

THE RIGHT TO POSSESS ARMS: THE INTENT OF THE FRAMERS OF THE SECOND AMENDMENT

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I. Introduction

The Constitution and Bill of Rights contain no superfluous language.

The Constitution was ratified in the belief, and only because of the belief, encouraged by its leading advocates, that, immediately upon the organization of the Government of the Union, articles of amendment would be submitted to the people, recognizing those essential rights of life, liberty, and property which inhered in Anglo-Saxon freedom, and which our ancestors brought with them from the mother country.¹

The Framers recognized that they could not enumerate or even contemplate all the specific rights they enjoyed and wished to protect.² Thus, The guarantees of the Bill of Rights were to be broadly and liberally construed.³

One may or may not agree on the wisdom of the Framers, but they believed that the right to possess arms was so necessary that they included it in the Bill of Rights. The Second Amendment reads: "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."⁴

The historical meaning and intent of this guarantee should not be ignored. The provision is not an outmoded relic of past fears about what could not possibly happen here.⁵

History has a way of repeating itself. In 1775 British General Gage seized the arms of the inhabitants of Boston in a futile effort to suppress a revolution. Bostonians surrendered 1,778 muskets, 634 pistols, 973 bayonets, and 38 blunderbusses.⁶ One purpose behind the Second Amendment, which was adopted in 1791, was to prevent a reoccurrence of such confiscatory efforts.⁷ In 1981 the Illinois Village of Morton Grove passed an ordinance to disarm the people of their pistols.⁸ Armed with the Second and Fourteenth Amendments, several citizens mounted a court challenge to the ordinance. A divided court upheld the ordinance in *Quilici v. Village of Morton Grove*,⁹ with the comment that the debates surrounding the adoption of the Second and Fourteenth Amendments were irrelevant to the court's determination, and further, that the possession of a pistol, even in the home, was not constitutionally protected.¹⁰

Justice Hugo Black criticized courts who "abate whenever and however possible" by such "judicial techniques" as "narrow construction" any right which "[s]ome people are hostile to" and view as "a constitutional nuisance."¹¹

This article will demonstrate that some courts exhibit a profound misunderstanding of the purposes or intent behind the Second Amendment, or demonstrate a disturbing willingness to simply ignore history and any favorable case law or writings in a concerted effort to turn the Second Amendment into a hollow shell, lacking any force and effect.

II. Historical Background of the Second Amendment

During the Revolutionary War the colonies established a confederation of states under Articles of Confederation without conferring real power on the United States Congress to solve national problems. Under the Articles each state retained "its sovereignty, freedom and independence, and every power, jurisdiction and right" which was not therein "expressly delegated to United States."¹² The United States were wholly dependent upon the response of the states for requests for troops and funds, ¹³ which frequently were ignored. Lack of independent power in Congress to raise revenue, to control interstate and foreign commerce, to establish effective international relations, and to provide effective internal and external defense were among its chief deficiencies in meeting national needs.

The Constitution was drafted by representatives of the states in the 1787 Constitutional Convention to provide a national government adequate to meet those needs. It preserved all the powers of the states except those that were exclusively delegated to the United States, while limiting those of the new national government to the powers delegated to it.¹⁴ This framework later was guaranteed by the Tenth Amendment.¹⁵

The experience of the Revolutionary War, the hostility Of the Indians on the western frontier and of the English and Spanish on the northern and southern borders, and the possibility of foreign invasions a some future time, convinced the framers of the Constitution of the necessity for a navy and a small standing army in the time of peace.¹⁶ Hence, the Constitution conferred on Congress the power "to raise and support Armies"¹⁷ and "to provide and maintain a Navy."¹⁸

There was no popular opposition to the navy provision, but memories of standing armies maintained by James II in England without the consent of Parliament and of British troops maintained in the colonies without their consent were fresh in the representative' minds. Mindful of the hostility of the people to standing armies the Founding Fathers provided safeguards against large standing armies. The power to raise armies and appropriate money therefor was vested in the Congress whose representatives are elected by the people every two years;¹⁹ command of the armies was conferred on the elected civilian President of the United States,²⁰ who appoints the officers with the advise and consent of the Senate,²¹ and appropriations for armies were limited to a term no longer than two years.²² Neither the English Bill of Rights nor those of the states prohibited standing armies established with the consent of the legislature itself,²³ but the Constitution vested the power of raising armies in the national legislature itself.²⁴ The main reliance apparently was to be placed in a federal militia to execute the laws of the Union, suppress insurrections, and repel invasions.²⁵ This federal militia was to consist of such part of the state militia as may be called into the active service of the United States, having been organized and trained by the states under standards prescribed by Congress, with the officers appointed by the states.²⁶ Thus the Constitution established civilian control over the military and left practically unaffected the right of the states to maintain and use state militia for state purposes.²⁷

The Founding Fathers believed that these safeguards were sufficient to overcome all reasonable popular opposition to the military provisions of the Constitution.²⁸ Furthermore, federal military power would be available to protect the citizens Of each state against usurpations and tyranny of the state government and its officials,²⁹ and against foreign invasions and against domestic violence (a provision lacking under the Articles of Confederation).³⁰ It was believed that a standing army necessarily would be so small that it would be no match for the greater power of the armed citizens of the militia.³¹ Compare the thirteenth article in the Virginia Declaration of

Rights of 1776 drafted by George Mason:

That a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that Standing Armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.³²

The Constitution fully met the spirit of that provision.

There was widespread and powerful opposition to the Constitution, which was to become effective only if ratified by at least nine state conventions elected by the people. Among the stated objections were the absence of a national Bill of Rights and the alleged destruction of the power of the states over their militia. One of the strategies of opponents of ratification was to condition ratification upon the adoption of previous amendments, thereby delaying ratification until after a new convention could make desired amendments and add a Bill of Rights. The proponents of ratification regarded such course of action as probably fatal to the Constitution, and in order to obtain unconditional ratification promised to propose appropriate amendments and a Bill of Rights once the Constitution was adopted. That strategy was successful.

Some of the ratifying conventions and the minorities of Pennsylvania, Massachusetts, and Maryland recommended Bills of Rights and amendments to the Constitution. The main battle over the militia was fought in the Virginia convention with James Madison, the principal author of the first ten amendments, one of the chief proponents of the Constitution. The Virginia proposals were the most comprehensive and included two separate and distinct recommendations relating to the militia. The wording of the Second Amendment proposed by Madison and slightly rephrased by the First Congress is in substance practically identical to one of the Virginia recommendations. The Second and Third Amendment provide:

II: 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.³³

III: No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.³⁴

III. State Militia Powers Were Retained Under the Constitution

Some courts and commentators contend that the Second Amendment was designed to prevent federal interference with the power of the states to organize, arm, maintain, and use state militia for state purposes.³⁵ This contention is flatly contradicted by its legislative history. That history indicates, as hereinafter conclusively demonstrated, that under the Constitution the states retained their powers over state militia subject only to the paramount power of Congress to provide for organizing, arming, and disciplining the militia and to call them into federal service in only three situations.³⁶

James Madison and other federalists in the Virginia Constitution Ratifying Convention repeatedly rejected the alleged need for a guarantee of the right of the individual states to organize, arm, and use state militia to enforce state laws and to suppress riots and insurrections. The Virginia opponents of ratification, led by George Mason and Patrick Henry, did indeed argue the need for such a guarantee, but James Madison, John Marshall, George Nicholas, Edmund Pendleton, and Governor Edmond Randolph were adamant in their assertion that the states retained their

preexisting powers over their militia and needed no such guarantee.

