

Ever since the beginning of the modern gun control debate, in the 1960s, prohibitions on small, inexpensive handguns—so-called “Saturday Night Specials”—has been a central issue. In this article, Markus Funk examines unique characteristics of “Saturday Night Specials” which are said to make them more appropriate for prohibition than other firearms. In addition, he makes the case that ban on low-cost handguns may amount to unconstitutional discrimination against the poor or minorities. A slightly different version of this article was originally published in 1995 in volume 8 of the Journal of Criminal Law and Criminology, beginning at page 764; this article is reprinted with permission.

Gun Control and Economic Discrimination: The Melting-Point Case-in-Point

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“Setting a high minimum price for handguns would be an effective means of reducing availability to precisely those groups that account for the bulk of the violent crime problem.”¹

I. INTRODUCTION

In 1992, an estimated daily average of 36 people were murdered with handguns, 32 women were raped at gunpoint, 931 people were the victims of armed robberies, and 1557 people were assaulted with a gun in the United States.² During the same year, handgun crimes accounted for approximately thirteen percent of all documented violent crimes.³ Some states have attempted to bridle such illegal firearm violence with “melting-point laws.” The Illinois, South Carolina, Hawaii, and Minnesota legislatures have adopted rigid melting-point schemes designed to remove so-called Saturday Night Specials from the market.⁴

Illinois, for example, prohibits the sale of handguns having “a barrel, slide, frame or receiver which is a die casting of zinc alloy or any other nonhomogeneous metal which will melt or deform at temperatures of less than 800 degrees Fahrenheit.”⁵ South Carolina and Hawaii have enacted laws virtually identical to Illinois, and Minnesota has enacted a similar law which has a 1000 degree melting point requirement and prohibits handguns with less than a certain “tensile strength” (resistance of the metal to longitudinal stress) and handguns that are made of a powdered metal less than a certain density.⁶

The net effect on the handgun market is hard to determine precisely, but in South Carolina, the melting-point laws, along with Bureau of Alcohol, Tobacco, and Firearms regulations, have resulted in bans on approximately ten percent of the handguns available on the retail market.⁷ It is undisputed, however, that the handguns which fail to meet the melting-point requirements are made of cheaper materials and are the least expensive.⁸ While there are manufacturers that produce handguns which both meet the melting-point standards and are less expensive than the premium makes, the sub-group of guns banned by the melting-point laws is the most affordable, and therefore the most accessible, segment of the handgun market.⁹ Thus, the net effect of the melting-point laws has been to eliminate the most affordable segment of handguns from the market.¹⁰

The primary arguments made in support of melting-point laws are threefold: (1) handguns which lack “quality materials” also often lack adequate safety and accuracy mechanisms and, thus, are not useful to sportsmen;¹¹ (2) handguns not meeting the melting-point requirements are made of softer metal, therefore making it more difficult for ballistics experts to identify these guns, and making it easier for criminals to file off the serial numbers;¹² and (3) the Saturday Night Specials which the melting-point laws target are the weapons of choice for criminals, and their removal from the marketplace will therefore reduce the criminals’ access to firearms.¹³

On the other hand, a compelling argument can be made that melting-point laws (1) are arbitrary in determining which handguns they ultimately remove from the market; (2) may have a *negative* effect on the ability of the police to track down criminals through the use of ballistics tests; (3) do not contribute to crime reduction; and (4) discriminate against the poor who cannot afford to purchase more expensive handguns.

This Comment will endeavor to avoid the emotionalism which tends to permeate the gun control controversy by focusing on possible legal, factual, and policy flaws which may undermine the arguments advanced in justification of the melting-point laws.

II. THE JUSTIFICATIONS OFFERED IN SUPPORT OF MELTING-POINT LAWS

A. PREMISE 1: THE HANDGUNS TAKEN OFF THE MARKET BY MELTING-POINT LAWS ARE NOT USEFUL FOR SPORTSMEN

This argument is misleading. It erroneously assumes that the only legitimate use of handguns will be for sport. Many citizens buy handguns for self-defense, not target shooting;¹⁴ indeed, a significant percentage of the public agrees that “personal protection” is a legitimate reason for owning a gun,¹⁵ and at least one-half of all U.S. households keep firearms.¹⁶ Most importantly, criminologists and criminal law scholars have increasingly begun to agree that the public is right.¹⁷

