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Federal Gun Control Laws: The Second Amendment And Other Constitutional Issues

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FEDERAL GUN CONTROL LAWS: THE SECOND AMENDMENT AND OTHER CONSTITUTIONAL ISSUES

SUMMARY

This report examines the arguments for an against an individual right to keep and bear arms for lawful purposes. The review includes a summary of the historical sources that bear on interpretation of the Second Amendment, an analysis of the leading constitutional cases, and a brief summary of modern legal commentary for and against an individual right to bear arms.

Proponents of an individual right to bear arms rely upon the text of the Second Amendment ("the right of the people to keep and bear arms shall not be infringed"), the evidence of the constitutional and congressional debates from 1787-1792 as confirmation of an individual right, the evidence of a common law right to bear arms for diverse lawful purposes, inclusion of a right to bear arms in the English Bill of Rights, the strong evidence that the American patriots asserted a right to bear arms, the inclusion of a right to bear arms in several state declarations of rights preceding adoption of the federal Constitution, and the evidence that our Founding Fathers preserved the right to bear arms in the Second Amendment for purposes of self-defense and as a safeguard against an unjust and tyrannical government.

Those opposed to an individual right to bear arms generally interpret the Second Amendment as either conferring a collective right for defensive purposes or a right by the States to maintain a well regulated militia. Supporters of the collective right interpretation rely primarily upon the judicial view that the Constitution does not grant any private right to keep and bear arms. The Supreme Court in *United States v. Miller,* 307 U.S. 174 (1939), which is the only case this century to examine the Second Amendment extensively, held there is no individual right to possess a sawed-off shotgun. The lower federal and state courts since then have consistently read *Miller* to mean that federal gun control laws do not violate the Second Amendment unless they could be shown to interfere with the maintenance of organized state militias. No federal gun control law has been found to offend the Second Amendment. Collective right supporters also argue that any common law "right" was hedged by severe restrictions, that the 1689 English Bill of Rights recognized only the collective, militia right, that the 1787-1792 constitutional debates confirm the Founding Fathers were concerned about military power and its proper allocation between federal and state authorities, and that there was no discussion of an individual right in the official debates.

The report does not take any position on which interpretation is correct.

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FEDERAL GUN CONTROL LAWS: THE SECOND AMENDMENT AND OTHER CONSTITUTIONAL ISSUES

The 103d Congress enacted two controversial federal gun control laws: the 1993 Brady Handgun Violence Prevention Act[1] and the assault weapons ban in the 1994 Violent Crime Control and Law Enforcement Act.[2] Gun control advocates see these measures as effective instruments in combatting violent crime, by reducing the number of guns in circulation and inhibiting access to guns by criminals. Opponents of federal gun control laws equally strongly believe that these laws are ineffective in combatting crime, do not meaningfully inhibit access by criminals, and simply burden or restrict the possession of guns by law-abiding citizens for lawful purposes. Gun control opponents also believe these laws infringe a constitutional right to keep and bear arms that is guaranteed by the Second Amendment -- a right that functionally undergirds the ability of the people to defend self, home, and family and to resist an authoritarian government.

This report examines the arguments for and against an individual right to keep and bear arms for lawful purposes. Other constitutional issues relating to federal gun control legislation are also examined. The review includes a summary of the historical sources that bear on interpretation of the Second Amendment, an analysis of the leading constitutional cases, and a brief summary of modern legal commentary on the Second Amendment (both for and against an individual right to bear arms).

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[1]Public Law No. 103-159, 107 Stat. 1536, Act of November 30, 1993, amending 18 U.S.C. 922(s). For a review of the basic provisions of the Brady Act and court decisions since its enactment, see "The Brady Handgun Control Act: Constitutional Issues," CRS Report No. 94-885 S by Dorothy Schrader.

[2] The Public Safety and Recreational Firearms Use Protection Act of 1994, Title XI, Subtitle A, of the Violent Crime Control and Law Enforcement Act, Public Law No. 103-322, 108 Stat. 1976, Act of September 13, 1994. For a review of the assault weapons ban and earlier federal firearms laws, see "The Assault Weapons Ban: Review of Federal Laws Controlling Possession of Certain Firearms," CRS Report No. 95-108 S by Dorothy Schrader.

I. THE RIGHT TO KEEP AND BEAR ARMS: HISTORICAL SOURCES

The Second Amendment to the federal Constitution provides:

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

What did these words mean to the Founders of our country? What is the modern understanding of these words? Have the courts reached a settled interpretation of these words?

The words do not mean that criminals have a right to bear guns. The words do not mean there can be no restrictions placed on the kinds of "Arms" law-abiding people may keep and bear. The courts have said to date that these words inhibit congressional action in the field of gun control laws, but are not applicable to the States. No federal court, however, has invoked the Second Amendment to hold unconstitutional a federal gun control law.

The antecedent of the words is acknowledged to be the 1689 English Bill of Rights,[3] but the right expressed there cannot be read literally because it is restricted to persons of the Protestant Christian faith. Our colonial forebears clearly thought a right to keep and bear arms essential to survival in their times (as an instrument for obtaining game to eat and for self-defense). But several colonial laws imposed restrictions on the right of people to bear arms.

Common Law Antecedents

Scholars disagree about the existence of a right to bear arms at common law.[4] The sparse historical materials could be interpreted as

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[3]The English Bill of Rights of 1689, 1 W. & M. st. 2, ch. 2 (1689).

[4]For arguments in favor of a common law right, see STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED, THE EVOLUTION OF A CONSTITUTIONAL RIGHT 37 (1984) and DAVID T. HARDY, ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT 14-19 (1986). For arguments against a common law right to bear arms, see Ehrman & Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?,* 15 UNIV. OF DAYTON L. REV. 5, 7-14 (1989) and Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History,*16 CATH. U.L. REV. 53, 59 (1966).

either confirming the existence of the right or negating the right. It seems fair to conclude that the "right," if it existed, was neither a primary nor an absolute right, and it was always hedged by restrictions.

Blackstone in his **Commentaries on the Laws of England**[5] refers to the right to bear arms as an "auxiliary" right (in the same category as the right to petition and access to the judicial process). Auxiliary rights serve to vindicate the primary rights of personal liberty, personal security, and private property.[6] Blackstone's primary source is the 1689 English Declaration (or Bill) of Rights.

The reference to a right to bear arms in the 1689 English Bill of Rights, which is the best confirmation of the right, applied only to persons of the Protestant Christian faith.[7] There was no acknowledgement that the right applied to all Englishmen, or even to all property-owning Englishmen. The king could not abridge the right of Protestants to bear arms for their defense, but even this expression of the right existed only where "suitable to their conditions as allowable by law."

The English Bill of Rights declared that "raising or keeping a standing army in time of peace, unless it be with the consent of Parliament, is against the law; that the subjects which are Protestants may have arms for their defense suitable to their conditions as allowable by law." This declaration asserted the rights of Protestants and

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[5]1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 139 (1979).

[6]Van Alstyne, *The Second Amendment and the Personal Right to Arms,* 43 DUKE L. JOUR. 1236, 1248 (1994).

[7]The Glorious Revolution of 1688 culminated nearly a century of parliamentary and religious conflicts in England. Earlier in the century, King Charles I had been executed by the parliamentary forces. From 1649-1660, the Puritan-parliamentary forces under Oliver Cromwell ruled England. They were generally Protestants. With the restoration of the monarchy upon the return from exile of Charles II, the royalist-Catholic sympathizers were temporarily returned to power. Upon the death of Charles II in 1685, his brother James II, a fervent Catholic, became king. Tensions increased between the Protestant-parliamentary forces and the royalist-Catholic party. With the birth of a son to King James II, matters came to a head. In the so-called "bloodless revolution" of 1688, the Protestant-parliamentary party compelled James II to flee the country (for fear he might be executed as his father before him), and replaced him with William and Mary, who were Protestants. Parliament passed the 1689 Bill of Rights to confirm the rights of Englishmen and place limits on the monarchy. The Bill declared that "Protestants may have arms for their defense suitable to their conditions as allowable by law."

Parliament against Catholics and the King. It represents a political protest against the attempts of the Stuart kings to disarm the Protestants who had led the Cromwell rebellion against the monarchy and had executed Charles I. Shortly after the restoration of the Stuart monarchy, Charles II persuaded the royalist Parliament to pass the Militia Act of 1662. This Act gave the king the power to disarm those persons judged "dangerous to the peace of the kingdom."[8]

In 1671, the royalist Parliament passed the English Game Acts which, while purporting to regulate the killing of game, really barred most nonproperty owners from keeping arms.[9]

The English Bill of Rights vindicated the right of Protestants to bear arms for militia purposes, but apparently did not affect enforcement of the game laws against nonproperty owners.[10]

Common law cases seem to support the right of the upper classes and certain property owners to keep and bear arms for purposes of self-defense, defense of property and family, and for other lawful purposes (e.g., hunting game within limits).[11]

We also know that whatever "right" existed at common law was long ago abandoned in England itself. England has gun control laws far more strict than United States laws. To bear a gun, you must obtain a permit from the local police, based on a compelling reason for gun ownership. The permit can be revoked at any time. Every gun transfer must be registered. [12]

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[8]See, Wagner, *Gun Control Legislation and the Intent of the Second Amendment: To What Extent Is There an Individual Right to Keep and Bear Arms?*,37 VILL. L. Rev. 1407, 1415-18 (1992).

