New York, 1965).

19. *Id.*

freemen" to possess certain arms and armour in proportion to their wealth which could not be sold, pledged, offered or otherwise alienated and of which a lord could not "in any way deprive his men."²⁰ In 1252, another Assize of Arms under Henry III (1216-1272) expanded the duty of keeping arms to include not only freemen, but also villeins, the English equivalent of serfs, so that all "citizens, burgesses, free tenants, villeins and others from 15 to 60 years of age" were obliged to be armed.²¹ This Assize, unlike its predecessor, had a strong emphasis on the law enforcement duties of the average citizen. Thus, in addition to the requirement of possessing certain arms, the Assize established a system of "watch and ward" which mandated each city to have armed men on guard at night to arrest strangers and give the "hue and cry" to summon assistance from other citizens if anyone resisted arrest or escaped from custody. Under Edward I (1272-1307), to ensure that the requirements of the earlier Assizes were being fulfilled "for to keep the peace," the Statute of Winchester was enacted and mandated a viewing by a local authority of every man's arms twice a year.²² In addition, because under Henry III's Assize, criminals had simply been run out of the city and not pursued and arrested, thus allowing them to escape punishment and continue their activities, the requirements of an earlier statute, which imposed a fine upon those who did not assist in the apprehension of criminals, were reenacted.

In later years, the Tudor kings began the first attempts to impose limits upon the use and possession of weapons; in particular, crossbows and the then-new firearms. These measures were not, however, intended to disarm the citizenry (who made up the bulk of the military forces) but rather to prevent their being diverted from practice with the longbow (the primary English military weapon since it could be fired relatively rapidly and penetrate chain mail at as much as 400 yards) by sport with crossbows and firearms which, at the time, were less effective for military purposes.²³ Such laws were also intended to restrict the hunting of

20. 2 ENGLISH HISTORICAL DOCUMENTS, 1042-1189, at 449 (2nd Ed., Oxford). The only arm the Assize required freemen to possess was the lance since undoubtedly they did not need to be encouraged to possess small arms such as knives.

21. J. J. BAGLEY & P. B. ROWLEY, *supra* note 18 at 155.

22. Statute of Winchester, 1285, 13 Edw. 1, ch. 6. This statute, which also required local landholders to cut back brushwood along the royal highways to a distance of 200 feet to deprive criminals of a place to hide, was repealed by James I in 1623, 21 Jac. I, ch. 28.

23. As early as 1369, Edward III ordered the sheriff of London to require that "everyone

game to the king and the landed gentry. Thus, when in 1503, Henry VII (1485-1509), after observing that "shotyng in Longe Bowes hathe ben moche used in this . . . Realme, wherby Honour & Victorie hathe ben gotten ageyne utwarde enymyes & the Realme gretly defended," limited shooting (but not possession) of crossbows to those with land worth 200 marks annual rental and those who had a license from the king, an exception was provided for those who "shote owt of a howse for the lawefull defens of the same."²⁴ In 1511, Henry VIII (1509-47), noting that "good Archers" had "defended this Realme", instituted a requirement of longbow ownership, requiring all able-bodied men to "use and ex[er]cyse shootyng in longbowes, and also to have a bowe and arrowes redy contynually in his house to use hymself and do use hymself in shotyng"; fathers were also required to provide bows and arrows for their sons between the ages of 7 and 14 and to train them in longbow use. In addition, because "so meny men have opteyned license to shote in Crosebowes . . . And many men p[r]tendyng to have landes & tenements to the yerely value of [200] marks shote dayly in Crosebowes", the property requirement was increased to 300 marks.²⁵

In 1514 the limitation on shooting of crossbows was extended to include firearms since many people "not regarding nor fereng the penalties of the [earlier statute] use daily to shote in Crosebowes and hand gones;" and for the first time, persons not meeting the property requirement were prohibited from possessing crossbows and "hand gones" (which at that time meant any firearm carried by hand, as distinguished from cannon).²⁶ There were, however, exceptions to the prohibition for those who lived near the sea or Scotland and for those who had licenses issued by the king, thereby emphasizing that the purpose of the law was primarily to protect the king's deer and to encourage "shoting in long bowes."

. . . , strong in body, at leisure time on holidays, use in their recreation bowes and arrows . . . and learn and exercise the art of shooting . . ." and to stop all other games which might distract them from this practice. E. HEATH, *THE GREY GOOSE WING* 109 (1971). Richard II followed suit, requiring servants and laborers to "have Bows and Arrows, and use the same the Sundays and Holydays, and leave [all playing at Tennis or Football, and other Games called Coits, Dice, Casting of the Stone, [Kailes,] and other such importune Games;]. . . ." (brackets in original) 1388, 12 Ric. 2, ch. 6.

24. 19 Hen. VII, ch. 4 (1503-4).

25. An Acte Concerning Shooting in Longe Bowes, 3 Hen. VIII, ch. 3 (1511); An Acte Agaynst Shooting in Crosbowes, 3 Hen. VIII, ch. 13 (1511).

26. Acte Avoidyng Shoting in Crosbowes, 1514, 6 Hen. 8, ch. 13.

Nine years later, however, Henry reduced the property qualification to 100 pounds per year²⁷ and in 1533 expanded the areas exempted from the prohibitions of the law to include the counties of Northumberland, Durisme, Westmoreland, and Cumberland. In 1541, realizing that his subjects possessed and used firearms for recreation and defense in spite of his efforts, Henry repealed all the former statutes and prohibited only the carrying of loaded firearms on a "Jorney goinge or ridinge in the Kings highe waye or elsewhere;" the prohibitions on keeping and shooting firearms were limited only to firearms smaller than "the lenghe of one hole Yard" for some and "thre quarters of one Yarde" for others. As the statute makes clear, he did so because it was recognized that exercise in the shooting of firearms (which by then were no longer considered merely ineffective sporting items) by the citizens "may the better ayde and assist to the defence of this Realme. . . ."²⁸

In 1670, after centuries of *requiring* citizens to possess and be exercised in the use of arms so as to vitiate the necessity for both a standing army and a police force, Charles II (1660-1685) instituted the Act for the Better Preservation of the Game,²⁹ which prohibited the possession of guns and bows and thus, *for the first time in English history*, denied most citizens the common law right to possess arms other than knives and swords. This statute, which followed earlier actions by Charles disarming the remnants of Cromwell's republican army as well as any other persons suspected of not being loyal to the crown, and which ran directly contrary to the common law, were a means of consolidating Charles' power by removing from the citizenry their ability to oppose his tyranny.³⁰ As Blackstone observed of the purpose of the Game Acts: "For

27. Thacte for Shoting in Crosbowes and Handgonnes, 14 & 15 Hen. VIII, ch. 7 (1523).

28. An Acte Concerninge Crosbowes and Handguns, 1541, 33 Hen. 8 ch. 6.

29. 1670, 22 Car. 2, ch. 25, § 3.

30. Charles had thus established a small standing army loyal to him and had molded the militia, which by that time no longer consisted of all able-bodied men, but only selected men from each locality formed into trained bands, into a large and effective royal police force. Thus, the militia, which had once been representative of the people, now included only those who had demonstrated loyalty to the crown. To control firearms at the source, he had also ordered gunsmiths to produce a record of all the weapons they had manufactured, together with a list of purchasers, in the six months since he had taken the throne. That list was to be updated every week. Privy Council 2/55/71 (Dec. 1660). In addition, guns could not be transported without a special license. And the importation of firearms was completely barred on the dual grounds that foreign weapons led "to the great impovrishment" of English manufacturers, and that they might aid insurrection. Privy Council orders of Mar. 28, 1661 and Sept. 4, 1661, Privy Council 2/55/189 and 1/55/187.

prevention of popular insurrections and resistance to the government, by disarming the bulk of the people; which last is a reason oftener meant, than avowed, by the makers of forest or game laws."³¹

Nonetheless, Charles' game acts were interpreted and enforced by the courts so as not to abrogate the common law right to possess guns.³² For example, *Rex v. Gardner*³³ held that the Game Acts did "not extend to prohibit a man from keeping a gun for his necessary defence. . . ."³⁴ Demonstrating the courts' reluctance to enforce the Game Act, Justice Page noted that "keeping a lurcher, without using it in killing game, was not within the Statute of Car. 2, though it be expressly named therein." Likewise, referring specifically to the acts of Charles II,³⁵ and Anne,³⁶ the court held that "as these acts restrain the liberty which was allowed by the Common law," they "ought not to be extended further than they must necessarily be."³⁷ *Malloch v. Eastly*³⁸ similarly held that "the mere having a gun was no offense within the game laws, for a man may keep a gun for the defence of his house and family. . . ."³⁹ Several years later, the court stated: "It is not to be imagined, that it was the intention of the Legislature . . . to disarm all the people of England . . . as a gun may be kept for the defence of a man's house, and for divers other lawful purposes. . . ."⁴⁰

The Statute of Northampton, which provided that no man should "go nor ride armed by night or by day in fairs, markets, nor

31. 2 W. BLACKSTONE, COMMENTARIES 412.

32. Henry St. George Tucker stressed the more absolute character of the right to keep and bear arms in America:

The right of bearing arms — which with us is not limited and restrained by an arbitrary system of game laws as in England; but, is practically enjoyed by every citizen, and is among his most valuable privileges, since it furnishes the means of resisting as a freeman ought, the inroads of usurpation. . . .

H. TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA 43 (Philadelphia, 1831).

33. 87 Eng. Rep. 1240 (K.B. 1739).

34. *Id.* at 1241.

35. 1670, 22 Car. 2, ch. 25, § 3.

36. An Act for the Better Preservation of Game, 1706, 6 Anne, ch. 16.

37. 2 CHITTY, TREATISE ON THE GAME LAWS 1068, 1071 (London, 1812).

38. 87 Eng. Rep. 1370 (K.B. 1744).

39. *Id.* at 1374.

40. *Wingfield v. Stratford*, 96 Eng. Rep. 787 (K.B. 1752); accord *The King v. Thompson*, 100 Eng. Rep. 10, 12 (K.B. 1787) (it is "not an offence to keep or use a gun"), and *Rex v. Hartley*, II Chitty 1178, 1183 (1782) ("a gun may be used for other purposes, as the protection of a man's house.").

in the presence of the justices or other ministers,"⁴¹ and thus dealt only with the *bearing* of arms in public places, not the keeping of arms, was also given a very narrow reading by the courts in that they required proof that the carrying of arms was to "terrify the King's subjects."⁴² Moreover, there was recognized a "general connivance to gentlemen to ride armed for their security."⁴³ In *Rex v. Dewhurst*,⁴⁴ it was held that the law went only so far as prohibiting a person "to carry arms to a public meeting, if the number of arms which are so carried are calculated to produce terror and alarm. . . ."⁴⁵ Thus, in addition to having "a clear right to arms to protect himself in his house," a person had "a clear right to protect himself when he is going singly or in a small party upon the road. . . ."⁴⁶ *Rex v. Mead*,⁴⁷ likewise held that it was "a great offense at common law" to "go armed to terrify the King's subjects," and that the Statute of Northampton, as construed in *Rex v. Knight*,⁴⁸ was "but an affirmance of the law."⁴⁹

Succeeding Charles II was James II (1685-1688) who attempted to expand the royal standing army and continued many of the repressive policies of Charles; moreover, because he was a devout Catholic, such policies were directed primarily against Protestants. James' brief rule ended, however, with the Glorious Revolution of 1688 and James' abdication.

Since one of the goals of the Glorious Revolution was to reinstate the right of Protestants to have arms, a right of which they had been deprived to prevent resistance to James' repressive policies, when the throne was offered to William and Mary, it was offered subject to their acceptance of the rights, including the right of Protestants to have arms, laid down in a Declaration of Rights. After they ascended the throne and Parliament was formally convened, the Declaration was enacted into law.⁵⁰

41. Statute of Northampton, 1328, 2 Edw. 2, ch. 3.

42. Sir John Knight's Case, 87 Eng. Rep. 75, 76 (K.B. 1686). See also W. BLACKSTONE, COMMENTARIES 149.

43. *Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686).

44. State Trials, New Series 529 (1820).

45. *Id.* at 601-02.

46. *Id.* at 602.

47. 19 T.L.R. 540 (1903).

48. See *supra* note 43 and accompanying text.

49. 19 T.L.R. at 541.

50. 1689, An Act Declaring the Rights and Liberties of the Subject, 1 W. & M., sess. 2, ch.

2. As originally proposed on February 2, 1689, by the House of Commons Committee (10 H.C. Jour. 15, reprinted 1803) it provided: "7. It is necessary for the public safety, that the

The first part of the Declaration consisted of the specific acts by which James II had subverted "the Laws and Liberties of this Kingdom." In that part is found the complaint: "By causing several good Subjects, being Protestants, to be disarmed, at the same time when Papists were both armed and employed, contrary to Law." As a consequence, the second part listed among other "true, ancient, and indubitable rights" that "the subjects which are Protestant may have arms for their defence suitable to their conditions and as allowed by Law."⁵¹ Since only slightly over two percent of the population was then Catholic (and they, even as enemies of the state, were given limited rights to keep arms), this amounted to a general right to keep arms.

In sum, by the time of the American Revolution, English law had developed a tradition of keeping and bearing arms which stretched back almost a millenium, a tradition which was retained and protected by the courts even during the brief eighteen year period in which the common law right of most citizens to possess and use arms other than knives and swords was extinguished by statute.⁵² And it was within this tradition of the individual's right to have and use arms for his own defense, as well as to enable him to contribute to the defense of the nation, that the spark which ignited the american Revolution was struck when the British, by attempting to seize stores of powder and shot in Concord and seeking to disarm the inhabitants of Boston, sought to deny the Massachusetts colonists the ability to protect their rights.

II. THE HISTORY OF THE SECOND AMENDMENT

The history of the second amendment indicates that its purpose was to secure to each individual the right to keep and bear arms so that he could protect his absolute individual rights as well as carry

Subjects which are Protestants, should provide and keep Arms for their common Defence. And that the Arms which have been seized, and taken from them, be restored." As finally passed on February 12, 1689, however, the references to common defense and to a *requirement* that arms be kept were stricken thereby making plain that the purpose was to guarantee an individual *right* to armed self-defense.

51. *Id.* It has been suggested that the language "as allowed by Law" anticipated that laws might be enacted limiting the right to arms. The "law" referred to in that phrase is not, however, future statutory law but rather the common law which existed prior to the reign of Charles II and James II and which recognized a near absolute right to keep arms and a somewhat more limited right to bear them.

52. It was because of the changes wrought by the Glorious Revolution of 1688 and the Bill of Rights of 1689 that in subsequent years game statutes, *e.g.*, 1706, 5 Ann., ch. 14, § 4, did not include any mention of guns.

out his obligation to assist in the common defense. The Framers did not intend to limit the right to keep and bear arms to members of a formal military body, but rather intended to ensure the continued existence of an "unorganized" armed citizenry prepared to assist in the common defense against a foreign invader or a domestic tyrant.⁵³

Subsequent to the American Revolution, which had, to a large extent, been fought by citizen soldiers, it was agreed that the Articles of Confederation were in need of revision to strengthen the structure of the new nation. Once assembled in Philadelphia to write what ultimately became the Constitution, one of the gravest problems faced by the Framers was whether the federal government should be permitted to maintain a standing army. Because of the lessons of history (particularly the reigns of Charles II and James II) and their personal experiences in and prior to the Revolution, the Framers realized that although useful for national defense, the standing army was particularly inimical to the continued safe existence of those absolute rights recognized by Blackstone and generally inimical to personal freedom and liberty.

Unwilling, however, to forgo completely the national defense benefits of a standing army, the Framers developed a compromise position, wherein the federal government was granted the authority to "raise and support" an army, subject to the restrictions that no appropriation of money for the army would be for more than two years and that civilian control over the army would be maintained.⁵⁴ Furthermore, knowing that the militiaman or citizen soldier had made possible the success of the American Revolution, and recognizing that the militia would be the final bulwark against both domestic tyranny and foreign invasion, the Framers divided authority over the militia,⁵⁵ empowering Congress to "govern . . .

53. In A. SIDNEY, *DISCOURSES CONCERNING GOVERNMENT* (1689), the author postulated that in the true commonwealth, "the body of the people is the public defense, and every man is armed. . . ." *Id.* at 157. Much earlier, Aristotle had written that the disarming of commoners created imbalance and oppression. ARISTOTLE, *POLITICS* 71 (Sinclair trans. 1962). Thus, where "the farmers have no arms, the workers have neither land nor arms; this makes them virtually the servants of those who do possess arms." *Id.* at 79. He concluded that tyrants have a basic "mistrust of the people; hence they deprive them of arms. . . ." *Id.* at 218.

54. U.S. CONST., art I, § 8, cl. 12.

55. Justice Story wrote:

The militia is the natural defense of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing

[only] *such part of them* [the militia] as may be employed in the Service of the United States . . .,” and leaving to the states “the Appointment of the Officers, and the Authority of training the militia”⁵⁶ It is thus evident, from the underscored language of Clause 16, that, in addition to that part of the militia over which the Constitution granted Congress authority, there exists a residual, unorganized militia that is not subject to congressional control.⁵⁷

This distinction was first codified, to some degree, in the Militia Act of 1792⁵⁸ which defined both an “organized” militia and an “enrolled” militia. (It also required officers and dragons to be armed with “a pair of pistols.”) The “unorganized” or “enrolled” militia, whose members were expected to be familiar with the use of firearms and to appear *bearing their own arms*,⁵⁹ were not actually in service, but were nonetheless available to assist in the common defense should conditions necessitate either support of the organized militia or possibly defense against a standing army or even the organized militia.⁶⁰

armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. *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 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.*”

(emphasis added) 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1890, at 746-47 (Philadelphia, 1833). Likewise, Jefferson wrote in 1803: “None but an armed nation can dispense with a standing army . . . To keep ours armed and disciplined, is therefore at all times important.” THE JEFFERSON CYCLOPEDIA 553 (1900).

56. U.S. CONST., art. I, § 8, cl. 16 (emphasis added).

57. 10 U.S.C. § 311 continues to recognize such a distinction. The constitutional militia, however, embraces a larger class of persons than today’s statutory unorganized militia since it consists of, at least, all persons “physically capable of acting in concert for the common defense.” *United States v. Miller*, 307 U.S. 174, 179 (1939). For example, the Illinois Constitution provides: “The State Militia consists of all able-bodied persons residing in the State except those exempted by law.” ILL. CONST., art. 12, § 1. The Virginia Constitution, upon which the Bill of Rights was modeled, is even broader in providing that the militia is “composed of the body of the people.” VA. CONST., art. 1, § 13.

58. 1 Stat. 271 (*repealed* by Act of Jan. 21, 1903, ch. 196 § 25, 32 Stat. 775, 780).

59. *United States v. Miller*, 307 U.S. 174, 179 (1939).

60. Since the organized militia could not fulfill the function of protecting “the security of a free State,” as the Constitution places it under the potential control of the federal government (the very government that the constitutional militia was to protect against), it is apparent that the organized militia (today’s National Guard) is not the equivalent of the constitutional militia. Moreover, it is logically unsound to equate the organized militia with the constitutional militia since the organized militia is a creature of statute and thus could be

When the proposed Constitution was sent to the states for ratification, Antifederalists (the popular name for those opposing the Constitution) were concerned that in spite of the restrictions in the Constitution, a federal standing army which would threaten the hard-won liberties of the people, might still exist. To mollify those fears, James Madison discussed, in the Federalist No. 46, how a federal standing army, which he estimated in 1788 would consist of "one twenty-fifth part of the number able to bear arms," might be checked or controlled:

To these [the standing army troops] would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by [state] governments possessing their affections and confidence. It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the late successful resistance of this country against the British arms, will be most inclined to deny the possibility of it. *Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, . . . the governments [of Europe] are afraid to trust the people with arms.*⁶¹

Moreover, the Antifederalists were concerned about the distribution of power over the militia between the federal government and the states.⁶² This concern centered on the fear of the Antifederalists that Congress was given a power which might be used to effectively disarm the militia thereby negating any potential use of the militia to oppose a standing army.⁶³ That that fear was genuine is

dissolved by statute.