But the notion that usefulness for a “sporting purpose” should be a qualifying factor in handgun regulation is not rejected only by those who own guns. Using this criterion to differentiate between acceptable and unacceptable handguns fails to recognize other legitimate purposes for acquiring a handgun. The 1968 Gun Control Act clearly recognized that sporting uses are not the only legitimate purposes for acquiring a handgun: “[I]t is not the purpose of this title to place any undue or unnecessary Federal restrictions on handguns and law-abiding citizens with respect to the acquisition, possession, or use of

firearms appropriate to the purpose of hunting, trapshooting, target shooting, *personal protection*, or any other lawful activity . . .”¹⁸ Therefore, the argument that sportsmen will not find these guns useful appears to miss the mark, since it ignores the fact that the primary reason for most legal handgun purchases is legitimate self-defense—a use to which guns are put between one million and 2.5 million times a year.¹⁹

B. PREMISE 2: THE HANDGUNS TAKEN OFF THE MARKET BY MELTING-POINT LAWS ARE HARDER FOR BALLISTICS EXPERTS TO TRACE, AND IT IS EASIER TO REMOVE THEIR SERIAL NUMBERS

According to ballistics experts, cheaper guns, such as those which do not meet the melting-point law requirements, are no harder to trace ballistically than their more expensive counterparts.²⁰ A brief discussion of ballistics demonstrates the reasons for this.

“Tool marks” are impressions made to either the bullet or the cartridge case by irregularities in the handgun’s barrel, firing pin, chamber, or cylinder (cuts, nicks, striations, etc.). Ballistics experts use these irregularities to match a specific bullet or cartridge to a specific gun.²¹ For example, a metallurgical irregularity in the breach face, firing pin, chamber, extractor, or ejector may leave unique and ballistically traceable marks on the cartridge.²² Similar marks can be made when the bullet passes through the bore of the gun.²³

Contrary to the assertions made by advocates of melting-point laws, cheaper guns are *more* likely to be identifiable than their costlier counterparts simply because the more expensive guns have fewer irregularities, and the irregularities which do exist are more permanent due to the hardness of the alloys.²⁴ While some may contend that this is irrelevant, since the inferior metal used in the cheaper guns causes the irregularities to ultimately “wear off” after repeated use (*e.g.*, a nick in the bore of the gun may disappear after repeated firings), this argument loses its persuasive appeal when one considers that the cheaper

guns will rarely, if ever, be fired, since they are not intended to be used for sport or for target practice.²⁵ Additionally, since the cheap Saturday Night Specials have a higher rate of cylinder misalignment, it is more likely that the bullet will retain a “misalignment mark” after it has exited the barrel.²⁶

Another argument that proponents of melting-point laws advance is that it is easier to file off the serial numbers on guns made of softer alloy.²⁷ This matter is scarcely worth considering. Although filing off the serial number of a “cheaper” handgun may take a few minutes less than filing the numbers off of a handgun made of a harder alloy, it does not require any additional tools, and is just as simple an undertaking.²⁸ More importantly, however, filing the serial numbers off of cheaper handguns is not common criminal procedure for two important reasons: First, it is a dead giveaway to law enforcement that the carrier of the handgun is likely involved in criminal activity, thereby calling much unwanted police attention to that individual;²⁹ second, filing the serial number off of a gun is a federal offense,³⁰ and virtually every state’s law criminalizes possession of a firearm without a serial number.³¹

Placing even more doubt on the premise that guns the melting-point laws might remove from the market are harder to trace ballistically, experts feel that cheaper handguns generally allow more primer residue to escape the cylinder after the handgun has been fired, thereby making it easier for forensics experts to identify this residue on the shooter’s hand.³² When a person discharges a firearm, primer residue may be deposited on the person’s hand in varying amounts. Forensics experts then test for the presence of antimony, barium, and lead—components of most primer mixtures.³³

The “cylinder gap,” which separates the front of the handgun cylinder from the rear of the barrel, is usually anywhere from four to nine one-thousandths of an inch wide.³⁴ Poorly-made guns tend to have a longer gap, thus allowing slightly more residue to escape.³⁵ Therefore, it appears that using a cheaper handgun in a crime will actually *increase* the criminal’s

likelihood of being linked to a particular shooting via a forensic examination.

