

The "Assault Weapon" Panic

By David B. Kopel

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Persons who claim that the Second Amendment protects only "sporting guns" implicitly assert that protection of recreational hunting and target shooting was seen by the authors of the Bill of Rights as some particularly important activity to a free society. The framers, as the "sporting gun" theory goes, apparently intended to exalt sports equipment used in recreational hunting to a level of protection not enjoyed by equipment for any other sport. It is true that the framers did see sport hunting as an activity better suited for building good character than other sports. ¹ Nevertheless, it is difficult to believe that the Framers would follow an amendment guaranteeing speech, assembly, and the free exercise of religion with an amendment protecting sporting goods.

Moreover, to the extent that there is a real conflict between public safety and sports equipment, public safety should win. Except for shooting in Department of Civilian Marksmanship programs, which have been created to enhance civil preparedness, recreational use of "assault weapons" does not directly enhance public safety. ² Hence, if "assault weapons" posed a substantial threat to public safety, control would be in order because protecting many people from death is more important than enjoying sports.

One reason that "assault weapon" bans are improper is that government statistics prove that "assault weapons" are no more threat to public safety than any other gun; the "safety vs. sports" conflict is non-existent.

Reflecting a sports-based theory of gun ownership, "assault weapon" prohibitionists claim that these guns have no purpose except to kill. As a factual matter, the claims are incorrect. The guns, as detailed in this section, are frequently used for sports. And ironically, the guns have the distinction of being the only firearms ever designed to wound rather than to kill. But even if the gun prohibitions' claim were correct, it would do nothing to militate for a ban on the guns.

Only if all killing were wrong would a gun made for killing be illegitimate. ³ American law clearly guarantees the natural right to self-defense, including the right to take an aggressors' life if necessary. Semiautomatics do not deserve Constitutional protection because they are sometimes used for hunting. Rather, they deserve protection because they are militia guns _ because they are made for personal and national defense, as the next section elaborates.

The Second Amendment of the United States Constitution states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." ⁴

Supports of "assault weapon" prohibition argue that the Second Amendment only grants to states a right to maintain a militia. Under this theory, the "right of the people to keep and bear arms" is infringed by laws which disarm states, but not laws which disarm people. The "right of the people" is said to be a "collective right," which (like "collective property" in Communist nations) can never be possessed by any individual

because it belongs to everyone at once.

In contrast, the theory which has been accepted six times by the Supreme Court, 5 is compelled by the text of the Second Amendment itself, 6 is held by approximately 89% of the American people, 7 is supported by the large majority of scholarship, 8 and which comports with original intent 9 is the individual rights theory. Under this theory, the "right of the people" to bear arms recognizes a right of individual people to own guns. 10 The discussion below attempts to show how the framers' objection of protecting the states' "well-regulated militias" was carried out by the recognition of "the right of the people to keep and bear arms."

This Issue Paper has thus far presented two contrasting views of semiautomatic "assault weapons." This Paper has argued that so-called "assault weapons" are no more deadly or dangerous than other semiautomatics and other guns. If this Paper's contention is correct, then an "assault weapon" ban would violate the right to bear arms because it would ban certain guns which are not logically different from other guns. The ban would also violate the equal protection clause of the Fourteenth Amendment, which requires that legislative classifications be rational, and based on real differences, rather than on hysteria or misinformation.

In contrast, gun prohibition advocates suggest that the semiautomatics which they call "assault weapons" are true "weapons of war" and not "sporting weapons." If the prohibitionists' theory is correct, then "assault weapon" prohibition is again unconstitutional, for the historical and judicial record shows that the core aim of the Second Amendment was to ensure that weapons of war would be in the hands of ordinary American citizens. The history and evolution of the Second Amendment clearly shows that weapons of war _ and not sports equipment _ are at the heart of the right to bear arms.

In 1982, the Senate Subcommittee on the Constitution evaluated the historical record, and unanimously concluded that the Second Amendment recognizes an individual right to bear arms. The Subcommittee noted that when James Madison drafted the second amendment, he "did not write upon a blank tablet." 11 The British history that predated the Bill of Rights affirmed not only an individual right, but also a duty, to own firearms. 12 Britain's great expositor of the common laws, Sir William Blackstone, called the right to bear arms the "fifth auxiliary right of the subject," which would allow citizens to vindicate all the other rights. 13 He explained the right as an instrument to permit violent revolution: "in cases of national oppression, the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people." 14 The duties for which the British right to bear arms was intended _ national defense against unjust rulers, national defense against foreign governments, and local defense against crime _ obviously required the use of anti-personal weapons, and not sports equipment.

The English colonies in America quickly established an individual right and duty to bear arms that paralleled the developments in England. 15 In 1658, the Virginia House of Burgesses required every householder to have a functioning firearms. 16 The legislatures in Virginia and the other colonies did not require persons to have guns so that those persons could enjoy a right sporting life. Instead, the purpose was to have a citizenry which could be called to militia duty to fight in numerous Indian wars. 17 Additionally, in both Great Britain and America, citizens were required to participate in anti-crime patrols such as night watch and to obey the commands of sheriffs to pursue fleeing felons. Lastly, as a practical matter, citizens had to possess arms for their own personal protection from Indians or criminals, since public safety agencies were few and far between.

The weapons that were most useful for these colonial purposes were weapons of war, and not guns designed for sports (although in practice there was no distinction, and almost all guns served multiple purposes).

Colonial recognition of the right and duty to bear arms helped precipitate the break with England. When the number of British soldiers increased in the colonies, colonists asserted their right to own firearms in order to defend their liberties. As the New York Journal Supplement proclaimed in 1769, "It is a national

right which the people have reserved for themselves, confirmed by their Bill of Rights, to keep arms for their own defense.

The outbreak of hostilities came at Lexington and Concord, when the British commander from Boston was informed that the Americans owned cannons, and the British marched on Concord to seize the American armory there. 18 (It was also a dispute over weapons of war _ and not sporting guns _ that sparked the Texan Revolution against Mexico. When Mexican dictator Santa Ana's forces attempted to confiscate a small cannon from settlers in Gonzales, the settlers raised a flag that said "Come and Take It," and the Texas Revolution began. 19)

The Revolutionary War strengthened the colonists' beliefs about the importance of an individual right to bear arms. 20 The militia arose wherever the British deployed. Thus, the American side developed a tactical mobility to match the British mobility at sea. As historian Daniel Boorstin put it, "The American center was everywhere and nowhere _ in each man himself." 21 With every American a militiaman, the British could triumph only by occupying the entire United States, and that task was far beyond their manpower resources. The Americans never really defeated the British; the war could have continued long past Yorktown. After seven years of winning most of the battles but getting no closer to winning the war, the British simply gave up.

The guns with which the American militia helped win the American Revolution were weapons of war. Particularly effective was the long-range Kentucky Rifle, which enabled American sharpshooters to snipe at British officers.

After the successful revolution the maintenance of a citizen militia was a primary concern of the framers of the Constitution. 22 General Washington's Inspector General, Baron Von Steuben, proposed a "select militia" of 21,000 that would be given government issue arms and special government training. 23 When the proposed Constitution was presented for debate, anti-Federalists complained that it would allow for the withering of the citizen militia in favor of the virtual standing army of a "select militia." 24 Richard Henry Lee, in his widely-read Letters from the Federal Farmer to the Republican, warned ratifiers that a select militia had the same potential to deprive civil liberties as a standing army, for if "one fifth or one eighth part of the people capable of bearing arms should be made into a select militia," the select militia would rule over the "defenseless" rest of the population. Therefore, wrote Lee, "the Constitution ought to secure a genuine, and guard against a select militia... 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. 25

Federalists promoting the new Constitution allayed fears of select militias and Congress' broad powers to "raise armies" under Article I, section 8. They reasoned that Americans would have nothing to fear from federal power since American citizens were universally armed. 26 Noah Webster, in the first major Federalist pamphlet, attempted to calm Pennsylvania anti-Federalists:

Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any bands of regular troops that can be, on any pretense, raised in the United States. 27

The Federalist Papers looked to the state militias, comprised of the armed populace, as the ultimate check on government. As James Madison put it, "the ultimate authority... resides in the same people alone." Madison predicted that no federal government could become tyrannical, because if it did, there would be "plans of resistance" and an "appeal to trial by force." A federal standing army would surely lose that appeal, because it "would be opposed by a militia amounting to near half a million citizens with arms in their hands." Exalting "the advantage of being armed, which the Americans possess over almost every other nation," Madison contrasted the American government with the European dictatorships, which "are afraid to trust the people with arms. 28

Alexander Hamilton explained that "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..." 29 Hamilton reassured skeptical anti-Federalists that no standing army, however large, could oppress the people, for the federal soldiers would be opposed by state militias consisting of "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 rights and those of their fellow citizens." 30

Many delegates to the state conventions that ratified the Constitution expressed discontent over the Federalists' assurances about existing protection of the right to possess arms. 31 New Hampshire provided the key ninth vote that ratified the Constitution only after receiving assurance that a Bill of Rights would be drafted with a protection for the right of individuals to own firearms. 32 The New Hampshire delegates suggested that the new Bill of Rights provision be worded as follows: "Congress shall never disarm any citizen unless such as are or have been in Actual Rebellion. 33

At the Virginia convention, Patrick Henry had stated, "Guard with jealous attention the public liberty. Suspect everyone who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are ruined... The great object is that every man be armed... Everyone who is able may have a gun." 34 During the ratification process five state conventions demanded protection of the right of citizens to bear arms, more than demanded protection of free speech. 35 The sentiment of Patrick Henry and the other state convention delegates was not fear that the federal government might regulate sports equipment too severely.