61. J. MADISON, THE FEDERALIST No. 46, at 334-35 (B. Wright, ed., 1961).

62. Likewise, at the constitutional convention, there had been vigorous debate over the control over the militia. This, however, like the debate during the ratification period, was a debate over distribution of powers between the states and the federal government, not a debate on the need for a bill of rights, an entirely independent matter.

63. The resolution of the dispute over the distribution of power over the militia in favor of the states is found not in the second amendment, but in the tenth amendment mandate that "[t]he powers . . . not prohibited by [the Constitution] to the States, are reserved to the States. . . ." U.S. CONST., amendment X. As one contemporary writer observed of the proposed second amendment:

apparent from the history of the militia as it had developed in England and subsequently on this continent. Because many of those citizens who were members of the militia would not always voluntarily keep themselves armed and practiced in the use of arms, the pre-Revolutionary states (and of course the English kings) found it necessary to *require* them to possess and use arms.⁶⁴ If, however, Congress were to be given the power to *provide for* arming the militia, that power might be construed as removing from the states' their power to require their citizens to be armed.⁶⁵ Thus, Congress, if it wished to destroy the militia, it could simply "neglect to provide for arming and disciplining the militia. . . ."⁶⁶ As noted above, the possibility of such a construction of the Constitution was negated by the Tenth Amendment.⁶⁷

More importantly, the Antifederalists were concerned with the absence of a Bill of Rights.⁶⁸ As one of the leading historians of the

It is remarkable that this article only makes the observation, 'that a well regulated militia, composed of the *body* of the people, is the best security of a free state;' it does not ordain, or constitutionally provide for, the establishment of such a one. *The absolute command vested by other sections in Congress over the militia, are not in the least abridged by this amendment.*

(emphasis added) Centinel, Revived, No. XXIX. Philadelphia Independent Gazetteer, Sept. 9, 1789, at 2 col. 2. Thus, the states could still exercise power over the militia, the power being "concurrent in the states and in Congress. . . ." *Leo v. Hill*, 126 N.Y. 497, 27 N.E. 789, 790 (1891).

64. See 307 U.S. at 179-82.

65. That article I, section 8, clause 16 of the Constitution delegated to Congress only the power "[t]o provide for organizing, arming, and disciplining, the Militia. . . ." indicates that the Framers intended to give Congress the same type of authority that the States then had, i.e. to require that members of the militia possess and learn to use their own arms. In fact, the first federal militia statute did precisely that. See *supra* note 54.

66. 3 J. ELLIOTT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 379 (2d ed. Philadelphia, 1836) (quoting G. Mason).

67. U.S. CONST. amend X. This Antifederalist fear is distinguishable from an additional fear that Congress might go further than failing to provide for arming the militia and attempt actually to disarm the people. It was in response to these dual fears that the Virginia ratifying convention proposed the following amendment:

Seventeenth, That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defense of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil power.

Notably, the right to keep and bear arms clause of the Virginia proposal was viewed as a separate and distinct right and was not in any way tied to or restricted by the militia clause.

68. The Federalists (the name that was given to those supporting the Constitution) viewed a federal Bill of Rights guaranteeing personal rights as out of place in what they saw as essentially a contract among sovereign states. Moreover, they viewed a federal Bill of

period has observed: "Only the alarm created by the threatened concentration of power in the second American constitution of 1787 could account for the agitation on behalf of a federal bill of rights."⁶⁹ Indeed, the absence of a Bill of Rights was the primary concern of the Antifederalists since, as federal law was supreme, "the Declarations of Rights in the separate States are no security."⁷⁰

In response to the concerns of the Antifederalists regarding the standing army, the division of power over the militia, and "the demand for a bill of rights [which] constituted a common ground on which citizens from every section of the Republic could take a stand,"⁷¹ a political compromise developed in the course of the ratification process in which the Federalists agreed (at no political cost given the popular sentiment) to support amendments to the Constitution in the First Congress declaring "the great rights of mankind"⁷² in exchange for the Antifederalists dropping their demands for changes to the basic framework of the federal government as then outlined in the Constitution. Consequently, when the First Congress met, Madison (who, to win election to the House had become a supporter of a Bill of Rights), drew up proposed amendments based upon proposals made by the state ratifying conventions (proposals which found their source in the state declarations of rights)⁷³ and submitted them to the First Congress. When he submitted them, as his notes make clear, he intended that the amendments "relate 1st to *private* rights."⁷⁴

Rights as unnecessary since the federal government was a government of expressly delegated and therefore, limited, powers, none of which would have allowed it to infringe individual liberties. Thus, Tench Coxe sarcastically noted, "Nothing was said about the privilege of eating and drinking in the Constitution, but he doubted that any man was seriously afraid that his right to dine was endangered by the silence of the Constitution on this point." *Addresses to the Citizens of Pennsylvania*, 4 (Philadelphia, 1787).

69. R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791* 79 (1955).

70. *Id.* at 61 (citing G. MASON, *OBJECTIONS TO THIS CONSTITUTION OF GOVERNMENT*).

71. *Id.* at 140.

72. *Id.* at 201.

73. Since the federal Bill of Rights was modeled on the state guarantees, it is apparent that the same rights were being protected, albeit from a different government. As a result, it is absurd to argue that the right to keep and bear arms, as found in the second amendment, protects a state from the federal government when that same right, as guaranteed in the state constitutions, protected individuals from the state. Viewing a right to keep and bear arms provision as protecting the state's right to have a militia results, moreover, in the ludicrous proposition that the state constitutions protect a state from infringing upon its power to have a militia.

74. 12 *MADISON PAPERS* 193-94 (Rutland ed. 1979) (emphasis added).

His notes also make clear (in that they contain a list of objections to the English Bill of Rights of 1689: "1. Mere act of parl. 2. No freedom of press — Conscience [.] G1. Warrants — Habs. corpus [.] Jury in Civil Causes — criml. [] attainders — *arms to Protessts.*"), that he viewed the English Bill of Rights as too narrow.⁷⁵

One of the proposed amendments⁷⁶ concerned the right to keep and bear arms. In its original form, as proposed by Madison, the second amendment (the fourth proposed amendment) read: "The right of the people to keep and bear arms shall not be infringed; a well-regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."⁷⁷

Significantly, when considering the proposed amendment, the First Senate soundly rejected a proposal to insert the phrase "for the common defense" after the words "bear arms," thereby emphasizing that the purpose of the second amendment was not primarily to provide for the common defense, but to protect the individual's right to keep and bear arms for his own defense.⁷⁸ Moreover, when Madison initially put forth his plan for amending the Constitution, which plan was "calculated to secure the *personal rights* of the people . . .,"⁷⁹ because of the Constitution's "omission of

75. *Id.*

76. Of the twelve proposed amendments, all but the first two dealt with the protection of the rights of individuals; all but the first two were ratified. Since, of the ten remaining, amendments I and II through X have repeatedly been held to secure fundamental individual rights, it is logical that the second amendment also secures a fundamental individual right. The word "people," moreover, as used in the first, fourth, ninth and tenth amendments, has consistently been construed to mean individual.

77. The language concerning religiously scrupulous persons demonstrates Madison's, and the Antifederalists', concern with an individual's liberty of conscience and as such is evidence that the amendments were intended to secure the rights of individuals.

78. J. GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 450 (1971).

79. Comments of contemporary writers make this point crystal clear. For example: "Last Monday a string of amendments were presented to the lower House; these altogether respected *personal liberty*. . ." Letter from William Grayson to Patrick Henry, June 12, 1784, 3 *PATRICK HENRY* 391 (1951) (emphasis added); "[The Amendments] will effectually secure *private rights*. . ." William L. Smith to Edward Rutledge, Aug. 9, 1789, Letters of William L. Smith to Edward Rutledge, 79 *So. CAR. HIST. MAG.* 14 (1968) (emphasis added); and "The whole of that Bill [of Rights] is a declaration of the right of the people at large or considered as individuals . . . [i]t establishes some *rights of the individual* as unalienable and which consequently, no majority has a right to deprive them of." Albert Gallatin to Alexander Addison, Albert Gallatin Papers 2 (Oct. 7, 1789) (available in N.Y. Hist. Soc.) (emphasis added).

guards in favor of rights & liberties,"⁸⁰ he designated the amendments as inserts between sections of the existing Constitution. He did not designate the right to keep and bear arms as an amendment to the militia clauses of Article I, section 8 or section 10; rather, the right to keep and bear arms was part of a group of provisions (including freedom of religion and press) to be inserted "in article 1st, Section 9, between clauses 3 and 4."⁸¹ While the first clause of Section 9 is concerned with slavery, clauses 2 and 3 (which the right to keep and bear arms was to follow) were devoted to the few individual rights expressly protected in the original Constitution relating to suspension of habeas corpus, bills of attainder, and *ex post facto* laws.⁸²

Adding further weight to the proposition that the second amendment guaranteed an individual right is the fact that appearing in the final version of the second amendment was the term "well-regulated." Contrary to modern usage, wherein regulated is generally understood to mean "controlled" or "governed by rule," in its obsolete form pertaining to troops, "regulated is defined as "properly disciplined."⁸³ When it is understood that "discipline" refers to the "training effect of experience,"⁸⁴ it is plain that by using the term "well-regulated" the Framers had in mind not only the individual ownership and possession of firearms, but also practice and training with such firearms so that each person could become experienced and competent in their use.

This conclusion is in complete accord with comments on the rights protected by the Constitution made by a leading constitutional commentator.

The Right is General. It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaran-

80. 12 PAPERS OF JAMES MADISON 201, 258 (Univ. of Va. Press, 1978).

81. *Id.*

82. It has been suggested the right to keep and bear arms was not viewed by the Framers as an important right since it was found in the constitutions of only four states prior to the federal constitutional convention. By that logic, however, the first amendment right to free speech (found in only 2 state constitutions), right to assembly (found in only 4 state constitutions), right to petition (found in only 5 state constitutions), and prohibition on the establishment of religion (found in only 1 state constitution) would also have been viewed as unimportant, an obviously fallacious conclusion. Indeed, only the right to the free exercise of religion and a free press were found in a majority (but not all) of the state constitutions. See, B. SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* 87 (1977).

83. I OXFORD ENGLISH DICTIONARY 741 (compact ed. 1971).

84. *Id.*

teed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrollment of all who are fit to perform military duty or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guarantee might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. *The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for that purpose.* But this enables the government to have a well-regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies a right to meet for voluntary discipline in arms, observing in doing so the laws of public order.⁸⁵

Likewise, in an opinion by one state's Chief Justice, it was held: "The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed or broken in upon, in the smallest degree"⁸⁶

The proposals made by the state ratifying conventions (while initially rejected in many cases, but upon which Madison drew in preparing his proposed amendments) further demonstrate that the Framers of the second amendment were concerned with, and guaranteed, an *individual* right to keep and bear arms. For example, among a group of 15 proposals (which eventually found their way into the Bill of Rights in the first, second, fourth, fifth, sixth, eighth, and tenth amendments) submitted by a minority of the Pennsylvania delegates at the ratifying convention on December 12, 1787, was a provision stating that

the people have the right to bear arms for the defense of themselves, their state, or the United States, and for killing game, and no law shall be enacted for disarming the people except for crimes committed or in a case of real danger of public injury from

85. T. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 298-99 (3d ed. 1898) (emphasis added).

86. *Nunn v. State*, 1 Ga. 243, 251 (1846).

*individuals. . .*⁸⁷

Likewise, in Massachusetts, Samuel Adams proposed an amendment requiring that the "Constitution be never construed to authorize Congress to . . . prevent the people of the United States, who are peaceable citizens, from keeping their own arms."⁸⁸ In New Hampshire the ratifying convention advanced a proposal which provided that "Congress shall never disarm *any citizen* unless such as are or have been in Actual Rebellion."⁸⁹ Judge Robert Sprecher has thus aptly noted that "history does not warrant concluding . . . that a person has a right to bear arms solely in his function as a member of the militia."⁹⁰

The passage of time has not altered the need for individuals to exercise their right to keep and bear arms, even in the context of the common defense. Indeed, one court has recently observed that individual marksmanship is an important skill even in the nuclear age.⁹¹ In the Second World War, moreover, the unorganized militia proved a successful substitute for the National Guard, which was federalized and activated for overseas duty.⁹² Members of the unorganized militia, many of whom belonged to gun clubs and whose ages varied from 16 to 65, served without pay and provided their own arms.⁹³ In fact, it was necessary for the members of the unorganized militia to provide their own arms since the U.S. government not only could not supply sufficient arms to the militia but "turned out to be an Indian giver" by recalling rifles.⁹⁴ The 15,000

87. E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 12 (1957) (emphasis added).

88. *DEBATES OF THE MASSACHUSETTS CONVENTION OF 1788* 86-87 (Pierce & Hale eds. Philadelphia, 1856) (emphasis added).

89. 1 *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 326 (J. Elliot ed., Philadelphia, 1836) (emphasis added). A newspaper article written by Tench Coxe explaining the importance of each proposed amendment, stated: "As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, *the people are confirmed by the next article in their right to keep and bear their private arms.*" *The Federal Gazette and Philadelphia Evening Post*, June 18, 1789, No. 68 of vol. II, at 2, col. 1. (emphasis added). This article was sent to Madison and was also reprinted in the *New York Packet*, June 23, 1789, at 2, cols. 1-2, and in the *Boston Massachusetts Centinel*, July 4, 1789, at 1, col. 2.

90. Sprecher, *The Lost Amendment*, 51 *A.B.A. J.* 554, 557 (1965).

91. *Gavett v. Alexander*, 447 *F. Supp.* 1035, 1046-48 (D.D.C. 1979).

92. *U.S. Home Defense Forces Study*, 32, 34 (Office of the Asst. Sec'y of Defense, March, 1981).

93. *Id.* at 58, 62-63.

94. M. SCHIEGEL, *VIRGINIA ON GUARD* 131 (1949).

volunteer Maryland Minute Men brought their own rifles, shot-guns, and pistols to musters.⁹⁵ And all over the country individuals armed themselves in anticipation of threatened invasion.⁹⁶ Thus, a manual distributed *en masse* by the War Department, recommended the keeping of “weapons which a guerrilla in civilian clothes can carry without attracting attention. They must be easily portable and easily concealed. First among these is the pistol.”⁹⁷ Likewise, in Europe, when the Germans were attempting to occupy Warsaw, the commander of the Jewish Fighting Organization noted, “Our weapons consisted of revolvers (one revolver for every man).”⁹⁸ Another partisan in the same resistance movement wrote of “the first weapon shipment — about ten pistols — received from the Polish underground”⁹⁹

As a final note on the history of the second amendment, it should be observed that the fact that the right to keep and bear arms is joined with language expressing one of its purposes in no way permits a construction which limits or confines the exercise of that right. Like the first amendment right of free assembly, which has as its stated purpose “petition[ing] the Government for a redress of grievances,” and which the Supreme Court has used to invalidate statutes requiring disclosure of organization membership lists, whether or not the organization intends to petition the Government,¹⁰⁰ the right to keep and bear arms cannot be interpreted into nonexistence by limiting it to one of its purposes.¹⁰¹ To hold otherwise is to violate the principle that “[c]onstitutional provisions for the security of a person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.”¹⁰² The Supreme Court

95. Baker, *I Remember — “The Army” With Men from 16 to 79*, *Baltimore Sun* (Mag.), Nov. 16, 1975, at 46.

96. *To Arms*, *TIME*, Mar. 30, 1942, no. 13, at 39.

97. Levy, *Guerrilla Warfare*, *PENGUIN AND INFANTRY JOURNAL* 55 (1942).

98. M. BARKAI, *THE FIGHTING GHETTOS* 30 (1962).

99. *Id.* at 42, 46.

100. *NAACP v. Alabama*, 357 U.S. 449 (1958).

101. The Supreme Court has also relied on the right of assembly to protect the ability to organize unions without government interference, despite that activity being wholly unrelated to petitioning the government. See *Thomas v. Collins*, 323 U.S. 516 (1945). The right of assembly has also been invoked to protect a Chamber of Commerce’s informing people of the advantages and disadvantages of joining a union. See *NLRB v. American Pearl Button Co.*, 149 F.2d 311 (8th Cir. 1945).

102. *Boyd v. United States*, 116 U.S. 616, 635 (1886).

of Oregon recently recognized this principle by stating:

We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.¹⁰³

III. SUPREME COURT INTERPRETATION

In *United States v. Cruikshank*,¹⁰⁴ the first case in which the Supreme Court had the opportunity to interpret the second amendment, the Court plainly recognized that the right of the people to keep and bear arms was a right which existed prior to the Constitution when it stated that such a right "is not a right granted by the Constitution . . . [n]either is it in any manner dependent upon that instrument for its existence."¹⁰⁵ The indictment in *Cruikshank* charged, *inter alia*, a conspiracy by Klansmen to prevent blacks from exercising their civil rights, including the bearing of arms for lawful purposes. The Court held, however, that because the right to keep and bear arms existed independent of the Constitution, and the second amendment guaranteed only that the right to keep and bear arms shall not be infringed by Congress, the federal government had no power to punish a violation of the right by a private individual; rather, citizens had "to look for their protection against any violation by their fellow-citizens" of their right to keep and bear arms to the police power of the state.¹⁰⁶ Thus, the second amendment did not apply in *Cruikshank* since the violation alleged was by fellow-citizens, not the federal government.

In *Presser v. Illinois*,¹⁰⁷ although the Supreme Court affirmed the holding in *Cruikshank* that the second amendment, standing alone, applied only to action by the federal government, it none-

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

104. 92 U.S. 542 (1876).

105. *Id.* at 553 (emphasis added). It is thus clear that the Supreme Court viewed the right to keep and bear arms, like the right peaceably to assemble, as "an attribute of citizenship under a free government" and thus a fundamental right. *Id.* at 551.

106. *Id.* at 553 (emphasis added). What the Supreme Court was making clear was that far from having the power to violate the right to keep and bear arms, it was the obligation of the states to protect an individual's right to keep and bear arms by punishing other individuals who deprived him of that right.

107. 116 U.S. 252 (1886).

theless found the states without power to infringe upon the right to keep and bear arms.

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and in view of this prerogative of the general government, as well as of its general powers, *the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security and disable the people from performing their duty to the general government.*¹⁰⁸

The idea of the armed people maintaining "public security" mentioned in this passage from *Presser* was based upon the common law concept that individuals had the right and, in fact, the duty, not only to resist malefactors, such as robbers and burglars, but to aid in the enforcement of criminal laws and to use deadly force, if necessary, to do so.¹⁰⁹ Disarming individuals would, of course, deprive them of their ability to protect themselves and others, and of their ability to perform their duty to maintain "public security" (or, in the words of the second amendment, the "security of a free State").¹¹⁰ Likewise, disarming individuals would deprive them of their ability to perform "their duty to the general government," i.e. the duty to contribute to the common defense, a duty which can most effectively be carried out if individuals are familiar with the use of firearms.¹¹¹

Presser, moreover, plainly suggests that the second amendment applies to the States through the fourteenth amendment and thus that a State cannot forbid individuals to keep and bear arms. To understand why, it is first necessary to fully appreciate the statutory scheme the Court had before it.

The statute under which *Presser* was convicted did not forbid individuals to keep and bear arms but rather forbade "bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by

108. *Id.* at 265 (emphasis added).

109. That common law concept is embodied in the main body of the Constitution: one of the duties of the militia is "to execute the Laws of the Union." U.S. CONST. art. I, § 8, cl. 15.

110. U.S. CONST. amend II.

111. Richard Henry Lee of Virginia, commenting on the proposed adoption of the Constitution, wrote that "to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them. . . ." LETTER FROM THE FEDERAL FARMER TO THE REPUBLICAN 124 (W. Bennett ed. 1975).

law. . . ."¹¹³ Thus, the Court concluded that the statute did not infringe or have the effect of infringing the right to keep and bear arms, adding, in what is virtually dictum, that:

a conclusive answer to the contention that this amendment [*i.e.* the second amendment] prohibits the legislation in question lies in the fact that the amendment [*i.e.* the second amendment] is a limitation only upon the power of Congress and the National Government, and not upon that of the states.¹¹³

No mention was made at this point in the opinion whether the second amendment, *through the fourteenth amendment*, is a limitation upon the power of the states.