[9]*Id.* at 1416, n. 48. The income level for qualifying property owners was set fairly high at 100-150 pounds in annual revenues. *See, Mallock v. Eastly,* 87 Eng. Rep. 1370 (K.B. 1744).

[10]To convict under the Game Laws as later amended, however, the government had to prove the gun was actually used to kill game; mere possession of the gun was not prohibited. *Wingfield v. Stratford,* 96 Eng. Rep. 787 (K.B. 1752).

[11]*Mallock v. Eastly,* 87 Eng. Rep. 1370 (K.B. 1744); *Wingfield v. Stratford,* 96 Eng. Rep. 787 (K.B. 1752).

[12]Ehrman & Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*,15 UNIV. OF DAYTON L. REV. 5, 9 (1989).

The modern English attitude about gun control laws, of course, has little relevance to the interpretation of the Second Amendment. For that we need to examine the colonial experience and the debates preceding adoption of the Constitution and the Second Amendment.

Colonial Antecedents

Colonial Americans asserted the right to enjoy any of the rights of free Englishmen that had been established by the common law and Parliament before the onset of the American Revolution.[13] Several colonial charters required citizens to keep arms, but the charters also regulated the possession of arms.[14] For example South Carolina required arms to be locked up. There were regulations against using guns in areas where livestock were kept. A Pennsylvania law prohibited the firing of a gun in Philadelphia without a special license.

Revolutionary Antecedents

It is not surprising that several of the initial confrontations between the British authorities and American rebels leading to the American Revolution concerned attempts by the British to disarm the potential rebels or seize their arsenals of weapons and gunpowder. These were the potential instruments of armed resistance to governmental policies.

When British troops were ordered quartered in Boston, the Faneuil Hall public meeting protested this action by passing a resolution calling on the people to arm themselves for the common defense.[15] The Resolution noted the legal obligation of "listed Soldiers" (the organized militia) and every "Householder" to keep a musket and ammunition for this purpose. Samuel Adams defended the Faneuil Hall Resolution and its call to arms as justified under the common law right to resist the violence of oppression.[16]

The rebels feared the British troops would be ordered to disarm the people of Boston. An account in a New York newspaper dated February

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[13]*Id.* at 7-8.

[14]Wagner, note 8 *supra,* at 1419.

[15]Hallbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment,* 15 UNIV. OF DAYTON L. REV. 91, 96-97 (1989).

[16]*Id.* at 99.

2, 1769 states that Bostonians were ordered to bring in their weapons or suffer the consequences.[17] The absence of other similar reports suggests that the order was not effectively enforced.

The Americans felt they were entitled to keep and bear military-style shoulder weapons with bayonets and shotguns for hunting fowl, and to carry small pistols for protection.[18]

The British military wanted to disarm the Americans. The British government favored disarmament, but was reluctant to enforce the policy because it would inflame the passions of the rebels and perhaps push the fence-sitters into supporting the rebels.

Matters came to a head after the act of defiance known as the "Boston Tea Party," when the rebels dumped tea in Boston Harbor in protest over the tax on tea. In 1774 the British passed the "Intolerable Acts," authorizing the closing of the port of Boston and essentially imposing military rule in the Massachusetts colony.

Although it was still not considered feasible to enforce general disarmament, General Gage, then Governor of Massachusetts, did attempt to ban distribution of gunpowder from community storage arsenals. The general practice was to store the gunpowder (which was highly volatile) in public powderhouses. Powder held for sale by merchants was stored in the public magazine along with publicly-owned supplies. According to the September 1774 Suffolk County Resolutions, Gage removed the gunpowder from the Charlestown magazine and forbad the keeper of the Boston magazine from distributing even that powder which had already been purchased.[19]

The people of Suffolk protested Gage's order. A committee presented their grievances to Gage, which included the unlawful withholding of the powder lodged in the Boston magazine from its legal owners. The Boston Gazette of September 19, 1774 reports that Gage made countercharges to the Suffolk Committee. Gage questioned "what occasion there is for such numbers going armed in and out of the Town, and through the country

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[17] *Id.* at 98.

[18] *Id.* at 101.

[19] *Id.* at 103.

in an hostile manner...or why were the guns removed privately in the night from the battery at Charleston?[sic]"[20]

The Massachusetts Provincial Congress attacked Gage for seizing the gunpowder at the Boston public arsenal and resolved that "if any of said inhabitants are not provided with arms and ammunition according to law, they [should] immediately provide[] themselves therewith."[21]

Warrantless searches for and seizures of weapons became the next major grievance of the Americans. Initially, searches were conducted in public places. Very soon, searches were carried out against persons keeping arms in their homes. According to Stephen Hallbrook, "[b]y mid-October 1774, the British apparently instituted a general policy of searching places for arms and seizing them, which only induced the populace to arm themselves even more."[22]

In December 1774, the Americans learned that the British government two months earlier had banned the exportation of firearms from England to America. New Hampshire rebels reacted by seizing muskets and gunpowder from Fort William and Mary. These citizens justified their act by condemning the ban on importation of firearms as a violation of the "right" to keep and bear arms.[23] They recalled the mistake of the citizens of Carthage who acquiesced to a Roman demand to surrender their arms --only to have their city destroyed by the Romans.[24]

The other American colonies also viewed the firearms import ban as a violation of the "right" to keep and bear arms. South Carolina's rebel group said the ban "too clearly appears a design of disarming the people of America, in order the more speedily to dragoon and enslave them...."[25]

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[20]Boston Gazette, Sept. 19, 1774, at 1, col. 2, *reprinted in* Hallbrook, note 15 *supra*, at 103-104.

[21]Boston Gazette, October 31, 1774, at 3, col. 1, *reprinted in* Hallbrook, note 15 *supra,* at 104.

[22]Hallbrook, note 15 *supra*, at 105.

[23]*Id.* at 110.

[24]*Ibid.*

[25]*Id.* at 112.

This pattern of confrontation over the Americans' asserted right to keep and bear arms and powder, and the British military's attempts to disarm the people, culminated in the incident that touched off the American Revolution. Since the arensals at Boston and Charlestown were under British control, the rebels had accumulated large stores of arms and powder at nearby Concord. In April 1775, General Gage made the fateful decision to seize the patriots' store of arms at Concord. The colonial militia gathered to defend themselves and their arms. The militia and the British soldiers met at nearby Lexington on April 19, 1775 and fired the shots heard 'round the world. The American Revolution began. "While not skirmishing with the armed citizens of Lexington and Concord, the troops searched the farms and houses for arms and ammunition." [26]

Following the armed conflict at Lexington-Concord, General Gage met with the Boston Selectmen and requested "temporary" disarmament of the citizenry. The Selectmen agreed. People could leave Boston only with a pass that declared they carried no arms or ammunition. Gage proclaimed martial law on June 12, 1775 and offered a pardon to all who would lay down their arms except for Samuel Adams and John Hancock.[27] "Seizure of these arms from the peaceable citizens of Boston who were not even involved in hostilities sent a message to all of the colonies that fundamental rights were in great danger."[28]

Rebel newspapers published a report from London that all the colonists were to be disarmed. Americans would be invited to deliver up their arms. Those who were found with arms after a stipulated date would be deemed rebels and punished accordingly.[29]

After the Declaration of Independence in July 1776, several states adopted declarations of rights. Four of the Revolutionary period declarations contain references to a right to bear arms, modeled on the 1689 English Bill of Rights. The Pennsylvania and Vermont declarations mention the right for purposes of self-defense and the common defense. North Carolina and Massachusetts refer to the right to bear arms for the defense of the state or the common defense.

Virginia rejected a proposal of Thomas Jefferson ("no freeman shall ever be debarred the use of arms") in favor of George Mason's language

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[26]*Id.* at 113.

[27]*Id.* at 115.

[28]*Id.* at 117.

[29]*Id.* at 118.

("a well regulated militia...is the proper...defense of a free state"). The other three states adopting bills of rights mention the right to a well regulated militia.[30] The formulation of the Virginia Bill of Rights is arguably critical since this language formed the foundation for the Second Amendment.

Constitutional Debates

The American patriots fought the Revolution to resist an oppressive, remote central government that sought to dictate governmental policies without due consideration of the will of the people. Most of the patriots who won the war feared establishment of a strong central government in the new United States of America. Consequently, the Articles of Confederation, the initial attempt at shaping the government, created a weak central authority. It became clear immediately that the central authority was too weak to govern the country. The 1787 Constitution replaced the Articles of Confederation.

The Founders who devised the written Constitution generally remained fearful of a strong central government. They devised the principles of separation of powers, checks-and-balances on the power of each Branch of government, the doctrine of enumerated powers, and, in the ratification period, the Bill of Rights, primarily to limit the national government.