C. PREMISE 3: MELTING-POINT LAWS TAKE HANDGUNS OFF THE MARKET AND THEREBY REDUCE CRIMINALS' ACCESS TO FIREARMS

Some gun control advocates have argued that the mere access to guns makes people more likely to commit crimes, because the access to guns causes otherwise law-abiding people to murder in a moment of ungovernable anger or because crimes are facilitated by access to handguns or both.³⁶ Access to handguns, however, does not turn law-abiding citizens into murderers. Professors James Wright and Peter Rossi from the University of Massachusetts performed what is considered the most complete empirical analysis on the relationship between guns and crime under a three-year grant from the United States Department of Justice.³⁷ After surveying all of the studies and criminological data that had been developed as of 1980, their conclusions were as follows:

There appear to be no strong causal connections between private gun ownership and the crime rate. . . . There is no compelling evidence that private weaponry is an important cause of . . . violent criminality. It is commonly hypothesized that much criminal violence, especially homicide, occurs simply because the means of lethal violence (firearms) are readily at hand, and thus, that much homicide would not occur were firearms generally less available. There is no persuasive evidence that supports this view.³⁸

Murder rates in “gun controlled” areas, such as Mexico and South Africa, are more than twice as high as those in the United States.³⁹ Conversely, countries such as Switzerland and Israel and, to a lesser degree, New Zealand, have high household gun

ownership rates, but generally lower rates of crime and violence than the United States.⁴⁰

In the case of Switzerland, for example, military service for males is compulsory, and according to the Federal Constitution of 1874, all military servicemen receive arms (most commonly “assault rifles”).⁴¹ As soon as the government adopts a new infantry rifle, it sells the old ones to the public.⁴² As a result, a nation of only six million people has at least two million guns, including over 600,000 fully automatic assault rifles (more than in the United States) and 500,000 pistols.⁴³ Even without a strict registration scheme, the Swiss homicide rate is only fifteen percent of the American rate, and to the extent that guns are used in crime, the weapon is usually a *stolen* pistol or revolver.⁴⁴ The correlation between access to a firearm and criminality does not, therefore, appear to be as tautological as gun control advocates claim.⁴⁵ In fact, studies trying to link gun ownership to violence find either no relationship or a *negative* relationship, and cities and counties with high gun ownership suffer less violence than demographically comparable areas with lower gun ownership.⁴⁶ The underlying reason for these results appears to be that criminals are fundamentally different from non-criminals. As Don B. Kates, Jr., puts it, “[murderers’] life histories are characterized by: often irrational violence . . . , felony, mental imbalance, substance abuse, firearm and car accidents. . . . 74.7% of murderers had violent felony or burglary arrests; murderers averaged four prior major felony arrests over a crime career of at least six years.”⁴⁷ These data do not even begin to comprise the full extent of murderers’ prior criminal careers—and thus how different murderers are from the ordinary law-abiding person. Much serious crime goes unreported. Of those crimes that are reported, a large number are never cleared by arrest; and many of those cleared by arrest are juvenile arrests that are not included in the data recounted above.⁴⁸ Therefore, the argument that the access to a gun during a time of stress or of anger will cause law-abiding persons to become murderers lacks persuasive power.

Turning to the question of whether access to guns facilitates criminal activity, melting-point laws are purportedly based on a desire to limit the access of handguns to criminals and, thereby, reduce criminality.⁴⁹ First, evidence suggests that Saturday Night Specials are not used more than other types of handguns for criminal activity,⁵⁰ since criminals, for obvious reasons, want high-quality guns.

Implicit in the melting-point legislation is the argument that regulations upon legitimate gun purchases will reduce the availability of guns for illegal purposes. This argument, however, assumes that the domestic market is the only source for guns, and that if the domestic market dried up, guns would no longer be available. Unfortunately, this assumption appears to be wrong. Gun smuggling is not currently uncommon.⁵¹ Unlike the islands of Japan and Britain, where the police forces are large in relation to the overall population,⁵² where the absence of long-lasting wars has eliminated a common source of illegal weapons acquisitions,⁵³ and where civil liberties are not guarded as jealously as in the United States,⁵⁴ it is implausible to expect the United States government to effectively restrict gun ownership.

What makes it even more unlikely that the United States government will be able to control the access to handguns is the reality that even the law-abiding population resists gun control; the use of severe mandatory sentences for gun control violations is merely a reflection of the unwillingness of the citizenry to have their right to self-preservation taken away by the government.⁵⁵ A 1977 study conducted in Illinois, for example, revealed that only twenty-five percent of handgun owners complied with registration,⁵⁶ and a 1979 survey revealed that seventy-three percent would not comply with handgun prohibition.⁵⁷ Professors Brendan Furnish and Dwight Small noted that “[a]larmingly, what gun laws have accomplished is to create an entire class of new criminals—normally honest, law-abiding citizens who elect to keep a gun in full knowledge that they are in violation of certain local and state laws.”⁵⁸ The reality is that

even the most Draconian measures could not hope to remove guns from the hands of people who were determined to get and keep them.⁵⁹