In what was, however, a clear step toward applying certain provisions of the Bill of Rights to the states through the fourteenth amendment, the Court went on to discuss the Privileges and Immunities Clause of the fourteenth amendment. It first noted that "[i]t is only the privileges and immunities of citizens of the United States that the clause relied on was intended to protect."¹¹⁴ The Court thus viewed the issue to be decided as "had [the defendant] a right as a citizen of the United States, in disobedience of the state law, to associate with others as a military company, and to drill and parade with arms in the towns and cities of the State?"¹¹⁵ The Court responded to its question by stating that if the defendant "had any such privilege he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred."¹¹⁶ Bearing in mind that it had already held that the substantive right to keep and bear arms was not infringed by the Illinois statute since the statute did not prohibit the keeping and bearing of arms but rather prohibited military-like exercises by armed men, the Court proceeded to address the question of whether Presser's first amendment right peaceably to assemble and to petition the government for a redress of grievances, which "was an attribute of national citizenship" and thus a privilege and immunity protected against abridgment by the states, was abridged by the Illinois statute.¹¹⁷ The Court held, as it did with regard to the second amendment, that Presser's first amendment

112. 116 U.S. at 264.

113. *Id.* at 265.

114. *Id.* at 266.

115. *Id.*

116. *Id.*

117. *Id.*

rights were not substantively abridged.¹¹⁸ Nonetheless, it is entirely clear that the Court viewed the right peaceably to assemble and to petition the government for a redress of grievances as attributes of national citizenship because they are protected by the first amendment. It is clear also that it viewed the right to keep and bear arms as an attribute of national citizenship because it is protected by the second amendment. Thus, it is plain that the Court viewed such rights as applying to the States through the Privileges and Immunities Clause of the fourteenth amendment,¹¹⁹ and would have invalidated the Illinois statute under either the first or second amendment had it determined that the statute either abridged the right peaceably to assemble or infringed the right to keep and bear arms.¹²⁰

118. *Id.* at 252. Likewise, the Court, in *In re Kemmler*, 136 U.S. 436 (1890), held that because the eighth amendment prohibition of cruel and unusual punishment was a privilege and immunity of a citizen of the United States, it applied to action by the states. Since, however, the particular statute under consideration "did not inflict cruel and unusual punishment" the Court did not "perceive that the State [had] abridged the privileges and immunities of the petitioner . . ." 136 U.S. at 449. Only three provisions of the Bill of Rights, all of which are related to judicial proceedings, have expressly been held by the Court *not* to be privileges and immunities of citizens of the United States and thus applicable to the states through the Privileges and Immunities Clause: the seventh amendment right to trial by jury in suits at common law (*Walker v. Sauvinet*, 92 U.S. 90 (1876)); sixth amendment right to jury of twelve jurors (*Maxwell v. Dow*, 176 U.S. 581 (1900)); and the fifth amendment exemption from compulsory self-incrimination (*Twining v. New Jersey*, 211 U.S. 78 (1908) *overruled*, *Malloy v. Hogan*, 378 U.S. 1 (1964)).

119. Such a view would have been entirely compatible with the intentions of the Framers of the fourteenth amendment. For example, Senator Jacob M. Howard's speech of May 23, 1866, introducing the fourteenth amendment in the Senate, which received front page press coverage the following day, included his explanation that the fourteenth amendment would compel the States to respect "these great fundamental guarantees:" "the personal rights guaranteed and secured by the first eight amendments of the United States Constitution; such as . . . the right to keep and bear arms. . . ." *Cong. Globe*, 39th Cong., 1st Sess., pt. 3, 2765; *New York Times*, May 24, 1866, at 1, col. 6; *New York Herald*, May 24, 1866, at 1, col. 3; and the *Philadelphia Inquirer*, May 24, 1866, at 8, col. 2.

Likewise, as the Supreme Court recognized in *Bartkus v. Illinois*, 359 U.S. 121, 124-25 (1959), that the states perceived the fourteenth amendment to protect the individual right to keep and bear arms from state deprivation, is evidenced by the fact that every state with a constitutional provision inconsistent therewith was duly amended after its adoption and the fact that the constitutions of all other states were consistent with an individual right to keep and bear arms.

120. *Miller v. Texas*, 153 U.S. 535 (1894) cites *Presser* to the effect that the second and fourth amendments "operate only upon the Federal power," thereby not deciding whether the rights to keep and bear arms and to be secure against unreasonable searches and seizures as guaranteed by those amendments applied to the states through the fourteenth amendment. In fact, the Court noted, "If the Fourteenth Amendment limited the power of the States as to such rights, as pertaining to the citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court." *Id.* at 538.

In *United States v. Miller*,¹²¹ the only case in which the Supreme Court has had the opportunity to apply the second amendment to a federal firearms statute, the Court carefully avoided making an unconditional finding of the statute's constitutionality; it instead devised a test by which to measure the constitutionality of statutes relating to firearms. The holding of the Court in *Miller*, however, should be viewed as only a partial guide to the meaning of the second amendment,¹²² primarily because neither defense counsel nor defendants appeared before the Supreme Court, and no brief was filed on their behalf giving the Court the benefit of argument supporting the trial court's holding that Section 11 of the National Firearms Act was unconstitutional.¹²³

The heart of the Court's decision is found in the following statement:

*In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.*¹²⁴

This conclusion, that for the keeping and bearing of a firearm to be constitutionally protected, the firearm's possession or use must have some reasonable relationship to the preservation of a well reg-

121. 307 U.S. 174 (1939).

122. This view is supported by the Congressional Research Office of the Library of Congress which has observed: "At what point regulation or prohibition of what classes of firearms would conflict with the [Second] Amendment, whether there would be conflict, the *Miller* case does little more than cast a faint degree of illumination toward answering." *The Constitution of the United States of America, Analysis and Interpretation*, S. Doc. No. 92-82, 92d Cong., 2d Sess. (1973).

123. In constitutional adjudication, *stare decisis* has less force than in statutory analysis. *Monell v. Dept. of Social Services*, 436 U.S. 658, 695 (1978). Thus, a court owes "less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations." *Id.* at 709 n.6 (Powell, J. concurring). Moreover, "[t]hat an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date." *Powell v. McCormack*, 395 U.S. 486, 546-47 (1969). On one occasion, the Court branded a whole line of decisions it had pursued for nearly a century "an unconstitutional assumption of power by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (citing *Black & White Taxi Cab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1927) (Holmes, J., dissenting)).

124. 307 U.S. at 178 (emphasis added).

ulated militia, is, however, an unjustified limitation upon the rights guaranteed by the second amendment and is based upon the Court's failure to consider fully the common law and the history of the second amendment as well as its misinterpretation of cited authorities.¹²⁵ As the discussions of the common law and the history of the second amendment demonstrate, the second amendment was also intended to guarantee the right of each individual to have arms for his own defense.¹²⁶

With respect to the authorities cited by the Court in support of its position that the second amendment's guarantee was limited to "ordinary military equipment" or weapons whose use "could contribute to the common defense," the Court cited *Aymette v. State*.¹²⁷ In *Aymette*, however, which involved a bowie knife, not a firearm,¹²⁸ the Tennessee Supreme Court was construing not the second amendment but the provision of Tennessee's constitution guaranteeing the right to keep and bear arms, a provision which, unlike the second amendment, spoke of each citizen's right to keep and bear arms only as it related to the common defense. The Ten-

125. Because of the question of whether a short-barrelled shotgun met that test, a matter of which the Court would not take judicial notice, the Court remanded the case to the trial court. Had the trial court had the opportunity to take evidence on the military value of short-barrelled shotguns, it would have found them protected by the second amendment since such shotguns (the modern descendant of the blunderbuss) were military issue in both World Wars, Korea, and Vietnam. Likewise, handguns are considered by the armed forces of every nation to be an important arm. W.H.B. SMITH, *SMALL ARMS OF THE WORLD: A BASIC MANUAL OF SMALL ARMS* (E. Ezell, ed. 11th rev. ed. 1977). Thus, in what has become a heated controversy in Congress, the armed forces are currently soliciting offers for the purchase of 217,439 9mm pistols with a *maximum* length of 8.7 inches. *Service Pistol Update*, Am. Rifleman, Sept. 1981, 30.

126. In *State v. Dawson*, 272 N.C. 535, 659 S.2d 1, 9, 11 (1968), the Supreme Court of North Carolina, in interpreting a provision of that state's constitution, which tracked the language of the second amendment, held that the individual right of self-defense was assumed by the Framers. Moreover, because the ninth amendment ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.") is a recognition of the "inherent natural rights of the individual" and presupposes the existence of personal rights which stem from natural law and common law, the right of self-defense may be viewed as protected by the ninth amendment as well as the second amendment. See B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 19 (1955).

127. 21 Tenn. (2 Hum.) 154 (1840).

128. *Aymette* did not address the question of whether pistols were arms in a constitutional sense. Two subsequent Tennessee cases, however, clarified *Aymette* and struck down laws which prohibited the carrying of handguns. *Andrews v. State*, 50 Tenn. 165 (1871) held that "the pistol known as the repeater is a soldier's weapon" and was constitutionally protected; it was followed by *Glasscock v. City of Chattanooga*, 157 Tenn. 518, 11 S.W.2d 678 (1928) (which held that "Army or Navy pistols" as well as pistols generally were constitutionally protected).

nessee court thus reasoned that not all objects which could conceivably be used as weapons were protected by the Tennessee Constitution, but only those weapons "such as usually employed in civilized warfare."¹²⁹ Such a limitation is not, however, applicable with regard to the second amendment because the first Senate had rejected the "common defense" language upon which the *Aymette* decision turned. It is plain, therefore, that the interpretation of the second amendment in *Miller* is more limited than it should be and that the second amendment protects the keeping and bearing of all types of arms, including handguns, which could be carried by individuals.¹³⁰ Even accepting, however, the existence of a militia or common defense nexus, the *Aymette* court held that "[t]he citizens have an unqualified right to *keep* the weapon" and, adopting the common law, to bear it except to "terrify the people, or for purposes of private assassination."¹³¹

One of the chief values of *Miller* is its discussion of the development and structure of the militia which, the Court pointed out, consisted of "all males physically capable of acting in concert for the common defense"¹³² and that "when called for service these men were expected to appear bearing arms *supplied by themselves* and of the kind in common use at the time."¹³³ *Miller* is also sig-

129. 21 Tenn. (2 Hum.) at 158.

130. *State v. Workman*, 35 W.Va. 367, 14 S.E. 9, 11 (1891), stands alone as the only case that has ever held that no type of pistol is an arm in a constitutional sense. The court, however, cited no cases to support its position and failed to clarify whether "guns" means handguns suitable for militia use. Interestingly, the court's only authority, BISHOP ON STATUTORY CRIMES, § 792 (1873), held that the second amendment applied to the states and protected arms used in warfare. Moreover, the cases cited by BISHOP held that handguns are constitutionally protected arms.

Hill v. State, 53 Ga. 473, 474 (1874) did not go as far as *Workman* and recognized that "guns of every kind, swords, bayonets, horseman's pistols, etc." are constitutionally protected arms. *English v. State*, 35 Tex. 473, 476 (1872), which went even less far, held that among constitutionally protected arms are the "musket, . . . holster pistols and carbine. . . ." *Pierce v. State*, 42 Okla. Crim. 272, 275 P. 393 (Okla. Ct. Crim. App. 1929), cited *Ex Parte Thomas*, 21 Okla. 770, 97 P. 260 (1908), which cited with approval a case holding that "horsemen's pistols" and "holster pistols" are constitutionally protected arms. 97 P. at 263-64.

131. 21 Tenn. (2 Hum.) at 160 (emphasis added). One other comment should be made about *Aymette*. What Judge Green was discussing when he said that the legislature could pass laws concerning arms was that laws could be enacted which would punish *the misuse of such arms*. As an example, Judge Green noted that the legislature could punish a set of ruffians for entering a theater or a church with drawn swords, guns, and fixed bayonets to the terror of the audience. *Id.*

132. 307 U.S. at 179.

133. *Id.* (emphasis added).

nificant for its implicit rejection of the view that the second amendment, in addition to guaranteeing the right to keep and bear only certain types of arms, also guarantees the right only to those individuals who are members of the militia. Had the Court viewed the second amendment as guaranteeing the right to keep and bear arms only to "all males physically capable of acting in concert for the common defense," it would certainly have discussed whether Miller met the qualifications for inclusion in the militia, much as it did with regard to the military value of a short-barrelled shotgun. That it did not discuss this point indicates the Court's acceptance of the fact that the right to keep and bear arms is guaranteed to each individual without regard to his relationship with the militia.

Finally, *Miller* also recognized, in the discussion at 179-182, that each able-bodied individual had not only a duty to assist in the common defense but, indeed, the legal *obligation to possess* the arms necessary to undertake that common defense.¹³⁴ For example, the Court noted that in Massachusetts the law levied fines and penalties against adult males who *failed to possess* arms and ammunition. In Virginia and New York all males of certain ages were required to possess their own firearms at their own expense, and to appear bearing said arms when so notified.¹³⁵

134. *Id.* at 179-82. The first federal militia statute enacted on May 8, 1792, implemented the intentions of the Framers and plainly reflects that handguns were understood to be arms in a constitutional sense. Thus, in *State v. Kerner*, 181 N.C. 574, 107 S.E. 222, 224 (1921), the court observed that the "historical use of pistols as 'arms' of offense and defense is beyond controversy. . . ." See also *In re Brickey*, 8 Idaho 597, 70 P. 609 (1902) and *State v. Rosenthal*, 75 Vt. 295, 55 A. 610 (1903). As a noted historian observed regarding colonial times: "It was considered normal for civilians to carry pocket pistols for protection while traveling. . . . Among eighteenth century civilians who traveled or lived in large cities, pistols were common weapons. Usually they were made to fit into pockets, and many of these small arms were also carried by military officers." G. NEUMANN, *THE HISTORY OF WEAPONS OF THE AMERICAN REVOLUTION* 150-51 (1967). Moreover, the Court in *Miller* observed that the second amendment was concerned with arms "of the kind in common use at the time." 307 U.S. at 179. Thus, while including handguns, rifles, shotguns, and muskets, which are all ordinarily possessed by private individuals and are capable of being used for individual defense, such instrumentalities as cannons, trench mortars, and antitank guns, which cannot be carried by individuals (a significant criterion given the fact that the second amendment speaks not only of the right to keep arms, but to bear them as well, implying that the type of arm protected is one which is capable of being carried), would not be included. Neither would bombs, which, although they could be carried by an individual, are not defensive instrumentalities.

135. *Miller*, 307 U.S. at 179. The Virginia Militia Statute (An Act for Settling the Militia) 3 VA. STAT. AT LARGE FROM 1619 335-342 (Wm. Hening ed. 1823), required even those who were exempted from militia service to keep arms (including pistols) and ammunition. A like requirement was found in the New York militia statute which required "That all persons though freed from Training by the Law yet that they be obliged to keep Convenient armes

In sum, it is clear that *Miller*, even with its limitations, supports the view that the second amendment guarantees an individual right to keep and bear arms, including handguns.¹³⁶ As aptly put by Mr. Justice Black, in discussing *Miller* and the second amendment, "Although the Supreme Court has held this amendment to include only arms necessary to a well-regulated militia, as so construed its prohibition is absolute."¹³⁷

IV. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT APPLIES THE GUARANTEES OF THE SECOND AMENDMENT TO THE STATES

In addition to guaranteeing the right to keep and bear arms against state infringement through the Privileges and Immunities Clause of the fourteenth amendment, modern developments in the analysis of the Due Process Clause dictate that the right to keep and bear arms applies to the states through that clause.¹³⁸

Commencing in 1925, the Supreme Court began to retreat from the position that the fourteenth amendment did not bind the states to honor the guarantees of every provision of the Bill of Rights by holding the substantive guarantees of the first amend-

and ammunition in Their houses as the Law directs To others." A Bill for the settlement of the Militia (passed October 27, 1684) I THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION (Albany, 1894). See also Act for regulating the Militia, Nov. 29, 1693, I ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY 1692-1714 (Boston, 1869); "An Act for the better security of the inhabitants by obliging the male white persons to carry firearms to places of public worship," 19 COLONIAL RECORDS OF STATE OF GEORGIA PART I, 1768-1773 at 138 (Every white male inhabitant who is or shall be liable to bear arms in the militia has to have and carry to church a rifle or pistol), and An act for regulating the militia (1741) 8 COLONIAL RECORDS OF CONNECTICUT FOR 1735-1743.

136. Numerous twentieth century cases hold explicitly or implicitly that all handguns, without distinction as to size, are constitutionally protected arms. See *Schubert v. DeBard*, 398 N.E.2d 1339 (Ind. App. 1980) ("handgun"); *Taylor v. McNeal*, 523 S.W.2d 148, 150 (Mo. App. 1975) ("pistols"); *Rinzler v. Carson*, 262 So.2d 661, 666 (Fla. 1972) ("Semi-automatic pistols"); *City of Las Vegas v. Moberg*, 82 N.M. 626, 485 P.2d 737 (N.M. App. 1971) ("pistols"); *State v. Nickerson*, 126 Mont. 157, 247 P.2d 188, 192 (1952) ("revolver"); *People v. Zerillo*, 219 Mich. 635, 189 N.W. 927 (1922) ("revolver"); *State v. Kerner*, 181 N.C. 574, 107 S.E. 222, 224 (1921) ("pistol"); *State v. Rosenthal*, 75 Vt. 295, 55 A. 610 (1903) ("pistol"); *In re Brickey*, 8 Idaho 597, 70 P. 609 (1902) ("revolver"); and *State v. Kessler*, 289 Or. 359, 614 P.2d 94, 89-99 (1980) ("includes those weapons used . . . for both personal and military defense.") One vintage case, *Nunn v. State*, 1 Ga. 243 (1846) ("pistols") is in accord with these modern cases.

137. Black, *The Bill of Rights*, 35 N.Y.U.L. Rev. 865, 873 (1963).

138. For a detailed discussion of the debates on the adoption of the fourteenth amendment which made it plain that the fourteenth amendment was intended to apply the guarantees of the second amendment to the states, see Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON U. L. REV. 1, 18-33 (1981).

ment binding on the states on a case-by-case basis.¹³⁹

In the landmark case of *Palko v. Connecticut*,¹⁴⁰ the Court harmonized the results of these cases by articulating a new test for the content of the Due Process Clause:

[I]mmunities that are as valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.¹⁴¹

Palko thus marks the point at which the Court first discredited and implicitly overruled Reconstruction-era cases which had held that the Due Process Clause of the fourteenth amendment did not apply the guarantees of the Bill of Rights to the states.¹⁴²

The Court initially applied the *Palko* test cautiously.¹⁴³ During

139. See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of speech and press); *Fiske v. Kansas*, 274 U.S. 380 (1927) (freedom of speech); *Near v. Minnesota*, 283 U.S. 697 (1931) (freedom of the press); *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934) (free exercise of religion); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (freedom of the press); *Herndon v. Lowry*, 301 U.S. 242 (1937) (freedom of assembly). See also *Powell v. Alabama*, 287 U.S. 45 (1932) (limited recognition of right to counsel in a capital case).

140. 302 U.S. 319 (1937), *overruled*, *Duncan v. Louisiana*, 391 U.S. 145 (1968).

141. 302 U.S. at 324-25 (footnote omitted).

142. See, e.g., *Hurtado v. California*, 110 U.S. 516 (1884) (fifth amendment right to grand jury indictment not applied through Due Process Clause); *Twining v. New Jersey*, 211 U.S. 78 (1908), *overruled*, *Malloy v. Hogan*, 378 U.S. 1 (1964) (fifth amendment exemption from compulsory self-incrimination not applied through the Due Process Clause); *Maxwell v. Dow*, 176 U.S. 581 (1900) (sixth amendment right to jury composed of twelve jurors not applied through the Due Process Clause); and *Walker v. Sauvinet*, 92 U.S. 90 (1875), (seventh amendment right to jury trial in suits at common law not applied through the Due Process Clause).