The fear of an oppressive central government crystalized in the nearly universal opposition to a standing army. The debates preceding the writing of the Constitution did not include discussion of a right to keep and bear arms.[31] There was considerable discussion, however, about military power and methods for restraining that power. Congress would

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[30]Joining Virginia in making a reference to the militia were Delaware, Maryland, and New Hampshire (the latter after the Revolutionary War, in 1784). Gun control opponents cite these declarations as evidence that the right to bear arms was recognized before the Constitution was adopted. They argue that the right is mentioned in four states' declarations of rights. Gun control advocates, on the other hand, look at this same evidence and argue these declarations do not support an individual right to bear arms. Of the eight declarations, four refer only to the militia purpose; two others refer only to a right to bear arms for the common defense, a varation of the militia purpose. Only two mention a right to bear arms for purposes of self-defense -- an individual right. Arguably, only two of the thirteen original states recognized an individual right to bear arms before the adoption of the Constitution.

[31]Ehrman & Henigan, note 12 *supra,* at 20.

be given the power to declare war. Congress would also have the power to raise and support armies, provide and maintain a navy, provide for organizing, arming, and disciplining the Militia, and the power to call out the Militia to execute laws, suppress insurrections, and repel invasions.[32]

The debate in 1787 centered on how to provide for the adequate military defense of the country while maintaining individual liberties. The prevailing views were that a standing army should be avoided in times of peace and the citizen Militia could provide the effective check on creation of a standing army.[33]

The most intense discussion focused on the Militia Clause. Opponents of the Militia Clause believed the delegates should give the states the power to regulate the militia. George Mason and James Madison --the principal drafters of the Constitution-- argued that the security of the nation depended upon either national regulation of the militia or a standing army.[34] Under the compromise adopted by the 1787 Convention, the Congress was given the power to provide for the organizing, arming, and disciplining of the Militia, and for governing the parts of the Militia placed in the service of the United States. The states were given the reserve power to appoint the officers of the Militia and train them according to the discipline prescribed by the Congress.[35]

Ratification Debates

Although most of the Founders had concerns about the power of a strong central government, the public debates over ratification of the new Constitution by the states revealed two main schools of thought. The Federalists generally were satisfied with the limitations on governmental power set forth in the 1787 Constitution. The Anti-Federalists were not satisfied: they either opposed ratification or would support ratification

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[32]U.S. Constitution, Article I, Section 8, Clauses 11-16.

[33]Under Clause 12, the power to raise and equip the army is subject to a two year appropriations limit. This was an attempt to inhibit creation of a professional army (which failed). It was thought that the people could express their approval or disapproval of the military appropriations through their votes for candidates for the house of Representatives every two years.

[34]Wagner, note 8 *supra,* at 1421. Mason, although more fearful of a strong central government than Madison, saw a need for a national militia in preference to a professional standing army.

[35]*Id.* at 1423.

only if the powers of the central government were further limited by declarations of individual and states rights.

Five of the eight states recommending amendments to the Constitution "sought guarantees for the right to keep and bear arms."[36] They were New Hampshire, New York, North Carolina, Rhode Island, and Virginia.[37] New Hampshire, in ratifying the Constitution, recommended adding a bill of rights, which included a provision that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion."[38] Virginia, in ratifying the Constitution, recommended the following amendment regarding the right to bear arms, the militia, and military power:

> 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 times of peace, are dangerous
> to liberty and therefore ought to be avoided, as far as
> the circumstances and the 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.[39]

The Virginia debates are highly significant, both because they reveal the range of opinion on the right-to-bear-arms issue and because the language was a starting point for the Second Amendment to the Constitution.

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[36]Wagner, note 8 *supra,* at 1423.

[37]Strong minority views favoring a right to bear arms were voiced in the Pennsylvania and Massachusetts debates. Wagner, note 8 *supra,* at 1423.

[38]1 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 326 (1836), *reprinted in* Hallbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias and the Second Amendment,*26 VALPARAISO UNIV. L. REV. 131, 148 (1991).

[39]*The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution* [hereinafter *Virginia Debates*], in 3 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 659 (Jonathan Elliot, ed., 1859) [hereinafter ELLIOT'S DEBATES], *reprinted in* Wagner, note 8 *supra,*at 1427.

James Madison believed Congress and the states had concurrent powers to arm the militia. Patrick Henry argued that there was no harm in confirming in an amendment that the militia power was held concurrently. To him, the "great object is, that every man be armed." [40] George Mason, an Anti-Federalist, thought the Militia Clause could be interpreted as giving Congress the exclusive power to arm the militia. Congress could destroy the militia by refusing to arm it. Congress would then have an excuse to create a standing army. Mason therefore proposed an amendment to the Constitution to give the states the express power to arm the militia, if Congress failed to do so.[41]

A minority proposal at the Pennsylvania Convention, which was not adopted, included a "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 individuals."[42] Massachusetts rejected a Samuel Adams amendment providing "[t]hat the said Constitution shall never be 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."[43]

In the Federalist Papers, Madison wrote that the "advantage of being armed" was a condition "Americans possess over the people of almost every other nation."[44]Madison envisioned a militia of half a million citizens "with arms in their hands."[45]

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[40]*Virginia Debates, in* 3 ELLIOT'S DEBATES at 386, *reprinted in* Wagner, note 8 *supra,* at 1425.

[41]Wagner, note 8 *supra,* at 1424-25.

[42]2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 597, 623-24 (1976), *reprinted in* Hallbrook, note 15 *supra,*at 122.

[43]*Reprinted in* SENATE SUBCOMM. ON THE CONST. OF THE SENATE COMM. ON THE JUDICIARY, 97 CONG., 2d. SESS. REPORT ON THE RIGHT TO KEEP AND BEAR ARMS 6 (Comm. Print 1982).

[44]THE FEDERALIST N0. 46 at 299 (C. Rossiter, ed. 1961), *reprinted in* Dowlut, *Federal and State Constitutional Guarantees to Arms,* 15 UNIV. OF DAYTON L. REV. 59, 64 (1989).

[45]*Ibid.*

Noah Webster wrote in a pamphlet that before a standing army can rule, the people must be disarmed as they are in almost every kingdom in Europe. But in America, the people are armed and have the inclination to resist unjust and oppressive laws.[46]

In a letter, Richard Henry Lee observed 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."[47] An Anti-Federalist, Lee feared Congress would create a "select militia," which could be used by the federal government to dominate the states.[48] He equated a preference for a select militia with anti-republican principles.[49]

John Adams and Thomas Jefferson held opposing views about the right to bear arms. Adams wrote in 1788 that "[t]o suppose arms in the hands of citizens, to be used at individual discretion, except in self-defence, or by partial orders of towns ... is a dissolution of the government."[50] The more radical Thomas Jefferson stressed a connection between a right to bear arms and the right to revolt, writing: "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." [51]

Early in the ratification process, the Federalists like Madison realized that amendments were needed to the Constitution to assure its ratification and acceptance by all of the states. Madison drew up the proposals that formed the basis for the first ten amendments --the Bill of Rights. The Federalists agreed that the First Congress would act upon these amendments.

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[46]PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 51, 56 (1888), *reprinted in* Dowlut, note 44 *supra,* at 64.

[47]RICHARD H. LEE, ADDITIONAL LETTERS FROM THE FEDERAL FARMER 170 (1788), *reprinted in* Hallbrook, note 38 *supra,* at 152-53.

[48]Hallbrook, note 38 *supra,* at 152.

[49]*Id.* at 153.

[50]3 JOHN ADAMS, A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 475 (1787-88), *reprinted in* Hallbrook, note 38 *supra,* at 165.

[51]Letter to William Smith (1787), *in* THOMAS JEFFERSON, ON DEMOCRACY 31-32 (S. Padover ed., 1939), *reprinted in* Hallbrook, note 38 *supra,* at 165-66.

Second Amendment Debates

Madison's first draft of the Second Amendment read--"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."[52]

The House of Representatives changed the order of the phrases. As passed, the text read: "A well regulated milita, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms."[53]

The report of the House debates does not include any explanation of text. An amendment to insert language denouncing "standing armies" and requiring a two-thirds vote of the House of Representatives to raise an army in wartime was defeated. Beyond that, the debates reflect the viewpoint that a citizen militia contributes to a free state by reducing the need to rely on a standing army, and concern that the Congress might rely on the conscientious objector clause as a ruse to disarm certain persons.[54]

The House adopted its version of the Second Amendment on August 20, 1789.[55] The Senate met in secret when it considered the proposed Bill of Rights in September 1789.

The Senate considered and rejected the same amendment rejected by the House, which would have denounced standing armies in times of peace and required a two-thirds vote to raise an army in wartime.[56] The Senate also rejected proposals 1) to give the states the power to organize, arms, and discipline their own militia[57] and 2) to add the phrase "for the

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[52]5 BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 1026 (1980), *reprinted in* Wagner, note 8 *supra,* at 1430, n. 127.

[53]*Id.* at 1432.

[54]Hallbrook, note 38 *supra,* at 181-82.

[55]*Id.* at 184.

[56]*Id.* at 189.

[57]*Ibid.*

common defense" after "bear arms."[58] The Senate changed the House text by deleting the "composed of the body of the people" language, by deleting the religious scuples clause,[59] and by slightly revising the phrase "the best security of a free state" to read "necessary to the security of a free state."[60] With these changes, the Senate passed the Second Amendment. The House acceded to the Senate's changes.