The basic premise of Mason and Henry was that the Constitution established a sovereign national government and that a sovereign government possesses all powers not specifically denied to it, particularly since the Constitution contained no express provision indicating that the national government was to possess only delegated powers and failed specifically to reserve to the states their powers, such as those contained in the Articles of Confederation. 37

Mason and Henry rejected the view that all powers not given to the federal government were reserved to the states, and argued that the states "have no power at all over the militia"³⁸ and could not use their militia even to protect themselves against domestic violence.³⁹ Henry said: "My great objection to this government is, that it does not leave us the means of defending our rights, or of waging war against tyrants ... Have we the means of resisting disciplined armies, when our only defense, the militia, is put into the hands of Congress?⁴⁰ They feared that the federal government had exclusive power to arm the militia and suppress insurrections and rebellions and that the states could not, and that by neglect and harassment of the militia the federal government would make militia duty so onerous and odious that the people would demand a standing army. The federal government would then erect a standing army on their ruin and billet federal soldiers "on the people at pleasure."⁴¹

Madison pointed out that under the Constitution "delegation alone warrants the exercise of any power."⁴² He noted:

The state governments might do what they thought proper with the militia, when they were not in the actual service of the United States. They might make use of them to suppress insurrections, quell riots, etc., and call on the general government for the militia of any other state, to aid them if necessary.⁴³

He stated further:

The state governments are to govern the militia when not called forth for general purposes; and Congress is to govern such part only as may be in the actual service of the union. Nothing can be more certain and positive than this. It expressly empowers Congress to govern them when in the service of the United States. It is, then, clear that the states govern them when they are not.⁴⁴

Earlier Madison had stated that he considered the militia provisions of the Constitution "to be an additional security to our liberty, without diminishing the power of the states in any considerable degree."⁴⁵

John Marshall, later Chief Justice of the United States, stated:

The state governments did not derive their powers from the general government; but each government derived its powers from the people, and each was to act according to the powers given it... . Could any man say this power was not retained by the states, as they had not given it away? ... The state legislatures had power to command and govern their militia before, and have it still, undeniably, unless there be something in this Constitution that takes it away... . But the power given to the states by the people is not taken away; for the Constitution does not say so ... To me it

appears, then, unquestionable that the state governments can call forth the militia, in case the Constitution should be adopted, in the same manner as they could have before its adoption ... If Congress neglect our militia, we can arm them ourselves ... the power of governing the militia was not vested in states by implication, because, being possessed of it antecedent to the adoption of the government, and not being divested of it by any grant of restriction in the Constitution, they must necessarily be as fully possessed of it as ever they had been. And it could not be said that the states derived any power from that system, but retained them, though not acknowledged in any part of it.⁴⁶

Nicholas argued that the national and state governments had concurrent power of arming the militia, and that such power given to the national government is not exclusive, "... for, in every instance where the Constitution intends that the general government shall exercise any power exclusively of the state governments, words of exclusion are particularly inserted. Consequently ... Virginia may arm the militia should Congress neglect to arm them."⁴⁷ And since Congress can call forth the militia only to execute the laws of the Union, suppress insurrections, and repel invasions, the federal government "can only govern such part of them as may be in the actual service of the United States."⁴⁸

Pendleton put the federal and state powers of the militia in perspective:

They say that the state governments have no power at all over the militia. The power of the general government to provide for arming and organizing the militia is to introduce a uniform system of discipline to pervade the United States of America. But the power of governing the militia, so far as it is in Congress, extends only to such parts of them as may be employed in the service of the United States. When not in their service, Congress has no power to govern them. The states then have the sole government of them; and though Congress may provide for arming them, and prescribe the mode of discipline, yet the states have the authority of training them, according to the uniform discipline prescribed by Congress. But there is nothing to preclude them from arming and disciplining them should Congress neglect to do it. As to calling the militia to execute the laws of the Union, I think the fair construction is directly opposite to what the honorable member says. The 4th section of the 4th article [which guarantees federal government protection of each state against invasion and domestic violence] contains nothing to warrant the supposition that the states cannot call them forth to suppress domestic insurrections ... All the restraint here contained is, that Congress may, at their pleasure, on application of the state... protect each of the states against domestic violence. This is a restraint on the general government not to interpose. The state is in full possession of the power of using its own militia to protect itself against domestic violence; and the power in the general government cannot be exercised, or interposed, without the application of the state itself. This appears to me to be the obvious and fair construction.⁴⁹

Governor Randolph said:

Another construction ... is, that it is exclusively in the power of Congress to arm the militia, and that the states could not do it if Congress thought

proper to neglect it ... Should Congress neglect to arm or discipline the militia, the states are fully possessed of the power of doing it; for they are restrained in no part of the Constitution.⁵⁰

Near the close of the debate he said that the Mason-Henry "amendment respecting the militia is unnecessary. The same powers rest in the states by the Constitution. Gentlemen were repeatedly called upon to show where the power of the states over the militia was taken away, but they could not point it out." ⁵¹

Unconvinced that the Constitution conferred only delegated power on the federal government or that the states retained all other powers not specifically prohibited therein, Mason stated:

I wish a clause in the Constitution, with respect to all powers which are not granted, that they are retained by the States ... We wish this amendment to be introduced to remove our apprehensions. There was a clause in the Confederation reserving to the states respectively every power, jurisdiction, and right, not expressly delegated to the United States.⁵²

Mason thought that, "... there ought to be some express declaration in the Constitution, asserting that rights not given to the general government were retained by the states. He apprehended that, unless this was done, many valuable and important rights would be concluded to be given up by implication."⁵³

Henry said that the Articles of Confederation declared that "every right was retained by the states, respectively, which was not given up to the government of the United States."⁵⁴ He "declared a Bill of Rights indispensably necessary; that a general positive provision should be inserted in the new system, securing to the states and the people every right which was not conceded to the general government; and that every implication should be done away."⁵⁵ Henry thought that "[a] bill of rights may be summed up in a few words. What do they tell us? That our rights are reserved. Why not say so?"⁵⁶ Madison obliged, in what are now the Ninth and Tenth Amendments.⁵⁷

The notion that the Second Amendment was adopted to guarantee to the states the right to maintain and govern their own militia is particularly difficult to understand, not only because it fails to so state, but also because the right to bear arms provision was a separate Virginia proposal, and because Madison and the First Congress rejected the Virginia recommendation that would expressly so provide in submitting the Bill of Rights to the states for ratification.

The Virginia convention recommended a separate specific amendment for that purpose: "That each State respectively shall have power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same."⁵⁸ That was the Mason-Henry Constitutional amendment that Madison, Marshall, Nicholas, Pendleton, and Randolph all had declared to be unnecessary. Not only did Madison fail to include it in his proposed amendments, but both the House of Representatives and the Senate of the First Congress refused to recommend it to the states for ratification. It should be noted that recommendation sought such guarantee of state power over their militia only if Congress should neglect the militia. The Pennsylvania minority, however, sought a guaranteed absolute and independent right of the states to maintain their militia. Its recommendation read: "That the power of organizing, arming and disciplining the militia, (the manner of disciplining the militia to be prescribed by Congress) remain with the individual states..." ⁵⁹

The U.S. Supreme Court has been in full agreement with the views of Madison, Marshall,

Pendleton, Nicholas, and Randolph. In 1820 in *Houston v. Moore*,⁶⁰ it observed that the power of the states to maintain their militia existed prior to the adoption of the Constitution, but under the Constitution such state power is subordinate to the paramount power of the federal government to call the militia to execute the laws of the Union, suppress insurrections, and repel invasions. As to state militia the Court said: "The power of the state government to legislate on the same subjects, having existed prior to the formation of the Constitution, and not having been prohibited by that instrument, it remains with the states."⁶¹

Unlike the Articles of Confederation which provided that "every state shall always keep up a well regulated and disciplined militia,"⁶² the Constitution contains no such specifically articulated mandate. However, as the Supreme Court observed in 1939 in *United States v. Miller*, "the states were expected to maintain and train" the militia.⁶³ Without state militia the Constitution's organization plan for the federal militia would lack its ordained foundation, since the states appoint the officers and the federal militia is composed of state militia called into active federal service. No command in the Constitution was considered necessary.