143. *Palko* itself held that the fifth amendment privilege against double jeopardy was not "implicit in the concept of ordered liberty," so that its denial by the state did not abridge due process. 302 U.S. at 328. *Adamson v. California*, 332 U.S. 46, 54-56 (1947), *overruled*, *Malloy v. Hogan*, 378 U.S. 1 (1964), held that a state prosecutor's comment on the accused's failure to testify in a criminal trial, a practice forbidden under the fifth amendment privilege against self-incrimination, did not violate the Due Process Clause under the *Palko* standard. *Wolf v. Colorado*, 338 U.S. 25 (1949), *overruled*, *Mapp v. Ohio*, 367 U.S. 643 (1961), held that the fourth amendment's guarantee against unreasonable searches and seizures was "implicit in the concept of ordered liberty," but nevertheless declined to apply the federally mandated exclusionary rule to the states. In *Rochin v. California*, 342 U.S. 165 (1952), the Court sustained a compulsory self-incrimination challenge to a conviction based on evidence forcibly removed from the defendant's stomach, commenting that the state's conduct "shocks the conscience" and limiting the decision to its facts. Then, in *Irvine v. California*, 347 U.S. 128 (1954), the Court rejected a fourth amendment challenge to a conviction based upon a flagrantly illegal wiretap of the defendant's bedroom, distinguishing *Rochin* and asserting that *Wolf* controlled. Similarly, in *Breithaup v. Abram*, 352 U.S. 432 (1957), the Court refused to extend *Rochin* to a conviction based on a blood test performed while the

the 1960's, however, it began to fill the vacuum created by *Palko*, adopting a broader definition of rights "implicit in the concept of ordered liberty" and upheld every challenge based upon a state violation of the guarantees of the Bill of Rights.¹⁴⁴

In determining whether specific guarantees of the Bill of Rights are so fundamental as to be "implicit in the concept of ordered liberty," the Supreme Court has looked to the history of the right in issue. For example, in *Benton v. Maryland*,¹⁴⁵ Justice Marshall traced the origins of the double jeopardy prohibition "to Greek and Roman times," and found that "[a]s with many other elements of the common law, it was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries."¹⁴⁶

Thus, in light of the fact that every express guarantee of the Bill of Rights that the Court has examined has been held "fundamental" and "implicit in the concept of ordered liberty"¹⁴⁷ for purposes of the Due Process Clause, it is logical and reasonable that the guarantees of the second amendment, which exist to ensure the defense of one's person, family, home, and country, and which constitutes one of the basic tenets of Greco-Roman and Anglo-American tradition, meet that test as well.

defendant was unconscious. While the specific holdings of *Palko*, *Adamson*, and *Wolf* have been overruled, the *Palko* test of fundamental rights "implicit in the concept of ordered liberty" retains its vitality to this day.

144. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (fourth amendment exclusionary rule); *Robinson v. California*, 370 U.S. 660 (1962) (eighth amendment right to freedom from cruel and unusual punishment); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (sixth amendment right to counsel); *Malloy v. Hogan*, 378 U.S. 1 (1964) (fifth amendment right to freedom from self-incrimination); *Pointer v. Texas*, 380 U.S. 400 (1965) (sixth amendment right to confront opposing witnesses); *Klopper v. North Carolina*, 386 U.S. 213 (1967) (sixth amendment right to speedy trial); *Washington v. Texas*, 388 U.S. 14 (1967) (sixth amendment right to compulsory process for witnesses); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (sixth amendment right to jury trial); *Benton v. Maryland*, 395 U.S. 784 (1969) (fifth amendment privilege against double jeopardy). See also *Hunt v. Roth*, 648 F.2d 1148, 1155 (8th Cir. 1981) (eighth amendment prohibition on excessive bail).

145. 395 U.S. 784 (1969).

146. *Id.* at 795. Interestingly, using the test of *Bartkus v. Illinois*, 339 U.S. 121, 124-25 (1959), ("a comparison of the constitutions of the . . . states [ratifying the fourteenth amendment] with the Federal Constitution.") the incorporation of the right to keep and bear arms is more historically vindicable than is incorporation of the privilege against double jeopardy.

147. This is particularly so where the right in question is one of substance rather than procedure. First amendment rights were the first to be recognized as binding on the states, and have been protected most stringently against state infringement.

V. FUNDAMENTAL RIGHTS CANNOT BE RESTRICTED BECAUSE OF PUBLIC HOSTILITY TO OR A PERCEIVED LACK OF CURRENT NEED FOR THEIR EXERCISE

The right to keep and bear arms may not be undercut simply because that right may at the moment be unpopular to some.¹⁴⁸ The Supreme Court has held time and again that "constitutional rights may not be denied simply because of hostility to their assertion or exercise."¹⁴⁹

Nor can constitutional rights be made dependent upon a popular consensus that there is a continued need for them. "The Constitution of the United States was not intended to provide merely for the exigencies of a few years but was to endure through a long lapse of ages. . . ."¹⁵⁰

Indeed, it is precisely because the courts do not allow any contraction of the Bill of Rights that the evils contemplated by the Framers now seem so removed. As Justice Black stated:

Its [the Bill of Right's] provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many.¹⁵¹

CONCLUSION

From the above discussion, it should be readily apparent that the right to keep and bear arms, as guaranteed by the second amendment, is indeed a fundamental individual right which no amount of historical revisionism can deny. Thus, along with all

148. Even if unpopular to many, the right should not be infringed because it was the purpose of the Bill of Rights to protect the smallest of minorities, the individual, from the tyranny of the majority. As Madison observed:

Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of the private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. . . .

5 THE WRITINGS OF JAMES MADISON 272 (G. Hunt ed. 1904).

149. *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963). See also *Village of Skokie v. National Socialist Party of America*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

150. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat. 304, 326) 562, 564 (1816).

151. *Adamson v. California*, 332 U.S. 46, 89 (1947) (Black, J., dissenting), *overruled*, *Malloy v. Hogan*, 378 U.S. 1 (1964).

other rights found in the Bill of Rights, it should be accorded a significant place in American jurisprudence.¹⁵²

152. On at least 15 occasions courts have struck down laws which violated the right to keep and bear arms: *State v. Blocker*, 291 Or. 255, 630 P.2d 824 (1981); *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980); *City of Lakewood v. Pillow*, 180 Colo. 20, 23, 501 P.2d 744, 745 (1972); *City of Las Vegas v. Moberg*, 82 N.M. 626, 485 P.2d 737 (N.M. App. 1971); *People v. Nakamura*, 99 Colo. 262, 62 P.2d 246 (1936); *Glasscock v. City of Chattanooga*, 157 Tenn. 518, 11 S.W.2d 678 (1928); *People v. Zerillo*, 219 Mich. 635, 189 N.W. 927 (1922); *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921); *State v. Rosenthal*, 75 Vt. 295, 55 A. 610 (1903); *In re Brickey*, 8 Idaho 597, 70 P. 609 (1902); *Wilson v. State*, 33 Ark. 557, 34 Am. Rep. 52 (1878); *Jennings v. State*, 5 Tex. Crim. App. 298 (1878); *Andrews v. State*, 50 Tenn. 165, 8 Am. Rep. 8 (1871); *Nunn v. State*, 1 Ga. (1 Kelly) 243 (1846); and *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 13 Am. Dec. 251 (1822).

HANDGUN CONTROL BY LOCAL GOVERNMENT

by *Martin C. Ashman**

On June 8, 1981, the Village of Morton Grove, a Chicago, Illinois suburb, enacted the first ordinance in the United States to ban the private possession of handguns within a community, thus "triggering" a national debate regarding the wisdom and legality of handgun control. The ordinance¹ permits licensed gun collectors, peace officers, members of the armed forces and militias on active duty, and other specified persons to keep their handguns, and allows all persons to keep or use their handguns at licensed gun clubs within the Village. The ordinance does not prevent Morton Grove residents from storing their handguns outside the Village or selling them outside the Village, nor does the ordinance prevent or restrict possession of standard (non-automatic) rifles and shotguns.

Morton Grove's action has already spurred the enactment of a similar ordinance in San Francisco,² and it is expected that, if and when all legal action is terminated favorably to the Village of Morton Grove, many municipalities will follow that lead.

The purpose of this article is to review some of the more common legal arguments which have surfaced respecting the question whether local government should attempt handgun control. This article does not discuss existing or potential problems with state constitutions which may have provisions affecting attempts at handgun control.

WHY HANDGUN CONTROL?

In the Preamble to its ordinance, the corporate authorities of Morton Grove set forth these legislative findings: "The easy and convenient availability of certain types of firearms and weapons have increased the potentiality of firearm related deaths and injuries; and Handguns play a major role in the commission of homicide, aggravated assault and armed robbery, and accidental injury and death."³

These findings are well documented nationally. A 1969 staff report of the National Commission on the Causes and Prevention of

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1. Morton Grove, Ill., Code § 132.102 (1981).

2. San Francisco City ordinance, File No. 175-82-1 (June 28, 1982).

3. Preamble to Morton Grove, Ill., Code § 132.102 (1981).

Violence, FIREARMS AND VIOLENCE IN AMERICAN LIFE, concluded, in part, that increasing handgun ownership increased firearms violence: "Data from these sources document that the proportion of gun use in violence rises and falls with gun ownership. *Statistics from Detroit show that firearms violence increased after an increase in handgun acquisitions.* Regional comparisons show that the percentage of gun use in violent attacks parallels rates of gun ownership."⁴

The same report also related that firearms were involved in 63 percent of homicides, in 21 percent of aggravated assaults and in 36 percent of robberies (63 percent of armed robberies) nationally in 1967.⁵ Although at the time handguns comprised only twenty-seven percent of the nation's firearms, handguns were used in the following percentages of those firearm-related crimes:

- Homicide - 76%
- Aggravated Assault - 86%
- Robbery - 96%⁶

The Federal Bureau of Investigation's 1980 crime statistics⁷ indicate that these statistics have remained at the same high levels or worsened. During 1980, according to the FBI, firearms were involved in 62.4 percent of murders, 23.9 percent of aggravated assaults and 40.3 percent of robberies nationally. *Of all murders, fully fifty percent were by handguns.* Between 1968 and 1976, the number of handguns increased from approximately 24 million to over 40 million.

Regarding accidental deaths and injuries, United States District Court Judge Bernard Decker, writing in his decision upholding the Morton Grove ordinance said:

In addition to controlling crime, the trustees also stated in their Preamble that they were attempting to reduce the incidence of handgun-related accidents. The Trustees needed only to read the daily papers to have been aware of the large number of tragic accidents involving the use or misuse of handguns in the home. Furthermore, it cannot be ignored that there is some support for the link between accidental injuries and handguns specifically. As one com-

4. NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, FIREARMS AND VIOLENCE IN AMERICAN LIFE 78 (1969)(emphasis added).

5. *Id.* at 40, 46.

6. *Id.* at 49.

7. FED. BUREAU OF INVESTIGATION, U.S. DEPT. OF JUST., UNIFORM CRIME REPORTS FOR THE UNITED STATES 6 *passim* (1981).

mentator observed: "The handgun—long gun distinction is founded both in the existence of legitimate recreational uses of long guns and on persuasive empirical evidence that long guns are not misused nearly as frequently as handguns." *Comment, The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U. CHI. L. REV. 185, 207 (1970). Certainly, the Village has a valid interest in attempting to reduce the possibility of firearms catastrophies in Morton Grove. A ban on the possession of handguns in the home cannot be considered an unreasonable response to that problem, and may in fact be the only method of obtaining the goal sought by the Trustees.⁸

Thus, an attempt by local government to enact meaningful handgun regulation is a reasonable exercise of legislative power, commonly known as police power.

THE SECOND AMENDMENT - DOES IT APPLY TO STATE OR LOCAL GOVERNMENT?

The second amendment to the U.S. Constitution provides that: "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."⁹

In *Presser v. Illinois*¹⁰, the United States Supreme Court considered a claim that the State of Illinois infringed the second amendment rights of men associated in a fraternal military association by prohibiting their drills with arms. The Court rejected this claim and expressed its opinion that no substantive "right to bear arms" was infringed by banning private military drills.¹¹ However, the Court determined to base its ruling on an even more fundamental ground: "A conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States."¹²

The *Presser* Court similarly rejected the argument that the fourteenth amendment, through its Privileges and Immunities Clause, adopted a "right to bear arms" as one of the attributes of citizenship.¹³ Finally, the Court denied the claim that the Due Process

8. *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169, 1179 (N.D.Ill. 1981).

9. U.S. CONST. amend. II.

10. 116 U.S. 252 (1886).

11. *Id.* at 265.

12. *Id.*

13. *Id.* at 266-67.

Clause of the fourteenth amendment invalidated the state legislation, ruling that this argument "is so clearly untenable as to require no discussion."¹⁴

In short, the Court in *Presser* unequivocally held that the second amendment does not reach state and local governments, either directly or through the fourteenth amendment.¹⁵

There is no decision by any court, state or federal, contradicting *Presser*. In *Miller v. Texas*,¹⁶ the Supreme Court itself reiterated that the second amendment's restrictions "operate only upon the Federal power" and time and again thereafter lower federal courts and state courts have followed the rule that the second amendment does not apply to state and local governments.¹⁷ Recognizing this rule, an analysis of the Constitution prepared for use by Congress states: "The protection afforded by the Second Amendment prevents infringement by Congress of the right to bear arms, but it does not similarly extend to state action (citing *Presser*) nor to private conduct (citing *Cruikshank*)."¹⁸

Arguments have been made that *Presser* has been overruled implicitly, or that it should be overruled. Obviously, only the Supreme Court can overrule its decisions¹⁹ and the Court has given no indication that it is prepared to overrule *Presser*. Indeed, in 1964 the Supreme Court included *Presser* in a list of decisions that held "that particular guarantees (of the Bill of Rights) were not safeguarded against state action by the Privileges and Immunities

14. *Id.* at 268.

15. The Court had earlier held that *private* action allegedly violating a right to bear arms was not prohibited by the second amendment. "The Second Amendment declares that it shall not be infringed; but this . . . means no more than that it shall not be infringed by Congress." *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

16. 153 U.S. 535, 538 (1894).

17. *Cases v. United States*, 131 F.2d 916, 921-22 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943); *Engblom v. Carey*, 522 F. Supp. 57, 71 (S.D.N.Y. 1981); *Eckert v. City of Philadelphia*, 329 F. Supp. 845 (E.D. Pa. 1971), *aff'd mem.*, 474 F.2d 1339 (3d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *State v. Swanton*, 629 P.2d 98, 99 (Ariz. App. 1981); *State v. Amos*, 343 So.2d 166, 168 (La. 1977); *Commonwealth v. Davis*, 369 Mass. 886, 890, 343 N.E.2d 847, 850 (1976); *In re Atkinson*, 291 N.W.2d 396, 398 n.1 (Minn. 1980); *Harris v. State*, 83 Nev. 404, 406, 432 P.2d 929, 930 (1967); *State v. Sanne*, 116 N.H. 583, 364 A.2d 630 (1976).

18. CONG. RESEARCH SERVICE, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION*, S. Doc. No. 92-82, 92d Cong. 1st Sess. 1,035 (J. Killiam ed. 1971).

19. *Hendricks County Rural Elec. Membership Corp. v. NLRB*, 627 F.2d 766, 769 (7th Cir. 1980), *rev'd on other grounds*, 102 S.Ct. 216 (1981); *United States v. Chase*, 281 F.2d 225, 230 (7th Cir. 1960); *cf. Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975).

Clause or other provisions of the Fourteenth Amendment.”²⁰

To be sure, the Supreme Court has overruled a number of earlier decisions that held certain provisions of the Bill of Rights inapplicable to state government.²¹ However, in each instance, the Court gave separate consideration to the individual provisions involved in the case before it. The Supreme Court has rejected the notion that the entire Bill of Rights were made automatically applicable to the states by the fourteenth amendment in *Adamson v. California*²² and *Malloy v. Hogan*.²³ Significant provisions of the Bill of Rights such as the right to indictment by grand jury under the fifth amendment²⁴ and the right to a civil jury trial under the seventeenth amendment²⁵ are not made applicable to the states by the fourteenth amendment.

THE SECOND AMENDMENT: DOES IT PERTAIN ONLY TO LEGISLATION THAT WOULD IMPAIR THE EFFECTIVENESS OF A STATE MILITIA AND THUS DOES NOT PROHIBIT A MORTON GROVE-TYPE BAN?

The Supreme Court considered the scope of the second amendment in only one case, *United States v. Miller*.²⁶ *Miller* involved a prosecution under the National Firearms Act of 1934, for transportation in interstate commerce of an unregistered sawed-off shotgun. The defendants argued at trial that this federal restriction on their use of the weapon violated the second amendment. The trial court agreed and quashed the indictment. The Supreme Court, reviewing the matter on direct appeal, reversed.

The Court reached its decision in two steps. First, the Court determined that the defendants had not shown at trial that a sawed-off shotgun had any “reasonable relationship to the preservation or efficiency of a well-regulated militia.”²⁷ Second, the Court explained *why* it was dispositive that the shotgun had not been shown to be related to the preservation or efficiency of the militia:

The Constitution as originally adopted granted to the Congress power—“To provide for calling forth the Militia to execute the Laws

20. *Malloy v. Hogan*, 378 U.S. 1, 4 n.8 (1964).

21. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-2 (1978).

22. 332 U.S. 46 (1947).

23. 378 U.S. 1 (1964).

24. See *Watson v. Jago*, 558 F.2d 330 (6th Cir. 1977).

25. See *Iacaponi v. New Amsterdam Casualty Co.*, 258 F. Supp. 880 (W.D. Pa. 1966), *aff'd*, 379 F.2d 311 (3d Cir. 1967), *cert. denied*, 389 U.S. 1054 (1968).

26. 307 U.S. 174 (1939).

27. *Id.* at 178.

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. . .” U.S. CONST. art. 1, § 8. *With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.*²⁸

In view of the second amendment’s declaration (“A well regulated Militia being necessary to the security of a free State”), the Supreme court has held that the amendment’s guarantee (“the right of the people to keep and bear arms shall not be infringed”) must be interpreted and applied with the end of assuring the continuation of the state militias. Because the sawed-off shotgun in *Miller* was not shown to be related to the preservation of the militia, there was no violation of the second amendment in limiting access to the weapon.

Arguments have been made by pro-handgun forces contending that, contrary to the above reasoning, under *Miller*, if a *weapon* is proved to be reasonably related to the preservation of the militia, there is a second amendment violation in limiting access to that weapon.

There is no such holding in the case. The lack of relationship between regulated weapons and the militia is only one ground for finding that a regulation does not impair the efficiency of the militia and hence, under *Miller*, is not in violation of the second amendment. Certain persons subject to a firearms regulation, minors and incompetents for example, might not be fit for service in the militia; presumably even a total prohibition of all firearms possession by such persons would comport with the second amendment.

Similarly, a restriction of access to military weapons even by persons qualified to serve in the military would not impair the effectiveness of the militia—or violate the second amendment—so long as the restriction did not prevent participation in military training or performance of military duties.

For precisely this reason, *Miller* would require a finding that the second amendment is not violated in a Morton Grove-type ordinance because the limitation on possession of handguns imposed

28. *Id.* (emphasis added).

by such ordinance in no way impairs the preservation of the militia.

The efficiency of a state militia is not dependent upon the private use or practice by individual citizens with weapons. Today, in most states, the state militia is the National Guard. All members of the National Guard are universally required to undergo a specific training program and to participate in regular drills and instruction, including target practice.²⁹ The federal government has assumed the responsibility for providing arms to the Guard.³⁰

In any event, a Morton Grove-type ordinance could never have any effect upon the ability of persons to practice with weapons for Guard purposes, inasmuch as that ordinance expressly permits possession and use of handguns at licensed gun clubs. Thus, to the extent it has any bearing on the maintenance of a militia, members or potential members of the militia may, under a Morton Grove-type ordinance, own handguns and become proficient in the use thereof, in full compliance with the ordinance, simply by joining or forming a gun club.

To state the obvious: the effectiveness of a state militia can in no way be impaired by enforcement of a Morton Grove-type ordinance.³¹

Arguments have been made that the second amendment protects a right to arms *not* dependent on the militia but on the need to provide self-defense or to allow citizens to take up arms against an oppressive government. These arguments, however, are really stating that *Miller* was wrongly decided by the Supreme Court. *Miller* declares that the second amendment must be interpreted and applied to "assure the continuation and render possible the effectiveness" of state militias,³² not to assure the continuation (or creation) of a nation armed with military weapons for personal protection or for revolution.