With respect to the Tenth Amendment, the Senate added the concluding phrase "or to the people."[61]

A Federalist colleague of Madison, Tench Coxe, said of the Second Amendment: "the people are confirmed ... in their right to keep and bear their private arms."[62]According to Hallbrook, "[d]uring the ratification period, the view prevailed that the armed citizenry would prevent tyranny. ...While the proposed amendments continued to be criticized for the lack of a provision on standing armies, no one questioned the right-to-bear-arms amendment."[63] A Pennsylvania newspaper commented on the Second Amendment as guaranteeing that "[y]our liberties will be safe as long as you support a well regulated milita."[64]

Militia Act of the Second Congress

The congressional debates on the proposed Militia Act took place at the same time the states were debating ratification of the Bill of Rights. The Milita Act debates arguably explicate the nature of a well regulated militia for purposes of understanding the Second Amendment. As passed, the 1792 Militia Act required every "free able-bodied white male citizen"

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[58]*Id.* at 190.

[59]*Id.* at 187.

[60]*Id.* at 190.

[61]*Id.* at 188. The entire Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[62]Remarks on the First Part of the Amendments to the Federal Constitution, Federal Gazette, June 18, 1789, at 2, col. 1, *reprinted in* Hallbrook, note 15 *supra,* at 122.

[63]Hallbrook, note 38 *supra,* at 194.

[64]INDEPENDENT GAZETTEER, Jan. 29, 1791, at 2, col. 3, *reprinted in* Hallbrook, note 38 *supra,* at 195.

age 18-45 to "provide himself with a good musket or firelock," bayonet, and ammunition.[65] Calvary were to equip themselves with a pair of pistols, ammunition, and a sabre.[66]

The House debated and rejected a proposal to have the federal Government furnish arms for the "poor, minors, and apprentices." [67] The House also considered and rejected possible exemption from the militia exercies by white males, age 18-45. None was legislated.

Since the Senate met in secret, there is no official record of its debates. A private journal of William Maclay says Richard Henry Lee made his arguments against standing armies. The Federalists, led by Alexander Hamilton, were characterized by Maclay as "promoting war with the Indians and foreign powers" as a pretext for raising an army to subdue citizens.[68] Militia supporters charged that the militia bill was delayed (from December 1790 until 1792) to enable Secretary of War Knox to push his bills forming the military establishment and increasing the army by 50 percent.[69] Army supporters argued it was dangerous to put arms in the hands of the Frontier People for their defense against the Indians, lest they use the arms against the United States.[70]

In summary, under the Militia Clause of the Constitution and the Second Amendment, the Congress has the power to organize, arm, and discipline the militia and may call the militia into federal service. Congress arguably is limited in its power to prohibit possession of such militia arms as the states are entitled to require that its citizens, or at least an organized part thereof, keep and bear arms for the common defense. The states' concurrent power to organize and provide for the

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[65]*Ibid.*

[66]*Ibid.*

[67]*Id.* at 196-97.

[68]*Id.* at 197.

[69]*Ibid.*

[70]*Ibid.* Army supporters recalled the Shays "Whiskey" Rebellion of February 1787. Although this revolt of destitute farmers in Western Massachusetts was suppressed by local militia, the revolt underscored the weakness of the federal government under the Articles of Confederation. Even during the ratification period, differing views were held by city-dwellers and rural residents about the authority of the federal government to enforce its laws. Rural residents were more inclined to rely on a citizen militia. City-dwellers were more inclined to trust a professional army for law enforcement and the common defense.

arming of their militias is a reserved power which cannot be infringed by the Congress. The critical issue is whether the right to possess arms may be asserted individually or collectively only.

This report next examines the case law bearing on interpretation of the Second Amendment.

II. JUDICIAL INTERPRETATION OF THE SECOND AMENDMENT

Case law interpretation of the Second Amendment is sparse. In all of the cases reviewing federal gun control laws this century, the Supreme Court has addressed the Second Amendment directly only one time. In the 19th Century, there were only three Supreme Court cases interpreting the Second Amendment. The more numerous lower federal court and state court decisions, of course, do not carry the same precedential weight as a decision of the United States Supreme Court on the interpretation of the federal Constitution.

According to one scholar, "the Second Amendment has generated almost no useful case law. ...[T]he useful case law of the Second Amendment, even in 1994, is mostly just missing in action."[71]

This report examines the Supreme Court precedents and a selected number of the lower federal and state court decisions.

Supreme Court Decisions

There have been many opportunities for the Supreme Court to develop Second Amendment jurisprudence, but, according to one modern scholar, the Court has been "uninterested" in the issue.[72] The Court has declined to revisit 19th Century precedent on which the lower courts have relied to sustain gun control legislation. Consequently, the Second Amendment has been interpreted only as a limitation on the national government, and the right to bear arms has been interpreted as a state or collective right to maintain a militia.[73]

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[71]Van Alstyne, note 6 *supra,* at 1239.

[72]*Ibid.*

[73]Since 43 of the state constitutions refer to a right to bear arms, some state gun control laws have been held to abridge the relevant state constitution. A review of these state law decisions is beyond the scope of this report. For a

In the only 20th Century Second Amendment case, the Supreme Court held in *United States v. Miller,* 307 U.S. 174 (1939) that the Second Amendment confers no right on a citizen to bear a sawed-off shotgun since there was no evidence that possession of such a firearm was reasonably related to the preservation or efficiency of a well regulated milita. The National Firearms Act of 1934 was held constitutional as applied to a defendant who transported a "sawed-off" shotgun without obtaining the federal license required by the Act in the face of challenges under the Second and Tenth Amendments. The Court reversed a decision of the district court which had held the Act violated the Second Amendment.

In its opinion, the Court reviewed the history of the militia in England and in the colonies.[74] It observed, based upon this historical review, that the sentiment in 1787 strongly disfavored standing armies. In their place, the country would be defended instead by the militia, composed of civilians who were soldiers on occasion.[75] The militia comprised all able-bodied white males capable of acting in concert for the common defense. When called out, these men were expected originally to appear bearing arms supplied by themselves and of the kind in common use at the time. In modern times, the federal government supplies the militia with arms. The Court had no evidence before it that a person serving in the militia would be expected to, or have any need to, own a sawed-off shotgun.[76]

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discussion of the state constitutions, *see* Dowlut, *Federal and State Coonsitutional Guarantees to Arms,* 15 UNIV. OF DAYTON L. REV. 59 (1989). The states without a right to bear arms in the state constitutions are California, Iowa, Maryland, Minnesota, New Jersey, New York, and Wisconsin. *Ibid.* The courts in Kansas and Massachusetts have held that the state constitutions establish a collective right rather than an individual right to bear arms. *City of Salina v. Blakely,* 72 Kan. 230, 83 P. 619 (1905); *Commonwealth v. Davis,* 369 Mass. 886, 343 N.E. 2d 847 (1976).

[74]307 U.S. at 179-182.

[75]307 U.S. at 179.

[76]According to Dowlut, note 73 *supra,* at 73, the defendants did not appear or have representation in the case before the Supreme Court. The Court, therefore, considered only the government's view of the militia-relatedness of sawed-off shotguns. Dowlut argues that *Miller* holds the Constitution protects the right to possess or use arms having a "militia utility." He also says *Miller* "leaves unanswered whether modern arms of mass destruction may be possessed by individuals." *Id.* at 74.

In a case alleging a conspiracy in violation of the constitutional rights of African-Americans, the Court in *United States v. Cruikshank,* 92 U.S. 542 (1876) held that the right to bear arms is not granted by the Constitution. The Second Amendment is a limitation on laws Congress may pass and has no effect other than to restrict the powers of the national government. No statutory right to bear arms had been passed. The indictment under the Reconstruction Acts of 1870 had charged a conspiracy to interfere with the "right" of African-Americans to bear arms was held defective because the Constitution does not grant an individual right to bear arms.[77]

The Court applied its *Cruikshank* ruling in *Miller v. Texas,* 153 U.S. 535 (1894), confirming that the Second Amendment does not apply to limit state action; it applies only to the national government.

In *Presser v. Illinois,* 116 U.S. 252 (1886), the Court held the Second Amendment is not violated by a state law prohibiting unauthorized para-military assemblies, parades, or drills with arms in cities and towns. "The right voluntarily to associate together as a military company or organization, or to drill or parade with arms...is not an attribute of national citizenship."[78]The Court again confirmed that the Second Amendment is a limitation only upon the power of Congress and the national government, and not upon that of the States. The state law did not conflict with the laws of Congress on the subject of the militia.[79]

Lower Federal Court Decisions

Since *United States v. Miller,* no federal gun control law has been held to violate the Second Amendment (although laws have been held unconstitutional on other grounds). The pattern of lower court decisions is typified by *United States v. Tot,* 131 F.2d 261 (3d Cir. 1942), *reversed on other grounds*, 319 U.S. 463 (1943).[80] The Third Circuit held there was never any absolute right to bear arms at common law and that gun control laws do not violate the Second Amendment unless they infringe on the preservation of a well-regulated militia.

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[77]92 U.S. at 553.

[78]116 U.S. at 267.

[79]116 U.S. at 269.

[80]The Supreme Court reversed on the ground the statutory presumption of defendant's possession of the gun in interstate commerce violated due process.