The first Congress delegated the duty of writing a Bill of Rights to James Madison. Madison obtained copies of state proposals and attempted to combine them in a succinct passage that all state delegates would accept. 36 The original intent of the second amendment remained consistent with the intentions of the states that demanded it.

Madison's use of the phrase "well-regulated militia" was not a code word for the National Guard (which did not even exist). The phrase was not esoteric, but had a commonly-accepted meaning. Before independence was even declared, Massachusetts patriot Josiah Quincy had referred to "a well-regulated militia composed of the freeholder, citizen and husbandman, who take up their arms to preserve their property as individuals, and their rights as freemen." 37 "Who are the Militia?" asked George Mason of Virginia. He answered his own question: "They consist now of the whole people." 38 The same Congress that passed the bill of Rights, including the Second Amendment and its militia language, also passed the Militia Act of 1792. That act enrolled all able-bodied white males in the militia and required them to own arms.

Although the requirement to arm no longer exists, the definition of the militia has stayed the same; section 311(a) of title 10 of the United States Code declares, "The militia of the United States consists of all able-bodied males at least 17 years of age and... under 45 years of age." The next section of the code distinguishes the organized militia (the National Guard) from the "unorganized militia." The modern federal National Guard was specifically raised under Congress's power to "raise and support armies," not its power to "Provide or organizing, arming and disciplining the militia." 39

James Madison wrote the Second Amendment in order to prevent the right to bear arms from vesting only in "select militias" like state national guard units. The Second Amendment was written to secure an individual right to bear arms that provided an ultimate check on government and any of its "select" militias. 40

The core of the Second Amendment therefore was that state militias _ comprised of individual citizens bringing their own guns to duty _ would have the power to overthrow a tyrannical federal government and its standing army. The weapons that would be most suited to overthrow a dictatorial federal government would, of course, be weapons of war, and not sports equipment.

To persons accustomed to think of the "right to bear arms" as a privilege to own sporting goods, it must

seem incredible that the authors of the Second Amendment meant to ensure that the American people would always own weapons of war. But that is precisely what the historical record demonstrates. The only commentary available to Congress when it ratified the Second Amendment was written by Tench Coxe, one of James Madison's friends. Coxe explained:

The powers of the sword are in the hands of the yeomanry of America from sixteen to sixty. The militia of these free commonwealths, entitled and accustomed to their arms, when compared with any possible army, must be tremendous and irresistible. Who are the militia? Are they not ourselves... Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birth-right of an American... [T]he unlimited power of the sword is not in the hands of either the federal or state governments, but, where I trust in God it will ever remain, in the hands of the people. 41

This original intent of the Second Amendment has nothing to do with sports, and only a little to do with personal defense against criminals. The text of the Second Amendment itself highlights the implausibility of the claim that the Amendment refers to sporting equipment rather than to devices made for injuring or killing other persons. "Arms," says Webster's Dictionary are "a means (as a weapon) of offense or defense; esp. FIREARM." 42 Sporting equipment that is not a means of offense or defense is not within the category of "arms," and hence cannot be what the "right to bear arms" refers to. The Second Amendment guarantees a popular militia in order to provide for "the security of a free state." _ ensuring that there will always be a force capable of overthrowing a domestic tyrant, or of resisting an invasion by a foreign one. The weapons best suited for this purpose are not weapons particularly suited for duck hunting; the weapons at the heart of the Second Amendment are weapons of war.

Under some theories of Constitutional interpretation, the language, common understanding, and intent of Constitutional provisions may be ignored by courts based on a judge's personal determinations of appropriate social policy. For example, when a lower federal court upheld Morton Grove's handgun prohibition, the court declared that the intent of the Second Amendment was "irrelevant." 43

The United States Supreme Court, however, has never claimed that original intent is "irrelevant," and the thrust of the most recent Supreme Court jurisprudence is to place the greatest emphasis upon the people's intent and the text of the Constitution. The leading (and only) Supreme Court case dealing with which weapons are protected by the Second Amendment falls squarely within the tradition of textual analysis and original intent.

In the 1939, case *United States v. Miller*, 44 Jack Miller was charged under section 11 of the 1934 "National Firearms Act" with the unlawful transportation of an unregistered "sawed-off" shotgun in interstate commerce. 45 The federal district court quashed the indictment on the grounds that section 11 of the National Firearms Act violated the Second Amendment. 46 The prosecutor appealed directly to the Supreme Court, and the Court produced its most thorough analysis of the meaning of the Second Amendment. 47 Instead of defining the militia as a select group such as the national guard, the Court unanimously defined "militia" as "all males physically able of acting in concert for the common defense." 48 The Court went on to note that these militiamen were expected "to appear bearing arms supplied by themselves." 49

Even though the Court recognized an individual right to bear arms, the justices still had to decide what types of "arms" individuals had a right to bear. The Court suggested that militia arms would consist of "the kind in common use at the time." 50 that had "some reasonable relationship to the preservation of efficiency of a well-regulated militia." 51 Since the defendant had not briefed this issue (he had disappeared while free pending appeal), the Court was presented with no evidence that a sawed-off shotgun had any value to the militia. The Court wrote:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the second amendment guarantees the right to

keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. 52

Although the Court held that this particular case did not present a violation of the Second Amendment, the unanimous opinion recognized an individual right to bear arms which were "part of the ordinary military equipment" or which "could contribute to the common defense" _ weapons of war. For the anti-gun lobbies to mouth their epithet "weapons of war" to concede that semiautomatics are protected arms under the Supreme Court's Miller test.

Concluding that the Second Amendment protects the right of American people to own arms which have a reasonable relationship to the maintenance of a well-regulated militia _ that is, weapons of war _ does not prove that all "assault weapon" prohibitions are necessarily unconstitutional. The Second Amendment, like the rest of the Bill of Rights, was historically seen as only a limit on federal power, and not a restraint on state or local governments. Thus, the Second Amendment, standing alone, would only prevent federal "assault weapon" prohibitions or other infringement.

The individual rights recognized in the Bill of Rights have only become enforceable against state and local governments through the 14th Amendment, which forbids states (and localities, which are subdivisions of states) to violate fundamental human rights.

In the 1876 case *United States v. Cruikshank*, the Supreme Court ruled the right peaceably to assemble and the right to bear arms were not protected against state interference by the Fourteenth Amendment's requirement that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." 53 The court reasoned that the clause only applied to "privileges or immunities" that arose from citizenship in the United States (such as the right to interstate travel). The Court said the peaceable assembly and bearing arms were not rights which arose as a result of American citizenship; rather, they were fundamental human rights which were found "wherever civilization exists." The First and Second Amendments, the Court said, had not granted a right to assemble or a right to bear arms, but had merely recognized the existence of those rights. 54

When California's "assault weapon" prohibition was challenged as violating the Second Amendment, the federal trial court, relying on *Cruikshank*, ruled that the Second Amendment could not be violated by state-level gun control, since the Second Amendment only restricts the federal government. 55

While *Cruikshank* has never been formally overruled, the federal trial court's reliance on it was dubious. *Cruikshank* dates from an era when the Supreme Court refused to hold any of the freedoms recognized in the Bill of Rights enforceable against the states. In the 20th century, the Supreme Court, while never overruling the 19th century "privileges and immunities" decisions, has relied on another provision of the 14th Amendment to make the Bill of Rights enforceable against the states.

The 14th Amendment forbids any state to deprive a person of "life, liberty, or property without due process of law." The Court has interpreted this phrase to mean that there can be no state deprivations of life, liberty, or property which violate certain rights recognized by the Bill of Rights. Thus, in *DeJonge v. Oregon*, the Court held that the First Amendment right to peaceably assemble was made applicable against the states by the Fourteenth Amendment's "due process" clause. In *Moore v. East Cleveland*, the Court stated, in dicta, that the right to bear arms was also enforceable against the states via the 14th Amendment's due process clause. 56 *Moore v. East Cleveland* more closely followed the intent of the framers of the 14th Amendment than did the *Cruikshank* case, since the historical record shows that the right to bear arms was one of the rights which the framers were most intent on making applicable against state government. 57

A distinct Constitutional provision, not discussed by the Fresno court, provides an additional reason to doubt the Constitutionality of state (or local) gun prohibitions. Article I, section 8 of the Constitution grants the Congress the authority to call forth the militia into national service. Hence, state gun prohibitions deprive the federal government of its ability to summon a militia. In *Presser v. Illinois*, 58 the

Supreme Court stated:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states, and in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provisions in question [the Second Amendment] out of view, prohibit the people from keeping and bearing arms... 59

Because the Fresno court ignored the clear language of Presser, and did not follow the modern Supreme Court's approach to the 14th Amendment, the case does not appear to be particularly well-reasoned. Regardless of whether the Fresno decision is eventually upheld on appeal, the case is relevant only in the handful of states, including California, which do not have a right to bear arms in their own state Constitution, and which must rely solely on the Second Amendment for protection of citizens' right to bear arms.