At bottom, criminals generally obtain their guns in one of two ways: They either steal them,⁶⁰ or they buy them on the black market⁶¹—either way, the guns are untraceable.⁶² The Department of Justice and the Bureau of Alcohol, Tobacco, and Firearms have estimated that ninety percent of violent crimes are committed without handguns, but of those crimes which are committed by “handgun predators”, *ninety-three percent* of the guns are obtained through unlawful purchases.⁶³

Even given the hypothetical situation where the United States borders are effectively closed off to gun smugglers and there are no legal gun sales, criminals would still make guns and purchase them on the black market. During the wars in Southeast and Southwest Asia, for example, local artisans produced, from scratch, AK-47 replicas in their “makeshift backyard foundries.”⁶⁴ But it is not necessary to go to Asia to find people capable of developing a gun-manufacturing cottage industry; Americans are clearly able to produce their own arms. “Investment casting,” for one, is a low-cost method of producing parts which have complex shapes, and it is presently widely used by hobbyists.⁶⁵ Moreover, a lathe, milling-machine, grinder, drill press, and a complement of hand tools are the only requirements for opening a modest gun-manufacturing shop.⁶⁶ With the aid of wood fires and the simplest hand tools, Pakistani and Afghan peasants, for example, have manufactured firearms capable of firing Russian AK-47 cartridges, so it should come as no surprise that a 1986 government study revealed that a full one-fifth of all guns seized by the police in Washington D.C. were home-made.⁶⁷ Of course, policing such a cottage industry would be impossible—even in the highly supervised environment of a prison, crude but effective firearms are continually produced and are readily available.⁶⁸

Further, criminals with guns are often less dangerous to their victims than criminals with alternative weapons. Robbers with

guns are less likely to physically attack their victims than are robbers armed with other weapons or no weapons at all.⁶⁹ Also, the availability of handguns appears to have no measurable effect upon the robbery rates in the larger cities, except that the criminals tend to shift their interest from weaker and more vulnerable targets (including women and the elderly) to stronger and more lucrative targets (such as banks, other commercial institutions, and men) once they obtain a gun.⁷⁰ From a criminal's standpoint, buying a gun legally would be unwise because the criminal has little interest in later being traced to the gun.

The law enforcement community is acutely aware of this state of affairs. In 1995, the National Association of Chiefs of Police polled the nation's 18,000+ police agencies.⁷¹ Of the respondents, 88.7% believed that banning all firearms would not reduce the ability of criminals to obtain firearms and 90.4% felt that law-abiding citizens should be able to purchase any legal firearm for either sport or self-defense; and 97.4% of the responding Chiefs of Police agreed that even if Congress approved a ban on all rifles, shotguns, and handguns, criminals would still be able to obtain "illegal weapons."⁷² Two of the nation's most distinguished law enforcement organizations also share these views—both the American Federation of Police and the National Police Officers Association of America are on record favoring private gun ownership.⁷³ Therefore, one of the prime justifications for melting-point laws—that limiting the legal access to guns will significantly reduce crime committed for personal financial gain—appears to be undermined.

Having heard the arguments for and against melting-point laws, it is now fitting to conduct a brief examination of the much-debated historical, legal, and philosophical foundation of the right to bear arms in the United States. This will provide an understanding for why Americans seem to profoundly resist gun control measures such as the melting-point laws,⁷⁴ and will shed some light on why this resistance may, historically at least, be justified.

III. The Second Amendment, the Right to Bear Arms, and the Use of the Term “Militia”

“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.”⁷⁵ Heated exchanges have arisen concerning the meaning of these words. Examinations of the original meaning of the Amendment have focused primarily on the implication of the phrase “[a] well regulated Militia, being necessary to the security of a free State” Some commentators view the phrase as a statement of purpose and maintain that the Second Amendment provides individual citizens the right to keep and bear arms;⁷⁶ others regard the Second Amendment as creating an exclusively collective right for the states to maintain organized military forces.⁷⁷

Those who favor the collective rights approach focus almost solely on the textual reference to a “well regulated Militia,” which they view as a linguistic preamble that restricts the right to keep and bear arms.⁷⁸ Their contention, therefore, is that the right to keep and bear arms is restricted to officially recognized military units.⁷⁹ This interpretation, arguably, ignores the plain language of the Constitution.⁸⁰

In the eighteenth century, the term “militia” rarely referred to organized military units, but instead was a term which included all citizens who qualified for military service.⁸¹ Since the militia was comprised of “the able-bodied men in the township or county” who elected their own officers,⁸² the government did not tax the populace to buy guns. Instead, the states required the citizens to own and carry their own guns for militia duty.⁸³ Even today, the definition that is included in the United States Code states that:

The militia of the United States consists of all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made declaration of intention to become, citizens of the United States and female citizens of the United States who are members of the National Guard.⁸⁴