In a more recent case, the Third Circuit has said "the right to keep and bear arms is not a right given by the United States Constitution." *Eckert v. City of Philadelphia,* 477 F.2d 610 (3d Cir. 1973).

The Eighth Circuit has said that the argument for a "fundamental right to keep and bear arms [under the Second Amendment] has not been the law for at least 100 years." *United States v. Nelson,* 859 F.2d 1318, 1320 (8th Cir. 1988).

Possession of a Colt revolver was not protected by the Second Amendment because its possession did not contribute to the maintenance of a well regulated militia, according to the First Circuit in *Cases v. United States,* 131 F.2d 916 (1st Cir. 1942), *cert. denied sub nom. Velazguez v. United States,* 319 U.S. 770 (1943). The court observed that some military use could be found for any lethal weapon, but it would be inconceivable to grant a constitutional right in private citizens to possess any and all such lethal weapons.[81]

In *United States v. Warin,* 530 F.2d 103 (6th Cir. 1976), the court held that federal registration of machineguns did not violate the Second Amendment. The court added that a private right to own military weapons is completely irrational in an age of nuclear weapons. *Accord, United States v. Oakes,* 564 F.2d 384 (10th Cir. 1977).

The Sixth Circuit Court of Appeals held in *Stevens v. United States,* 440 F.2d 144 (6th Cir. 1971) that Congress has the power under the Commerce Clause to deny a convicted felon the right to possess a firearm, even without an allegation in the indictment that the particular firearm was in, or affected, commerce. The court also rejected a challenge to the constitutionality of the 1968 Gun Control Act[82] under the Second Amendment. "Since the Second Amendment right 'to keep and bear Arms' applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm."[83]

The federal record-keeping requirements of the 1968 Gun Control Act do not violate the Second Amendment. *United States v. Decker,* 446 F.2d

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[81]131 F.2d at 922.

[82]82 Stat. 1213, codified at 18 U.S.C. 921-928.

[83]440 F.2d at 149. *Accord, United States v. Johnson,* 497 F.2d 548 (4th Cir. 1974); *United States v. Synnes,*438 F.2d 764 (8th Cir. 1971), *vacated on other grounds,* 404 U.S. 1009 (1971); and *United States v. Craver,* 478 F.2d 1329 (6th Cir. 1973).

164 (8th Cir. 1971). Nor do the dealer licensing requirements of the same Act violate the Second Amendment. *United States v. Swinton,* 521 F.2d 1255 (10th Cir. 1975); accord, *United States v. Kraase,* 340 F. Supp. 147 (E.D. Wis. 1972). The prohibition on false statements to a federally-licensed dealer in the course of a gun purchase does not violate the Second Amendment. *Cody v. United States,* 470 F.2d 34 (8th Cir. 1972).

A municipal ordinance banning the possession of handguns within town limits did not violate either the Second, Ninth, or Fourteenth Amendment nor the Illinois state constitution's right to bear arms. *Quilici v. Village of Morton Lane,* 695 F. 2d 261 (7th Cir. 1982). The court held that the Second Amendment does not apply to the states. Nevertheless, in dicta, the court commented on the scope of the Second Amendment, asserting that the right to bear arms is inextricably connected to the preservation of a militia.[84] "Under the controlling authority of *Miller* we conclude that the right to keep and bear handguns is not guaranteed by the second amendment."[85] Nor has the Supreme Court ever recognized any guarantee in the Ninth Amendment of a right to own arms for self-defense.[86]

The right-to-bear-arms provision in the Illinois Constitution "simply prohibits an absolute ban on all firearms. ... There is no right under the Illinois Constitution to possess a handgun...."[87]The state right is limited by the police power, which justified the handgun ban.[88]

The dissent in *Quilici* argued that the state legislature had preempted the subject of handgun possession and that the ordinance "violates both the fundamental right to privacy and the fundamental right to defend the home against unlawful intrusion within the parameters of the criminal law."[89]

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[84]695 F. 2d at 270.

[85]695 F. 2d at 270.

[86]695 F. 2d at 271.

[87]695 F.2d at 268.

[88]695 F. 2d at 267.

[89]695 F. 2d at 279.

State Court Decisions

The bulk of the state court decisions regarding a right to bear arms are interpretations of the relevant state constitution rather than the Second Amendment. If the Second Amendment is discussed, the court typically observes that the Second Amendment limits the national government and not the states, and that the provision has generally been interpreted as conferring a militia right on the state or the people of the state collectively.[90]

An early Georgia case, however, invoked the Second Amendment to invalidate a state gun control law at a time when Georgia's state constitution was silent on the right to bear arms. *Nunn v. Georgia,* 1 Ga. 243 (1846). At one point, the court said 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. ..."[91]The court finished this comment by explaining its reasoning in terms of the need for a militia. The right to bear arms is needed "for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State."[92]

The Supreme Court of Minnesota expressed the view of 20th century state courts in *In Re Atkinson,* 291 N.W. 2d 396 (Minn. 1980) when it said "the Second Amendment protects not an individual right but a collective right, in the people as a group, to serve as militia."[93] *Accord, Sandidge v. United States,* 520 A.2d 1057, 1058 (D.C.), *cert. denied,* 108 S. Ct. 193 (1987); *Kalodimos v. Village of Morton Grove,* 103 Ill. 2d 483, 509, 470 N.E. 2d 266, 278 (1984); *Salina v. Blakesley,*72 Kan. 230, 232-33, 83 P. 619, 620 (1905); *Burton v. Sills,* 53 N.J. 86, 97, 248 A.2d 521, 526 (1968), *appeal dismissed,* 394 U.S. 812 (1969); *State v. Fennell,* 95 N.C. App. 140. 141, 382 S.E. 2d 231, 232 (1989); *State v. Vlacil,* 645 P. 2d 677, 679 (Utah 1982).

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[90]According to Dowlut (who disagrees with the decisions), the "command that the people have a right to keep and bear arms is simply ignored." Note 73 *supra,* at 70. The Second Amendment is interpreted merely "to guarantee the right of a state to have a military force." *Ibid.*

[91]1 Ga. at 251.

[92]1 Ga. at 251.

[93]291 N.W. 2d at 398, n. 1.

In *City of East Cleveland v. Scales,* 10 Ohio App. 3d 25, 30, 460 N.E. 2d 1126, 1130 (1983), the court summed up the collectivist interpretation of the Second Amendment this way: "The right of an individual is dependent upon a role in rendering the militia effective."

According to one commentator, "[n]o court in this century has suggested that private ownership of firearms by members of the 'sedentary' or 'unorganized' militia is protected by the second amendment."[94] The contrary view is that the Second Amendment and the various state constitutions promise to the people a right to bear arms.[95] According to Dowlut, "[t]he majority of commentators support the individual rights view on arms. The courts are required to follow it. Laws seeking to disarm the people must be declared unconstitutional."[96]

III. INTERPRETATION OF THE SECOND AMENDMENT IN SCHOLARLY WRITING

Scholarly writings about the Second Amendment generally adopt either a "collective-state militia right" or an "individual private right" interpretation. Not surprisingly, those contemporary scholars who support federal gun control legislation adopt the militia right interpretation. Those who oppose federal gun control laws argue for an individual right to keep and bear arms under the Second Amendment, or under the Ninth Amendment.

This report next summarizes the opposing theories, using historical, philosophical, and case law arguments for each interpretation of the Second Amendment.

Arguments Supporting An Individual Right

Proponents of an individual right to keep and bear arms rely upon the text of the Second Amendment ("the right of the people to keep and bear arms shall not be infringed"), the evidence of the constitutional and congressional debates from 1787-1792 as confirmation of the grant of an individual right, the evidence of a right at common law to bear arms for diverse lawful purposes, inclusion of the right in the English Bill of

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[94]Ehrman & Henigan, note 12 *supra,* at 50.

[95]Dowlut, note 73 *supra,* at 82.

[96]*Id.* at 83.

Rights, the strong evidence that the American patriots asserted a right to bear arms for lawful purposes, the inclusion of the right in several state declarations of rights preceding adoption of the federal Constitution, and the evidence that our Founding Fathers preserved the right to bear arms in the Second Amendment as a safeguard against an unjust and tyrannical government.

Textual Argument

Stephen Hallbrook argues that the "language and historical intent of the Second Amendment mandates recognition of the individual right to keep and bear firearms and other personal weapons."[97] The right belongs "to the people" not to the States. The Militia Clause fully protects the concurrent power of a State to maintain a militia. The Second Amendment's reference to a well regulated militia merely confirms part of the philosophical basis for an individual right to bear arms. The Second Amendment does not confer a substantive right on the States; the people's substantive right is preserved.[98]

Tench Coxe, a federalist colleague of James Madison, wrote during the Constitution's ratification period that "the people are confirmed ... [by the Second Amendment] in their right to keep and bear their private arms."[99]

St. George Tucker, in updating Blackstone's Commentary on the Common Law, commented in 1803 on the Second Amendment as follows: "The right of self-defense is the first law of nature .... Wherever ... the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction."[100]

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[97]Hallbrook, note 38 *supra,* at 207.

[98]Id. at 204-206.

[99]Remarks on the First Part of the Amendments to the Federal Constitution, Federal Gazette, June 18, 1789, at 2, col. 2, *reprinted in* Hallbrook, note 15 *supra,* at 122.