To the extent that state Supreme Courts have confronted the issue of what types of arms are protected by the state Constitutional right to bear arms, the decisions militate against the Constitutionality of "assault weapon" prohibition.

In 1846, the Georgia" Supreme Court found that, even in the absence of an explicit right to bear arms in the state Constitution, the Georgia legislature had no power to interfere with the right of Georgia citizens to "keep and bear arms of every description." 60

After the Civil War, courts addressed the implications of a developing weapons technology. The decades immediately after the Civil War are particularly significant for evaluating the "assault weapon" issue, because it was in these decades that courts confronted rapid-fire, high-capacity weapons capable of causing mass destruction.

The Civil War was by far American's bloodiest war; no war in American history remotely approaches the mass destruction and widespread death of that terrible conflict. The war witnessed the widespread use of the first type of repeating firearm (the revolver, invented several years before by Col. Samuel Colt) and the Gatling Gun, a hand-cranked ancestor of the machine guns. In the two decades following the war, the high-capacity, rapid-fire rifle (such as the Sharps, Winchester, and Henry models) became ubiquitous. The courts in the post-war years were more personally aware of the killing potential of rapid-fire, high-capacity weapons than any American courts have been before or since.

In the 1871 case *Andrews v. State*, 61 the Tennessee Supreme Court held that, although the Tennessee Constitution did not protect "every thing that may be useful for offense or defense," the Constitution did protect "the rifle of all descriptions, the shotgun, the musket, and repeater." 62 In 1876, the Arkansas Supreme Court stated that protected "arms" included "the unusual arms of the citizen of the country." 63 The court agreed with the Tennessee court's listing of these arms and noted the addition of the "army and navy repeaters, which, in recent warfare, have very generally superseded the old-fashioned holster, used a weapon in the battles of our forefathers." 64 These early courts _ which were cited by the U.S. Supreme Court in *Miller*_ found that personal sidearms, including new repeating firearms, fell within the reach of constitutional provisions drafted in times of more simplistic weapons technology.

In 1980, the Oregon Supreme Court approached more modern weapons developments in a similar manner. The court noted that since the era of the Civil War, "The development of powerful explosives, ... combined with the development of mass produced metal parts, made possible the automatic weapons, explosives, and chemicals of modern warfare." 65 The Oregon Court explained that "the term 'arms' as used by the drafters of the constitution probably was intended to include those weapons used by settlers for both personal and military defense... The term 'arms' would not have included cannon or other heavy ordnance not kept by militiamen or private citizens." 66 The court concluded that such modern heavy ordnance, used exclusively by the military, would not be considered individual "arms" deserving of constitutional protection. 67 The Attorney General of Oregon has stated that so-called "assault weapons" fall within the

scope of arms protected under the Oregon Supreme Court's test. 68

Some proponents of "assault weapons" legislation have argued that even if one recognizes an individual right to bear arms, such guns are not the type of arms that individuals have a right to bear. Although the framers might have intended that citizens have a right to possess the single-shot rifles, shotguns, and pistols of their day, the gun prohibitionists assert that the Second Amendment never intended to give citizens the right to own modern small arms such as military-style semiautomatics. 69

It is true that the Second Amendment never intended to protect the right to own semiautomatics (since such guns did not exist), just as they never intended to protect the right to talk privately on a telephone or to broadcast news on a television (since telephones and televisions did not exist either). To assert that Constitutional protections only extend to the technology in existence in 1791 would be to claim that the First Amendment only protects the right to write with quill pens and not with computers, and that the Fourth Amendment only protects the right to freedom from unreasonable searches in log cabins and not in homes made from high-tech synthetics.

The Constitution does not protect particular physical objects, such as quill pens, muskets, or log cabins. Instead, the Constitution defines a relationship between individuals and the government that is applied to every new technology. For example, in *United States v. Katz*, the Court applied the privacy principle underlying the Fourth Amendment to prohibit warrantless eavesdropping on telephone calls made from a public phone booth _ even though telephones had not been invented at the time of the Fourth Amendment. 70 Likewise, the principle underlying freedom of the press _ that an unfettered press is an important check on secretive and abusive governments _ remains the same whether the press uses a Franklin press to produce a hundred copies of a pamphlet, or laser printed to produce a hundred thousand.

It is true that an individual who misuses a semiautomatic today can shoot more people than could an individual misusing a musket 150 years ago. 71 Yet if greater harm were sufficient cause to invalidate a right, there would be little left to the Bill of Rights.

Virtually every freedom guaranteed in the Bill of Rights causes some damage to society, such as reputations ruined by libelous newspapers, or criminals freed by procedural requirements. The authors of the Constitution knew that legislatures were inclined to focus too narrowly on short term harms: to think only about society's loss of security from criminals not caught because of search restrictions; and to forget the security gained by privacy and freedom from arbitrary searches. That is precisely why the framers created a Bill of Rights _ to put a check on the tendency of legislatures to erode essential rights for short-term gains.

Since the Constitution was adopted, virtually all of the harms that flow from Constitutional rights have grown more severe:

* Today, if an irresponsible reporter betrays vital national secrets, the information may be in the enemy's headquarters in a new minutes, and may be used to kill American soldiers and allies a few minutes later. Such harm was not possible in an age when information traveled from America to Europe by sailing ship.

* Similarly, an inappropriate leak of information in a superpower crisis could harden negotiating positions, leading at the worst to nuclear war. Previously, a leak might precipitate a war, but could not destroy the planet.

* As Gary Hart learned the hard way, a single act of gutter journalism can wipe out in a week a decades-long career of public service. In the early years of the Constitution, journalists also printed stories of sex and politics, but the slower movement of information kept one tale of indiscretion from growing to such destructive proportions.

* Correspondingly, a show like "60 Minutes" can wrongfully ruin a person's reputation throughout the nation, a feat no single newspaper could have accomplished before.

* In earlier times, strong community ties and traditional values made young people less susceptible to religious charlatans. But today, freedom of religion can kill people, as we learned at Jonestown.

* Criminal enterprises have always existed, but the proliferation of communications and transportation technologies such as telephones and automobiles makes possible the existence of criminal organizations of vastly greater scale _ and harm _ than before.

The principle underlying the Second Amendment is resistance to federal tyranny. The method of achieving the Second Amendment's goal is for individual citizens to possess arms equal to those possessed by the federal standing army. If the federal standing army possesses muskets, then citizens may own muskets. If the federal standing army own M16 assault rifles, then citizens may own M16 assault rifles.

Persons who find the argument above to be unpersuasive are not without a remedy. If the Constitutional right to bear arms has become inappropriate for modern society, because the people are so dangerous and government so trustworthy, then a Constitutional amendment to abolish or limit the right may be proposed. (Although given the fact that only two states have enacted "assault weapon" legislation, it is doubtful that a proposed amendment would be ratified by many states.) But it is not permissible for legislators or courts to flout an existing Constitutional guarantee, even if they personally think it unimportant. 72

So-called "assault weapons," particularly the politically incorrect semiautomatic rifles, are well-suited for personal defense against criminals. 73 More significantly, from a Second Amendment viewpoint, they are well-suited for community defense against dangers both internal and external.

Americans watched in horror when television showed the Cambodian school children killed by a deranged criminal with a Kalshnikov rifle, in a Stockton, California, schoolyard in January 1989. America's "Drug Czar" William Bennett informed the American people the Kalashnikovs were guns made only for drug traffickers, like the Crips and Bloods gangs in Los Angeles. Through Bennett and the television networks, America heard one story about semiautomatic rifles. Another, equally dramatic story, never was heard outside Los Angeles. In May 1988, the Bloods attacked a Los Angeles housing project containing Cambodians. The Cambodians fought back with M1s and Kalashnikovs and drove away the Bloods. 74

To defend a neighborhood from Bloods on Piru Street, Los Angeles, "some block clubs had to resort to armed guerrilla warfare," reports The Washington Times. One block club leader met with Mayor Bradley, the Police Chief Daryl Gates, and with the city attorney (all vocal gun prohibitionists) and achieved nothing. Drug dealers continued to shoot at block club members, but now the block club fired back. After club leader Norris Turner shot and wounded two gang members who had tried to ambush and kill him on the street, Turner threatened to call the media. Police presence increased, and the neighborhood was cleaned up. 75

The War on Drugs took on a new meaning in September 1989 in Tacoma, Washington, where angry citizens gathered for an anti-crime rally. Spurred by the rally, an off-duty sergeant organized a dozen off-duty Army Rangers and went into free-fire combat with neighborhood crack dealers. Up to 300 rounds of handgun, shotgun, and semiautomatic rifle fire were exchanged. No fatalities resulted, and Washington Governor Booth Gardner praised the gunmen: "They were very good shots. They weren't shooting to harm. They were shooting to make a point, I think." The police mediated a truce, whereby the drug dealers agreed to stop dealing in the streets, and the neighborhood agreed to put away its guns. 76

Citizens of the United States have often used personal sidearms to aid law enforcement officials in restoring public order. 77 In 1977, a blizzard in Buffalo, New York, and a flood in Johnstown, Pennsylvania, both prompted local officials to call for citizens to arm themselves and restore the public order. 78 In other situations, as in the aftermath of an earthquake or hurricane, there may not even be any public officials around to urge citizens to protect themselves. In the chaotic frontier circumstances of an area after a natural disaster _ or the modern inner city under day-to-day conditions _ a reliable, rugged,

easy to operate firearms is the type of arm which is most necessary for the protection of life.