The claim that the purpose of the Second Amendment was to guarantee the right of the states to maintain armed militia, [That is the right to bear arms belongs only to the militia itself] is not only contrary to historical fact, but demonstrates flawed reasoning or theory. The constitutional function of the federal militia is to suppress insurrections and repel invasions, which necessitate an armed response. Said the Supreme Court of the Second Amendment in *Miller* "With the obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee [of "the right of the people to keep and bear arms"] were made."⁶⁴ The contention that the second Amendment guarantees the right of the states to maintain militia, which the Constitution presupposed and expected that they would maintain for the benefit of the United States and of the states themselves, is patently erroneous and reveals how dismal the intellectual discourse is on this topic.

An absolute right of the states to maintain militia would mean that the states have a right to maintain at least two militia: that called into active federal service and the militia retained, and therefore is contrary to the Constitutional prohibition against keeping troops without the consent of Congress⁶⁵ (since the right to keep an armed militia riot subject to federal requisition would be independent of the consent of Congress). Nothing in the Second Amendment or its history warrants such a theory. Under current federal law the "organized" militia (the National Guard, a recent institution) is part of the federal militia and a reserve component of the Army of the United States.⁶⁶ If a state militia guarantee rather than an individual right of citizens to keep and bear arms were the purpose of the Second Amendment, it would have been totally unnecessary and irrelevant to include any guarantee of "the right of the people to keep and bear arms," since by its very nature a militia is necessarily an armed force and without arms it would be impossible to carry out its constitutional functions of suppressing insurrections and repelling invasions. Both Virginia and the Pennsylvania minority⁶⁷ suggested a specific provision for that purpose, without a right of the people to bear arms provision, but both suggestions were rejected by Madison and the First Congress. Note that Virginia in article XIII of its 1776 Declaration of Rights contained no right of the people to bear arms provision, but like the U.S. Constitution clearly implied that the state should maintain a state militia.

Since the states retained their powers over their militia, the right of the states to maintain and govern their militia, which the Constitution presupposed they would do, is guaranteed by the Constitution as originally adopted and by the Tenth Amendment.

The above-quoted statement of the Supreme Court in *Miller* may have given rise to the state militia protection theory. However, immediately following that statement is a lengthy reference to

the history of colonial and early state laws requiring all able-bodied free male citizens to perform militia duty and provide their own arms and ammunition. That discussion would have been irrelevant if the purpose of the Second Amendment was viewed merely as protection of the right of the states to maintain militia without federal interference. Had that been the purpose of the framers, in order to render possible the effectiveness of federal militia it would have been more appropriate to protect federal militiamen against state and federal infringement, otherwise the states could frustrate federal use of militia by failing to maintain state militia or by prohibiting their citizens to keep arms. The Supreme Court recognized this in *Presser v. Illinois*,⁶⁸ stating that aside from the Second Amendment "the states cannot ... prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government."⁶⁹

The Framers of the Second Amendment believed that there was no necessity to guarantee state militia powers against federal interference, since under the Constitution the federal government was dependent upon state militia for its organized manpower "which the States were expected to maintain and train"⁷⁰ for mutual benefit. Furthermore the state retained their rights over their militia.

To determine the framers' intent, we should be mindful of the following: (1) having emphasized the inherent right of the states to maintain and use state militia for state purposes, (2) doubtless being aware of complete federal dependence on state militia for its own militia, (3) leaving a want of federal power to interfere with state militia, (4) having rejected state and minority recommendations for protecting state militia powers, (5) and stating preference by Madison and the framers for militia over large standing armies, and (6) having guaranteed state militia powers by the Tenth Amendment, (7) plus including in the Constitution's plan reliance on federal militia for suppressing insurrections and repelling invasions; Madison and the framers perceived no necessity to guarantee state militia powers by the Second Amendment, which by its terms does not preserve them, but instead guarantees the right of the people to keep and bear arms against federal infringement in order to protect the federal militia. The history of the Second Amendment militates against state militia protection theory. Furthermore, the Court's statement in *United States v. Miller*, regarding the purpose of the Second Amendment was not addressed to state militia, but to the federal militia.

Neither Madison nor the First Congress in proposing the Bill of Rights recommended that any change be made with respect to the powers of either Congress or of the states over militia, or to the organization, functions, training, or use of federal or state militia, although state recommendation included time and territorial limitations on federal use of state militia, as well as a requirement of state consent in some circumstances. Likewise state recommendations that no standing army be kept up in time of peace unless with the consent of two-thirds or three-fourths of the Congress were rejected, but state proposals against quartering troops in private homes is now the Third Amendment. Hence it is clear that the purpose of the Second Amendment was not to guarantee to the states the right to organize, arm, maintain, and use state militia for state purposes, since they had retained that right.

IV. The Purpose of the Second Amendment Was To Prevent Large Standing Armies

What then was the purpose of the Second Amendment? It was to prevent the establishment of large standing armies by the federal government by guaranteeing the right of the people to keep and bear arms so as to provide the foundation for a national militia as the preferred armed service of the federal government to suppress insurrections and repel invasions. This view is supported by Virginia's Seventeenth Bill of Rights Recommendation:

That the people have a right to keep and bear arms; that a well regulated militia composed of the body of the people trained to arms is the proper, natural and safe defense of a free state. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as circumstances and protection of the community will admit ... 71

Madison's draft of the Second Amendment adopted the substance of the first sentence of that Virginia recommendation. Virginia followed that up immediately with Its Eighteenth Bill of Rights Recommendation: "That no Soldier in time of peace ought to be quartered in any house without the consent of the owner, and in time of war in such manner only as the laws direct."72

The adoption of that recommendation in the Third Amendment lends support to the view that one purpose of the Second Amendment was to promote the militia as the principal military arm of the federal government rather than large standing armies. This view is also supported by the remarks of Alexander Hamilton and Madison in THE FEDERALIST.73

There was strong universal objection to large standing armies as dangerous to liberty at the time of adoption to the Constitution. Madison stated:

If insurrections should arise, or invasions take place, the people ought unquestionably to be employed, to suppress and repel them, rather than a standing army. The best way to do these things was to put the militia on a good and sure footing, and enable the (federal) government to make use of their service when necessary.74

Although convinced of the necessity of maintaining a standing army,75 Madison stated that, "the only possible way to provide against standing armies is to make them unnecessary. The way to do this is to organize and discipline our militia, so as to render them capable of defending the country against external invasions and internal insurrections."76 In the Constitutional Convention of 1787 Madison had stated that "as the greatest danger to liberty is from large standing armies, it is best to prevent them, by an effectual provision for a good militia."77

There should not be overlooked the state recommendations against standing armies in time of peace nor their recommendations that the people have a right to keep and bear arms .78 These clearly indicated a preference for a national militia rather than the maintenance Of regular troops as the military arm of the national government.

Patrick Henry agreed when he argued that a "most fatal omission" of the Constitution "is with respect to standing armies. In our Bill of Rights of Virginia, they are said to be dangerous to liberty, and it tells you that the proper defense of a free state consists in militia..."79

George Mason was of like mind. In the 1787 Constitutional Convention, fearful that an absolute prohibition against standing armies would be unsafe, he had sponsored the militia clause of the Constitution providing for federal regulation of the militia as to arms, organization, and training in order to make the militia an effective military arm of the federal government in suppressing insurrections and repelling invasions. He unsuccessfully proposed that the militia clause be prefaced with the words, "And that the liberties of the people may be better secured against the danger of standing armies in time of peace."80 In 1775 Mason had drafted a plan for a Fairfax County, Virginia militia composed of all able-bodied freemen 18 to 50 years of age, being convinced that such militia would relieve the mother country from any expense in their protection and defense, "and render it unnecessary to keep any standing army (ever dangerous to liberty) in

this colony."⁸¹

Another leading opponent of ratification of the Constitution, Elbridge Gerry of Massachusetts, said: "What, Sir, is the use of militia? It is to prevent the establishment of a standing army, the bane of liberty."⁸² Thus there appears to have been general agreement between the proponents and opponents of ratification of the Constitution that one purpose of a militia is to prevent standing armies. The expression "a free state" in the Second Amendment "is obviously here used in the generic sense, and refers to the United States as a whole rather than to the several states."⁸³