As with *Presser*, no reported decision has ever suggested that the holding of *United States v. Miller* has been overruled. On the contrary, the Supreme Court itself, in dismissing the appeal of *Burton v. Sills*,³³ implicitly reaffirmed *Miller*. In *Burton*, the New Jersey

29. 32 U.S.C. §§ 501-502; ILL. REV. STAT. ch. 129, §§ 220.29, 220.31 (1981).

30. *Id.*, §§ 106, 701.

31. Should a state someday determine to call upon the general citizenry in a general emergency, there is no reason why trained gun owners would not be able to respond.

32. 307 U.S. at 178.

33. 53 N.J. 86, 248 A.2d 521 (1968), *appeal dismissed*, 394 U.S. 812 (1969).

Supreme Court upheld a state gun control statute against charges that it violated the second amendment. The statute required that a permit be obtained by all firearms purchasers, and that permits would be denied "to certain groups including minors under eighteen, convicted criminals, mental and physical defectives, narcotics addicts, habitual drunkards, [and] 'to any person where the issuance would not be in the public health, safety or welfare.'"³⁴ The New Jersey Supreme Court noted the precedent holding that the second amendment did not apply to the states,³⁵ but determined not to pursue that issue because, citing *Miller*, "regulation (such as New Jersey's Gun Control Law) which does not impair the maintenance of the State's active, organized militia . . . is not at all in violation of either the terms or purposes of the second amendment. . . ."³⁶ By dismissing the appeal of this ruling, the United States Supreme Court necessarily determined that the constitutional challenge to the New Jersey statute was insubstantial.³⁷ Numerous other federal and state courts have accepted the rule in *Miller*.³⁸

The conclusion is inescapable that, under the existing law, the second amendment does not apply to a local or state government handgun ban of the type enacted by Morton Grove.

THE SECOND AMENDMENT: SHOULD *Presser* AND *Miller* BE OVERRULED?

The argument has been made many times that the Supreme Court should revise its interpretation of the second amendment, based upon a contention that English common law recognized a fundamental, individual right to possess and use all firearms. Arguing that the founding fathers recognized such a right, many of

34. 248 A.2d at 523.

35. *Id.* at 526-27.

36. *Id.* at 528.

37. See *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (dismissal of appeal constitutes decision on the merits).

38. *United States v. Three Winchester 30-30 Caliber Lever Action Carbines*, 504 F.2d 1288, 1290 n.5 (7th Cir. 1974) (dicta); *United States v. Gross*, 451 F.2d 1355 (7th Cir. 1971), *aff'g* 313 F. Supp. 1330, 1334 (S.D. Ind. 1970); *United States v. McCutcheon*, 446 F.2d 133, 135-36 (7th Cir. 1971); *United States v. Lauchli*, 444 F.2d 1037, 1041 (7th Cir. 1971); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974); *United States v. Cody*, 460 F.2d 34, 36-37 (8th Cir. 1972); *Brown v. City of Chicago*, 42 Ill. 2d 501, 504, 250 N.E.2d 129, 131 (1969); *State v. Rupp*, 282 N.W.2d 125, 130 (Iowa 1979); *State v. Skinner*, 189 Neb. 457, 458, 203 N.W.2d 161, 162 (1973).

those fighting gun control measures assert that the second amendment should be interpreted (contrary to *United States v. Miller*) as supporting an individual's right to possess and use common arms for any purpose, not just for use related to the militia.

In point of historical fact, however, there never was an absolute right to possess or use weapons under English law. In 1670, a law was passed under Charles II providing that guns could not be kept by any person ranking lower than son and heir of an esquire, unless he held lands generating at least 100 pounds annually.³⁹ Much earlier, in 1328, a statute had been enacted providing that no man should "go nor ride armed by night or by day in fairs, markets, nor in the presence of the justices or other ministers."⁴⁰

When the English Bill of Rights was enacted in 1689, following the ouster of James II, it included a provision that "the subjects which are protestants may have arms for their defense. . . ."⁴¹ This "right," however, was created in response to the employment by James II of a standing army in peace time, largely composed of Catholics. There was no attempt in the English Bill of Rights to create an absolute right to bear arms. To the contrary, the right granted to Protestants was to permit possession of only "suitable to their conditions, and as allowed by law."⁴² The qualifications implicit in the common law "right" to have arms are such that England now has one of the strictest gun control laws in the world.⁴³ Thus, the American revolutionaries inherited from England no absolute right to keep or bear arms.

Alone among the provisions of the Bill of Rights, the second amendment contains a statement of its rationale: "a well regulated Militia being necessary to the security of a free State." The Court in *Miller* and many other courts have interpreted the amendment in a way which is consistent with this rationale by upholding legislation that does not impair the effectiveness of state militias. However, arguing from its interpretation of the history of second

39. 22 Car. II, ch. 25, § 3 (1670), noted in *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 156 (1840); Rhoner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U. L. REV. 52, 62 (1966).

40. Statute of Northampton, 1328, 2 Edw. III, ch. 3, quoted in *Burton v. Sills*, 53 N.J. 86, 96, 248 A.2d 521, 526 (1968), appeal dismissed, 394 U.S. 812 (1969).

41. 1 Wm. & Mary., Sess. 2, ch. 2 (1689).

42. Note, *The Right to Keep and Bear Arms*, 26 DRAKE L. REV. 423, 425-26 (1977). See also *Burton v. Sills*, 53 N.J. 86, 248 A.2d 521 (1968), appeal dismissed, 394 U.S. 812 (1969).

43. 1 Edw. VIII and 1 Geo. VI, ch. 13, § 30 (1937), noted in *Feller & Gottling, The Second Amendment, A Second Look*, 61 Nw. U. L. REV. 46, 49 n.10 (1966).

amendment and from subsequent commentary on it, pro-gun forces generally assert that broader interests were at stake: the right to effective exercise of personal defense, maintenance of the ability to overthrow an oppressive government, and a guarantee of recreational use of weapons.

The circumstances surrounding the adoption and ratification of the United States Constitution and its second amendment, however, reflect debate over the proper balance of power between state and federal governments with respect to armed forces—and not over a right to arms for any individual purpose. Accounts of the history of the amendment are numerous; among the commentators that dispute the analyses presented by pro-gun forces are Feller and Gottling,⁴⁴ Levin,⁴⁵ Rhoner,⁴⁶ Weatherup,⁴⁷ and a writer in *DRAKE LAW REVIEW*.⁴⁸ There is clearly substantial and extensive current debate as to the complete import of the historical documents. However, it is sufficient here to note three points:

A) *The concern leading to adoption of the Second Amendment*

In the period surrounding the War of Independence, one of the most prominent themes in American political thought was an abiding distrust of standing armies, and a preference, during peace time, for defense needs to be served by militias. Indeed, the stationing by the British of large standing armies in the American colonies was a major cause of the war itself.⁴⁹ This much is admitted by pro-gun forces, but they go on to assert that the newly independent colonists thought it necessary to create an absolute right in each citizen to keep weapons, to allow not only for an effective militia but also to guarantee the various individual uses of arms.

This view is contradicted by the state constitutions adopted prior to the Constitutional Convention of the United States. Nearly all of the states adopted provisions condemning a standing army or otherwise limiting the military, but only three states

44. Feller & Gottling, *supra* note 43, at 49-62.

45. Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 *CHI.-KENT L. REV.* 148, 150-59 (1971).

46. Rhoner, *supra* note 39, at 55-61.

47. Weatherup, *Standing Armies and Armed Citizens, An Historical Analysis of the Second Amendment*, 2 *HASTINGS CONST. L. Q.* 961 (1972).

48. Note, *supra* note 42, at 427-33.

49. The Declaration of Independence thus says of George III: "He has kept among us, in time of peace, standing armies, without the consent of our legislatures. . . He has affected to render the military independent of and superior to the civil power." The Declaration of Independence, para. 12 (U.S. 1776). See also, Weatherup, *supra* note 47, at 977-78.

(North Carolina, Massachusetts, and Pennsylvania) mentioned any right to arms.

Thus the Constitution of Virginia, adopted in June 1776, contained a comprehensive Declaration of Rights, including the following Article 15:

That a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free State; that Standing Armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to and governed by the civil power.⁵⁰

The source of the arms and training for the militia were not a constitutional concern here, and a right to arms for self-defense or further revolution is plainly not encompassed.⁵¹ The Virginia declaration served as the model for several state constitutions, while other states adopted briefer formulations similarly expressing a distrust of an established military without granting a right to bear arms.⁵² The New York Constitution not only failed to mention a right to bear arms, but required the state, at its expense, to supply military equipment.⁵³ North Carolina accorded a right to bear arms, "for the defense of the state,"⁵⁴ and Massachusetts, in condemning standing armies, provided a right to keep and bear arms "for the common defence."⁵⁵ These provisions thus implied that the right to arms was limited to militia-related service.⁵⁶ Of the

50. 1 B. SCHWARTZ, *THE BILL OF RIGHTS* 239 (1971).

51. In adopting the Virginia Declaration of Rights, the delegates decided to include the provision of a draft by Thomas Jefferson that "no freeman shall be debarred the use of arms." *Id.* at 245.

52. Delaware and Maryland followed the Virginia formula. *Id.* at 278. South Carolina simply provided that "the militia shall be subordinate to the civil power of the state." *Id.* at 335. New Hampshire stated only that "a well regulated militia is the proper, natural and sure defence of a state." *Id.* at 378.

53. *Id.* at 312.

54. *Id.* at 287.

55. *Id.* at 342-43.

56. In *City of Salina v. Blaksley*, 72 Kan. 230, 83 P. 619 (1905), the Kansas Supreme Court interpreted a similar provision of the Kansas Constitution, holding:

The provision in section 4 of the Bill of Rights 'that the people have the right to bear arms for their defense and security' refers to the people as a collective body. It was the safety and security of society that was being considered when this provision was put into our Constitution. It is followed immediately by the declaration that standing armies in time of peace are dangerous to liberty and should not be tolerated and that 'the military shall be in strict subordination to the civil power.' It deals exclusively with the military. Individual rights are not considered in this section.

[T]he provision in question applies only to the right to bear arms as a member of the state militia or some other military organization provided for by law. . . ."

original states, only Pennsylvania included in its constitution a right of the people "to bear arms for the defence of themselves and the state."⁵⁷

The state constitutions thus reflect a widespread consensus that standing armies are to be avoided. But at the same time, they indicate that an individual right to arms for self-defense, revolutionary activities or recreation was not generally thought to be so sufficiently important as to be included in a constitution.

B) *The debate concerning ratification of the United States Constitution and adoption of the Bill of Rights*

Virtually the entire debate regarding the inclusion of a right to arms in the United States Constitution centered upon the question whether the federal government should be allowed to maintain a standing army and to what extent it should be allowed control over the state militias. There was no significant discussion of any individual right to arms.

Samuel Adams proposed to the Massachusetts Ratifying Convention an amendment to the Constitution prohibiting Congress from denying peaceful citizens the right to keep their own arms. The amendment was not adopted.⁵⁸ A Pennsylvania proposal for an individual right to arms was not the product of the official Ratifying Convention (which approved the United States Constitution without proposing amendments), but of a meeting of dissidents held thereafter.⁵⁹

The real character of state concern is expressed in the contentions of anti-federalists, who claimed that the power given Congress, by the proposed Constitution, to train and equip the state militias amounted to a power to disband them, thus requiring a standing army.⁶⁰

It was in response to this debate that the Virginia Ratifying Convention proposed the following amendment to the Constitution:

Seventeenth, That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people

72 Kan. at __, 83 P. at 620.

57. 1 B. SCHWARTZ, *supra* note 50, at 266.

58. B. PIERCE & C. HALE, *DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS* 86-87 (1856).

59. Feller and Gotting, *supra* note 43, at 58.

60. *Id.* at 59-60; *see also* Weatherup, *supra* note 47, at 984-93, and Note, *supra* note 42, at 431-32.

trained to arms is the proper, natural and safe defense of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil power.⁶¹

This formulation, especially in the context of the debates that produced it, must be seen as establishing a right of the people of a state to maintain a militia, but no more.

After the ratification of the Constitution, James Madison of Virginia transformed the language of the Virginia resolution into a section of his proposed federal Bill of Rights. He added a clause exempting from personal military service anyone opposed to bearing arms on religious grounds, thus emphasizing that the purpose of the amendment was to secure to the states an armed force, not to secure an individual right to arms.⁶²

The language of the second amendment, as finally adopted, omitted the religious exemption upon the insistence of Elbridge Gerry.⁶³ Gerry's remarks, however, again reflect only the possibility of federal destruction of the militia (by declaring persons religiously scrupulous). Throughout the reported congressional debates on the second amendment, the only concern of the participants was with the militia, not with any individual right to arms. The final language continued to emphasize this central purpose of the amendment by declaring that a militia was necessary to the defense of a free state.

C) *The right of revolution and the right of self-defense*

Pro-gun forces argue that there is a right of revolution inherent in the rights of citizens of the United States. Again, however, there is no indication in any of the debates regarding second amendment issues in Congress or in the state ratifying conventions to support the notion that a right to bear arms was intended to support a right to revolution. "In the years during and immediately following the Revolution, the doctrine of the natural right of revolution was an accepted part of colonial political theory. After the Revolution, however, the need for stable and orderly government grew, and the

61. See Note, *supra* note 42, at 430.

62. 1 ANNALS OF CONG., 434 (J. Gales ed. 1789); see also Note, *supra* note 42, at 430.

63. 1 ANNALS OF CONG., 749-50 (J. Gales ed. 1789).

philosophy of rebellion withered."⁶⁴

The absence of any right to revolution is also reflected in decisions such as *Presser* and *Commonwealth v. Murphy*,⁶⁵ which upheld laws that forbade private military groups from assembling, and prohibited private possession of modern war weapons presumably essential to a revolution.⁶⁶ In *Dennis v. United States*,⁶⁷ the Supreme Court denied that there exists any right to revolution that must be supported by a democratic government: "We reject any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy."⁶⁸ Thus, the second amendment cannot be interpreted on the basis set forth by pro-gun commentators.

Similarly, the right to self-defense was not at all discussed in connection with the debates regarding the second amendment. There plainly exists no general right to carry weapons for self-defense. Laws which prohibit the carrying of concealed weapons have long been routinely upheld.⁶⁹ More recently, statutes have also been enacted to prohibit, within municipal areas, the *open* carrying of weapons.⁷⁰ There simply is no basis for a claim that the right of self-defense includes a constitutional right to possess any particular means of self-defense; the second amendment has nothing to do with this issue.

Taking into consideration all of the circumstances surrounding adoption of the second amendment, it must be found that the amendment, as the *Miller* decision held, is directed toward maintaining effective state militias, and not toward arming the citizenry for some other purpose.

CONCLUSION

As has been shown, a carefully drafted local ordinance or statute, based upon concerns over the awful toll of handguns, is sustainable as being reasonable and not arbitrary. The various court holdings are clear that the second amendment does not apply to local or state government and, in any event, the second amend-

64. Levin, *supra* note 45, at 154.

65. 166 Mass. 171, 44 N.W. 138 (1896).

66. *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943).

67. 341 U.S. 494 (1951).

68. *Id.* at 501.

69. *See, e.g.*, *Herring v. State*, 371 S.W.2d 884 (Tex. Crim. App. 1963).

70. *See, e.g.* ILL. REV. STAT. 1979, ch. 38, § 24-1(10) (1961), upheld under the 1970 Illinois Constitution in *People v. Williams*, 60 Ill. App. 3d 726, 377 N.E.2d 285 (1978).

ment is a limitation only upon legislation which impairs a militia. These court decisions are logically and historically correct. Thus, in the opinion of this writer, states and local governments are free to exercise their good judgment in gun control without second amendment consequences.

No one argues that enactment of these laws will instantly cure the nation's crime and gun accident problems. No one argues that enactment of these laws will instantly cause the disappearance of handguns. It is, however, fair to say that over the long term these laws will, if generally enacted, cause the existence of handguns to become rarer and less readily available, and, to that extent, help prevent deaths and injuries which otherwise would have occurred.

GUN OWNERSHIP: A CONSTITUTIONAL RIGHT

by Alan M. Gottlieb*

INTRODUCTION

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

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

Moreover what the "Right to keep and bear arms" meant to the Founding Fathers cannot be understood without reference to its development in the 17th and 18th Century British experience

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

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

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

4. Halbrook, *supra* note 2, at 8.

which was most immediate to them. Yet, as Dr. Joyce Malcolm has noted:

Without a doubt, the belief in the virtues of an armed citizenry had a profound effect upon the development of the English, and in consequence the American, system of government. Despite its importance, however, the history of the individual's right to keep and bear arms remains obscure. British historians, no longer interested, and constitutional scholars, ill equipped to investigate the English origins of this troublesome liberty, have made a few cursory and imperfect attempts to research the subject.⁵

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

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

On its face, the second amendment's language, "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed," suggests an intent to guarantee a right which people can effectively enforce.⁷ This was invariably what the Founders described on the numerous occasions in which they indicated what they meant by "mi-

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

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

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

litia,"⁸ and that is how the identical "right of the people" language which appears in the first and fourth amendments has always been construed.⁹ The following points are offered to support the contention that the language of the second amendment must be taken at face value:

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

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

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

4. When what was guaranteed by English common law (and confirmed by the English Bill of Rights of 1689) was unequivocally an individual right to keep and bear arms, there is no cause for assuming that its American successor guarantees only an exclusively "collective right"—something that did not exist in any legal system with which the Founding Fathers were familiar.

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

The evidence for the individual right interpretation is so overwhelming that the existence of an argument which (by studiously ignoring that evidence) degrades the second amendment into a meaningless "collective right" is inexplicable. The readily available explanation is that this "collective right" argument has been written under the influence of a violent antipathy to firearms and a

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

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

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

profound belief that their eradication will somehow reduce violence. The effect of that belief upon the discussion of second amendment issues has been so great that a brief consideration of the criminological issues is imperatively necessary, even though it is theoretically irrelevant to the legal considerations involved.

GENERAL CRIMINOLOGICAL CONSIDERATIONS

The Relationship between Handgun Prohibition and Violent Crime

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

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

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

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

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

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

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

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

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

(1) *Comparative Lethality and Criminal Violence*

The primary argument for banning all guns is that, because they are the deadliest of weapons, their elimination would reduce homicide by forcing attackers to rely on less dangerous weapons. The handgun is a relatively small weapon whose victims have an ap-

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

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

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

15. Murray, *Handguns, Gun Control Laws and Firearms Violence* 23 *SOCIAL PROB.* 81, 88 (1975) ("the conclusion is, inevitably, that gun control laws have no individual or collective effect in reducing the rates of violent crime."). Murray's work has been criticized, notably by De Zee, whose methodologically different study leads, however, to the same conclusion: "The results indicate that not a single gun control law, nor all the gun controls added together, had a significant impact in providing additional explanatory power in determining gun violence. It appears then, that present legislation, created to reduce the level of violence in society, falls short of its goals." From yet a third methodological perspective, Professors Magaddino and Medoff also reach that conclusion. See, *Firearm Control Laws and Violent Crimes: An Empirical Analysis, forthcoming in D. KATES, FIREARMS AND VIOLENCE: ISSUES OF REGULATION* (Ballinger n.d.).

proximately 85% survival rate—only marginally less than the survival rate from ice pick or butcher knife wounds.¹⁶ Professor Kleck, describing the prohibition of handguns alone as “a policy disaster,” finds that wounds from a hunting rifle, or particularly a shotgun, are enormously more lethal, with victims having little chance of survival.¹⁷ Kleck recognizes that, even though we already have twice as many rifles and shotguns as handguns, disappearance of the latter would substantially reduce the number of firearms assaults. Some attackers would not acquire long guns and some assaults would not occur where substitution was impossible. The difficulty is that no reasonable projectable decline in handgun assaults would offset the enormous increase in lethality from the substitution of long guns for handguns in the remaining assaults. The “best case” estimate, which comes from Professor Zimring (the leading academic opponent of handguns), is that a ban would cause substitution of long guns in only one-third of the attacks in which handguns are now used. Accepting this estimate, *arguendo*, Kleck notes that American firearms homicide could not possibly decrease—and would probably increase by at least 25%. But if, as Kleck himself estimates, long guns would be substituted in 50-75% of all present handguns assaults, homicide would increase by 50-500%, depending upon precisely which kinds of long guns were substituted.¹⁸

(2) *Handguns are Militia Weapons*

*United States v. Miller*¹⁹ upholds the right of citizens to possess any firearms which (unlike the sawed-off shotgun involved in that case) is a recognized military or militia weapon. It has been positively established by general reference works that a handgun is a recognized militia weapon. The standard reference work on military firearms is *SMALL ARMS OF THE WORLD*,²⁰ which provides a nation-by-nation listing of the designated military small arms of every country as of 1976. All of the countries listed from Argentina

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

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

18. *Id.*

19. 307 U.S. 174 (1939).