The most recent instance in which people of the United States mobilized "bearing arms supplied by themselves and of the kind in common use at the time" to defend their nation was during the World War II.

After Pearl Harbor the citizen militia was called to duty. Nazi submarines were constantly in action off of the East Coast. On the West Coast, the Japanese seized several Alaskan islands, and strategists wondered in the Japanese might follow up on their dramatic victories in the Pacific with an invasion of the Alaskan mainland, Hawaii, or California. Hawaii's governor summoned armed citizens to man checkpoints and patrol remote beach areas. 79 Maryland's governor called on "the Maryland Minute Men," consisting mainly of "members of Rod and Gun Clubs, of Trap Shooting Clubs and similar organizations," for "repelling invasion forays, parachute raids, and sabotage uprisings," as well as for patrolling beaches, water supplies, and railroads. Over 15,000 volunteers brought their own weapons to duty. 80 Gun owners in Virginia were also summoned into home service. 81 Americans everywhere armed themselves in case of invasion. 82

After the National Guard was federalized for overseas duty, "the unorganized militia proved a successful substitute for the National Guard," according to a Defense Department study. Militiamen, providing their own guns, were trained in patrolling, roadblock techniques, and guerrilla warfare. 83 The War Department distributed a manual recommending that citizens keep guerrilla weapons on hand. 84

Certainly the militia could not defend against intercontinental ballistic missiles, but it could keep order at home after a limited attack. In case of conventional war, the militia could guard against foreign invasion after the army and the National Guard were sent into overseas combat. Especially given the absence of widespread military service, individual Americans familiar with using their private weapons provide an important defense resource. 85 Canada already has an Eskimo militia to protect its northern territories. 86

It has been more than 40 years since the last invading troops left American soil. No invasion is plausible in the foreseeable future. Is it now possible to state with certainty that America is so omnipotent, and the nuclear umbrella so perfect that America will never again need the militia, and that Americans should jettison their tradition of learning how to use arms that would be useful for civil defense?

In the unlikely event that the United States were ever subjugated by a foreign or domestic tyrant, could citizens actually resist? Recent history suggests that the answer is "yes".

Of course, ordinary citizens are not going to grab their "Saturday night specials" (or even their "assault weapons") and charge into oncoming columns of tanks. Resistance to tyranny or invasion would be a guerrilla war. In the early years of such a war, before guerrillas would be strong enough to attack the occupying army head on, heavy weapons would be a detriment, impeding the guerrillas' mobility. As a war progresses, Mao Zedong explained, the guerrillas use ordinary firearms to capture better small arms and eventually heavy equipment. 87

The Afghan mujahedeen were greatly helped by the belated arrival of Stinger anti-aircraft missiles, but they had already fought the Soviets to draw using a locally made version of the outdated Lee-Enfield rifle. 88 One clear lesson of this century is that a determined guerrilla army can wear down an occupying force until the occupiers lose spirit and depart _ just what happened in Ireland in 1920 and Palestine in 1948 (and America in 1783). As one author put it: "Anyone who claims that popular struggles are inevitably doomed to defeat by the military technologies of our century must find it literally incredible that France and the United States suffered defeat in Vietnam... that Portugal was expelled from Angola; and France from Algeria." 89

If guns were not useful in a popular revolution, it would be hard to explain why dictators as diverse as Ferdinand Marcos, Fidel Castro, Idi Amin, and the Bulgarian communists have ordered firearms confiscation upon taking power. 90

In sum, American citizens can and do use "assault weapons" successfully to protect themselves against domestic chaos when local police forces cannot or will not protect them. In the unlikely event that Americans were threatened by hostile foreign or domestic governments, "assault weapons" would be useful, and citizen resistance might well prove successful.

If "military" arms, such as the assault rifles carried by the federal standing army, are precisely what the Constitution protects, it may be asked where the upper boundary lies _ at grenade launchers, anti-aircraft rockets, tanks, battleships, or nuclear weapons.

To begin with, the phrase "keep and bear" limits the type of arm to an arm that an individual can carry. Things which an individual cannot bear and fire (like crew-served weapons) would not be within the scope of the Second Amendment. Nor would things which bear the individual, instead of being borne by him or her. Thus, tanks, ships, and the like would be excluded.

In addition, if a hand-carried weapon is not "part of the ordinary military equipment" (as the Supreme Court put it in *Miller*), then the weapon might not have a reasonable relationship to the preservation of a well-regulated militia; hence its ownership would not be protected. Since American soldiers do not carry nuclear weapons, such weapons would not be within the scope of the Second Amendment. Perhaps the Supreme Court will one day further elaborate the boundaries of the *Miller* test.

Soldiers do carry real assault rifles (namely M16s), and it would therefore seem that such weapons would fit with the *Miller* test. In early 1991, the Supreme Court declined to hear a case involving the prohibition of machine-guns produced after 1986. *Handgun Control, Inc.* immediately announced that the Supreme Court had validated the ban, although the Court had done so such thing. As the Supreme Court itself has stated, however, a denial of review has no presidential effect and is not a decision on the merits. ⁹²

As this Issue Paper is written, the Constitutionality of the 1986 federal ban is unclear. In the case that the Supreme Court declined to hear, the federal trial court had interpreted the relevant statute as not being a ban, but only a licensing requirement. The trial court had said that if the statute were to be read as a ban, it would be unconstitutional. ⁹³ The 11th Circuit Court of Appeals reversed on the statutory interpretation issue, and did not address the Constitutional question.

In the meantime, a federal district court in Illinois found the ban unconstitutional on the grounds that Congress' enumerated powers did not include the banning of firearms. ⁹⁴

Even if the machine gun issue remains in a Constitutional limbo, the semiautomatic issue need not. The bias on which machine guns may be considered distinguishable from other guns is their capability of rapid, automatic fire. All semiautomatic firearms lack this capability, and according to the Bureau of Alcohol, Tobacco and Firearms, it is quite difficult to convert semiautomatics to automatic. ⁹⁵ In fact, semiautomatic rifles may fire less rapidly than traditional pump action shotguns, ⁹⁶ and there is no dispute that traditional pump action shotguns fall within the scope of the right to bear arms.

The "assault weapon" controversy wears the mask of a crime control issue, but it is in reality a moral issue. Regardless of whether "assault weapons" are a serious crime problem, and regardless of whether prohibitions will reduce criminal use of the guns, such weapons have no legitimate place in a civilized society _ or so many gun prohibitionists feel. These prohibitionists do not trust their fellow citizens to possess "assault weapons"; but astonishingly, they do trust the government to possess such guns.

"Government is the great teacher," said the late Justice Brandeis. What lesson does government teach when police chiefs insist that "assault weapons" have no reasonable defensive use, and are evil machines for killing many innocent people quickly _ but that prohibitions on these killing machines should not apply to the police? Are massacres acceptable if perpetrated by the public sector? ⁹⁷

The exemption cannot be logically defended. If "assault weapons" can legitimately be used for police

protection of self and others, then a ban on those guns cannot be Constitutionally applied to ordinary citizens, because ordinary citizens have a right to bear arms for personal defense, and like police, face a risk of being attacked by criminals. (And unlike police, ordinary citizens cannot make a radio call for backup that will bring a swarm of police cars in seconds.)

Conversely, are "assault weapons," as some police administrator insist, only made for slaughtering the innocent? If so, such killing machines have no place in the hands of domestic law enforcement. Unlike in less free countries, police in this country do not need highly destructive weapons designed for murdering innocent people.

The arrogance of power manifested by police chiefs such as Daryl Gates in their drive to outlaw semiautomatics for everyone but themselves is reason enough for a free society to reject gun prohibition.

98

In Maryland, the police staged an illegal warrantless raid on gun rights group's office the night before a gun control referendum. 99 The pro-Second Amendment protesters picketed at the state capitol, Governor Donald Schaefer's police photographed them. 100 The police-state tactics in Maryland led one newspaper (which favors gun control as a substantive matter), to note "Just because you're paranoid doesn't mean they're not out to get you." The paper labeled the tactics of Governor Schaefer and his police (including the illegal warrantless raid, the photographing of protesters, and a late night surprise visits to a critic's home) a validation of the paranoid world-view allegedly held by proponents of the rightt bear arms. 101 Is the Maryland police hierarchy the kind of government agency that should be trusted to disarm citizens, while it keeps "assault weapons" for itself?