The Bill of Rights, which naturally includes the Second Amendment, was added due to “anti-federalist protests.”⁸⁵ In particular, the anti-federalists were concerned that the government would use its control over the militia to “prevent popular rebellion against tyranny.”⁸⁶ At the Virginia ratifying convention, George Mason warned that the government could “gradually increase its power ‘by totally disusing and neglecting the militia,’”⁸⁷ and Patrick Henry repeated this fear, stating that “[t]he militia, sir, is our ultimate safety. . . . The great object is that every man be armed . . . everyone who is able may have a gun.”⁸⁸ Thus, the collectivist reading of the Second Amendment seems to ignore the historical context of the amendment’s enactment.

Further casting doubt upon the collective rights contention that “militia” refers only to governmentally organized military units, the Second Amendment does not mention the right of the states to regulate the militia.⁸⁹ Instead, it expressly protects the “right of the people” to keep and bear arms.⁹⁰ As with the First and Fourth Amendments, the phrase “right of the people” protects the people from the government and not *visa versa*.⁹¹

As Michigan Supreme Court Justice Thomas McIntyre Cooley wrote in his *General Principles of Constitutional Law* in 1898:

[I]f the right were limited to those enrolled [by the government in the militia], the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.⁹²

In striking down a gun control law, the Supreme Court of North Carolina, in *State v. Kerner*, described the right to keep and bear arms as “a sacred right, based upon the experience of the ages in order that the people may be accustomed to bear

arms and ready to use them for protection of their liberties or their country when occasion serves.”⁹³ The court considered the right to bear arms a right of “[t]he ordinary private citizen” as it was “the common people, . . . accustomed to the use of arms,” who had fought and won the revolution.⁹⁴

Therefore, *Kerner* appears to support the proposition that the right to bear arms does not depend on the organized militia but, instead, exists in large part to provide people a *defense* against such organized militias: “In our own State, in 1870, when Kirk’s militia was turned loose and the writ of *habeas corpus* was suspended, it would have been fatal if our people had been deprived of the right to bear arms, and had been unable to oppose an effective front to the usurpation.”⁹⁵ Defense by the militia means civil defense, not defense by organized military units under the control of the State,⁹⁶ and the collectivist assertion that the term “militia” refers purely to military units, therefore, appears to lack foundation. As English History Professor Joyce Malcolm points out:

The Second Amendment was meant to accomplish two distinct goals, each perceived as crucial to the maintenance of liberty. First, it was meant to guarantee the individual’s right to have arms for self-defence and self-preservation. . . . This is . . . plain from American colonial practice, the debates over the Constitution, and state proposals for what was to become the Second Amendment. . . . The second and related objective concerned the militia The argument that today’s National Guardsmen, members of a select militia, would constitute the *only* persons entitled to keep and bear arms has no historical foundation.⁹⁷

It therefore seems that equating “right of the people” with “right of the state” would require considerable stretching of the Constitution’s meaning.⁹⁸ While the Second Amendment apparently protects the citizens’ right to keep and bear arms, its

language indicates that this is a private right protected for the sake of the public good.⁹⁹

IV. THE SUPREME COURT AND THE RIGHT TO BEAR ARMS

The Supreme Court did not have an occasion to render a thorough interpretation of the Second Amendment until the twentieth century.¹⁰⁰ Until then, the federal government did not regulate firearms, the Bill of Rights was not yet applied to the states, and the Court only occasionally made reference to the Second Amendment.¹⁰¹

It was during the Prohibition Era that the Court first took a closer look at the Second Amendment.¹⁰² Certain weapons, such as “Tommy guns” and sawed-off shotguns, became associated with “gangsters” during this time, and therefore became the targets of legislative action.¹⁰³ In part to combat the use of these weapons, Congress passed the National Firearms Act of 1934, which restricted the private possession of specified weapons.¹⁰⁴

After a district court dismissed an indictment under the Act for violating the Second Amendment,¹⁰⁵ the Supreme Court for the first time rendered a detailed interpretation of the Second Amendment in *United States v. Miller*.¹⁰⁶ The defendants in *Miller* were charged under the Act for possessing a sawed-off shotgun. After the Supreme Court reviewed the lower court’s decision, the Court decided to reinstate the indictments and pointed out that the weapon involved in this case lacked “[s]ome reasonable relationship to the preservation or efficiency of a well regulated militia”¹⁰⁷ and that “its use could [not] contribute to the common defense.”¹⁰⁸ On its face, this holding appears to support the collectivist argument that the Second Amendment creates an exclusive collection of rights for states to maintain organized military forces.¹⁰⁹ The Court’s decision in *Miller* is subject to several criticisms, however, and in the end it arguably lends support to the individual rights argument.¹¹⁰