Madison stated:

The states are to have the authority of training the militia according to the Congressional discipline: and of governing them at all times when not in the service of the Union. Congress is to govern such part of them as maybe employed in the actual service of the United States ... If you limit their [United States'] power over the militia, you give them [the United States] a pretext for substitution a standing army.⁸⁴

The Supreme Court has echoed this view: "The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of the country and laws could be secured through the Militia - civilians primarily, soldiers on occasion."⁸⁵ The Court further agree that "the Militia comprised all males physically capable of acting in concert for the common defense."⁸⁶ Clearly this did not refer to a select militia such as the National Guard. Federal law provides that the militia includes all able-bodied male citizens of the United States between the ages of 17 and 45.⁸⁷ The National Guard is a relatively recent organization and is part of the Organized Militia, it constitutes a "select militia," which colonial Americans opposed as the equivalent of the universally hated "standing armies." Obviously the framers of the Second Amendment did not have a "select militia" such as the National Guard in mind.⁸⁸

In view of George Mason's 1775 explanation that the purpose of organizing the Fairfax County militia was to make a standing army unnecessary, it is apparent that such was the purpose of his 1776 Virginia Bill of Rights militia as well as Virginia's 1788 seventeenth Bill of Rights recommendation for a national Bill of Rights, which Mason and Patrick Henry presented to the 1788 Virginia Convention. That purpose is also self-evident from that seventeenth Bill of Rights recommendation itself. Since Madison's Second Amendment recommendation was based thereon, as well as his views and those of both proponents and opponents of ratification of the constitution that the way to prevent standing armies is to have an effective militia, it is proper to conclude that one purpose of the Second Amendment was to prevent large standing armies, even though Madison believed that a standing federal army was necessary. The debates in the Virginia Convention set forth above of Madison, Marshall, Nicholas, Pendleton, and Randolph with Mason and Henry clearly support this view of the Second and Tenth Amendments, of the militia controversy, by all of the states that made any recommendations for amendments.

It seems clear, therefore, that what is now the Second Amendment, considered together with proposals of the states for a Bill of Rights and amendments to the Constitution, was proposed by Madison and the First Congress, not to guarantee to the states the right to maintain state militia, but to prevent large standing armies by guaranteeing to the people, all of them potential militia, the right to keep and bear arms.

V. Possession of Arms an Individual Right

Madison's Second Amendment proposal was based on recommendations originating in the State conventions.⁸⁹ Three of these specifically involved an individual right to possess arms for other than militia purposes.⁹⁰ The Pennsylvania Minority would protect the peoples "right to bear arms for the defense of themselves and their own State, or the United States, or for the purpose of killing game," and no individual should be disarmed "unless for crimes committed" or threat of "real danger of public injury."⁹¹ The Massachusetts minority urged that "the said Constitution be never construed ... to prevent the people of the United States, who are peaceable citizens, from keeping their own arms."⁹² New Hampshire urged that "Congress should never disarm any Citizen, unless such as are or have been in actual rebellion."⁹³ While the exact wording of such recommendation is not found in the Second Amendment, the command that "the right of the people to keep and bear arms shall not be infringed" is entirely consistent with them. It captures the essence of the various proposals through consolidation and merger.⁹⁴

It was in the era when militiamen were still required by state law to possess and furnish their own arms that the Second Amendment was adopted (1789-1791).⁹⁵ Presumably the framers of the amendment considered that tradition when they wrote the guarantee of "the right of the people to keep and bear arms." They apparently assumed that for the immediate future, at least, considering the primitive arms production technology of the time and the limited financial resources of the new government encumbered with large Revolutionary War debts, individual citizen militiamen would have to furnish their own arms (which would hardly be a hardship, since private ownership of arms was general).

This is amply illustrated by the fact that the first federal militia law, enacted immediately after the adoption of the Second Amendment by many of the same men who had framed that amendment, required every militiaman to furnish his own arms and ammunition.⁹⁶ That law required "each and every" resident free able-bodied male citizen 18 to 45 to enroll in the militia and report for training and militia duty with arms and ammunition furnished by himself, and exempted the same from seizure for debts and taxes.

There was riot imposed an ambiguous impersonal "collective" duty upon citizens, but a duty upon "each and every" such individual citizen, to furnish his own arms and ammunition and perform militia duty, just as it is still the duty in modern time of each able bodied male citizen of military age to serve in the armed forces when called in time of war, and even in time of peace when universal military service is mandates. Even today all able-bodied male citizens 17-45 are members of the unorganized militia.⁹⁷

Since the existence of a duty implies the right to perform the duty, and since it was the duty of every such individual citizen was to have the corresponding right to keep and bear arms. It is apparent, then, that the right to keep and bear arms was a right of each and every such citizen, and not an exclusively "collective" right, whatever that may mean.⁹⁸ Certainly the Militia Act of 1792 enacted by many of the same men who framed the Second Amendment throws definitive illumination upon the meaning of that Amendment, particularly since it was enacted to carry into effect the militia clause of the Constitution immediately after Second Amendment was adopted.

In *United States v. Miller*, the U.S. Supreme Court said that

[T]he history and legislation of the Colonies and States, and the writings of approved commentators ... show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the

time.99

It noted Blackstone's Commentaries pointing out "that King Alfred First settled a national militia in his kingdom" and quoted historian Osgood:

In all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms, and with certain exceptions, to cooperate in the work of defense ... Clauses intended to insure the possession of arms and ammunition by all who were subject to military service appear in all the important enactments concerning military affairs. Fines were the penalty for delinquency, whether of towns or individuals.¹⁰⁰

The Court then cited specific laws: A 1784 Massachusetts law required that every militiaman "shall equip himself, and be constantly proved with a good fire arm."¹⁰¹ A 1786 New York law directed that every able-bodied resident male citizen 16 to 45 enroll in the militia and "provide himself, at his own expense, a good Musket or Firelock" and ammunition.¹⁰² A 1785 Virginia law required every free male citizen 18 to 50 to appear at his respective muster-field "with a good, clean musket" or rifle and ammunition.¹⁰³ It was with this historical background that the Court made this pronouncement:

In the absence of any evidence tending to show that the possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we can not say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.¹⁰⁴

If the Supreme Court considered that the purpose of the Second Amendment was to prevent federal interference with state militia, or that the right of the people to keep and bear arms was limited to the militia itself or to militiamen on militia duty, it certainly would not have maintained a complete silence with respect to such matters, nor would it have instead emphasized and discussed in such detail the history of the obligation of all able-bodied male citizens of military age to enroll in the citizen militia and provided their own arms and ammunition at their own expense. If state militia protection had been considered the purpose of the Second Amendment, it certainly would have ruled on that basis and remanded the case for determination of the militia status of the defendants at the time of their alleged crime, and if the requisite status existed, whether a sawed-off shotgun was a recognized militia weapon. The Court was completely silent concerning the militia status of defendants: Whether they had active, inactive, organized or unorganized militia status, if any. Instead of disposing of the case on such a basis, it followed what must be regarded as a most strange course if it considered that the Second Amendment does not protect the right of individual citizens to keep and bear arms against federal infringement. It engaged in a lengthy discussion of the universal traditional obligation of individual citizens to perform militia duty with arms furnished by themselves at their own expense, and it focused its conclusion on the relationship of the weapon to accepted militia arms. It clearly indicated that the sole factual issue in the case was that relationship, completely ignoring any possible militia status of defendants. Its holding was the Second Amendment does not prevent Congressional prohibition of a weapon not commonly possessed by the people and unrelated to militia armament for use by individual militiamen, particularly gangster and criminal types, of weapons regulated by the National Firearms Act. ¹⁰⁵ The Supreme Court clearly implied that the Second Amendment protects the right of individual citizens to possess arms.¹⁰⁶

At least one federal appellate court has agreed that the Second Amendment guarantees an individual right. *Cases v. United States*, interpreted *Miller* as meaning that "Congress would be prevented by the Second Amendment from regulating the possession or use by private persons not present or prospective members of any military unit, of distinctively military arms."¹⁰⁷ It said that the federal government could not "prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well-regulated militia."¹⁰⁸