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

through Yugoslavia have one or another handgun for their military forces. In addition, *MILITARY SMALL ARMS OF THE 20TH CENTURY*,²¹ devotes 39 pages to military handguns out of a total of 160 pages devoted to military handguns, rifles and submachine guns; and *BRASSEY'S INFANTRY WEAPONS OF THE WORLD, 1950-1975*, devotes 20 pages to military handguns.²² In short, the suitability of handguns for militia use, particularly for quasi-police activities involving the maintenance of order after a national disaster, cannot be doubted.

(3) *Handgun Superiority in Self-Defense*

Gun control advocates claim that a handgun ban does not infringe upon the individual right to self-defense because it allows access to rifles and shotguns for that purpose. The second amendment guarantees to "the people" the right to choose for themselves.²³ The public is not terrified by the mere ownership of handguns which can be used for self-defense without danger to the neighbors and which, according to a national survey specially prepared for a handgun prohibition organization, are kept in fully 25% of all U.S. households.²⁴ There are numerous reasons why a rational individual might prefer a handgun to a long gun for self-defense: While a long gun is much more likely to kill assailants, one is surely entitled to prefer a handgun which has the capacity to terminate the attack while minimizing the risk of killing them. It is likewise rational to prefer the weapon which, if discharged against assailants (or accidentally in the home), is least able to plow through stucco, plaster, etc., menacing neighbors and innocent bystanders far away.²⁵ Indeed, in most situations the handgun will be the defense weapon of choice for anyone responsible enough to take the danger of accident into consideration.²⁶ Finally, the

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

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

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

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

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

26. Long guns are not only both far more deadly than handguns and far more likely to inflict an injury on someone (whether near or far away) when they are discharged, but they

handgun is the best, if not the only, defensive weapon available to those who legitimately need to conceal a weapon, e.g., shopkeepers, and to those who are not physically able to handle a long gun.

THE SECOND AMENDMENT DEFINED

The Collective Right Position

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

The Individual Right Position

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

are more difficult to secure from inquisitive children and much easier for a child to accidentally discharge. For instance, shotguns are involved in five times as many fatal accidents each year as are handguns, although the number of shotguns in the country barely exceeds the number of handguns—and it may reasonably be assumed that the number of shotguns kept loaded at any one time is a tiny fraction of the number of handguns. Based on 1971-1973 data, the National Safety Council concludes that shotguns and rifles together are involved in 90% of all fatal gun accidents, whereas handguns are involved in only 10%. *National Safety Council Safety Education Data Sheet*, No. 3 (Revised 1974).

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

28. 307 U.S. at 179.

against disarming the people was simultaneously a prohibition against disarming the militia because the people and the militia were one and the same.

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

The Bill of Rights and Direct Legislative History

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

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

This point is implicitly reinforced by Madison's handwritten notes detailing his initial plan for organizing the amendments.³⁰ He had thought to interpolate the amendments as inserts between the sections of the original Constitution being amended. Thus, if

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

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

the right to keep and bear arms had been a limitation to the militia clause of Art. 1, § 8, he would have designated it as an insert therein. Instead, Madison planned to insert the right to keep and bear arms (along with freedom of religion, press, and various other personal and individual rights) in § 9 of Art. 1, immediately following clause 3 (which forbids bills of attainder and ex post facto laws). It can easily be inferred, therefore, that Madison viewed the amendment as guaranteeing a personal right rather than purely as a modification of the Congressional power over the militia of the states. Indeed, Madison's original notes said of the list of proposed amendments (in which the right of arms appeared in the first clause) that "they relate first to private rights."³¹

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

Even stronger inferential support for the individual right interpretation is its endorsement by contemporary legal scholars. The earliest commentary flatly stated, "the people are confirmed by (the second amendment) in their right to keep and bear their private arms."³³ Every one of the four contemporary commentaries—each written by men who personally knew Madison and/or others involved in formulating the amendment—categorically affirmed that it was meant to protect an individual right to possess private arms.³⁴

Thus neither the text nor the direct legislative history provides a scintilla of evidence for the exclusive states' right or "collective right" theory. In the absence of direct legislative history to support that position, the next best evidence would be general statements or writings which reflect the Founders' attitudes toward the individual ownership and possession of firearms and governmental regulation thereof. Though such materials are copiously available—most of them from the original debates on ratifying the Constitution to which the second amendment was immediately

31. *Id.*

32. *See* REPORT, *supra* note 6.

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

34. *Id.*

added—they are never referred to by those who take an anti-individual right position. Instead, the advocates of that position simply seem to project their own attitudes onto the Founders.

The Attitude of the Founding Fathers Mandates the Individual Right Interpretation

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

A strong body makes the mind strong. As to the species of exercises, I advise the gun. While this gives a moderate exercise to the Body, it gives boldness, enterprise and independence to the mind. Games played with the ball, and others of that nature, are too violent for the body and stamp no character on the mind. Let your gun therefore be the constant companion of your walks.³⁸

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

Two years before he wrote the second amendment, James Madison was congratulating his countrymen on “the advantage of being armed, which the Americans possess over the people of almost every other nation,” deriding the despotisms of Europe “that are afraid to trust the people with arms.”⁴⁰

So far as it is possible to tell, such attitudes were universal among the Founders. They are expressed across the entire political

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

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

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

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

39. *Id.* at 51.

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

spectrum of the Early Republic by men who were personally or politically at odds on innumerable other great issues of the day. Madison and Jefferson, for instance, though they had been friends and would be so again, were sharply divided by Madison's championship of the Constitution about which Jefferson was dubious. Another doubter was Patrick Henry, who argued against ratification on the specific ground that the Constitution contained no guarantee of the individual's right to arms:

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

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

The ever-antagonistic Adams cousins, Sam and John, were on opposite sides of the ratification controversy. But on the subject of an individual right to keep arms, they were fully in accord. In the Massachusetts convention, Sam Adams opposed ratification unless accompanied by a provision "that the said Constitution be never construed . . . to prevent the people of the United States, who are

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

42. *Id.* at 380.

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

peaceable citizens, from keeping their own arms."⁴⁴ In a book published the year before, John Adams had enthused that "arms in the hands of citizens may be used at individual discretion," for the defense of the nation, the overthrow of tyranny or "private self-defense."⁴⁵

The fact is that the necessity of an armed populace was so unanimously advocated in the early Republic that it played a central part in the arguments of both sides in the debate over the Constitution. As the Senate Committee on the Judiciary, Subcommittee on the Constitution notes, the anti-federalists opposed ratification because of the lack of a bill of rights, "while the Constitution's supporters frequently argued to the people that the universal armament of Americans made such limitations unnecessary. A pamphlet written by Noah Webster, aimed at swaying Pennsylvania toward ratification, observed:

Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme Power in America cannot enforce unjust laws by the sword, because the whole body of the people are armed, and constitute a force superior to any and of regular troops that can be, on any pretence, raised in the United States.⁴⁶

English Common Law History Mandates the Individual Rights Interpretation

Whenever possible, courts look to English common law antecedents in interpreting the provisions of the Bill of Rights, because the Constitution was written by men steeped in the Anglo-Saxon legal tradition.⁴⁷ As the Founders were well aware, the English

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

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

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

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

common law recognized an absolute right of individuals to keep arms and a more qualified right of individuals to carry them outside the home. Indeed, from the earliest times, Englishmen were not only privileged but actually *required* to have arms because both law enforcement and the defense of the realm were the responsibility of the entire people.⁴⁸

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

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

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

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

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

cerning self-incrimination); *accord* *Murphy v. Waterfront Commission*, 378 U.S. 52, 58-63 (1964); *Weeks v. United States*, 232 U.S. 383, 392 (1914); *Boyd v. United States*, 116 U.S. 616, 630 (1886).

48. See REPORT, *supra*, note 6, at 1.

49. 1 W. BLACKSTONE, COMMENTARIES 123.

50. *Id.* at 129.

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

populace.

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

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

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

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

52. See *supra* note 3 at 6, 7.

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

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

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

*Common Law in the American Colonies Mandates the
Individual Right Position*

Thus Blackstone (from whom the colonists principally took their knowledge of English law) analyzed the Bill of Rights and other documents of English constitutional history as guaranteeing the subject three major rights: personal security, liberty and property; and five auxillary rights, the most important of which ("because preservative of the rest") was the "absolute right of individuals of having and using arms for self-preservation and defense. . . ."⁵⁶

It was British policy to arm the colonists with any and all fire-arms available to them:

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

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

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

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

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

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

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

In sum, the context in which these states' bills of rights were introduced compels the conclusion that they were intended to protect at least a *Miller*-type individual right to personally possess militia-type weapons. Moreover, any attempt to construe these provisions as a states' right theory is patently nonsensical, as the Subcommittee on the Constitution Report notes:

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

Contemporary Understanding of The Second Amendment

The points already made converge on a final refutation of the exclusive "collective right" position. Assume, *arguendo*, that the Founders had decided that the second amendment should *not* express their belief in the individual's right to arms, but only protect those arms actually owned by the states. How would they have expressed such an intention in light of their knowledge of their generation's manner of speaking and philosophical predispositions?

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

59. REPORT, *supra* note 6, at 11.

The amendment might have read something like, "the right of the states to keep, and of their militias to bear, arms shall not be infringed." But, it seems logical, they would never have chosen the language which actually appears in the amendment to express such an intention—because their contemporaries would necessarily have misunderstood their intent. They could have read the phrase "the right of the people" to keep and bear arms in light of the "absolute right of individuals" to do so as described by Blackstone and celebrated in the combined Anglo-American common law and republican philosophical traditions most familiar to them.

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

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

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms.⁶¹

In 1803, an American edition of BLACKSTONE was published with annotations by St. George Tucker. We may assume that Tucker was learned in American common law since he was the Chief Justice of the most distinguished court of his day, the Virginia Supreme Court. Likewise we may assume his authoritative familiarity with the thought underlying the American Bill of Rights. He was not only an important member of the generation which produced

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

61. *See supra* note 33.

it, but also an intimate of Jefferson and Madison (and his brother and his best friend were both members of the First Congress which enacted the amendment).⁶² Tucker added to Blackstone's description of the common law right the observation that it was incorporated in the second amendment—"And this without any qualification as to their condition or degree as is the case in the British government."⁶³

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

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

One further point deserves special note: Literally hundreds of men who had served in the First Congress of state legislatures at the time the Bill of Rights was enacted were living 12 years later

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

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

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

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

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

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

when Tucker's American edition of BLACKSTONE was published. Many of those men—including Madison himself—were still living 25 years later when Rawle's and Story's highly popular volumes on the Constitution first appeared. Surely Madison, Jefferson⁶⁸ and the many other interested parties would have objected with the commentators and commented publicly if the amendment was being wholly and consistently misconstrued by every one of them.

THE MORTON GROVE CASE: AN ASSAULT ON THE SECOND AMENDMENT

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

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

68. All of the legislators who passed upon the second amendment were necessarily still alive when Tench Coxe's commentary, *supra* note 33 was written, since it predated the enactment of the Bill of Rights by several months. Thomas Jefferson and John Adams, who both died on July 4, 1826, would presumably have been in a position to repudiate the commentaries of Rawle (1825) and Tucker (1803). Madison, the amendment's author, died in 1836 and therefore would have been in a position to repudiate Story (1833) as well. Without attempting comprehensively to document the longevity of the legislators who passed on the amendment, D. & I. MORRIS, WHO WAS WHO IN AMERICAN POLITICS (1974) states the following: U.S. Senator Albert Gallatin (d. 1849); U.S. Representative Jeremiah Smith (d. 1842); State Senator Stephan Van Rensselaer (d. 1839); U.S. Senator Paine Wingate (d. 1838); U.S. Senator Aaron Burr (d. 1836); State Senator Hugh Nelson (d. 1836); State Representative Nathan Dane (d. 1835).

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

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

The Ordinance Outrages Constitutional Federalism

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

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

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.⁷³

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

It is important to note that the *Presser* Court regarded the second amendment as creating a purely individual right. Indeed, the

71. 10 U.S.C. § 331-333.

72. Sprecher, *supra* note 58, at 667.

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

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

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

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

The Second Amendment as a Fundamental Due Process Liberty is Inescapable

Unquestionably those portions of the Bill of Rights which are expressive of the most important liberties are now incorporated against the states through the Due Process Clause of the fourteenth amendment. In deciding whether a particular provision is so fundamental, we look first to our Anglo-American common law heritage, and also to its Greek and Roman antecedents.⁷⁵ At least equal weight is accorded evidence as to how the Founders themselves viewed a right's importance.⁷⁶ The esteem in which the

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

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

Founders held the right to keep arms has been exhaustively detailed. This right was part of their colonial common law and they knew it to have been among the most ancient in English common law, recognized by Bracton, Coke and Hawkins, and exalted by Blackstone as the "absolute right of individuals" of "having and using arms for self preservation and defense."⁷⁷ Finally every ancient and modern commentator of the Revolutionary Era affirmed not only that this right had existed in Greco-Roman law, but that it was the basis for republican institutions and popular liberties. In short, if the matter were purely one of legal theory, the only impediment to the amendment's incorporation has been the historical misconception that it protects only states' rights and not those of individuals.⁷⁸

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

77. BLACKSTONE, *supra* note 49.

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

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

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

As the Oregon Supreme Court recently stated:

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

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

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

Ante-bellum challenges to these arms provisions by free blacks were rejected on the ground that the second amendment did not

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

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

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

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

apply against the states and that blacks could never be considered "citizens" within the meaning of the analogous state arms guarantees.⁸⁴ The latter proposition was, of course, the basis of decision in the *Dred Scott* case, with the Chief Justice noting, in horror, that if blacks were considered citizens they would have the right "to keep and carry arms wherever they went."⁸⁵

The authors of the 1866 Act and fourteenth amendment were familiar with these decisions because they drafted language specifically overruling them in particular, and the entire blacks-as-property theory of slavery in general.⁸⁶ But, there is even stronger evidence than this inference to support the view that the authors meant to protect the individual right to keep arms. The *betes noir* of the Congress of 1866—at which these enactments were particularly aimed—were in Black Codes which the southern legislatures had enacted immediately after the war in order to keep newly freed blacks in a state of perpetual peonage. One of the most obnoxious provisions of these Codes, according to the Special Report of the Anti-Slavery Conference of 1867, stated that blacks were "forbidden to own or bear firearms," and thus were rendered defenseless against assault.⁸⁷ Congressman after congressman, including the Senate sponsors of both the 1866 Act and the fourteenth amendment, expressed their outrage at the denial of the freedman's rights to arms and their consequent intention to guarantee that right.⁸⁸ In summarizing what it would accomplish, the Act's House and Senate sponsors both cited and employed Blackstone's classification of the right of subjects, stating that these essential human rights were being conveyed.⁸⁹ Finally, a myriad of statements, and an official committee report, regarding the KKK Act of 1871, show an unchallenged assumption by a body largely identical

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

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

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

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

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

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

to the Congress of 1866 that the fourteenth amendment which they had enacted five years earlier encompassed second amendment rights.⁹⁰ The authors of the fourteenth amendment saw the right to arms as no less fundamental than did the authors of the second, and intended equally to protect it.

The Second Amendment Is Relevant Today

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

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

Even less credible is the oft-made assertion that the amendment's central purpose has no meaning today since a citizenry pos-

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

91. See *supra* note 76 and accompanying text.

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

93. LEVY, GUERRILLA WARFARE 56 (1964).

sessing only small arms would inevitably be defeated by a despotism possessing tanks, aircraft, etc. But the military experience of our century shows many cases in which a revolutionary people having only small arms have defeated a modern army. This is how the Shah came to be expelled from Iran, General Somoza from Nicaragua and the British from Palestine and Ireland. Moreover, if a revolutionary people start out with small arms, they can obtain more sophisticated weaponry if they need it—by capture, from parties outside the country, or by maintaining the struggle to the point at which sympathetic segments of the opposing military break off and join the revolution. Anyone who claims that popular struggles are inevitably doomed to defeat by the military technology of our century must find it literally incredible that France and the United States suffered defeat in Viet Nam; that the Shah no longer rules Iran or Battista, Cuba; that Portugal was expelled from Angola and Mozambique; and France from Algeria. It is quite irrelevant for our purposes whether each of these struggles was justified or the people benefited therefrom. However one may appraise these victories, the fact remains that they were achieved against regimes equipped with all the military technology which it is asserted inevitably dooms popular revolt.

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

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

Because it leads any prospective dictator to think through such questions, the individual, anonymous ownership of firearms is still a

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

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

GUNS, CRIME AND THE NEGLIGENT GUN OWNER

by Samuel Fields*

On February 11, 1982, a District of Columbia jury found the National Rifle Association of America to be negligent and awarded damages in the amount of \$2,038,000.¹ The case, a wrongful death action, arose from a homicide in which the murder weapon had been burglarized from the offices of the NRA only days earlier. This case marked the first time in which the owner's failure to adequately guard against theft of a gun was determined to be the proximate cause of the resulting injury caused by the use of the gun. The case raised numerous questions and has already been the subject of no less than 25 newspaper editorials.² But regardless of the outcome of subsequent appeals, the issue of negligence by gun owners and manufacturers promises to be with us for years to come.³ The central focus is proximate cause, and, more specifically, criminal intervention by third parties: What factors should determine whether such criminal intervention is or is not foreseeable and therefore should or should not cut off the negligent actor's liability?⁴

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1. *Romero v. National Rifle Ass'n*, No. 80-2576 (D.D.C. 1980).

2. Favorable Editorials Eau Claire (WI) Leader-Telegram, Mar. 12, 1982; Shrewsbury (NJ) Register, Feb. 16, 1982; Gainesville (FL) Sun, Feb. 20, 1982; Madison (WI) State Journal, Mar. 4, 1982; Meriden (CT) Record-Journal, Feb. 15, 1982; St. Petersburg (FL) Times, Feb. 14, 1982; Raleigh (NC) News and Observer, Feb. 13, 1982; Richmond (VA) Times-Dispatch, Feb. 21, 1982. Unfavorable Editorials Political Gun News, Mar. 26, 1982; Medford (OR) Mail Tribune, Mar. 9, 1982 (letter); Madison (WI) State Journal, Mar. 13, 1982; Orangeburg (SC) Times and Democrat, Mar. 3, 1982; Roseburg (OR) News-Review, Feb. 21, 1982; Muncie (IN) Star, Feb. 19, 1982; Glen Falls (NY) Post Star, Feb. 22, 1982; Tulsa (OK) Tribune, Feb. 15, 1982; Cocoa (FL) Today, Feb. 18, 1982; Salem (OR) Statesman-Journal, Feb. 14, 1982; Salt Lake City (UT) Tribune, Feb. 16, 1982; Green Bay (WI) Press-Gazette, Feb. 16, 1982; Salt Lake City (UT) Deseret News, Feb. 13, 1982; Wichita Falls (TX) Times, Feb. 15, 1982; Provo (UT) Herald, Feb. 15, 1982; Atlanta (GA) Journal, Feb. 17, 1982; Oklahoma City (OK) Oklahoman Feb. 13, 1982.

3. See e.g., Fisher, *Are Handgun Manufacturers Strictly Liable in Tort?* 56 CAL. ST. B. J. 16 (1981).

4. In reality, "[t]he question is one of negligence and the extent of [the actor's] obligation," and not one of causation, "since there is no doubt whatever that the defendant has created the situation acted upon another force. . ." W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 283 (4th ed. 1971).