One of this holding’s infirmities is that the defendants disappeared following the dismissal of their indictments and,

therefore, did not brief their side of the argument before the Court.¹¹¹ Some commentators contend that this deprived the Court of the opportunity to thoroughly examine both sides of the issue and, therefore, may have influenced the outcome of the case.¹¹² Further, certain commentators interpret the holding in *Miller* to merely stand for the proposition that “it is not within judicial notice that [a sawed-off shotgun] is any part of the ordinary military equipment or that its use could contribute to the common defense.”¹¹³ This proposition is empirically incorrect, however, as it has been demonstrated that sawed-off shotguns were (and are) commonly used military weapons.¹¹⁴

Moreover, the reasoning in *Miller* appears to be incomplete in light of the strange results that would follow adherence to it. The Court in *Miller* seemed to be saying that precisely those weapons considered most superfluous for self-defense purposes (military weaponry) deserve constitutional protection.¹¹⁵ But the Court could not have intended to outlaw all non-military firearms, while allowing private citizens to own weapons designed solely for military application.¹¹⁶ Few weapons, after all, could be more useful in a military context than a bazooka or a portable rocket-launcher, but these surely could not have been the types of weapons the Court intended to sanction for private use.¹¹⁷

Lastly, if the Court’s holding in *Miller* did protect only the guns of the National Guard or organized state militias, as many advocates of the states’ right theory claim, then the Court would have disposed of the appeal on *standing* alone. The Court, in effect, would have held that, since the accused were not protected by the Amendment, they did not have standing to challenge the law. Instead, the Court in *Miller* recognized that the accused, as individuals, *did* have standing to invoke the Amendment, and the Court dealt with the challenge on its merits. Moreover, nothing in the holding on the merits focuses on whether *the accused* were within the Amendment; the holding instead focused on whether *the weapon* was within the Amendment. Noting that the Second Amendment’s stated purpose is the militia,¹¹⁸ the Court held that only military-type and militarily useful weapons were

within the Amendment. Having set out these general guidelines, the Court found itself unable to apply them to determine whether the specific weapon type involved in *Miller* was within the Amendment.

Even with all its shortcomings, the holding in *Miller* does, in the end, seem to support the proposition that the Second Amendment protects an *individual's* right to keep and bear arms.¹¹⁹

[The historical sources] show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. . . . 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.¹²⁰

In 1990, the constitutional argument against laws that restrict gun ownership was strengthened by the Supreme Court's decision in *United States v. Verdugo-Urquidez*.¹²¹ Chief Justice Rehnquist, writing for the majority, observed that the phrase "the people" occurs several times in the Bill of Rights, specifically the Second Amendment's "right of the people to keep and bear Arms," the First Amendment's "right of the people peaceably to assemble," and the Fourth Amendment's "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."¹²² In each of these instances, the Court said, the phrase "the people" was used as a "term of art" in select parts of the Constitution that referred to *individual* Americans.¹²³

Miller and *Verdugo* dealt with only federal law, and the Supreme Court has never ruled on any of the roughly twenty-thousand state and local gun laws.¹²⁴ Even though the collective rights theory arguably has neither strong historical support, nor precedential authority, the lower courts for the most part have upheld gun control laws against Second Amendment challenges.¹²⁵

V. THE RIGHT TO BEAR ARMS FOR SELF-PRESERVATION

While the foregoing Second Amendment analysis suggests that the right to keep and bear arms is designed at least in part to offer protection against potential political oppression, few seriously argue that this is the primary reason that the modern civilian wants to own a handgun or rifle. The real reason that people want handguns is undoubtedly for self-defense.¹²⁶ And given that people are committing crimes against other persons with a violence that is unprecedented in modern world history,¹²⁷ this appears understandable.

Each day, approximately 16,000 United States citizens are victims of violent crimes.¹²⁸ In response to this high rate of crime, every forty-eight seconds an American uses a handgun for defense against an attacker.¹²⁹ In fact, studies indicate that seventy-eight percent of Americans declared themselves willing to use a gun for self-defense.¹³⁰ Thus, the fundamental reason many Americans (non-criminals, at least) desire access to firearms seems to be to protect themselves against criminal violence—violence which the government appears unable to control.¹³¹

Consider that a twelve-year-old child has an eighty-three percent chance of being the victim of a violent crime in his or her lifetime and a fifty-two percent chance of being victimized twice.¹³² How does the criminal justice system respond to such startling figures? In cities such as New York, a person arrested for committing a felony has a mere *one percent* chance of serving time in state prison.¹³³ Thus, it should come as no surprise that police chiefs admit that they are unable to protect the citizens all of the time and that, as a result, they support civilian firearms possession.¹³⁴ Department of Justice Statistics for 1991 show that, for all crimes of violence, the police are able to respond within five minutes only twenty-eight percent of the time.¹³⁵ Thus, it is unreasonable to expect citizens to rely on law enforcement to protect them when they are confronted with a violent offender.