Justice Hugo Black, a member of the *Miller* Court, wrote that "Although the Supreme Court held this amendment to include only arms necessary to a well-regulated militia, as so construed, its prohibition is absolute."¹⁰⁹ Even Chief Justice Taney indicated that citizens had a constitutionally protected right "to keep and carry arms wherever they went." ¹¹⁰

Justice Story wrote:

The right of the citizens to keep and bear arms has justly been considered the palladium of the liberties of a republic; since it offers a strong moral check against usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.¹¹¹

Recently the Supreme Court indicated that specific liberty guarantees in the Bill of Rights included "freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on."¹¹²

Conclusion

The History of Militia laws requiring almost universal militia membership with militiamen furnishing their own arms and ammunition and the opinion, relevant until very recent times, that the Second Amendment protects the right of individual citizens to possess arms against federal infringement.¹¹³ If it had been the purpose of Madison and the First Congress to preserve state militia rights against federal interference (an unneeded protection) it is inconceivable that they would have rejected the clear and unambiguous proposals of the Virginia convention and the Pennsylvania minority, which were designed specifically to establish just such a guarantee without a "right of the people to keep and bear arms" provision. Instead, they not only flatly rejected those proposals, but adopted the guarantee of "the right of the people to keep and bear arms," which considered in the light of the long historical tradition of individual militiamen being required to furnish their own arms at their own expense not only before but immediately after the adoption of the Second Amendment, clearly establishes that a guarantee of the right of the individual citizen to possess arms was intended, and would include a least side and shoulder arms commonly possessed by the people and appropriate for militia use.

The undoubted right of citizens to protect their lives and those of their families deserves the protection of the right to possess the means for self-defense, the right to possess arms. The core element of the right to arms is to keep them in one's home for self-defense, for possible militia use, and to deter governmental oppression.

The only proper and logical approach is to interpret the Constitution as its drafters and adopters intended. The Constitution contains provisions for amending it.¹¹⁴ Amendment through judicial fiat is both unconstitutional and illegal. If federal, state, and local authorities can stomp out the right to arms with impunity, which has been enjoyed since the founding of this country, then each

of us should tremble at our own vulnerability in face of a reign of judicially sanctioned tyranny in which governmental ends justify any means.

Footnotes

1. *O'Neil v. Vermont*, 144 U.S. 323, 370 (1982) (Harlan, J., dissenting). See also *id.* at 361 (Fields, J., dissenting). For a historical analysis of the common law tradition of possessing arms see Malcolm, *The Fight of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983); Caplan, *The Right of the individual to Bear Arms: A recent Judicial Trend*, 1982 DET. C.L. REV. 789 (1982).
2. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316,407 (1819) (Constitution cannot take on the "prolixity of a legal code ... only its great outlines should be marked
3. *Boyd v. United States*, 116 U.S. 616, 635 (1886).
4. U.S. CONST. amend.II.
5. The purposes of a right to arms are to deter governmental oppression, to enable the people to perform militia duties if the occasion should arise, and to protect the right of personal defense. *State v. Kessler*, 289 Or. 359,614 P.2d 94 (1980). These purposes are still vital today.

In response to fears of opponents of the Constitution that the power of the federal government would endanger state governments, Madison suspected that, in case of federal encroachments over the authority of state governments, plans of resistance would be concerted and "a militia amounting to near half a million of citizens with arms in their hands" would overwhelm the standing armies, which could not amount to more than 25,000 or 30,000 men. THE FEDERALIST No. 46, at 325-27 (J. Madison). That shows that he believed that the militia should consist of all able-bodied men capable of bearing arms: The 1790 census indicated that the population of the United States was 4,000,000, of whom 700,000 were slaves. In THE FEDERALIST No. 29, at 190 (A. Hamilton), Alexander Hamilton, after suggesting that "the people at large" be properly armed, stated that the "army can never be formidable to the liberties of the people while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens." Patrick Henry asserted that "The great object is, that every man be armed ... Every one who is able may have a gun." 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 386 (J. Elliot ed. 1836).

The militia is more than the National Guard. It is the people capable of bearing arms. *State ex rel. McGaughey v. Grayton*, 349 Mo. 700, 163 S.W.2d 335,337 (en banc 1943); *People ex rel Leo v. Hill*, 126 N.Y 497, 27 N.E. 789,790 (1891); *Dunne v. People*, 94 Ill.120, 34 Am. Rep. 213 (1879); Ex parte McCants, 39 Ala. 107,113 (1863). During WWII the people capable of bearing arms served in the militia when the National Guard was federalized and sent overseas. "State Guard Reserve units operated only in their own towns or rural localities. Members served without pay and provided their own uniforms, arms, and ammunition. Many of them belonged to gun clubs..." U.S. Home Defense Forces Study 58 (Office of Sec. of Defense, Mar. 1981).

"[T]here is no constitutional right to be protected by the state against being murdered by criminals or madmen." *Bowers v. DeVito*, 686 F.2d 616,618 (7th Cir. 1982). The police have no duty to protect the individual citizen. *Warren v. District of Columbia*, 444 A.2d 1 (D.C. App. 1981).

6. R. FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON, AND OF LEXINGTON,

CONCORD, AND BUNKER HILL, 95 (6th ed. 1903).

7. Documents Illustrative of the Formation of the Union of the American States, H.R. Doe. No. 398, 69th Cong., 1st Sess., 14-15 (1927) (The confiscation effort in Boston was listed in the "Declaration of the Causes and Necessity of Taking Up Arms" delivered on July 6, 1775, at the Continental Congress); *Nunn v. State*, 1 Ga. 243 (1846) (neither federal nor state government may disarm the individual); *State v. Dawson*, 272 N.C. 535, 159 S.E. 2d 1, 9 (1968).

"Remarks on the first part of the Amendments to the Federal Constitution, moved on the 8th instant In the House of Representatives," *The Federal Gazette and Philadelphia Evening Post*, June 18, 1789, at 2, col. 1, described the Second Amendment:

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

"Great weight has always been attached, and very rightly attached, to contemporaneous exposition." *Cohens v. Virginia*, 19 U.S. 264, 418 (1821). For contemporaneous exposition on the right to possess arms, as enunciated in writings of the post-Revolutionary War era; see Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791*, 10 N. KY. L. REV. 13 (1982).

8. Morton Grove, Ill., Ordinance 81 -11 (June 8, 1981).

9. *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982).

10. For a textual analysis of the 39 state guarantees on arms and criticism of Quilici's interpretation of the state guarantee, see Dowlut & Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U.L. REV. 177 (1983).

11. *Rogers v. United States*, 340 U.S. 367, 375-76 (1951) (Black, J., dissenting). Outright nullification is another technique. When the Prohibition Amendment was still in force a federal commission, which included Harvard Law Dean Roscoe Pound, extolled prohibition, rejected suggestions for the amendment's repeal, and declared "The open saloon in this country is dead beyond any resurrection." WICKERSHAM COMMISSION 71, 83, 127 (1931). Commission member William S. Kenyon opined that an alternative to repeal of the Eighteenth Amendment was nullification. "Nullification is an odious word in this republic and yet the Fifteenth and parts of the Fourteenth Amendment to the constitution have been nullified and such nullification accepted by the people." *Id.* at 133.