After the Tiananmen Square massacre, the response of the National Rifle Association was to purchase print advertisements suggesting the core purpose of the Second Amendment is resistance to tyranny. The response of Chicago police chief LeRoy Martin _ a vociferous advocate of gun prohibition _ was to accept a paid trip to China from the Communist government. Upon returning, Chief Martin pronounced his admiration for the Chinese system of criminal justice, and suggested that in the United States zones should be created where the Constitution would be suspended. Is LeRoy Martin the kind of police chief who should be trusted to enforce an "assault weapon" ban, while he keeps such weapons for himself?

Of course even despite the excesses of the drug war, most of the Bill of Rights remains intact. Elections will take place as scheduled in 1992, and there is no plausible claim that it would be appropriate to take up arms against the federal government. Can the gun prohibition movement guarantee that this happy state will persist forever?

In 1900, Germany was a democratic, progressive nation. Jews living there enjoyed fuller acceptance in society then they did in Britain, France, or the United States. Thirty-five years later, circumstances had changed. The Holocaust was preceded by the Nazi government's enactment of the strictest gun controls of any industrial nation. 102

The prospect of a dictatorial American government thirty-five years from now seems almost impossible. What about a hundred years from today? Two hundred? The Bill of Rights attempted to enshrine for all time the principle that the government should not be able to overpower the people. On the 200th anniversary of the Bill of Rights, should that principle be discarded forever? Do government officials like Daryl Gates, Donald Schaefer, and LeRoy Martin inspire confidence that the government may always be trusted?

Before rejecting the United States Constitution's bedrock principle that the people are more trustworthy than the government, it would be wise to consider the words of the late Vice President Hubert Humphrey: "The right of citizens to bear arm is just one more guarantee against arbitrary government, one more safeguard against the tyranny which now appears remote in America, but which historically has proved to be always possible. 103

The asserted major concern of legislators passing "assault weapon" legislation is the criminal misuse of these firearms. Proposed legislation, to be effective must directly target this misuse. Legislators should consider the following proposals:

A. Fund the appointment of at least one Assistant U.S. Attorney in each District to prosecute felon-in-possession cases involving violent offenses under 18 U.S.C. 924 and relevant sections of the Firearms Owners' Protection Act, Public Law 99-308. More consistent enforcement of existing statutes would directly target criminal misuse of all firearms. States and localities could also assign prosecutors to felons using firearms to perpetrate violent crimes.

B. Fund the creation of new prison facilities dedicated to violent repeat felony offenders. Reallocate existing prison capacity to that same end. Prison facilities must be adequate to insure that those convicted of the criminal misuse of firearms actually serve the sentences.

C. Reform and streamline probation revocation. If a person already eligible for probation revocation commits a violent armed felony, probation should be revoked immediately. This reform would have prevented a career criminal named Eugene Thompson from perpetrating a murder spree in the suburbs south of Denver in March 1989. 104

D. Create a task force that will exert informal pressure on the entertainment industry to encourage industry officials to reduce the portrayal of criminal misuse of firearms. Beginning in 1983, prime-time television shows such as *The A Team*, *Wise Guy*, *Hardcastle & McCormack*, *Riptide*, *21 Jump Street*, and *Miami Vice* have filled American homes with the depiction of criminal misuse of "assault weapons." 105 while direct links between these portrayals and criminal violence may be difficult to establish, at least one study has linked television and movie depictions of "assault weapons" to increased sales of those weapons. 106 Dr. Park Dietz, the specialist in violent behavior who conducted this recent study, called NBC's *Miami Vice* "the major determinant of assault gun fashion for the 1980's." 107 Research by the University of Washington's Brandon Centerwall has found a cause and effect relation between television violence and homicide. 108

A task force could draft voluntary guidelines limiting the depiction of the misuse of military-style semiautomatics, and the task force, along with interested citizens' groups, could exert informal pressure on industry officials to conform to these guidelines.

And at the very least, the film/television industry exemption from existing state and local "assault weapon" bans should be removed. Film-makers who glorify mindless violence encourage far more gun misuse than do ordinary citizens who quietly own a firearm for sports or self-defense. 109

The solutions suggested above will not cure the problem of armed crime. But they will make the problem better, whereas, "assault weapon" prohibition will make the problem worse.

CONCLUSION

"Assault weapon" legislation appears to offer several political advantages. This legislation allows its proponents to appear "tough on crime and drugs," to garner to the applause of the establishment media, and to exploit the political potential latent in the emotion surrounding tragic events such as the Stockton shootings. At the same time, "assault weapon" legislation requires no fiscal outlay.

Unfortunately, "assault weapon" legislation is unconstitutional. Second Amendment jurisprudence establishes an individual right to bear arms that protects the possession of military-style semiautomatics. While "assault weapon" legislation may not unduly impinge the privilege to hunt ducks, it strikes at the heart of the right to defend home, person and property against criminal individuals and criminal governments.

The "assault weapon" controversy poses a litmus test for continued adherence to the principles on which

the United States was founded. Shall citizens retain the power claimed in the Declaration of Independence to "alter or abolish" a despotic government?

The claims that certain politically incorrect semiautomatic firearms are machine-guns, are the weapon of choice of criminals, have a uniquely high ammunition capacity, or cause uniquely destructive wounds are a hoax. Although the gun prohibition lobby managed to generate a few months of national panic in early 1989, only two state legislatures decided to adopt "assault weapon" legislation. In one state (California), the Attorney General has found that most of the law is so ineptly drafted as to be unenforceable. The more that legislatures examine the facts, the more apparent the gun prohibition lobby's fraud becomes. The Great "Assault Weapon" Panic of 1989 deserves a place alongside Senator Joseph McCarthy's list of State Department Communists and the Tawana Brawley kidnapping as one of America's greatest political hoaxes. When hysteria is replaced by analysis, the gun prohibition lobby's fraud becomes apparent.

Despite their "evil" appearance, so-called "assault weapons" are no more dangerous than many non-semiautomatics. According to empirical evidence and police experience, the guns are not the weapons of choice of drug dealers or other criminals. Even if these guns played a significant role in violent crime, sociological evidence suggests that "assault weapon" legislation would not reduce the criminal misuse.

To limit the criminal misuse of firearms, legislators must take the more difficult and costly steps of providing sufficient funding to the prosecutors and prisons that directly confront the problems of firearms misuse. While these measures may not seem as simple as passing a severe "assault weapon" prohibition, an effective firearms policy _ one that preserves basic Constitutional rights _ will be logical, legal, and moral, and well worth the effort.

Footnotes

1. Thomas Jefferson advised his nephew: "Games played with a bat and ball are too violent, and stamp no character on the mind... [A]s to the species of exercise, I advise the gun." J. Foley, THE JEFFERSON ENCYCLOPEDIA (1967), at 318. Were Jefferson to visit a high school shooting competition, and then a high school football game where student cheered as a player was slammed to the ground, Jefferson might think his earlier view confirmed.

2. Because of budget constraints, the DCM program will lose its federal subsidy. That the program must become financially self-sufficient does not prove that it is no longer important. Many important federal programs, such as aviation safety and airport construction, are financed by user fees.

3. It might be interesting to ask the anti-gun lobby why a gun designed to kill an innocent game animal is more legitimate than a gun designated to protect an innocent human being against a criminal attack.

4. U.S. CONST. amend. II.

5. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 417 (1857) (If free Blacks were citizens, they would have the right "to carry arms wherever they went."); United States v. Cruikshank, 92 U.S. 542, 551-53 (1876) (The Second Amendment right to bear arms, like the First Amendment right to assemble, was not granted by the Constitution, but was merely recognized by that document, since arms bearing and assembly are both fundamental human rights that are "found wherever civilization exists."); Robertson v. Baldwin, 165 U.S. 275, 281-82 (1896) (In this case, the Court wrote "The right of the people to keep and bear arms is not infringed by laws prohibiting the carrying of concealed weapons." The obvious implication is that laws prohibiting the carrying of unconcealed weapons would violate the Second Amendment, a fact that could only be true if the Amendment recognized an individual right); United States v. Miller, 307 U.S. 174 (1938 (discussed extensively below); Moore v. East Cleveland, 431 U.S. 494, 502 (1976) ("the freedom of speech, press, and the religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures" are part of the "full scope of liberty" guaranteed by the Constitution and made applicable against the states by the due process clause of the 14th amendment); United States v. Verdugo-Urquidez, 110 S. Ct. 1056, 1061 (1990) ("[T]he 'people' protected by the Fourth Amendment, and by the First and

Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of the national community or who have otherwise developed sufficient connection with this country to be considered part of the community.")

6. As the Senate Subcommittee on the Constitution noted in 1982, "The Framers of the Bill of Rights consistently used the words 'right of the people' to reflect individual rights _ as when these words were used to recognize the 'right to the people to peaceably assemble'" in the first amendment.

7. Eighty-nine percent of Americans believe that as citizens they have a right to own a gun, and 87 percent believe the Constitution guarantees them a right to keep and bear arms. J. Wright, P. Rossi, and K. Daly, UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICAN 229 (1983), quoting survey conducted by Decision-Making Information Inc.