The Second Amendment guarantees the people the right to protect themselves from a criminal threat.¹³⁶ Unfortunately, the Framers did not distinguish between crimes committed by apolitical criminals and those committed by political oppressors (whom they deemed just another variety of criminal).¹³⁷ The most likely explanation for this is that, given the frontier ethos and the rural culture that shaped the society during those times, it did not occur to the Framers that the government would ever question the citizens' right to defend themselves against the various dangers which awaited them.¹³⁸

The European emigrants who settled the United States necessarily had to learn how to use guns not only for hunting, but also for defending against attacks from indigenous Indians, upset by the encroachment upon their land.¹³⁹ After the colonists secured independence from England in 1783, there was rapid expansion westward. Since the pioneers moved faster than the government could provide law and order, the settlers had to protect themselves.¹⁴⁰ Thus, the Framers may have failed to distinguish between political and personal safety rationales for enacting the Second Amendment because they never envisioned a need for such a distinction.

The above explanation, however, may seem unsatisfactory to many modern students of the issue. Since objective social conditions have changed in most parts of the country since the time of the Framers, it is necessary to analyze how the general purpose for the Second Amendment includes self-defense.¹⁴¹ The Framers and their philosophical contemporaries already recognized the right to personal self-defense in their conception of the "common defense."¹⁴² John Locke wrote that

[e]very one . . . is bound to preserve himself, and not to quit his Station willfully; so by the like reason when his won Preservation comes not in competition ought he, as much as he can, to preserve the rest of Mankind, and may not unless it be to do Justice on an Offender, take away, or impair the life, or what tends to the Preserva-

tion of the Life, the Liberty, Health, Limb or Goods of another.¹⁴³

As heirs to an Anglo-Norman legal tradition which required free men to keep arms for the defense of the realm and the suppression of crime,¹⁴⁴ the Founding Fathers were upholding the same philosophical tradition that had passed from Aristotle through Machiavelli to Locke and Harrington—a tradition which deemed the possession of arms as what distinguished a free man from a slave and which viewed the disarming of the people as an essential device of tyranny.¹⁴⁵ Arguing that natural law could be enforced by the armed law-abiding citizen, Cicero stated:

And indeed, gentlemen, there exists a law, not written down anywhere but inborn in our hearts; a law which comes to us not by training or custom or reading but by derivation and absorption and adoption from nature itself; . . . I refer to the law which lays down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. . . . Indeed, even the wisdom of the law itself by a sort of tacit implication, permits self-defense, because it does not actually forbid men to kill; what it does, instead, is to forbid the bearing of a weapon with the intention to kill.¹⁴⁶

At the time of the founding there were no organized police forces or standing armies in the colonies. Therefore, private citizens had to protect themselves and their families.¹⁴⁷ Not only were firearms commonplace, but they were, as was the case throughout much of English history,¹⁴⁸ often required to be kept.¹⁴⁹ A 1639 Newport law, for example, required that “noe man shall go two miles from the Towne unarmed, eyther with Gunn or Sword; and that none shall come to any public Meeting without his weapon,” and in 1770 the colony of Georgia deemed it necessary “for the better security of the inhabitants” to require every white male resident “to carry firearms to places of public worship.”¹⁵⁰ These examples are not surprising, given that

self-defense is at the basis of liberal theory; perhaps more basic than the guarantees of free speech, freedom of religion, trial by jury, and due process of law.¹⁵¹ As Thomas Hobbes wrote:

The right of nature, which writers commonly call Jus Naturale, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgment, and Reason, hee shall conceive to be the aptest means thereunto¹⁵²

Liberal theorists' differing political interpretations of this right to self-preservation notwithstanding, it seems axiomatic that the government was (and is) instituted primarily to secure individuals from threats to their personal safety and well-being.¹⁵³ Social contract theory is based upon the notion that individuals agree to give up certain natural rights to liberty in return for political rights to better protect their interest in self-preservation and personal prosperity through benefits which only the state can provide.¹⁵⁴ In creating a national government of enumerated powers subject to numerous express limitations, the Constitution outlined the specific exchange of rights and powers.¹⁵⁵ The primary question, therefore, becomes whether the government has been able to sufficiently protect the citizens of the United States from crime, making the possession of firearms for self-defense unnecessary.