However, studies reveal that most people believe they have a constitutional right to own a gun, and that the majority would disobey gun prohibition. Wright, *Public Opinion and Gun Control*, 455 ANNALS 24 (May 1981); *RESTRICTING HANDGUNS-THE LIBERAL SKEPTICS SPEAK OUT* 201 (D. Kates, Jr. ad. 1979). Labeling conduct, which was lawful since the founding of this country, as criminal would make certain "that a sizable portion of the gun-owning population would simply ignore any law interfering with the possession of weapons ... Laws which turn a high percentage of the citizenry into criminals impose serious costs on society over and above those incurred in attempted enforcement." Kaplan, *Controlling Firearms*, 28 CLEV. ST. L. REV. 1, 10 (1979). The willingness of some judges to ignore constitutional rights where a gun is involved is exemplified in *People v. Warren*, 89 A.D.2d 501, 452 N.Y.S.2d 50 (1982), where the appellate

division reversed on first amendment grounds a trial judge's order that defendant contribute \$2,500 to an organization politically advocating gun control. See also Hagan, Gun Law Violators Told to Join Anti-Arms Unit, Cleveland Plain Dealer, Oct. 9, 1982, at 1 (defendant ordered to join National Coalition to Ban Handguns as condition of probation).

12. ARTICLES OF CONFEDERATION art. II.

13. ARTICLES OF CONFEDERATION arts. VI, VIII, IX.

14. THE FEDERALIST NO. 32, at 210 (A. Hamilton).

15. The Amendment Provides: "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." U.S. CONST. amend. X. While the Tenth Amendment has been generally stripped of its vitality, it has been occasionally employed to strike down a statute. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

16. THE FEDERALIST NO. 24, at 161-63 (A. Hamilton); No. 25, at 164-69 (A. Hamilton); No. 41, at 276-81 (A. Hamilton).

17. U.S. CONST. art. 1, * 8, cl. 12.

18. U.S. CONST. art. 1, * 8, cl. 13.

19. U.S. CONST. art. I * 2, cl. 1.

20. U.S. CONST. art. II, * 2, cl. 1.

21. U.S. CONST. art. II, * 2, cl. 2. Of. U.S. CONST. art. I, * 8 cl. 16 (for appointment of militia officers).

22. U.S. CONST. art. I, * 8, cl. 12.

23. As in THE DECLARATION OF INDEPENDENCE 1776, e.g., wherein the colonists complained: "He has kept among us, in times of peace, Standing Armies without the Consent of our Legislature," (Emphasis added),

24. Supra, notes 17, 18. Neither the Articles of Confederation nor any state constitution prohibited standing armies. THE FEDERALIST Nos. 24, 26, 29 addressed the standing army and militia. Only two state constitutions "contained an interdiction of standing armies in time of peace," and they merely stated that "standing armies OUGHT NOT to be kept up, in time of peace ... The other eleven either observed a profound silence on the subject, or had in express terms admitted the right of the Legislature to authorize their existence," as had the English Bill of Rights of 1689. "A good militia would render an army unnecessary, [and] will be a more certain method of preventing its existence than a thousand prohibitions upon paper." [The early state constitutions are found in the multi-volume SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS (Wm. Swindler ed. 1973)]. The 1775 responses of armed citizens at Lexington, Concord, and Boston illustrate the colonial concept of individually armed militiamen and armed citizen opposition to government tyranny.

25. U.S. CONST. art. 1, * 8, cl. 15.

26. U.S. CONST. art. 1, * 8, cl. 16.

27. *Luther v. Borden*, 48 U.S. 1, 45 (1849); *Houston v. Moore*, 18 U.S. 1, 16-17 (1820).

"The power to control and organize the militia resided in the several states at the time of the adoption of the Constitution of the United States and was not taken away by that instrument 	People ex rel. *Leo v. Hill*, 126 N.Y. 497, 27 N.E. 789,790 (1891).

28. THE FEDERALIST No. 8, at 50-51 (A. Hamilton); No. 24, at 158-60 (A. Hamilton); No. 25, at 164-68 (A. Hamilton); No. 26, at 172-74 (A. Hamilton); No. 28, at 180 (A. Hamilton); No. 29, at 184 (A. Hamilton); No. 32, at 187-90 (A. Hamilton); No. 41, at 275-80 (J. Madison); No. 46, at 325 (J. Madison).

29. THE FEDERALIST NO. 28, AT 183-85 (A. Hamilton). 30. THE FEDERALIST No. 43, at 297-301 (J. Madison).

31. THE FEDERALIST No. 8, at 53 (A. Hamilton); No. 46, at 325-27 (J. Madison).

32. B. Schwartz, 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, 235 (1971).

33. U.S. CONST. amend. II.

34. U.S. CONST. amend. III.

35. *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971); L. TRIBE. AMERICAN CONSTITUTIONAL LAW 226 n.6 (1978).

36. *Hamilton v. Regents of University of California*, 293 U.S. 245, 260 (1934).

37. 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 52,169, 206, 417, 423, 444-46, 461 (J. Elliot ed. 1836) [hereinafter cited as ELLIOT'S DEBATES].

38. *Id.* at 440.

39. *Id.* at 441.

40. *Id.* at 47-48.

41. *Id.* at 410-11. See also *id.* at 52,169, 206, 379-81, 416, 423, 441, 445-46.

42. *Id.* at 620.

43. *Id.* at 416.

44. *Id.* at 424 (emphasis added).

45. *Id.* at 90.

46. *Id.* at 419-21.

47. *Id.* at 391.

48. *Id.*

49. *Id.* at 440-41.

50. *Id.* at 206.

51. *Id.* at 602.

52. *Id.* at 442. *Cf.*, *id.* at 380, 444, 446.

53. *Id.* at 444.

54. *Id.* at 446.

55. *Id.* at 150. This also reveals that the Framers recognized the distinction between the terms "the states and the people."

56. *Id.* at 448.

57. U.S. CONST. amend, IX provides: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage other retained by the people." U.S. CONST. amend. X; *supra* note 15.

58. ELLIOT'S DEBATES, *supra* note 37, at 660, proposal "11th."

59. E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 174 (1957). ELLIOT'S DEBATES do not contain the Pennsylvania and Massachusetts mini proposals for a bill of rights.

60. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 16-17 (1820). See also, *supra* notes 27 & 36.

61. *Id.*

62. ARTICLES OF CONFEDERATION art. VI

63. *United States v. Miller*, 307 U.S. 174,178 (1939).

64. *Id.*

65. U.S. CONST. art 1, - 10, cl. 3.

66. 10 U.S.C. ** 311, 3062 (1977).

67. ELLIOT'S DEBATES, *supra* note 37, at 660 (Va.). DUMBAULD, *supra* note 59, at 13 (Penn).

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

69. *Id.* at 265. The Court was referring to the militia clauses of U.S. CONST. art. 1, 8.

70. *Miller*, 307 U.S. at 178.

71. ELLIOT'S DEBATES, *supra* note 37, at 659.

72. *Id.*

73. THE FEDERALIST No. 29, at 188-90 (A. Hamilton); No. 46, at 325-28 (J. Madison).

74. ELLIOT'S DEBATES, *supra* note 37, at 378.

75. *Id.* at 91.

76. *Id.* at 413. See also *Id.* at 381.

77. Documents Illustrative Of The Formation Of The Union Of The American States, *supra* note 7, at 602. See also THE FEDERALIST No. 46 (Madison).

78. Dumbauld, *supra* note 59, at 174, 179, 182, 185, 187, 190, 194, 201, 203. Several ideologies on arms existed in American thought when the Second Amendment was framed. While the emphasis for arms in the Second Amendment is for a militia purpose, self-defense and defense of state and country existed side by side. This view is supported by the various proposals which surfaced in the state conventions.

On Dec. 12, 1787, a minority faction in the Pennsylvania convention was the first to propose a Bill of Rights, making 15 proposals. Number 7 reads:

That the people have a right to bear arms for the defense of themselves and their own State, or the United States, or for the purpose of killing games; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil power.

PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 422 (J. McMaster & F. Stone eds. 1888). This proposal reveals that the common understanding of the term "to bear arms" was not restricted to a militia purpose. The right to bear arms for lawful hunting is presently found in the constitutions of New Mexico and Nevada. NEV. CONST. art. I,*11; N.M. CONST. art. II, *6. It stems partly from fears that game laws could be used to disarm the people. "For prevention of popular insurrections and resistance to the government, by disarming the bulk of the people, which last is a reason oftener meant, then avowed, by the makers of forest or game laws." 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 412 (1771).