8. The most recent endorsements of the individual right position appear in Amar, The Bill of Rights as a Constitution, 100 YALE L. J. 1131, 1164ff (1991) and Scarry, War and the Social Contract: Nuclear Policy, Distribution, and The Right to Bear Arms, 139 U. PENN. L. REV. 1257 (1991).

Similar conclusions were reached in the overwhelming majority of scholarly writing in the 1980s, of which the following is only a partial list: Levinson, The Embarrassing Second Amendment, 99 YALE L. J. 637 (1989); S. Halbrook, A Right To Bear Arms: State and Federal Bills Of Rights And Constitutional Guarantees (1989); L. Levy, Original Intent and the Framers' Constitution 341 (1988); Hardy, The Second Amendment and the Historiography of the Bill of Rights, 4 J. L. & POL'Y 1 (1987); Lund, The Second Amendment, Political Liberty and the Right to Self-Preservation, 39 ALA. L. REV. 103 (1987); Shalhope, The Armed Citizen in the Early Republic, 49 LAW & CONTEMP. PROBS. 125 (1986); Kates, A Dialogue on the Right to Keep and Bear Arms 49 LAW & CONTEMP. PROBS. 143 (1986); 4 Encyclopedia of the American Constitution 1639-40 (Karst & Levi eds. 1986); Hardy, Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment, 9 HARV. J. L. & PUB. POL'Y 559 (1986); Marina, "Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective" in Firearms and Violence: Issues of Public Policy (D. Kates, ed. 1984); Dowlut, The Current Relevancy of Keeping and Bearing Arms, 15 U. BALT. L. REV. 32 (1984); Kates, Handgun Prohibition and the Original Meaning of the Second Amendment, 82 MICH L. REV. 204, 244-52 (1983); Malcolm, The Right of the People to Keep and Bear Arms: The Common Law Perspective, 10 HAST. CONST. L. Q. 285 (1983); Dowlut, The Right to Arms, 36 OKLA. L. REV. 65 (1983); Senate Subcomm. on the Constitution of the Comm. on the Judiciary, 97th Cong., 2d Sess., The Right To Keep and Bear Arms (1982); Caplan, The Right of the Individual to Bear Arms, 1982 DET. COLL. L. REV. 789 (1982); Gardiner, To Preserve Liberty _ A Look at the Right to Keep and Bear Arms, 10 N. KY. L. REV. 63 (1982); Note, Gun Control: Is It A Legal and Effective Means of Controlling Firearms in the United States?, 21 WASHBURN L.J. 244 (1982); Shalhope, The Ideological Origins of the Second Amendment, 69 J. AM HIST. 599 (1982); Cantrell, The Right to Bear Arms, 53 WIS. BAR B. 21 (1980).

It appears that only five articles from the last decade which approximate support of the prohibitionist, anti-individual position. Significantly, even one of these rejects the states' right view. Beschle, Reconsidering the Second Amendment: Constitutional Protection for a Right of Security, 9 HAMLIN L. REV. 69 (1986) concedes that the Amendment does guarantee a right of personal security, but argues that the right can constitutionally be implemented by banning and confiscating all guns. The others are Fields, Guns, Crime and the Negligent Gun Owner, 10 N. KY. L. REV. (1982) (article by a non-lawyer spokesperson for the National Coalition to Ban Handguns); Spannaus, State Firearms Regulation and the Second Amendment, 6 HAMLIN L. REV. 383, (1983); Cress, An Armed Community: The Origins and Meaning of the right to Bear Arms, 71 J. AM. HIS. 22 (1983); Ehrman & Henigan, The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately? 15 DAYLTON L. REV. 5 (1990) (employee of Handgun Control, Inc.).

9. Madison's original structure of the Bill of Rights did not place the amendments together at the end of the text of the Constitution (the way they were ultimately organized); rather, he proposed interpolating

each amendment into the main text of the Constitution, following the provision to which it pertained. If he had intended the Second Amendment to be mainly a limit on the power of the federal government to interfere with state government militias, he would have put it after Article 1, section 8, which granted Congress the power to call for the militia to repel invasion, suppress insurrection, and enforce the laws; and to provide for organizing, arming, and disciplining the militia. Instead, Madison put the right to bear arms amendment (along with the freedom of speech amendment) in Article I, section 9 _ the section that guaranteed individual rights such as habeas corpus. Donald B. Kates, "Second Amendment," in *Encyclopedia of the American Constitution*, ed. Leonard Levy (New York: MacMillan, 1986), p. 1639. See also Robert Shalhope, "The Ideological Origins of the Second Amendment," 69 *Journal of American History* (December 1982): 599-614; Joyce Malcolm, "The Right of the People to Keep and Bear Arms: The Common Law Tradition," *Hastings Constitutional Law Quarterly* 10 (Winter 1983): 285-314. See also discussion below, and legal scholarship cited in previous note.

10. See, e.g., Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 *HARV. J. L. & PUB. POL'Y* 559, 560 (1986). This article provides a summary of contemporary interpretations of the Second Amendment and a thorough discussion of the intent of its framers.

11. SENATE SUBCOMM. ON THE CONSTITUTION OF THE COMM. ON THE JUDICIARY, 97th Cong., 2d Sess., *THE RIGHT TO KEEP AND BEAR ARMS* 6 (Comm. Print 1982) [hereinafter *SUMCOMM. ON THE CONSTITUTION*].

12. *Id.* The English background of the individual right to possess weapons dates back to the reign of King Alfred the Great in 690 A.D. Hardy *supra* note 10, at 562. Under King Alfred, every free male was required by law to possess the weapons of an infantryman and serve in the citizen militia (although the word "militia" itself was not used until the late 16th century). In 1181, King Henry II's Statute of Assize of Arms ordered all freemen to bear arms for national defense. The Assize required every freeman to "bear these arms in his [Henry II's] service according to his order and in allegiance to the lord King and his realm." The Assize was based on the old Saxon tradition of the fyrd, in which every male aged 16 to 60 bore arms to defend the nation. Statute of Assize of Arms, Henry II, art. 3 (1181); Robert W. Coakley and Stetson Conn, *The War of the American Revolution* (Washington: Center of Military History United States Army, 1975), at 2. Complaining about an increase in crime, Edward I enacted the Statute of Winchester, which required "every man," not just freemen, to have arms. The types of arms required to be owned by the poorest people were Gisarnes (a type of pole-ax), knives, and bows. Another anti-crime measure in the statute ordered local citizens to apprehend fleeing criminals, and established night watches. 13 Edward I chapter 6 (1285). By the late 16th century, gun ownership had become mandatory for all adult males _ for anti-crime purposes, and for the defense of the realm. Arms were necessary so that all citizens could join in the *hutesium et clamor* (hue and cry) to pursue fleeing criminals; indeed, citizens were legally required to join in. Any person who witnessed a felony could raise the hue and cry. Frederick Pollock and Frederic W. Maitland, *The History of English Law before the Time of Edward I* (Cambridge: Cambridge University Press, 1911, 2d ed., 1st pub. Cambridge, 1895), II, chapter IX, paragraph 3, pp. 578-80; Blackstone, IV, pp. *293-94; Statute of Winchester, 13 Edward I, chapter 1 & 4; Bradley Chaplin, *Criminal Justice, in Colonial America, 1606-1660* (Athens: University of Georgia Press, 1983), p.31, citing Michael Dalton, *The Country Justice, Containing the Practice of Justices of the Peace out of the Their Sessions* (London: 1619), p. 65, and Ferdinando Pulton, *De Pace Regis Regni Viz A Treatis declaring which be the great and generall offences of The Realme, and the chiefe impediments of the pace of The King and The Kindom* (London: 1609), pp. 152-56. The English Bill of Rights of 1689 recognized a right to bear arms, albeit one subject to limitation. "The subjects which are Protestants may have arms for their defence suitable to their conditions as and allowed by law." Bill of Rights of 1689, 1 William & Mary, sess. 2 chapter 2.

13. "The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2 c. 2. and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found

insufficient to restrain the violence of oppression." William Blackstone, *Commentaries on the Laws of England*, I (Chicago: University of Chicago Press, 1979) (facsimile of First Edition of 1765-1769), p. 139.

14. Blackstone, IV, p. *82.

15. Hardy, *supra* note 10, at 588.

16. *Id.*

17. Between 1620 and 1775, "almost the entire male population of New England actively participated in the militia." Marie Ahearn, *The Rhetoric of War: Training Day, the Militia, and the Military Sermon* (Westport, Connecticut, Greenwood Press, 1989), p. 2.

18. *Essex Gazette*, April 25, 1775, p. 3, col. 3; Coakley and Conn, pp. 25-26.

19. Halbrook, *The Right to Bear Arms in Texas: The Intent of the Framers of the Bill of Rights*, 41 *BAYLOR L. REV.* 629, 636 (1989).

20. "The experience of the Revolution thus strengthened the colonial perception of a link between individual armament and individual freedom. The colonists, who perceived themselves as staunch Whigs, continued to see free individual armament as Whig dogma." Hardy, 10, at 593.