[100]1 TUCKER, BLACKSTONE'S COMMENTARIES 300 (1803) (appendix), *reprinted in* Hallbrook, note 15 *supra,* at 123.

Colonial Period

The pre-revolutionary conflicts with the British over seizure of public powderhouses and attempts to seize private arms show the American rebels went to war to defend their right to bear arms. The Founding Fathers viewed the right to bear arms as inextricably related to the defense of civil liberties and personal freedom. The Founders strenuously resisted disarmament. They considered a ban on importation of firearms as a violation of an individual's settled right to obtain and possess arms for various lawful purposes. Because the British used general warrants to search private homes for arms, the Framers of the Bill of Rights wrote the Fourth Amendment to safeguard the people's right to be free of unreasonable searches and seizures. The Fourth Amendment has been held to confer an individual right. The Second Amendment should be interpreted in the same way, according to supporters of the individual right-to-bear theory. These Amendments are interrelated since the frequent object of the hated general warrants was the private arms of the citizens.[101]

Thomas Jefferson saw a direct connection between the right to bear arms and the right to rebel against a tyrannical government. "[W]hat 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."[102]

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[101]Hallbrook, note 15 *supra,* at 123-24.

[102]Letter to William S. Smith (1787), *in* THOMAS JEFFERSON, ON DEMOCRACY 31-32 (S. Padover ed., 1939) *reprinted in* Hallbrook, note 38 *supra,* at 165-66.

Common Law Right

The right to bear arms existed at common law. The Chief Judge of King's Bench observed in a 1752 case *[Wingfield v. Stratford,* 96 Eng. Rep. 787)] that "[i]t is not to be imagined, that it was the intention of the Legislature, in making the [game statute] ... to disarm all the people of England."[103] The King's Bench held that mere possession of a gun did not violate the game laws, since a gun could be kept for various lawful purposes, including self-defense.[104]

An American case, *Judy v. Lashley,* 50 W.Va. 628, 634, 41 S.E. 197, 200 (1903), confirms that "the peaceful carrying of arms ... at common law ... was not an indictable offense ...."

The 1689 English Bill of Rights, which was the antecedent of many of the rights asserted by the American patriots, declared that "the subjects which are Protestants may have arms for their defense suitable to their conditions as allowable by law." A 1780 account of the Recorder of London, who was the chief legal officer for the city, explains the scope of the right to bear arms. It is the right and duty of every Protestant to bear arms for lawful purposes including self-defense, suppression of violent breaches of the peace, assistance of civil magistrates in the execution of the law, and for the defense of the country against invaders.[105] The American patriots claimed their rights and liberties from their English forbears and applied those rights to all adult white males--not only to persons of the Protestant Christian faith.[106]

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[103]96 Eng. Rep. at 787.

[104]Interestingly, the ownership of setting dogs by disqualified persons was held to violate the game laws because such dogs were not kept for any purpose other than killing game and the setting dogs were specifically mentioned in the statute. By 1752, the Game Acts did not explicitly mention guns as "engines for killing game." Since a gun could be kept for various lawful purposes, it was necessary to prove that the gun had actually been used to kill game in order to violate the game laws. *Wingfield v. Stratford,* 96 Eng. Rep. 787 (K.B. 1752).

[105]W. BLIZZARD, DESULTORY REFLECTIONS ON POLICE: WITH AN ESSARY ON THE MEANS OF PREVENTING CRIMES AND AMENDING CRIMINALS 59-63 (1785), *reprinted in* Dowlut, note 73 *supra,* at 60-61.

[106]Wagner, note 8 *supra,* at 1418.

Constitutional Debates

After declaring their independence from England, the Founding Fathers continued to fear military power and a tyrannical government. In framing the Constitution of 1787 and the subsequent Bill of Rights, our forebears guarded against an oppressive government through various constitutional principles. Among these were the concurrent power of the national government and the States to maintain a militia (a citizen army), and, according to its advocates, the individual right of the people to keep and bear arms.[107]

According to individual right-to-bear arms supporters, the militia safeguarded by the Second Amendment comprises the entire body of the people.[108] Members of the militia have not only the duty but the right to keep and bear arms suitable for the common defense. It is a right of the people-- not a right of the States. During congressional consideration of the Bill of Rights, the Senate rejected an amendment detailing the power of each State to organize, arm, and discipline its own militia.[109] This "action highlights the clear distinction between the 'right' of 'the people' to keep and bear arms, and the 'power' of the 'state' to arm and provide for militias."[110] It "demonstrates the absurdity of the argument invented in the twentieth century that by declaring a right of the people to keep and bear arms, Congress actually intended to declare the power of states to maintain militias -- the very proposal Congress rejected."[111]

Supporters of an individual right-to-bear arms protected by the Second Amendment argue that the right is not confined to participation in an organized or unorganized militia. During congressional consideration of the Bill of Rights, the Senate rejected an amendment to add the phrase "for the common defense" after the words "bear arms."[112] This action, it is argued, confirms that the individual right to bear arms is not co-extensive with preparation for militia service or the common defense. It is a personal, individual right which may be exercised

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[107]Wagner, note 8 *supra,* at 1421.

[108]Wagner, note 8 *supra,* at 1422.

[109]Hallbrook, note 38 *supra,* at 189.

[110]*Ibid.*

[111]*Ibid.*

[112]Hallbrook, note 38 *supra,* at 190.

for various lawful purposes. These purposes include defense of one's person, family, or home; marksmanship competition; target practice; hunting and other sporting purposes; and defense of individual liberty by resisting an oppressive or unjust government.[113]

"[T]here is no doubt that the Framers considered the right of the people to keep and bear arms to be among the most fundamental of all rights when the Second Amendment was adopted. This right was the people's last line of defense against attempts by the government to deprive them of their liberty."[114]

Ninth Amendment Argument

In addition to the Second Amendment's explicit reference to a right to bear arms, some argue that the right can be sustained under the Ninth Amendment, as a right reserved to the people.[115] The Ninth Amendment provides that the "enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

"The Federalist Papers directly support derivation of an individual right to arms for self-defense from the Ninth Amendment."[116] Alexander Hamilton, in Federalist Paper No, 28, wrote: "If the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self-defense, which is paramount to all positive forms of government ...."[117]

"Blackstone viewed the right to bear arms as pre-existing government. ... He described a right to arms as both statutory and natural."[118] A right to bear arms for self-defense is justified by the pre-eminent human interest in the continuation of life. "The plethora of historical support

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[113]Dowlut, note 73 *supra,* at 68-69; Hallbrook, note 38 *supra,* at 206-07.

[114]Wagner, note 8 *supra,* at 1449.

[115]Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment,* 24 RUTGERS L. JOUR. 1 (1992).

[116]*Id.* at 35.

[117]THE FEDERALIST NO. 28 at 227 (Random House, Inc. 1964), *reprinted in* Johnson, note 115 *supra,* at 32.

[118]Johnson, note 115 *supra,* at 35.

suggests that deriving an individual right to arms from the Ninth Amendment may be substantially easier than deriving other popularly advocated rights."[119]

Scope Of The Right To Bear Arms: Individual Right Viewpoint

With respect to the militia purpose of the Second Amendment, "Congress has no power to prohibit possession of such militia arms as the states are entitled to require that its citizens or a part thereof furnish themselves with and keep in their homes. The states' concurrent power to organize and provide for arming their militias is a reserved power which federal legislation may not contradict."[120] The patriots thought they had the right to keep and bear at least the following arms: carbines, blunderbusses, muskets with bayonets, fowling pieces, pocket pistols, military pistols, hangers (short military swords), and Toledo swords.[121] In contemporary times, citizens have the right to keep weapons suitable for militia purposes, but not sophisticated military weapons of mass destruction such as howitzers or nuclear weapons.[122]

Beyond the militia purpose, proponents of an individual right argue that citizens have a right to keep and bear arms for various lawful purposes including self-defense, recreation, hunting, and other sporting purposes. "Reasonable time, place, and manner restrictions may be imposed on the exercise of fundamental rights, provided the restrictions are narrowly tailored."[123] Special protection should be accorded the right to keep arms in the home. Bearing arms in a public place can be subject to more detailed regulation than keeping arms at home.[124] "[T]he peaceful bearing of arms in a motor vehicle or on a street could not be prohibited."[125]

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[119]Johnson, note 115 *supra,* at 36.

[120]Hallbrook, note 38 *supra,* at 203-04.

[121]Hallbrook, note 15 *supra,* at 117.

[122]Wagner, note 8 *supra,* at 1456.

[123]Dowlut, note 73 *supra,* at 68.

[124]*Id.* at 69.

[125]*Ibid.*

Dowlut asserts that "[c]onstitutionally protected arms under the modern view are not limited to those of a militia. They include hand-carried defensive arms and the modern equivalents of arms possessed by colonial militiamen. While semi-automatic firearms are protected, arms of mass destruction used exclusively by the military are not. Legislation banning or severely restricting the possession and sale of semi-automatic firearms is unconsitutional ... [because these firearms are suitable for personal protection, deter oppression, and have been possessed by citizens since the late 19th Century.]"[126]

Proponents of an individual right argue that the courts should apply modern principles of constitutional review in evaluating the constitutionality of federal gun control legislation.[127] Since gun control legislation relates to the exercise of a fundamental right, it is argued that the courts should review the legislation under a "strict scrutiny" standard. *United States v. Guest,* 383 U.S. 745 (1966). Individual right advocates argue that the court should uphold the gun control law only if the regulation is necessary to promote a compelling or overriding governmental interest. *American Party of Texas v. White,* 415 U.S. 767 (1974).