On November 23, 1979, four teenagers, including one named Jo Jo Nicks,⁵ entered the offices of the National Rifle Association and committed what would prove to be one of 13,115 burglaries in the District of Columbia that year.⁶ On Tuesday, November 27, 1979, Nicks and two others committed what would be one of 6,743 reported robberies, and one of 185 reported homicides in the District of Columbia.⁷ In a city dulled by constant crime, neither of these incidents rated nightly news coverage and the robbery-murder of Orlando Gonzalez-Angel was barely mentioned in either the *Washington Post* or *Washington Star*.

Aside from the presence of Nicks at both crimes, there was a second common factor: the weapon used in the Gonzalez-Angel killing had been one of eight handguns Nicks and two others had burglarized from the NRA on the previous weekend. As the statistics below show, gun crime and, more specifically, handgun crime, was and is nothing unusual in the Capital.

CHART A

1979 District of Columbia Violent Crime by Weapons*

	Total number	Rifle	Shotgun	Handgun and percentage by handguns
Homicide	185	2	4	85 (45.9%)
Robbery	6,743	10	162	2,443 (36.2%)
Aggravated Assault	2,782	26	82	693 (24.9%)

* *District of Columbia Metropolitan Police Department
1979 Annual Report*

It was not, however, until the spring of 1980, that it became public knowledge that the NRA burglary and Gonzales-Angel robbery-murder shared both perpetrators and weaponry. The weapon in point was a .22 caliber target pistol that its owner, Robert W. Lowe, a NRA employee, regularly brought in and left in his desk

5. Jo Jo Nicks had been recently released from a correctional facility after having served approximately two years for the brutal murder of an 85-year-old woman.

6. Metropolitan Police Department, Washington, D.C., FISCAL YEAR 1979 ANNUAL REPORT (1980).

7. *Id.*

and/or closet overnight.⁸ Lowe, like many NRA employees, took advantage of a basement gun range for lunchtime target practice.

Between the time the complaint was filed and the jury decision, numerous facts emerged from discovery that necessarily distinguished the findings in this case from any likely to follow in its path.

(1) The National Rifle Association openly maintained a gun range which made it a magnet for potential burglaries.⁹

(2) Charles Fletcher, one of the convicted burglars with Nicks, testified that he had burglarized the NRA offices a year earlier and taken two handguns at that time including a .357 magnum and a .38 caliber revolver.¹⁰ Thus, the NRA was on notice of security problems.

(3) In both burglaries, Fletcher was able to make entry by simply removing a fourth story window grate with his bare hands. In one of the episodes he spent nearly four hours roaming the building.

(4) It was not until the day after the Executive Vice President of the NRA, Harlan Carter, was deposed that the NRA took any remedial actions to guard against additional thefts.¹¹ And even then his memo only advised employees to conform with legal requirements.

For the purposes of this article, however, it is far less important to dwell upon the special circumstances of the NRA case than it is to establish that (1) there is a general problem of gun violence, and (2) the contribution of negligent gun owners to such violence is so great that they should be held legally liable when the facts warrant.

FORESEEABILITY

Foreseeability as it relates to criminal intervention by a third

8. Mr. Lowe brought the gun in to use at the NRA basement range, an act encouraged by the NRA. Although the NRA denied that it allowed weapons to be left in offices overnight, the jury apparently believed defendant Lowe, who contended that there was no such prohibition. The NRA was unable to document such a rule. Lowe was individually acquitted by the jury. It is expected that Lowe's acquittal will be appealed.

9. While it is arguable that the maintenance of such a gun range could amount to an "abnormally dangerous activity," the judge rejected plaintiff's theory for strict liability on this basis. See *RESTATEMENT (SECOND) OF TORTS* §§ 519, 520 (1965).

10. The NRA disputed this allegation, and although no police report was found, a one line entry in a D.C. police computer printout showed that at approximately the same time Fletcher said his first burglary occurred, the police responded to a call concerning a forced entry at the NRA. No report was filled out at the time.

11. While subsequent remedial measures are not admissible to support an admission of negligence, they are admissible to show "feasibility of precautionary measures." *FED. R. EVID.* 410. It would be naive to believe, however, that jurors would distinguish according to the guidelines given by the Federal Rules of Evidence.

party in stolen handgun cases must be determined from the substantive issues inherent in the special danger presented by guns and, at the same time, the structural analysis associated with the "key in the ignition" cases.¹² Here, there is a two-tiered analysis that looks, first, at the foreseeability of the theft and, second, at the foreseeability of the incident that occurs after the theft.

All previous cases involving criminal intervention by a third party involve situations where the gun owner either voluntarily supplied the gun or the third party criminal was a person known to the owner. Thus, there had not, to date, been a case of negligence arising from a gun theft, although this may be the most common form of criminal acquisition. These prior cases, however, deserve consideration.

In *Cullum & Boren-McCairn Mall, Inc. v. Peacock*,¹³ a gun dealer sold a handgun to a mentally disturbed person (there was no allegation or evidence that a local, state or federal law had been broken), who, according to witnesses, was acting in a very strange manner. The purchaser, one Francis T. Blodgett, shortly thereafter shot the plaintiff for no apparent reason. In *Hetherington v. Sears, Roebuck*,¹⁴ the issue revolved around a sale, made in violation of Delaware law, in which the buyer, a convicted felon, shot an off-duty policeman. *Olson v. Rutzel*¹⁵ is another illegal sale case in which the plaintiff attempted to argue that the illegal sale was negligence *per se*.¹⁶

The fact situation most similar to the one presented here occurred in *Palmisano v. Ehrig*.¹⁷ There, a family who owned several guns went on vacation to Europe. During its absence, their 23 year old son, who had moved out and was no longer supposed to have keys to the house, entered the house and occupied it with three friends. After showing his father's guns to his friends, one of the friends accidentally discharged a weapon injuring a tenant above. The trial court granted defendant's summary judgment motion,

12. For a general discussion of these cases and others involving intervening cause, see W. PROSSER, *supra* note 4, § 44.

13. 592 S.W.2d 442 (Ark. 1980).

14. 493 F. Supp. 82 (D. Del. 1980).

15. 89 Wis.2d 227, 278 N.W.2d 238 (1979).

16. See also *Robinson v. Howard Bros. of Jackson, Inc.*, 372 So.2d 1074 (Miss. 1979); *Angell v. Avanzani*, 363 So.2d 571 (Fla. Dist. Ct. App. 1978); *DiGironimo v. American Seed Co.*, 96 F. Supp. 795 (E.D. Pa. 1951); *Skelton v. Gambrell*, 80 Ga. App. 880, 57 S.E.2d 694 (1950).

17. 171 N.J. Super. 310, 408 A.2d 1083 (1979), *cert. denied*, 412 A.2d 793 (N.J. 1980).

stating that to do otherwise "would extend the doctrine of foreseeability beyond all reason."¹⁸ The Appellate Division reversed, making it clear that when dealing with guns, there is "a duty to use extraordinary care."¹⁹ In concluding, the *Palmisano* court wrote: "In order to prevail at a trial on the merits, plaintiffs are not required to demonstrate that the precise event could have been foreseen, they are only required to demonstrate that *some harm might reasonably be anticipated*."²⁰

While it is clear that the court showed deep concern in the handling of firearms, it is quite arguable that the relationship between the defendant and the intervenor(s) helped considerably in establishing foreseeability.

We see, then, that with these types of cases, foreseeability is more easily found to exist when the original actor is somehow connected with the person who pulled the trigger. No such argument can be made in the NRA case. Although the NRA burglars obviously could predict that guns were in the building, they were totally unknown to all the defendants. Unlike sellers whose greed overcame common sense²¹ or family guns,²² neither Charles Fletcher, Joseph Nicks nor the fourth burglar, Lavonne Williams, had any known connection to the NRA.

Does the lack of connection, however, either familial or fiduciary, between the negligent party and the criminal cut off liability? While in past cases the connection seems to be a common thread, there appears to be little legal justification for this limitation.²³ In-

18. 408 A.2d at 1084.

19. *Id.*

20. *Id.* at 1084-85.

21. See *supra* notes 13-16 and accompanying text.

22. See *Spivy v. Sheeler*, 514 S.W.2d 667 (Ky. 1974); *Palmisano*, 171 N.J. Super. 310, 408 A.2d 1083 (1979), *cert. denied*, 412 A.2d 793 (N.J. 1980).

23. In his order of July 15, 1982, granting defendant's motion for j.n.o.v., Judge Oliver Gasch noted that one factor supporting the granting of the motion was the NRA's lack of contact with the murderer John Hart or ". . . any knowledge of Hart's dangerous propensities" *Romero*, No. 80-2576, at 25. In support of his argument, however, he distinguished two cases which involved *negligent release of dangerous persons* who went on to murder. (*Reiser v. District of Columbia*, 563 F.2d 462 (D.C. Cir. 1977), *Hicks v. United States*, 511 F.2d 407 (D.C. Cir. 1975)). He did this by showing that in *Hicks* and *Reiser* the defendant's had control of the third parties whereas in the present case the NRA had no control over the murderer. This analogy is not a parallel construction of the facts. There had been no suggestion that the NRA ever had the burglars or the murderers under its control, *only the gun which was used*. *Hicks*, *Reiser* and *Romero* all involve the failure of actors to control inherently dangerous things, in the former two cases they were dangerous people, and in the third case it was a dangerous instrumentality. The *only* connection in all three is that the defen-

stead, it may be hypothesized that this special feature in gun cases is a needless historical protection of gun owners and sellers reflective of the American love affair with handguns. Yet, it is obviously not the case with car owners, in spite of that well-known love affair.

While it would needlessly burden the reader to give a complete review of the "key in the ignition cases," suffice it to say that in no case that could be found was it even offered that the defendant knew the thief.²⁴ Thus, the issues here should revolve around what happens *after* the theft, i.e., at what point should liability stop? How much should the negligent defendant be required to reasonably "foresee"?²⁵ The problem presented by the stolen gun cases ought not be hindered by lack of familiarity. While familiarity with the transferee might go to aid in proving foreseeability (and ultimately liability), the lack of it in gun cases ought not be dispositive. What, then, should be considered in determining foreseeability?

EMPIRICAL DATA AND THE FORESEEABLE CONSEQUENCE OF STOLEN GUNS

In the final analysis, foreseeability (which defines the scope of proximate cause) is an issue of public policy. As Justice Andrews wrote in *Palsgraf*: "What we do mean by the word proximate is that, because of convenience, of public policy, or a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. *This is not logical, it is practical politics.*"²⁶

Justice Andrews' candor about proximate cause stands in stark contrast to Justice Traynor's analysis in *Richards v. Stanley*.²⁷ That case, a classic "key in the ignition" case, offers the kind of internal logic argument that may appeal to lawyers but has little to do with the reality of stolen cars.

The problems are not answered by pointing out that there is a foreseeable risk of negligent driving on the part of thieves. There is a

dants breached their duty of care in controlling dangerous instrumentalities . . . insane people and concealable firearms.

24. See e.g., *Colonial Parking v. Morley*, 391 F.2d 989 (D.C. Cir. 1968); *Casey v. Carson & Gruman Co.*, 221 F.2d 51 (D.C. Cir. 1955); *Ross v. Hartman*, 139 F.2d 14 (D.C. Cir. 1943); *Ney v. Yellow Cab Co.*, 2 Ill.2d 74, 117 N.E.2d 74 (1954).

25. For a thorough discussion of the need to limit liability based upon the foreseeability of the consequences, see *Palsgraf v. Long Island Ry. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

26. *Id.* at 341, 162 N.E. at 102 (emphasis added).

27. 43 Cal. 2d 60, 271 P.2d 23 (1954).

foreseeable risk of negligent driving whenever anyone drives himself or lends his car to another. That risk has not been considered so unreasonable, however, that an owner is negligent merely because he drives himself, or lends his car to another, in the absence of knowledge on his part of his own or the other's incompetence. Moreover, by leaving the key in the car the owner does not assure that it will be driven, as he does when he lends it to another. At most he creates a risk that it will be stolen and driven. The risk that it will be negligently driven is thus materially less than in the case in which the owner entrusts his car to another for the very purpose of the latter's use.²⁸

Out of this internal logic has emerged California's "special circumstances" rule which requires that the original actor's negligence to have been committed in the most glaringly negligent circumstances, e.g., next to a schoolyard, or as the court later described in *Hergenrether v. East*,²⁹ an area noted for frequency by undesirable characters. In summary, Dean Prosser has noted:

Here two courts have found liability at common law, and three have construed legislation to create a duty to the plaintiff and impose liability. The great majority have refused to hold the defendant liable, either with or without a car-locking ordinance. The opinions have run the gamut of all possible grounds, ranging from no duty through no lack of reasonable care to no proximate causation. Actually the problem appears to be a very simple one. Leaving a car unlocked certainly creates a foreseeable likelihood that it will be stolen, which endangers the interests of owner; but is it so likely that the thief, getting away, will drive negligently, that there is any unreasonable risk of harm to anyone else? When the plaintiff is run down five days after the theft, the decisions agree that there is no liability, since there is nothing more than the ordinary risk of being run down by any car. Is there so much more danger while the thief is escaping that the owner is required to take precautions for the protection of those down the highway? The bulk of the decisions have said no.³⁰

What is the truth about cars with keys in the ignition? Are they stolen more often? Are they more likely to be involved in accidents?

One who has looked into this problem in great depth is Cornelius J. Peck.³¹ Just two paragraphs offer important testimony

28. *Id.* at 65, 271 P.2d at 26.

29. 61 Cal.2d 440, 393 P.2d 164, 39 Cal. Rptr. 4 (1964).

30. W. PROSSER, *supra* note 4, at 283-84 (footnotes omitted).

31. Peck, *An Exercise Based Upon Empirical Data: Liability for Harm Caused by Stolen*

about the shaky ground upon which *Ney*, *Hegenrether* and a host of other rules of law rely:

In the latter part of 1966, the Department of Justice undertook a survey to obtain information concerning such items as the stolen car accident rate, means of entry into the car, and the purpose of the theft. It selected as its information source those persons who had been convicted of auto thefts who were either serving sentences in prison or on probation, including juveniles who had committed auto thefts and were in detention. [A series of] carefully developed questionnaires were returned, covering a total of 4,077 auto thefts.

As the report on the survey puts it, one of the survey's most startling and significant results was the high percentage of stolen cars which became involved in accidents. *Of the total sample, 18.2 percent of the cars stolen were involved in accidents even though most stolen cars are recovered within 24 to 48 hours after theft. Of the car thefts resulting in accidents, 19.6 percent resulted in personal injury to one or more persons. Reference to the statistics of the National Safety Council produced the observation that the rate for stolen cars appears to be approximately 200 times the normal accident rate. Moreover, 42.3 percent of the automobiles stolen had been left with the keys in the ignition and another 16.7 percent were automobiles with ignition systems which can be and were left operable after removal of the key. Thus 59 percent of the thefts involved automobiles left without, as statutes so frequently put it, "locking the ignition and removing the key."* (Emphasis added).³²

The results are, as he states, quite startling. Although Peck does indicate some areas of weakness, it is difficult to dispute the overall argument that:

- 1) People who leave their keys in the car have their cars stolen with significantly greater frequency.
- 2) Those cars are markedly more dangerous after theft than when they were under the owner's control.

Thus, through the use of empirical data, it is obvious that the underlying principles of *Ney* and *Hegenrether* are, at best, questionable. Can the same principles of empirical evidence be applied to handguns? Before examining the available data on stolen handguns, however, it is worthwhile to give a quick overview of the societal impact associated with handguns.

Automobiles, 1969 Wisc. L. Rev. 909.

32. *Id.*, citing *Hearings on H.R. 15215 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. 31-39 (1968).

HANDGUN VIOLENCE: ITS COST

The role of the handgun in gun violence is so overwhelming as to make the use of the phrase "gun control" interchangeable with "handgun control." Statistically, while handguns account for only 20-25% of the nation's firearms, they account for 85-90% of all gun misuse.³³

There can be little doubt that handgun violence in America is catastrophic. The following statistics show that from the economic and personal tragedy viewpoint, the only form of violence that equates with it is the automobile; and, in terms of death and injury, handguns are arguably more dangerous than cars. The 50,000 annual auto deaths come from over 154,000,000³⁴ vehicles while the 22,000³⁵ handgun deaths are generated from 30,000,000 handguns.³⁶

CHART B

- In 1979 more than 350,000 Americans suffered gunshot wounds in assaults.
- During the years 1963-1973 while 46,121 Americans died in Viet Nam, 84,644 were murdered with firearms (80% with handguns). (FBI UNIFORM CRIME REPORTS 1963-1973)

It would be inaccurate to state that the definitive study on stolen handguns—comparable to the earlier discussed one on stolen cars—has been done. Studies that discuss this issue have only done so as a feature of a broader issue.³⁷ Nevertheless, some interesting data has emerged.

According to a March 1, 1982, conversation with officials at the FBI, the National Crime Information Center [NCIC] had 1,739,674 guns entered into its computer as stolen. The Bureau of Alcohol, Tobacco, and Firearms reported 225,000 stolen firearms in 1979.³⁸

33. Fields, *Handgun Prohibition and Social Necessity*, 23 St. Louis U. L. J. 35 (1979). This article details the distribution among handguns and various long guns from technological as well as criminological, sociological and economic viewpoints.

34. Statistical Abstract of the United States, 647-48 (1980) Washington, D.C., Gov't. Printing Office.

35. *Id.* In 1980 the FBI reported 11,522 handgun homicides. Additionally, there were over 10,000 handgun suicides and accidental deaths.

36. JAMES D. WRIGHT, *WEAPONS, CRIME, AND VIOLENCE IN AMERICA* 45-81 (U.S. Dep't of Justice, Nat'l Inst. of Justice, 1981).

37. ATT'Y GEN. TASK FORCE ON VIOLENT CRIME, U.S. DEP'T OF JUSTICE, *FINAL REPORT, PHASE I RECOMMENDATIONS* 17 (1981).

38. Bureau of Alcohol, Tobacco and Firearms, *FFL Newsletter*, Vol. I., #2. [Hereinafter cited as *FFL Newsletter*].

The actual number of stolen guns, however, is considerably higher. In meetings with the Director of the Bureau of Alcohol, Tobacco and Firearms (BATF), it was estimated that the annual number of stolen guns was possibly as high as 800,000. Handguns, the criminal's favorite weapon, account for at least 70% of this number and quite possibly as much as 90%.³⁹

A limited analysis of where some of these weapons go was provided in a 1980 BATF publication. According to the Bureau's Directors "[of] 1000 weapons seized by the Philadelphia police in the first 5 months of 1979, 88% were used in serious crime and half of these, 44% of the total sample, were stolen from private residences."⁴⁰

A 1976 study by BATF, *Project 300*, looked intensely into the history of 300 firearms confiscated as part of its *Project Identification*. Sixty-six—or 22%—had been stolen but only 14 had been reported stolen and none were reported to the FBI-NCIC.⁴¹

Another powerful indication of under-reporting came in a related New York City Intelligence Division study which followed up on a 144 gun sample. While BATF standard tracing reported only 5—3%—to be stolen, a more intense analysis identified 28—19.5%—as stolen.⁴² Of course, the weak point here is that we are unaware as to the purpose of BATF confiscation or NYPD traces. While it is safe to assume that many or most were involved in criminal activity, we are simply without the full data.⁴³ While there is strong indication of a significant role of stolen guns in the violent crime categories, the sample is arguably smaller than is ordinarily desirable in social scientific analysis. Still, we do find stolen handguns to be the largest single source of criminally used firearms.

39. Fields, *supra* note 32, at 47-48.

40. *FFL Newsletter supra* note 38. (Efforts to secure more data on these figures have of this writing been futile).

41. Steven Brill, *Firearm Abuse: A Research and Policy Report*, POLICE FOUND. 102 (1977).

42. *Id.* at 107.

43. *But see* Moore, *Keeping Handguns From Offenders*, ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI., VOL. 455, AT 107 (MAY 1981) (an analysis of the source of criminally used firearms).