On February 6, 1788, a minority faction in the Massachusetts convention made a number of proposals for a Bill of Rights:

And that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United states, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defense of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature, for redress of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers or possessions.

DEBATES AND PROCEEDINGS IN THE MASSACHUSETTS CONVENTION 86-67 (B. Pierce & C. Hale eds. 1856).

The majority in the New Hampshire convention proposed twelve Amendments. The tenth

proposal addressed standing armies and the eleventh freedom of religion and conscience. The twelfth simply stated: "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion." 1 ELLIOT'S DEBATES at 326.

The proposal on arms surfacing in the North Carolina convention copied that of Virginia:

That the people have a right to keep and bear arms; is the proper, natural, and safe defence of a free states; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.

4 ELLIOT'S DEBATES at 244. See ELLIOT'S DEBATES, supra note 37, at 659 the Virginia proposal. The proposals surfacing in New York and Rhode Island similar to those of Virginia and North Carolina, but provided that the militia include "the body of the people capable of bearing arms." 1 ELLIOT'S DEBATES at 327 (N.Y.); id. at 335 (R.I.)

"In framing his propositions [for a Bill of Rights] Madison went over amendments asked for by the conventions of Massachusetts, South Carolina, New Hampshire, Virginia, New York and North Carolina, and by minorities in Pennsylvania and Maryland." 1. BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 264 (1950).

Keeping the various proposals in mind, the language of the Second Amendment, listing a militia purpose on the one hand and a right to keep and bear arms which may not be infringed on the other hand, is broad enough to satisfy the needs concerns on arms expressed in the Virginia, New York, New Hampshire, North Carolina, Rhode Island, Massachusetts, and Pennsylvania convention.

79. ELLIOT'S DEBATES, supra note 37, at 588. Henry also said: "The object is, every man be armed ... Every one who is able may have a gun." Id. at 386. Zachariah Johnson (Va.) said: "The people are not to be disarmed of their weapons. They left in full possession of them." Id. at 646. Johnson unlike Henry, considered a bill of rights unnecessary.

80. Documents Illustrative of the Formation of the Union, supra note 7, at 725.

81. 1 PAPERS OF GEO. MASON 215 (1970).

82. 1 ANNALS OF CONG. 749-50 (1789).

83. E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 299 (19

84. ELLIOT'S DEBATES, supra note 37, at 383.

85. Miller, 307 U.S. at 179 (emphasis added).

86. Id. This broad definition of militia comports with George Mason's definition of the militia. He said:

Mr. Chairman, a worthy member has asked who are the militia, if they be not the people of this country, and if we are not to be protected from the fate of the Germans, Prussians, & c. by our representation? I ask, Who are the militia? They consist now of the whole people, except a few public

officers.

ELLIOT'S DEBATES, *supra* note 37, at 425.

87. 10 U.S.C. * 311 (1977).

88. "A militia, when properly formed, are in fact the people themselves... . [T]he constitution ought to secure a genuine and guard against a select militia..." The militia should include "all men capable of bearing arms ..." 2 THE COMPLETE AN FEDERALIST 341 (H. J. Storing ed. 1981).

89. DUMBAULD, *supra* note 59, at 36.

90. *Supra* note 78.

91. *Id.*

92. *Id.*

93. *Id.*

94. American ideological, constitutional, and philosophical thought was shaped by writings praising the virtues of a militia, as opposed to a standing army, and self defense. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982). An English writer of the period noted that "possession of arms" In itself "Is the distinction between a freeman and a slave." A freeman "ought to have arms to defend himself, and what he possesses, else he lives precariously ... awed into submission to every arbitrary command." J. BURGH, II POLITICS DISQUISITIONS: OR AN INQUIRY INTO PUBLIC ERRORS, DEFECTS, ABUSES 390 (1774). Aristotle noted: "Those who possess arms are the persons who enjoy constitutional rights." THE POLITICS OF ARISTOTLE 114 (Baker, Jr., ed 1962). Furthermore, the people of the Revolutionary War era were faced by a hostile environment and surrounded by Indians, Spaniards, and Frenchmen who resented English intrusion in America. In construing a state constitution which tracks the language of the Second Amendment, it has been recognized that the framers assumed the right to self-defense was protected. *State v. Dawson*, 272 N.C. 535, 159 S.E.2d 1, 9 (1968). The Supreme Court has acknowledged that protected rights are "not confined to the specific terms of the Bill of Rights ... This court, however, has never held that the Bill of Rights or the Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name." *Griswold v. Connecticut*, 381 U.S. 479, 486, 486 n.1 (1965) (Goldberg, J., concurring).

The majority in *Quilici*, 695 F.2d at 270, rejected the claim that "[t]he fact that the right to keep and bear arms is joined with language expressing one of its purposes in no way permits a construction which limits or confines the exercise of that right." The evidence presented here, when coupled with various proposals on arms made in the state conventions, demonstrates the penchant for inaccuracy of the *Quilici* majority. *Supra* note 78.

95. What constitutes constitutionally protected arms can be gleaned from some decisions cited in *Miller*, 307 U.S. at 182 n.3: *Fife v. State*, 31 Ark. 455, 25 Am. Rep. 556 (1876) ("the rifle, of all descriptions, the shot gun, the musket and ... such [pistol] as is in ordinary use, and effective as a weapon of war"); *People v. Brown*. 253 Mich. 537, 235 N.W. 245 (1931) ("ordinary guns, swords, revolvers, or other weapons usually relied upon by good citizens for defense or pleasure"); *State v. Duke*, 42 Tex. 455 (1875) ("shot-gun, the huntsman's rifle, and such pistols at least as are not adapted to being carded concealed").

The Oregon Supreme Court defined what constitutes arms in a constitutional sense in *State v. Kessler*, 289 Or. 359, 614 P.2d 94, 98-99 (1980):

[T]he term "arms" as used by the drafters of the constitutions probably was intended to include those weapons used by settlers for both personal and military defense. The term "arms" was not limited to firearms, but included several hand carried weapons commonly used for defense. The term "arms" would not have included cannon or other heavy ordinance not kept by militiamen or private citizens. [A]dvanced weapons of modern warfare have never been intended for personal possession and protection. When the constitutional drafters referred to an individual's "right to bear arms," the arms used by the militia and for personal protection were basically the same weapons. Modern weapons used exclusively by the military are not "arms" which are commonly possessed by individuals for defense, therefore, the term "arms" in the constitution does not include such weapons. If the text and purpose of the constitutional guarantee relied exclusively on the preference for a militia "for defense of the State," then the term "arms" most likely would include only the modern day equivalents of the weapons used by colonial militiamen.

Militia statutes are another source for determining what the frame considered to be constitutionally protected arms. Such statutes typically referred weapons such as a "musket or fusee ... pike ... Sword ... Lance.... pistol ... case good pistols ... rapier... carbine ... powder ... bullets..." I THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 232 (1894).

Colonial militia statutes considered the pistol a legitimate arm. A 1 Connecticut law referred to "a case of pistols and holsters." 3 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 12,295 (C. Hoadly ed. 1968). 1744 New Jersey law referred to "a Case of Pistols." 6 DOCUMENTS RELATING COLONIAL HISTORY OF NEW JERSEY 193 (W. Whithead ed. 1882). A 1701 Rhode Island law referred to "pistol." 3 RECORDS OF THE COLONY OF RHODE ISLAND 433 (J. Bartlett ed. 1856). A New York law referred to "case of good pistols." 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 232 (1894). A Virginia law referred to "case of pistols well fixed." 3 LAW OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1691 338 Hening ed. 1823). Even the first federal militia statute referred to pistols. 1 Stat. 271 272 (1792). One court has simply stated that the "historical use of pistols as 'arms' offense and defense is beyond controversy ..." and included the pistol in the term "arms." *State v. Kerner*, 181 N.C. 574, 107 S.E. 222, 224 (1921). Thus the claim in *Quilici* 695 F.2d at 270, that "the right to keep and bear handguns is not guaranteed by the Second Amendment" is contrary to history and case law. Under the Illinois constitution the right to keep arms is subject only to the police power. While the Quill majority conceded that possession of handguns is there protected, so long as a firearms are not outlawed it viewed the banning of handguns as a permissible police regulation based on a city council's finding their possession to be inimical to public safety. There was no credible evidence showing the such possession by the residents of that peaceful community is a threat to public safety. Surely no legislative finding based on non-existent evidence should survive constitutional scrutiny. Gun possession in itself obviously constitutes no such threat, nor is crime caused peaceful law-abiding citizens. Can a city's legislative finding not based on relevant local evidence nullify a constitutional right?