"The government has a compelling interest in enacting legislation designed to protect human life by decreasing criminal activity involving firearms. Nonetheless, in determining whether gun control legislation is constitutional, a court must balance the government's interest against the people's fundamental right to keep and bear arms."[128]

The argument by its proponents in favor of an individual right to keep and bear arms can be summed up as follows: "The common law history of the right to keep and bear arms, the legislative history of the Second Amendment and the debates between the Federalists and Anti-Federalists show that the Framers of the Constitution intended the right to keep and bear arms to be an individual right."[129] "Every term in the Second Amendment's substantive guarantee -- which is not negated by its philosophical declaration about a well regulated militia -- demands an individual rights interpretation."[130] "The Framers were confident

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[126]Dowlut, note 73 *supra,* at 80.

[127]Wagner, note 8 *supra,* at 1444-45.

[128]*Id.* at 1453.

[129]*Id.* at 1444-45.

[130]Hallbrook, note 38 *supra,* at 206.

the federal government would provide for the common defense ... [either through the militia or a standing army, but] because the Framers were unsure exactly how this defense would be insured, they provided the people with the right to keep and bear arms as a check against abuses of Congress' power over the military."[131] And finally, proponents of an individual right view it as the last line of defense against a tyrannical government.[132] They invoke the words of Thomas Jefferson --"[W]hat 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."[133]

ARGUMENTS AGAINST AN INDIVIDUAL RIGHT TO BEAR ARMS: COLLECTIVE OR MILITIA RIGHT THEORY

Those opposed to an individual right to bear arms generally interpret the Second Amendment as either conferring a collective right for defensive purposes or a right by the States to maintain a well regulated militia. "From either the state or individual perspective, the thrust of the [second] amendment was to ensure the existence of an effective state militia. In neither case was there an intent to confer a broad individual right to have arms for other lawful purposes."[134] "[T]he proposition that the second amendment does not guarantee each individual a right to keep and bear arms for private, non-militia purposes may be the most firmly established proposition in American constitutional law."[135]

English Historical Sources

There was no absolute right at common law to keep and bear arms, according to advocates of the collective right viewpoint. Although Blackstone lists the right to bear arms as an auxiliary right, he qualifies it as a right for defensive purposes. The carrying of arms was subject to

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[131]Wagner, note 8 *supra,* at 1433.

[132]Hallbrook, note 38 *supra,* at 165.

[133]Letter to William S. Smith (1787), *in* THOMAS JEFFERSON, ON DEMOCRACY 31-32 (S. Padover ed., 1939), *reprinted in* Hallbrook, note 38 *supra,* at 165-66.

[134]Ehrman & Henigan, note 12 *supra,* at 33.

[135]*Id.* at 40.

conditions and the status of the bearer; the "right" could be exercised only "as allowable by law."[136]

Collective right advocates argue the 1689 English Bill of Rights does not confirm a private right to bear arms.[137] The document denounced a standing army in time of peace and declared such an army illegal unless Parliament consented to it. Next, the document declared that "the subjects which are Protestants may have arms for their defense suitable to their conditions as allowable by law." King Charles II had obtained through the Militia Act of 1662, the power to disarm those persons judged "dangerous to the peace of the kingdom."[138] During the religious conflicts of the time, this power was exercised more against the Protestants than against Catholics. "[T]he most supportable interpretation is that the [English] Bill [of Rights] constituted a restatement of the preference for militias over standing armies, and of the rights of Protestants to participate as military members."[139]

The English Game Acts, which purported to restrict the keeping of arms in order to preserve game, in reality barred most nonproperty owners from keeping arms.[140] Under the 1671 Game Act, you were prohibited from having, keeping, or using any gun to kill game unless you were the Lord of the manor, owned lands worth 100 pounds in annual rents (or in the case of lands under long term leases, 150 pounds in revenues), or you were the son and heir apparent of an esquire or other person of higher degree. *See Mallock v. Eastly,* 87 Eng. Rep. 1370 (K.B. 1744).

The English "right" to bear arms existed on a collective basis for militia purposes.[141] "There was obviously no recognition of any personal right to bear arms on the part of subjects generally."[142]

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[136]*Id.* at 10.

[137]*Id.* at 14.

[138]Wagner, note 8 *supra,* at 1416.

[139]Ehrman & Henigan, note 12 *supra,* at 14.

[140]Wagner, note 8 *supra,* at 1416, n. 48.

[141]Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History,*16 CATH. U. L. REV. 53, 59 (1966).

[142]Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment,*2 HASTINGS CONST. L.Q. 961, 974 (1975).

Colonial Period Sources

Although several American colonial charters had provisions requiring citizens to bear arms for the common defense, many of the colonies regulated the use of firearms. Virginia and Pennsylvania forbade Negroes from carrying arms without their masters' certificate. South Carolina required that
the master keep all arms not in use locked up in his house. Other laws prohibited the use of guns in public areas where a person or livestock might be injured or killed. A Pennsylvania law forbade the firing of a gun in Philadelphia without a special license from the governor.[143]

Of the state constitutions adopted folowing the Declaration of Independence, only two (Pennsylvania and Vermont) can be interpreted as granting an individual right to bear arms.[144] Two others (Massachusetts and North Carolina) reference a right to bear arms for the common defense or the defense of the state. Four other state constitutions have clauses establishing a well regulated militia.

"The Declarations [in these state constitutions] were attempting to ensure supremacy of the militia, not establish individual rights."[145] "In no sense can it be confidently stated that these state Declarations were concerned with an individual right to bear arms for anything other than militia-related purposes."[146]

Although the Pennsylvania Constitution makes a brief reference to a right to bear arms for self-defense, its emphasis is on the common defense and curbing military power. The provision denounces standing armies and asserts that "the military should be kept under strict subordination to, and governed by, the civil power."[147]

Undoubtedly the colonists used guns for defense of person, family, and home and for shooting game. The patriots resisted British attempts to disarm them and protested against general warrants for searching their

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[143]Levin, *The Right to Bear Arms: The Development of the American Experience,*48 CHI.-KENT L. REV. 148, 149-50 (1971).

[144]Ehrman & Henigan, note 12 *supra,* at 17-18.

[145]*Id.* at 18.

[146]*Ibid.*

[147]Ehrman & Henigan, note 12 *supra,* at 17.

private homes for arms. According to supporters of a collective right interpretation, none of these facts establish that, in writing the Constitution, the Framers intended to establish an individual right to bear arms. The weight of the evidence favors a collective or militia right interpretation of the Second Amendment.[148]

Constitutional Period Sources

"Nowhere in the [1787] Constitutional debates was there a discussion of a right to keep or bear arms."[149] The Framers debated the military authority of the national government. Many of them feared standing armies. They saw a militia composed of ordinary citizens as a bulwark against an unjust or tyrannical government and an alternative to a standing army. The whole debate was in terms of the common defense or collective assertion of liberties. The Militia Clause embodies the compromise between national and state interests: the Congress was given the power to raise armies, to organize, equip, and discipline the militia; the states were given concurrent power over the militia, in addition to the power to appoint its officers.[150]

During the debate over ratification of the Constitution, the "Anti-Federalists demanded an express declaration of the states' right to arm the militias."[151] The Anti-Federalists feared the Congress might abolish the militias by refusing to arm them. Even though James Madison tried to reassure them that the states had concurrent power over the militias,[152] the Anti-Federalists needed a "belt-and-suspenders" guarantee that if Congress failed to organize the militias, the states had the power to do so. "[I]n the context of the Bill of Rights debate, [militia] referred to organized, trained, and government-suplied militias."[153]

One commentator, who supports an individual right to bear arms, nevertheless acknowledges that the critical Virginia Convention debates

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[148]*Id.* at 33.

[149]*Id.* at 20.

[150]*I d.* at 28-30.

[151]*Id.* at 29.

[152]Wagner, note 8 *supra,* at 1424-25.

[153]Ehrman & Henigan, note 12 *supra,* at 29.

"lend some support to the state's right view of gun control."[154] A collective right supporter writes more emphatically: "The Virginia debates reveal that the delegates were not concerned with an individual right to carry weapons, outside the context of militia service."[155]

According to supporters of the collective right interpretation, the outcome of the debates between the Federalists and Anti-Federalists was that the"new federal government could keep much of its broad military power, but it would be forbidden from disarming the state militias .... The 'right to bear arms' concerned the ability of the states to maintain an effective militia, not an individual right to keep weapons for any purpose whatsoever."[156]

"The background of the second amendment indicates that Congress did not intend to confer a broad 'individual' right to carry arms, outside of the military context."[157] "[I]n none of the conventions, writings, or debates preceding the second amendment was there <u>any</u> discussion of a right to have weapons for hunting, target shooting, self-defense, or any other non-militia purpose."[158] "[T]he right of an individual to keep and carry arms only exists in the context of contributing to a 'well-regulated militia,'"[159]according to adherents of the collective right viewpoint.