CHART C
PATHS OF GUNS TO OFFENDERS

OFFENSE	PATH	ORIGINAL RETAIL PURCHASE		UNBROKEN CHAINS OF PRIVATE TRANSFER	STOLEN AT SOME STAGE	OTHER OR UNKNOWN	TOTAL
		ENTITLED PURCHASER	PROSCRIBED PURCHASER				
Homicide and rape (in percentage)		28 N = 2	0 N = 0	0 N = 0	72 N = 5	0 N = 0	100 N = 7
Assault (in percentage)		52 N = 21	2 N = 1	20 N = 8	13 N = 5	13 N = 5	100 N = 40
Armed robbery (in percentage)		8 N = 2	0 N = 0	17 N = 4	62 N = 15	13 N = 3	100 N = 24
Other, for example, drugs, burglary, gambling, drink, and weapons offenses (in percentage)		14 N = 6	2 N = 1	26 N = 11	50 N = 21	7 N = 3	100 N = 42

SOURCE: Closed ATF Investigative Case Files, Boston, MA, 1975-76

NOTE: N = number

All these studies surely point to problems with handguns being stolen and problems with stolen guns. But they clearly lack that thoroughness that Peck was able to achieve with his stolen car study. The best data that traces the comings and goings of guns comes from Dr. D. E. Scott Burr at the University of Central Florida.⁴⁴ He surveyed 808 Florida residents about their guns as well as 277 felons in jail for gun crimes. In interviewing householders, he was able to identify 304 persons who owned one or more handguns. Of that number, 283 had disposed of a total of 333 of these weapons, of which they reported that 9.6% (32 handguns) had been stolen. Burr was also able to identify the source of 176 guns owned and/or used by felons.⁴⁵

44. See generally D.E.S. BURR, HANDGUN REGULATION (Bur. of Crim. Justice Plng. & Asst., Tallahassee, Florida, 1977).

45. *Id.*

CHART D
SOURCE OF HANDGUNS IN POSSESSION
OF INMATES

SOURCE	GUN MURDER	NON GUN MURDER	ASSAULT	NON GUN ASSAULT	BREAKING AND ENTERING	TOTAL
Public	21(38.2%)	4(25%)	12(21.8%)	3(14.3%)	2(6.9%)	42(23.9%)
<u>Private</u>						<u>SUB-TOTAL</u>
Purchase	20(36.4%)	6(37.5%)	18(32.7%)	6(28.6%)	10(34.4%)	60(34.1%)
Trade				1(4.8%)		1(5.7%)
Gift	1(1.8%)		4(7.2%)	2(9.5%)	2(6.9%)	9(5.1%)
Pawn	2(3.6%)	1(6.3%)				3(1.7%)
Hold	1(1.8%)		4(7.2%)			5(2.8%)
Round	1(1.8%)		1(1.8%)		1(3.4%)	3(1.7%)
					Total - 81	81(51.1%)
<u>Stolen</u>	6(10.9%)	3(18.8%)	11(20%)	7(33.3%)	14(48.2%)	41(23.3%)
<u>DNA*</u>	1(5.4%)	2(12.5%)	5(9.1%)	2(9.5%)		12(6.8%)
TOTALS	55	16	55	21	29	176

NOTE: Some inmates owned and gave information about more than one weapon.

DNA*: Inmate either did not know or would not answer.

SUMMARY

If we start with the presumption that foreseeability is, as Justice Andrews stated, a question of "public policy" then, logically, empirical data ought to be a significant component of developing that policy. A number of studies have been cited here as a basis. They indicate that from 20-50% of criminally used firearms are derived from theft. Clearly, more data is necessary. Data along the lines cited by the Peck article would go a long way in solving this problem. It is, however, first and foremost, necessary to recognize the special dangers associated with handguns and that this danger is derived from its special, inherent technology. Of course, this would not provide the final answer as to foreseeability or third party criminal intervention. For in the final analysis, as Judge Andrews stated, it is still a political question.

SECOND AMENDMENT SURVEY

I. INTRODUCTION

In recent years, assassination attempts and other gun-related crimes have increased remarkably. This has created a demand for legislation dealing with gun control. It is difficult to deal with this problem unless there is a clear understanding of the second amendment of the United States Constitution. The second amendment states: "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."¹ This amendment is subject to two major interpretations. The view supported by most courts is that the right to bear arms is a collective right of the people to form a militia in order to protect themselves and their state.² The opposing view is that the second amendment guarantees to each citizen an individual right to bear arms.³ In order to have gun control legislation in today's society, it must be determined whether such legislation would be violative of any guaranteed constitutional rights. Therefore, it is necessary to briefly review the historical origins of the second amendment, and the manner in which federal and state courts have interpreted and applied the second amendment.

II. HISTORICAL BACKGROUND

Gun control is not a concept that has been recently developed in the United States. Because the United States has often looked to the English common law for guidance in determining legal issues, the history of English gun control measures must be briefly explored.

The Statute of Northampton⁴ was enacted during the reign of King Edward III. This statute prohibited persons from carrying weapons in public places.⁵ The Statute was narrowly interpreted in

1. U.S. CONST. amend. II.

2. See *United States v. Johnson*, 497 F.2d 548 (4th Cir. 1974) (Courts have consistently held that the second amendment "only confers a collective right of keeping and bearing arms which must bear a 'reasonable relationship to the preservation. . . of a well regulated militia.'"); *United States v. Day*, 476 F.2d 562 (6th Cir. 1973); *Stevens v. United States*, 440 F.2d 144 (6th Cir. 1971); *City of Salina v. Blaksley*, 72 Kan. 230, 83 P. 619 (1905).

3. See *Robertson v. Baldwin*, 165 U.S. 275 (1897); *State v. Reid*, 1 Ala. 612 (1840); *Davis v. State*, 146 So. 2d 892 (Fla. 1962); *State v. Keet*, 269 Mo. 206, 190 S.W. 573 (1916); *City of Las Vegas v. Moberg*, 82 N.M. 626, 485 P.2d 737 (1971) (an ordinance which denies any person the constitutionally guaranteed right to bear arms is void).

4. 2 Edw. 3, ch. 3 (1328).

5. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB.

the seventeenth century as requiring proof that the arms were intended to terrify the King and his subjects.⁶

Later in the seventeenth century, during the reign of King Charles II, only persons who owned land valued at one hundred pounds or more were permitted to have guns.⁷ Later events, such as the disarming of certain social⁸ and economic classes, led to the Glorious Revolution of 1688 and the enactment of the English Bill of Rights, the latter giving the suppressed Protestants the right to bear arms.⁹

Sir William Blackstone believed it clear that the common law was in favor of the individual citizen's right to possess and carry arms for both an individual and collective defense.¹⁰ He stated that "having and using arms for self-preservation and defense" was among the "absolute rights of individuals."¹¹

In the United States, before the ratification of the Constitution, there were statutes that required persons to carry and bear arms. The first statute of this nature was found in Virginia in 1623.¹² It stated "no man go or send abroad without a sufficient party will [sic] armed," and that "men go not to work without their arms (and a centinell upon them)."¹³ In 1658, a Virginia statute required "every man able to beare armes have in his house a fixt gunn."¹⁴ Such statutes were introduced as a result of the fears of many people in this new country. The land was wild and unknown, and there was always the possibility of intervention by a foreign country.

The second amendment was adopted as part of the Bill of Rights to the Federal Constitution in 1791.¹⁵ When the Constitution was presented to the states for ratification, several states criticized the

L.J. 31, 32 (1976).

6. *Id.*

7. *Id.* at 33. See *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 155 (1840).

8. Protestants were disarmed by the government while Catholics were afforded the right to bear arms.

9. See Caplan, *supra* note 5, at 33.

10. 1 W. BLACKSTONE, COMMENTARIES 144.

11. *Id.* at 124.

12. Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI.-KENT L. REV. 148 (1971).

13. Acts of the Grand Assembly 1623-1624, Nos. 24 and 25.

14. Acts of Grand Assembly 1658-59, Act 25. See also Levin, *supra* note 12.

15. BUR. OF ROLLS & LIBRARY, U.S. DEPT. OF STATE, II DOCUMENTARY HISTORY OF THE CONSTITUTION 321-24 (1894). See Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U.L. REV. 53, 55 (1966).

document because it failed to include a discussion of several basic human rights which had been provided for in some state constitutions drafted earlier.¹⁶ This protest caused Congress to draft the Bill of Rights, which was subsequently ratified by the states.¹⁷

The first state to draft a 'right to bear arms' bill was Virginia.¹⁸ The bill stated that "a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; [and the military should be subordinate to] and governed by, the civil power."¹⁹ It is believed that this bill had a major influence upon the drafting of other state provisions, and that James Madison's version of the current second amendment originated from it.²⁰

For many years there was no need for an extensive interpretation of the second amendment. Guns were extremely important possessions for a majority of people in America. Guns were needed to provide food for families as well as to protect them from wild animals and Indians.²¹ Another concern of the people was the possibility that the Federal Government would neglect to form a militia, thus endangering their newly won freedom.²² Also, after experiencing the British conflict, people were wary of the power of an armed governmental body.²³ These factors caused the "framers of the Constitution to formulate carefully their concept of the militia and of the role of firearms in the national defense."²⁴

The second amendment has become an object of many different interpretations. It is difficult to perceive which interpretation the framers of the Constitution had in mind when the second amendment was ratified. A review of the decisions handed down by the United States Supreme Court will show how the second amendment has been interpreted and applied by the judicial branch of our government.

16. See Rohner, *supra* note 15, at 55.

17. *Id.*

18. *Id.* at 56.

19. SOURCES OF OUR LIBERTIES 312 (R. Perry & J. Cooper, eds. 1959).

20. Rohner, *supra* note 15, at 56.

21. *Id.* at 57.

22. See Caplan, *supra* note 5, at 37.

23. *Id.*

24. *Id.*

III. SUPREME COURT DECISIONS

When the issue of gun control surfaces, the United States Supreme Court is looked to for direction. While the Court has heard only four principal cases dealing with the second amendment,²⁵ a review of those opinions can be helpful in determining which direction the Court may take if it is called upon to deal with the issue in the future.

The first Supreme Court case interpreting the second amendment was *U.S. v. Cruikshank*.²⁶ In *Cruikshank*, a civil rights action alleging thirty-two violations of the Enforcement Act²⁷ had been brought against a group of Southern whites. It was alleged by plaintiffs that, in enforcing the Act, the defendants intended to hinder and prevent the plaintiffs' exercise of the "right to keep and bear arms for a lawful purpose."²⁸

The Court did not explore the meaning of the second amendment in depth, but did state that "the right to keep and bear arms for a lawful purpose" was not an absolute right guaranteed by the Constitution.²⁹ Rather, the Court held that the second amendment merely prevented Congress from infringing upon the right to bear arms. The Court stated that the second amendment had no other purpose than to limit the powers of national government.³⁰

The next Supreme Court case to deal with the second amendment was *Presser v. Illinois*.³¹ Presser belonged to a society called "Lehr und Wehr Verein,"³² formed for the purpose of "improving the mental and bodily condition of its members, so as to qualify them for the duties of citizens of a republic," and to encourage its members to "obtain, in meetings of the association, a knowledge of our laws and political economy, and . . . be instructed in military

25. Note, *Gun Control: Is it a Legal and Effective Means of Controlling Firearms in the United States?* 21 WASHBURN L.J. 244, 249 (1982).

26. 92 U.S. 542 (1875).

27. Enforcement Act, ch. 114, 16 Stat. 140 (1870).

28. 92 U.S. at 545.

29. *Id.* at 553.

30. See *State v. Shelby*, 90 Mo. 302, 2 S.W. 468 (1886) (restriction upon national government only); *State v. Keet*, 269 Mo. 206, 190 S.W. 573 (1916) (amendment does not apply to states); *State v. Amos*, 343 So.2d 166 (La. 1977) (amendment not incorporated into fourteenth amendment); *Onderdonk v. Handgun Permit Review Bd. of Dep't of Pub. Safety & Correctional Serv.*, 44 Md. App. 132, 407 A.2d 763 (1979).

31. 116 U.S. 252 (1886).

32. *Id.* at 254. (A translation into English would roughly make this a "Weapons Instruction Society.")

. . . exercises”³³ This violated the Military Code of Illinois, which required a license from the governor for any group, other than the state militia or troops of the United States, to drill or parade with arms in the streets of that state.³⁴ Presser alleged that such a provision violated his second amendment rights.

Again, the Court, not deeply exploring the meaning of the second amendment, held, although in a different context, that the second amendment limited the power of Congress, *not* the power of the states.³⁵ The Court further stated that the question whether a state may prohibit its citizens from bearing arms for other than military purposes did not need to be addressed at that time.³⁶

The Supreme Court again discussed aspects of the second amendment in the case of *Miller v. Texas*.³⁷ This case was heard during the latter 1800’s, a time when gunfights and the wild west comes to mind rather than an issue related to the second amendment. Miller was tried and convicted on murder charges in the state of Texas. On appeal, he claimed that his second amendment rights had been infringed by a state statute which prohibited the carrying of weapons in public.³⁸ The lower court had instructed the jury that “if defendant was on a public street carrying a pistol, he was violating the law. . . .”³⁹ Miller claimed that the statute and the jury instruction conflicted with his second amendment right and his rights as a United States citizen.⁴⁰

The Court found that there had been no infringement of Miller’s second amendment right.⁴¹ The Court reiterated the holding in *Cruikshank* by stating that the second amendment does not restrict state powers but is merely a limitation upon federal powers.⁴²

The most recent second amendment case heard by the Supreme Court is *United States v. Miller*.⁴³ Jack Miller and Frank Layton were charged with violating the National Firearms Act.⁴⁴ They

33. *Id.*

34. *Id.* at 253.

35. *Id.* at 257. *See supra* note 28, at 553.

36. 116 U.S. at 258.

37. 153 U.S. 535 (1894).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 538.

42. *Id.*, *see supra* note 28, at 553.

43. 307 U.S. 174 (1939).

44. National Firearms Act, ch. 757, 48 Stat. 1236-40 (1934) (current version at 26 U.S.C. § 5801 *et. seq.* (1976)).

transported a shotgun, having a barrel less than eighteen inches in length, across state boundaries without registering the weapon or acquiring a stamp-affixed written order, as required by the Act.⁴⁵ (The National Firearms Act of 1934 also provided for a tax on both the transfer⁴⁶ and manufacture⁴⁷ of firearms and further required that firearms dealers, manufacturers, and importers register with the Federal Government.⁴⁸)

The district court held that the Act violated the second amendment.⁴⁹ The case went on to the Supreme Court on direct appeal and was reversed. This time the Court took a different approach in treating the second amendment issue. The Court discussed the historical concept of militia and stated:

In the absence of any evidence tending to show that possession or use of a shotgun having a barrel of less than eighteen inches in length at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.⁵⁰

While the Court has discussed various aspects of the second amendment, the issue of whether an *individual* has a guaranteed right to bear arms under the second amendment has never been directly faced. Because of the present controversies surrounding this issue, undoubtedly the Court will soon be called upon to resolve it. The Court may use the preceding cases as a foundation, but eventually will have to squarely address the issue and define the scope of the right protected by the second amendment.

IV. OTHER FEDERAL AND STATE DECISIONS

It is difficult to assess the value of state court holdings because, in the absence of a binding federal provision, the states are bound by their own constitutions. So, although these decisions are not controlling, they are important because they deal with provisions of state constitutions that are similar to the second amendment of

45. *United States v. Miller*, 307 U.S. 174, 175 (1939).

46. National Firearms Act, ch. 757, 48 Stat. 1237 (1934) (current section at 26 U.S.C. § 5811 (1976)).

47. *Id.*

48. *Id.*

49. 307 U.S. at 177.

50. *Id.* at 178.

the United States Constitution.⁵¹

The first state court decision resulting from the "right to bear arms" issue was *Bliss v. Commonwealth*.⁵² The court held that "the right of citizens to bear arms in defense of themselves and the State must be preserved entire, . . ." ⁵³ This holding was unique because it stated that the right to bear arms is absolute and unqualified.⁵⁴ In contrast to this, *all* states currently regulate the possession and use of firearms to some extent.⁵⁵

An early decision which influenced subsequent state decisions was that of *Aymette v. State*.⁵⁶ The Supreme Court of Tennessee held that the right to bear arms was a right of the people to protect themselves against the excesses of an oppressive government.⁵⁷ The court stated that "the citizens have the unqualified right to keep the weapon . . . but the right to bear arms is not of the unqualified character."⁵⁸

In the 1800's, most state courts were divided on the issue of the right to bear arms.⁵⁹ After the Supreme Court stated in *Cruikshank* that there was no guaranteed constitutional right to bear arms, most jurisdictions, whether accurate or not, have interpreted their respective constitutional provisions, as well as the second amendment, to mean that an individual right to bear arms does not exist.⁶⁰

It has been held that the second amendment was not adopted with the individual's right in mind, but as a method for the states to maintain a militia to protect against encroachments by the Federal Government.⁶¹ State regulation of the acquisition or possession of guns has been frequently characterized as a reasonable ex-

51. Feller & Gotting, *The Second Amendment: A Second Look*, 61 Nw. U.L. Rev. 46, 62 (1966).

52. 12 Ky. (1 Litt.) 80 (1822).

53. *Id.* at 91.

54. See Levin, *supra* note 12, at 160.

55. Feller & Gotting, *supra* note 51, at 63.

56. 21 Tenn. (2 Hum.) 154 (1840).

57. Levin, *supra* note 12, at 160.

58. 21 Tenn. (2 Hum.) at 158.

59. Note, *supra* note 25, at 252.

60. *Id.* at 253. See *Burton v. Sills*, 53 N.J. 86, 248 A.2d 521, *appeal dismissed*, 394 U.S. 812 (1968) (the amendment refers to a *collective* right only); *State v. Rosenthal*, 75 Vt. 295, 55 A. 610 (1903); *People v. Garcia*, 197 Colo. 550, 595 P.2d 228 (1979) (right to bear arms can be restricted by state's valid exercise of its police power); and *Davis v. State*, 146 So. 2d 892 (Fla. 1962).

61. *Burton v. Sills*, 53 N.J. 86, 248 A.2d 521, *appeal dismissed*, 394 U.S. 812 (1968).

ercise of the police power,⁶² thus allowing courts to uphold statutes prohibiting the carrying of a concealed weapon,⁶³ the possession of weapons by persons such as convicted felons,⁶⁴ and to validate laws requiring gun purchasers to obtain identification cards after being investigated, fingerprinted, and approved by state officials.⁶⁵

Most court decisions have paralleled the Supreme Court decisions. With few exceptions, the state courts have taken one of three positions in upholding legislation against second amendment claims: (1) the amendment applies to the Federal Government, but not to the states,⁶⁶ (2) the right is not absolute, and therefore subject to regulation,⁶⁷ or (3) the amendment guarantees a collective right rather than an individual right.⁶⁸

V. CONCLUSION

The controversy surrounding the interpretation of the second amendment is destined to be ruled upon soon by the Supreme Court. No matter what interpretation is handed down, it will be opposed by a large number of people. In order to uphold gun control measures, the Court can choose to find that the right is not an individual one, follow the holding in *Cruikshank* and defer the gun control issue to the communities and states, or simply find that the right is not absolute. The Court realizes that something needs to be done about our country's growing gun-related problems, and the above-mentioned alternatives are the only solutions for which the Court could find supporting precedents at this time.

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62. See *Galvan v. Superior Court of San Francisco*, 70 Cal. 2d 851, 76 Cal. Rptr. 642, 452 P.2d 930 (1969) (regulation of firearms is a valid police function); *State v. Robinson*, 251 A.2d 552 (Del. 1969); *People v. Brown*, 253 Mich. 537, 235 N.W. 245 (1931).

63. See, e.g., *Herring v. State*, 371 S.W.2d 884 (Tex. Crim. App. 1963); *Pierce v. State*, 42 Okla. Crim. 272, 275 P. 393 (1929).

64. See *Jackson v. State*, 37 Ala. App. 335, 68 So.2d 850 (1953), cert. denied, 260 Ala. 698, 68 So.2d 853 (1953), and *State v. Bolin*, 200 Kan. 369, 436 P.2d 978 (1968).

65. *Burton v. Sills*, 53 N.J. 86, 249 A.2d 521, appeal dismissed, 394 U.S. 812 (1968).

66. See *supra* note 28, at 553.

67. See *supra* notes 60-63.

68. See *supra* note 2.