21. Daniel Boorstin, *The Americans: The Colonial Experience* 370 (1965). See also William Marina and Diane Cuervo, "The Dutch-American Guerrillas of the American Revolution," in ed. Gary North, *The Theology of Christian Resistance: A Symposium*, vol. 2 of *Christianity and Civilization* (Tyler, Texas: Geneva Divinity School Press, 1982): 242-65.

22. Hardy, *supra* note 10, at 600-15.

23. *Id.* at 600.

24. *Id.* at 600-15.

25. W. Bennett, ed., *Letters from the Federal Farmer to the Republican* 21, 22, 124 (1975). Lee sat in the Senate that ratified the Second Amendment. *SUBCOMMITTEE*, *supra* note 11, at 5.

26. Hardy, *supra* note 10, at 599.

27. N. Webster, "An Examination into the Leading Principles of the Federal Constitution," in P. Ford, ed., *Pamphlets on the Constitution of the United States* 56 (1888).

28. *The Federalist*, No. 46 (J. Madison). At the time Madison wrote, "half a million citizens" amounted to almost the entire adult white male population.

29. *The Federalist*, no. 28 (A. Hamilton).

30. *The Federalist*, no. 29 (A. Hamilton).

31. Hardy, *supra* note 10, at 604.

32. H. R. DOC. NO. 398, 69th Cong., 1st Sess. 1026 (1927).

33. *Id.*

34. Quoted in ed. Morton Borden, *The Antifederalist Papers*, vol. 3 (East Lansing: Michigan State University Press), p. 386.

35. "State conventions had made no fewer than five appeals for such a right; such accepted rights as freedom of speech, of confrontation, and against self-incrimination could boast but three endorsements." Hardy, *supra* note 10, at 604.

36. SUBCOMM. ON THE CONSTITUTION, *supra* note 11, at 6.

37. Quoted in Clinton Rossiter, *The Political Thought of the American Revolution* (New York: Harcourt, Brace and World, 1953), pp. 126-27.

38. Quoted in Borden. 425.

39. House Report No. 141, 73d Cong., 1st sess. (1933), pp. 2-5. Congress did so in order that the National Guard could be sent into overseas combat. The National Guard's weapons cannot be the arms protected by the Second Amendment, since Guard weapons are owned by the federal government. 32 U.S.C. paragraph 105[a][1].

40. Subcommittee on the Constitution, at 11. "There can be little doubt... that when the Congress and the people spoke of a 'militia,' they had reference to the... entire populace capable of bearing arms, and not to any formal group such as what is today called the National Guard... When the framers referred to the equivalent of our National Guard, they uniformly used the term 'select militia' and distinguished this from 'militia'. Indeed, the debates over the Constitution constantly referred to organized militia units as a threat to freedom comparable to that of a standing army, and stressed that such organized units did not constitute, and indeed were philosophically opposed to, the concept of a militia."

Several states included a similar right to bear arms guarantee in their own constitutions. If the Second Amendment protected only the state uniformed militias against federal interference, a comparable article would be ridiculous in a state constitution.

41. Coxe, *Pennsylvania Gazette*, Feb. 20, 1788, quoted in Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791*, 10 N. KY. L. REV. at 17 (1982).

42. Webster's Ninth New Collegiate Dictionary 103 (1984).

43. *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169 (N.D. Ill.), *affd.* 695 F.2d 261 (7th Cir., 1982), *cert. denied* 464 U.S. 863 (1983).

44. 307 U.S. 174 (1938).

45. *Id.* at 175.

46. *Id.* at 177.

47. A federal statute at the time allowed appeals directly to the Supreme Court when a federal district court found a federal statute unconstitutional.

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

49. *Id.*

50. *Id.*

51. *Id.* at 178.

52. *Id.* (quoting *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840)).

53. *United States v. Cruikshank*, 92 U.S. 542, 551-53 (1976).
54. The Court's decision failed to consider *Dred Scott*, where the Court had stated the right to carry arms was included within the "Privileges and Immunities" clause of Article IV, section one of the Constitution.
55. *Fresno Rifle and Pistol Club v. Van de Kamp*, 746 F. Supp. 1415 (E.D. Calif. 1990).
56. *Moore v. East Cleveland*, 431 U.S. 494, 502 (1976) ("the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures" are part of the "full scope of liberty" guaranteed by the Constitution and made applicable against the states by the due process clause of the 14th amendment).
57. Said Rep. Sidney Clarke of Kansas, during the debate on the Fourteenth Amendment, "I find in the Constitution of the United States an article which declared that 'the right of the people to keep and bear arms shall not be infringed.' For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in their local laws." Quoted in David Hardy, "The Constitution as a Restraint on State and Federal Firearm Restrictions," in D. Kates, ed. *Restricting Handguns: The Liberal Skeptics Speak Out* 181 (1979). For more on the history of the 14th Amendment, see S. Halbrook, *THAT EVERY MAN BE ARMED*, *supra* note 144; Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983).
58. 116 U.S. 252 (1886).
59. *Id.* at 265.
60. 196. *Nunn v. State*, 1 Ga. (1 Kel.) 243, 251 (1846)
61. 50 Tenn. (3 Heisk.) 165 (1871).
62. *Id.* at 179.
63. *Fife v. State*, 31 Ark. 455, 461 (1876).
64. *Id.* at 460-61.
65. *Oregon v. Kessler*, 289 Or. at 369, 614 P. 2d at 99.
66. *Kessler*, 289 Or. at 368, 614 P. 2d at 98.
67. *Id.* The Texas Constitution has also been interpreted to deny a right to possess machine-guns.
68. 204. Oregon Attorney General, Opinion 82-15, Apr. 20, 1990. An Oregon trial court has disagreed, under the rationale that semiautomatics are essentially machine-guns. *Oregon State Shooting Association v. Multnomah County*, no. 9008-04628 (Circuit Court, August 22, 1991). The case is being appealed. The trial court labeled as "dicta" the Oregon Supreme Court's methodology for evaluation of technological advances in arms in relation to the right to bear arms. The trial court reasoned that the Supreme Court's methodology had been outlined in a case involving knives, and thus was not binding to a case involving guns.
69. Hearings on H.R. 1154 before the Subcomm. on Trade of the House Comm on Ways and Means, 101st Congress, 1st Sess. 10, at 104. [Herein after called Hearings.] Hon. Charles B. Rangel, National Council For a Responsible Firearms Policy, Inc., stated:

I understand the second amendment and the right to bear arms. I understand the right to protection and all of those issues. I am well aware of the fact that just because a gun is powerful and has lots of fancy features, it does not mean that each and every person who purchases it does so with the intent of taking

human lives.

But I also understand the fact that we cannot continue to allow human beings, and not animals, to be hunted down with these weapons. People are being stalked through the street and the neighborhoods and pumped fill of bullets like prey on "Wild Kingdom."

70. 389 U.S. 347.

71. It should be noted that the Stockton murders were not made worse because Patrick Purdy owned a semiautomatic. He fired approximately 10 rounds in six minutes. Anyone who was willing _ as Purdy apparently was _ to spend some time practicing with guns, could have speedily reloaded even a simple bolt-action rifle, and fired as many shots in the same time period.

Moreover, the medical technology has greatly outstripped firearms in the past two centuries. Because gunshot wounds are much less likely to result in fatality today, a criminal firing a semiautomatic gun for a long period (such as six minutes) today would kill fewer people today than a criminal firing a more primitive gun two hundred years ago.

72 . One clearly obsolete provision of the Constitution is the guarantee of federal jury trials when the amount in controversy exceeds \$20. Due to inflation, a \$20 case today is immensely less significant than a \$20 case from 200 years ago. Today, the \$20 rule impedes judicial efficiency by guaranteeing a jury trial for even the pettiest of cases. Yet no-one suggests that a legislature could simply ignore the 7th amendment because of obsolescence. The only remedy is to propose an amendment.

73. That the guns to be prohibited may sometimes be the best form of self defense does not matter to some advocates of prohibition. As New York City Mayor responded to self defense arguments: "I'm telling you this nonsense that the Constitution entitles us to a weapon to defend ourselves is not an appropriate response to [gun prohibition] legislation. "Council Panel OKs Ban on Assault Weapons," New York Post, July 25, 1991.

74. Los Angeles Times, May 13, 1988, at II, 3.

75. "Block Clubs Wage the Battle," Washington Times, November 25, 1988, p. C6.

76. "Drug Battle Truce," Rocky Mountain News, September 29, 1989, p. 4; "Anti-Drug Gun Battle Spurs Demand for Firearms," Gun Week, November 3, 1989, p. 9, citing Spokane Chronicle.

77. 135 CONG. REC. S 1869-70 (daily ed. Feb. 28, 1989).

78. Hearing, supra note 69, at 77.

79. Alan Gottlieb, "Gun Ownership: A Constitutional Right," Northern Kentucky Law Review 10 (1982): 138.

78 . Governor O'Conor of Maryland delivered a radio address on March 10, 1942, at which he called for volunteers to defend the state: "[T]he volunteers, for the most part, will be expected to furnish their own weapons. For this reason, gunners (of whom there are sixty thousand licensed in Maryland), members of Rod and Gun Clubs, of Trap Shooting and similar organizations will be expected to constitute a part of this new military organization." State Papers and Addresses of Governor O'Conor, vol III, p. 618, quoted in Bob Dowlut, "The Right to Bear Arms: Does the Constitution or the Predilection of Judges Reign?" Oklahoma Law Review 36 (1985): 76-77, n. 52. See also D. Kates, Why Handgun Bans Can't Work 74 (1982), citing Baker, "I Remember 'The Army' with Men from 16 to 79," Baltimore Sun Magazine, November 16, 1975, p. 46.