"[T]he second amendment was not designed to ensure that every citizen would have weapons. The second amendment was designed to assure the states and citizens that they could maintain effective state militias. However, the states and citizens demonstrated during the 1800's that they did not want to exercise this prerogative."[160] Today the federal government provides most of the equipment for the National Guard, the successor to the colonial militia. Supporters of the collective right viewpoint argue that "[s]o long as the federal government continues to provide arms, and so long as privately owned weapons are not needed

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[154]Wagner, note 8 *supra,* at 1425.

[155]Ehrman & Henigan, note 12 *supra,* at 29.

[156]*Id.* at 30.

[157]*Id.* at 32.

[158]*Id.* at 33.

[159]*Id.* at 34.

[160]*Id.* at 40.

for militia purposes, gun legislation should raise no constitutional problems [under the Second Amendment]."[161]

Case Law Precedent

Supporters of the collective right interpretation of the Second Amendment argue that "[n]o court in th[e] [twentieth] century has suggested that private ownership of firearms by members of the 'sedentary' or 'unorganized' militia is protected by the second amendment."[162] *United States v. Miller,* 307 U.S. 174 (1939), is the only Supreme Court case in this century extensively examining the Second Amendment. The Court held that the Constitution did not confer an individual right to possess a sawed-off shotgun. "[T]he Court regarded the militia as a government directed and organized military force...."[163] It decided the constitutional issue "by finding an absence of evidence that the weapon in question had a 'reasonable relationship to the preservation or efficiency of a well regulated militia. The possible use of the weapon for purposes unrelated to the militia was not discussed."[164]

"The proposition that *Miller* recognizes the protected status of any weapon that could have a military use has been rejected by every court which has addressed it."[165] *Cases v, United States,* 131 F.2d 916 (1st Cir. 1942), *cert. denied sub nom. Velazguez v. United States,* 319 U.S. 770 (1943) (possession of Colt revolver did not contribute to well regulated militia); *United States v. Warin,* 530 F.2d 103 (6th Cir. 1976) (federal registration of machinegun does not violate Second Amendment; private right to own military weapons completely irrational in nuclear age).

"[T]he courts consistently have read *Miller* to mean that federal statutes regulating firearms do not offend the second amendment unless the statutes are shown to interfere with the maintenance of an organized state militia....[S]ince *Miller,* no federal gun law has been held to violate the second amendment."[166] *Stevens v. United States,* 440 F.2d 144 (6th

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[161]*Ibid.*

[162]Ehrman & Henigan, note 12 *supra,* at 50.

[163]*Id.* at 41.

[164]*Id.* at 42.

[165]*Id.* at 42-43.

[166]*Id.* at 44-45.

Cir. 1971)(disqualification of convicted felons to possess or receive firearm does not violate Second Amendment); *United States v. Swinton,* 521 F.2d 1255 (10th Cir. 1975)(federal licensing of firearms dealers does not violate the Second Amendment); *Cody v. United States,* 420 F.2d 34 (8th Cir. 1972) (prohibition on false statements in course of making a firearms purchase does not violate the Second Amendment).

Proponents of gun control laws note that "[t]he courts repeatedly have...[held] that the right guaranteed by the second amendment is not an individual right, but rather a 'collective' right."[167] *Eckert v. City of Philadelphia,* 477 F.2d 610 (3d Cir. 1973) ("the right to keep and bear arms is not a right given by the United States Constitution"); *In Re Atkinson,* 291 N.W. 2d 396 (Minn. 1980) (the Second Amendment "protects not an individual right but a collective right, in the people as a group, to serve as militia"); *United States v. Nelson,* 859 F.2d 1318, 1320 (8th Cir. 1988) (the argument for a "fundamental right to keep and bear arms" under the Second Amendment "has not been the law for at least 100 years").

"[T]he courts have held, in accord with *Miller,* that the interest protected by the second amendment is the collective and public interest in a viable state militia, not the private interest of individuals in owning firearms for reasons unrelated to the militia. The second amendment is thus distinguishable from other parts of the Bill of Rights, because it protects a public interest, not a private interest."[168]

"[T]he possibility that laws affecting privately-owned firearms could also cripple a state's militia was quite real in colonial times when...militiamen often were required to use their own arms in active militia duty. This possibility now seems purely theoretical because American citizens do not own firearms for the purpose of participating in militia activities. For such activities, they use arms supplied by the federal government .... [T]he historical changes in the nature of the militia and how it is armed have made it impossible for the second amendment guarantee to be violated by laws affecting the private ownership of firearms."[169]

"Because no second amendment case involving a challenge to a state or local statute has reached the Supreme Court since 1894, the

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[167] *Id.* at 46.

[168] *Id.* at 47.

[169] *Id.* at 48.

question arises whether the Supreme Court would find the second amendment right to be an element of due process under the fourteenth amendment and thereby applicable as a restraint on state action. For the Court to do so would be difficult to reconcile with the rationale of the *Miller* decision."[170] In *Commonwealth v. Davis,* 369 Mass. 886, 890, 343 N.E. 2d 847, 850 (1976), the Massachusetts Supreme Court observed that the "chances appear remote that...[the second] amendment will ultimately be read to control the States, for unlike some other provisions of the Bill of Rights, this is not directed to guaranteeing the rights of individuals, but rather...to assuring some freedom of State forces from national interference."

"With the exception of one pre-*Miller* ruling of the Idaho Supreme Court, since *[United States v.] Cruikshank,* [92 U.S. 542 (1876)] the courts have unanimously held the second amendment inapplicable as a restraint on state power."[171] "[A]ll successful challenges to state or local firearms statutes since *Miller* have been brought under 'right to keep and bear arms' provisions of state constitutions. The state constitutional provisions which have invalidated these laws use language which is far broader than the language of the second amendment and which divorces the right to keep and bear arms from the state's interest in an effective militia."[172]

Adherents to the collective right viewpoint argue that "the courts, in unanimously rejecting...equal protection [clause] challenges [to gun control laws], have ruled that there is no fundamental right to gun ownership under the Constitution."[173] "Statutory classifications affecting firearms have not been held to infringe a fundamental right."[174] *Lewis v. United States,* 445 U.S. 55 (1980) (disqualification of convicted felons from gun possession upheld on rational basis standard); *United States v. Synnes,* 438 F.2d 764 (8th Cir. 1971), *vacated on other grounds*, 404 U.S. 1009 (1972) (firearm possession law analyzed under rational basis standard); *United States v. Karnes,* 437 F.2d 284 (9th Cir. 1971) (disqualification from gun ownership upheld in case of one dishonorably discharged from military).

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[170]*Id.* at 56.

[171]*Ibid.*

[172]*Id.* at 57.

[173]*Id.* at 50.

[174]*Id.* at 51.

Scope Of The Second Amendment: Collective Right Viewpoint

The argument of those who advocate a collective or state's right interpretation of the Second Amendment may be summed up as follows. "The second amendment was simply an effort to address the proper distribution of military power in our society. It did so in a manner that made sense in the historical context of colonial America, but which has lost its resonance for modern-day America because of changes in the nature and role of the citizen army the amendment was intended to protect."[175] "[B]ecause the state militias no longer rely on the use of privately-owned firearms by their active members, federal regulation of private gun ownership poses no threat to state militias, and therefore raises no constitutional issue. This is demonstrated by the remarkable unanimity of federal and state courts in upholding the constitutional validity of firearms laws against second amendment challenges."[176] "From either the state or individual perspective, the thrust of the [second] amendment was to ensure the existence of an effective state militia. In neither case was there an intent to confer a broad individual right to have arms for other lawful purposes."[177]

[175]*Id.* at 58.

[176]*Id.* at 57.

[177]*Id.* at 33.

IV. CONCLUSION

There are not many more controversial public policy issues than gun control legislation. The 103d Congress enacted two gun control laws: the Brady Handgun Violence Protection Act and the assault weapons ban in the 1994 Violent Crime Control and Law Enforcement Act. While everyone agrees this country must take steps to control violent crime, there are sharp differences of opinion about the efficacy of gun control laws in reducing violent crime. Today and historically, these viewpoints tend to divide along regional and population lines. The public in urban-suburban areas, especially in the populous cities of the Northeast and Midwest, tends to favor restrictions on gun ownership. In less populous areas, especially in the South and West, the public tends to favor private ownership of guns for various lawful purposes.

This report has reviewed the historical and legal sources bearing on the interpretation of the Second Amendment of the Constitution, including scholarly writings, without drawing any conclusion about the nature of the right accorded by the Second Amendment.

Many commentators argue that the Second Amendment should be interpreted to grant an individual right to bear arms. They argue that the courts have erroneously failed to apply modern principles of constitutional review in evaluating federal gun control legislation. They conclude that an individual right to bear arms is essential for self-defense and, as a last resort, to resist an unjust and oppressive government.

Other commentators disagree. They assert that the Second Amendment has been correctly interpreted by the courts as conferring only a collective right, which can be exercised by participation in state militias. Collective right advocates note that no court in the Twentieth Century has even suggested that the Second Amendment grants an individual right to bear arms. They conclude that an individual right is inconceivable in modern times, given the concentrations of population and the dangerous nature of modern weaponry.