96. Militia Act of 1792, 1 Stat. 271 (1792).

97. 10 U.S.C. - 311 (1977).

98. The term "people" is used in the First, Second, Fourth, Ninth, and Tenth Amendments. A word repeatedly used in a constitution will bear the same meaning through the instrument. *Kirkpatrick v. King*, 228 Ind. 236, 91 N.E.2d 785, 789 (1950). The term "people" as used in the constitution is broad and comprehensive, and comprises generally all of the individual inhabitants of the state. *State v. Kofines*, 3 R.I. 211, 80 A. 432, 437 (1911). Also since the Tenth Amendment recognizes a clear distinction between the people and the state, the term "people" in the Second Amendment was meant to guarantee an individual right rather than solely a collective right. George Mason, as quoted in *FERC v. Mississippi*, 456 U.S. 742 (1982) (O'Connor, J., dissenting), contrasted the states with the people or individuals. People of the states equal individualism the state, not the state itself: "Under the existing Confederacy, Congress represents the States not the people of the States their acts operate on the States not on the individuals. The case will be changed in the new plan of Government." *Id.* at 791. Lastly, logic dictates that even a claimed collective right can only be assertible by individuals, for its individuals who make up a collective body.

The individual right to keep and bear arms, however, does not extend to those convicted of violent felonies, the mentally incompetent, and infants. The proposals on arms surfacing in the state conventions, especially that of the Pennsylvania minority, support this view; *supra* note 78. Person not falling within these high-risk categories enjoy a right guaranteed by the command language: "the right of the people to keep and bear arms shall not be infringed."

99. *Miller*, 307 U.S. at 179.

100. *Id.* at 179-80.

101. *Id.* at 180-181. England had suffered successive invasions by foreign peoples, many of whom remained there. Alfred sought to end such invasions by establishing sufficient sea and land forces composed of citizens to prevent and repel future invasions. After the Norman Conquest in 1066 William the Conqueror established a system of land tenure involving the duty of certain citizens periodically to perform military service. By the Assize of Arms in 1181 Henry II required all free laymen to possess arms according to their property status. When England was experiencing a major crime wave of murder, robbery, arson, etc., Edward by the Statute of Winchester in 1285 in order to control and prevent crime required "that every man shall have in his house arms for keeping the peace according to the ancient assize" and hold himself ready for service when summoned; his arms were to be inspected by government agents twice a year; upon death his arms were to remain to his heirs. Other measures were instituted for the prevention of crime and apprehension of criminals, such as keeping of watch and ward, and performing posse and militia duties. See Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 *HASTINGS CONST. L.Q.* 285 (1983); Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 1982 *DET. C.L. Rev.* 789, 794 (1982). (Contrast that statute with the modern day clamor to disarm American citizens and the criminalization of self-defense and possession of the means therefor.)

102. *Id.* at 180.

103. *Id.* at 181.

104. *Id.* at 178. For a list of constitutionally protected arms see *supra* note 95.

105. 48 Stat. 1237 (1934); presently 26 U.S.C. §§ 5801-5872 (1977).

106. The narrow holding in *Miller* can be imputed in part to the defendant's failure to file a brief

before the Supreme Court. The Court thus did not benefit from the traditional adversary process. A full briefing would have shed light on the personal defense aspects of the second amendment guarantee. A historian recently noted: "But advocates of the control of firearms should not argue that the Second Amendment did not intend for Americans of the late eighteenth century to possess arms for their own personal defense, for the defense of their states and their nation, and for the purpose of keeping their rulers sensitive to the rights of the people." Shalhope, *supra* note 91 at 614. "The instrument [the constitution] was not intended to proved merely for the exigencies of a few years, but was to endure through a long lapse of ages..." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816).

107. *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942).

108. The court agreed that "the weapon [a .38 caliber Colt type revolver] may be capable of military use, or while at least familiarity with it might be regarded as of value in training a person to use a comparable weapon of military type and caliber," but the conviction was upheld because the defendant was previously convicted of a violent felony and used the revolver for shooting up a night club. "We are of view that, as applied to the appellant, the Federal Firearms Act does not conflict with the Second Amendment to the Constitution of the United States." *Cases*, 131 F.2d at 922-23 (emphasis added). See also *United States v. Bowdach*, 414 F. Supp, 1346,1353 N.11 (S.D. Fla. 1976).

109. Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865,873 (1960).

110. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1856) (Dred Scott). Congress cannot disarm the people. *Id.* at 450.

111. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION 746 (1833)

(emphasis added).

112. *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977).

113. The Second Amendment would *apply* to the states through incorporation under the Fourteenth Amendment. THE RIGHT TO KEEP AND BEAR ARMS, REPORT OF Sen. Judiciary Subcom. on the Constitution, 97th Cong., 2d Sess., 68 (Feb. 1982). That the Second Amendment should apply to the states is also supported in 1. BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 319, 336 (1965). The fundamental nature of a constitutional guarantee can be gauged by examining state constitutional guarantees. *Benton v. Maryland*, 395 U.S. 784,794-96 (1969). The right to arms is guaranteed in the constitutions of 39 states. Dowlut & Knoop, *supra* note 10. State courts have struck down weapons laws on at least 17 reported occasions: *State v. Blocker*, 291, Or. 255,630 P.2d 824 (1980); *State v. Kessler*, 289 Or. 359,614 P.2d 94 (1980); *City of Lakewood v. Pillow*, 180 Colo. 20,23,501 P.2d 744, 745 (en banc 1972); *City of Las Vegas v. Moberg*, 82 N.M. 626,485 P.2d 737 (N.M. App. 1971); *People v. Nakamura*, 99 Colo.. 262, 62 P.2d 246 (en banc, 1936); *Glasscock v. City of Chattanooga*, 157 Tenn. 518, 11 S.W.2d 678 (1928); *People v. Zerillo*, 219 Mich. 635,189 N.W. 927 (1922); *State v. Kerner*, 181 N.C. 574,107 S.E. 222 (1921); *In re Reilly*, 31 Oh. Dec. 364 (C.P. 1919); *State v. Rosenthal*, 75 Vt. 295,55 A. 610 (1903); *In re Brickey*, 8 Idaho 597,70 P.609 (1920); *Wilson v. State*, 33 Ark. 557,34 Am. Rep. 52 (1878); *Jennings v. State*, 5 Tex. Crim. App. 298 (1878); *Andrews v. State*, 50Tenn. 165, 8Am. Rep. 8 (1871); *Smith v. Ishenhour*, 43 Tenn. 214,217 (1866); *Nunn v. State*, 1 Ga. (1 Kelly) 243 (1846); *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90,13 Am. Dec. 251 (1922).

Prior to adoption of the Fourteenth Amendment, in *Nunn*, 1 Ga. 243, the court applied the Second

Amendment directly to the state:

It is true, that these adjudications are all made on clauses in the State Constitutions: but these instruments confer no new rights on the people which did not belong to them before. When, I would ask, did any legislative body in the Union have the right to deny to its citizens the privilege of keeping and bearing arms in defence of themselves and their country?

We do not believe that, because the people withheld this arbitrary power of disfranchisement from Congress, they ever intended to confer it on the local legislatures.

The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken upon, in the smallest degree; and all this 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.

In summation, the rationale of Nunn, the presence of an arms guarantee in 39 state constitutions, and the history surrounding the Second Amendment applies to the states.

114. The Constitution provides for amending ft. U.S. CONST. art. V.