81. M. Schlegel, Virginia On Guard _ Civilian Defense and the State Militia in the Second World War

(Richmond: Virginia State Library, 1949), pp. 45, 129, 131. According to Schlegel, the Virginia militia "leaned heavily on sportsmen," because they could provide their own weapons. *Ibid.*, p. 129; quoted in Bob Dowlut, "State Constitutions and the Right to Keep and Bear Arms," *Oklahoma City University Law Review* 2 (1982): 198.

82. "To Arms," *TIME*, March 30, 1942, p. 1.

83. Office of the Assistant Secretary of Defense, U.S. Home Defense Study (March 1981), pp. 32, 34, 58-63, quoted in Dowlut, "State Constitutions," p. 197.

84. *Id.*

85. A study by the Arthur Little firm found that men who participated in the DCM shooting program before joining the military learned military shooting more speedily than did other recruits. DCM participants who do not join the military are still a national defense resource, since they will be able to use their skills in the event of an emergency of the type detailed in this section.

86. "Far North Has Militia of Eskimos," *New York Times*, April 1, 1986, p. A14.

87. Mao Zedong, *Mao-Tse Tung on Guerrilla Warfare*, translated by S. Griffith (New York: Praeger, 1961), cited in Raymond Kessler, "Gun Control and Political Power," *Law and Policy Quarterly* 5 (1983): 395.

88. "One Year Later, Analysts Groping for Answers to Afghanistan," *Kansas City Times*, December 26, 1980, p. B-3, cited in Kessler, p. 395.

89. Gottlieb, p. 139.

90. For the Philippines, see R. Sherrill, *THE SATURDAY NIGHT SPECIAL* 272 (1973). For Uganda, "Uganda Curbs Firearms," *New York Times*, December 22, 1969, p. 36. For Cuba, see Kessler, p. 382; Crum, "Gun Control Paved Castro's Way," *Conservative Digest*, April 1976, p. 33 (use of Batista's registration lists to facilitate confiscation); Williams, "The Rise of Castro: 'If only we hadn't given up our guns!'", *Medina County Gazette*, October 15, 1978, p. 5. For Bulgaria, see *GUN CONTROL LAWS IN FOREIGN COUNTRIES*, rev. ed. (Washington: Library of Congress, 1976), p. 33. (Upon coming to power Bulgarian communists immediately confiscated all firearms.)

91. *Farmer v. Higgins*, 907 F.2d 1041 (11th Cir. 1990), cert. denied, 111 S. Ct. 753 (1991).

92. *Hopfman v. Connolly*, 471 U.S. 459 (1985).

93. The statute prohibits manufacture of machine-guns for sale to civilians except "under the authority of the United States." The federal district court, noting repeated Congressional statements of intent not to outlaw any firearms, found the phrase to require the Bureau of Alcohol, Tobacco and Firearms to issue manufacturing licenses to persons who were not otherwise prohibited from manufacture.

94. *United States v. Rock Island Armory* (C. D. Ill. May 2, 1991).

95. In this issue paper, the term "assault rifle" is generally used without quotation marks, since it has a precise and commonly accepted definition. The term "assault weapon" is always used in quotation marks, since there is no definition other than "an amorphous subset of guns which are incorrectly considered to be military firearms."

96. Legislating against semiautomatic firearms that happen to look like military weapons does not draw any meaningful distinctions between those firearms that are banned as "assault weapons" and those that are not.

97. Massacres do not have to be planned. An inexperienced police officer, under stress and armed with a deadly "assault weapon" could do at least as much damage as an ordinary citizen who went berserk. Of course it would be wrong to deprive all police officers of useful firearms to guard against the unlikely possibility that an officer with no prior record of illegal violence would suddenly lose his bearings and start killing people. The same may be said of ordinary citizens.

98. In the spring of 1989, Philip McGuire testified before the U.S. Senate Subcommittee on the Constitution in favor of Senator Metzenbaum's S.386. The bill would have given the Bureau of Alcohol, Tobacco and Firearms the discretionary authority to outlaw almost every semiautomatic. Mr. McGuire, a former administrative official with the BATF, assured the Senators that BATF would not abuse its discretionary authority. The assurance was ironic, considering its source.

When Mr. McGuire was Chief of Investigations for BATF, the United States Senate made the finding that "[E]nforcement tactics made possible by current firearms laws [which were later reformed over Mr. McGuire's strong opposition] are constitutionally, legally, and practically reprehensible... [A]pproximately 75 percent of BATF gun prosecutions were aimed at ordinary citizens who had neither criminal intent nor knowledge, but were enticed by agents into unknowingly technical violations." Senate Committee on the Judiciary, Subcommittee on the Constitution, THE RIGHT TO BEAR ARMS, 97th Cong., 2d. Sess., S. Doc. No. 2807 (February 1982), at 20-23 (unanimous report).

In 1982, Mr. McGuire was promoted to Associate Director, Law Enforcement, a position which he held until his retirement in 1988. In 1986, Congress enacted the Firearm Owners Protection Act, which narrowed the definition of offenses under the Gun Control Act of 1968, and sharply curtailed the search and seizure authority of BATF. The preamble to the law reining in the enforcement activities under Mr. McGuire's supervision states;

The Congress finds that (1) the rights of citizens (A) to keep and bear arms under the second amendment to the United States Constitution (B) to security against illegal and unreasonable searches and seizures under the fourth amendment (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment and (D) against unconstitutional exercise of authority under the ninth and tenth amendments; require additional legislation to correct existing statutes and enforcement policies...

18 U.S.C.S. paragraph 921 (1990 Supp.), at 149. The only fact that gave Mr. McGuire's promises on non-abusive enforcement by BATF any credibility was that he was no longer with the Bureau.

99. "Gun-control foes' Lawsuit Alleges Warrantless Search," Wash. Times, July 17, 1990, at B5; "Pro-gun Groups for Access to Papers Related to '88 Search," The (Baltimore) Sun, July 17, 1990.

100. The act which the police said justified the taking of photos was unfurling a banner comparing Governor Schaefer to Hitler, but no photograph shows such a banner. None of the photos showed persons engaging or seeming ready to engage in violent conduct. The photographs were mostly of speakers and persons quietly listening to them. The rally was the only 1991 State House demonstration where police photographed the demonstrators. "Police Photos Taken at State House Rally Irk Gun-Control Foes," Wash. Times, Mar. 28, 1991, at B4; "Police Photos and Gun Rally Blasted," The (Baltimore) Evening Sun, Mar. 27, 1991, at A1; "Gun Advocates Charge Intimidation," Montgomery J., Mar. 28, 1991, at A1.

101. "Smile! You're on State Police Camera," Montgomery J., Apr. 1, 1991, at A4 (editorial).

102. The Nazi controls were based on a foundation of strict controls enacted by the Weimar government.

103. Quoted in David Hardy, "The Second Amendment as a Restraint on State and Federal Firearm Restrictions," in Restricting Handguns, pp. 184-85.

At "assault weapon" hearings in 1989, Representative William Hughes told witness Neal Knox (the

lobbyist for the Firearms Coalition), that it was outrageous that Knox and his supporters did not trust the government. Knox shot back that it was outrageous that Hughes did not trust the people.

104. Thompson used a stolen, fully-automatic firearm. The gun prohibition lobby's low regard for truth is evidenced by their advertising assertions that the gun was a semiautomatic.

105. Austin Amer. Statesman, Sept. 17, 1989, at A19 col. 2.

106. Id. at A19, col. 3. In fact, the study showed that after one episode of Miami Vice featured the Bren 10, gun stores were flooded with demands for the unusual weapon and the price has now reached \$1200 per gun. Id.

107. Id.

108. Homicide rates in the United States, Canada, and South Africa all rose steeply after the introduction of television. Centerwall noted that after television was introduced in Canada, the homicide nearly doubled, even though per capita firearms ownership remained stable. In the United States, the rise in firearms homicide was paralleled by an equally large rise in homicide with the hands and feet. The data therefore implies that the underlying cause of the homicide increase was not a sudden surge in availability of firearms, since there was no surge in availability of hands and feet, and hand and foot homicide rose as sharply as firearms homicide. Centerwall suggested that one mechanism by which television causes homicide, and perhaps other violent crime as well, is simple imitation. He pointed to an ABC news poll of prisoners which asked "have you ever committed a crime you saw on television?" Over one quarter of prisoners remembered a specific crime episode they had imitated. Brandon Centerwall, "Exposure to Television as a Risk Factor for Violence," 129 American Journal of Epidemiology 643-652 (April 1989).

109. There is no First Amendment violation in subjecting the entertainment industry to the same criminal laws that apply to the rest of the population.