Given the nationally skyrocketing crime rates,¹⁵⁶ it seems clear that the government is not able to protect the citizenry from criminals, and, thus, social contract theory indicates that the government cannot justify taking away the citizens' right to defend themselves. This notion echoes Blackstone, who viewed the right to have suitable arms for self-defense "when the sanctions of society and laws are found insufficient to restrain the violence of oppression" among the five "absolute rights of individuals,"¹⁵⁷ and Federalist No. 28, which discussed an "original right

to self-defense which is paramount to all positive forms of legal government.”¹⁵⁸

Given this historical backdrop, the government would have to justify any interference with an individual’s right to self-preservation by showing that the regulation significantly contributes to the individual’s safety.¹⁵⁹ The historical and textual support for the right to bear arms indicates that the right to self-preservation deserves at least as much protection as the general rights of privacy and self-expression.¹⁶⁰ In the words of Nelson Lund, “[t]his would be as true as a matter of common sense even if it could not be asserted as a matter of constitutional law.”¹⁶¹

Some commentators argue that the benefit to society from bringing handguns under tight control through the use of legislative mechanisms such as the melting-point laws would, in terms of net benefits to public safety, outweigh the cost of losing the ability to rely on a handgun for personal protection.¹⁶² However, empirical evidence suggests that the prospect of facing an armed victim is more of a deterrent to contemporary violent offenders than the impact of facing the justice system.¹⁶³ One reason for this may be that as punishment increases in certainty, severity, and promptness, its deterrent value increases accordingly.¹⁶⁴ For example, the FBI estimated that only forty percent of all crimes are reported, and of every 100 reported, only four criminals are apprehended, convicted, and sent to prison.¹⁶⁵ Moreover, of every 100 prisoners serving life sentences, twenty-five are released before their third year, forty-two by their seventh year.¹⁶⁶

Based on an extensive review of the empirical evidence, James Wilson and Richard Hernstein argue that criminals are less able than the general populace to conceptualize the results of their acts beyond the present.¹⁶⁷ Unlike most people involved in academe, who are used to thinking in terms of the future and are willing to make relatively great sacrifices today for rather speculative returns later, criminals are more worried about the present consequences of their actions rather than future consequences.¹⁶⁸ The possibility of being shot and killed for breaking

and entering a premises in which a gun-owner resides has greater and more definite costs than a round in the United States justice system,¹⁶⁹ and using melting-point schemes to eliminate a subset of legally owned handguns would likely leave many citizens at the mercy of the relatively small segment of the populace which commits the overwhelming majority of the violent crimes.

The personal safety rationale, thus, seems to provide a reasonable basis for protecting the citizens' access to handguns. Combining the fundamental right to self-preservation with the basic postulate of liberal theory, which states that people surrender their natural rights only to the extent that they are recompensed with more effective political rights,¹⁷⁰ leads to the conclusion that every gun control law must be justified in terms of the law's contribution to the personal security of the citizenry.¹⁷¹

VI. DOES HANDGUN OWNERSHIP HAVE SOCIAL UTILITY?

Although for many commentators the more speculative and academic legal, historical, and philosophical justifications for firearm ownership are of great import, others contend that the focus should really be on the tangible net effect of gun-ownership on society—*i.e.*, its social utility.¹⁷² Northwestern University School of Law Professor Daniel Polsby states that

[o]pponents of gun control have traditionally wrapped their arguments in the Second Amendment of the Constitution. . . . But most people are not dedicated antiquarians, and would not be impressed by the argument "I admit that my behavior is very dangerous to public safety, but the Second Amendment says I have a right to do it anyway." That would be a case for repealing the Second Amendment, not respecting it.¹⁷³

In the end, the social utility of handgun ownership in the United States may prove to be the most significant justification for opposing legislation such as the melting-point laws.

Data reveals that criminals have a tendency to avoid occupied premises out of fear that the occupants may have a weapon.¹⁷⁴ This actually shows a great deal of insight by the criminals, considering that they are statistically more likely to be shot, detained, or scared away by an armed citizen than by the police.¹⁷⁵ Since the average criminal has no way of knowing which households are armed and which ones are unarmed, the benefits of the deterrent effect of gun-ownership are shared by the community as a whole.¹⁷⁶ Criminals who try to enter an occupied home are twice as likely to be shot or killed as they are to be caught, convicted, and imprisoned by the U.S. criminal justice system.¹⁷⁷ According to a study conducted by constitutional lawyer and criminologist Don B. Kates, Jr., only two percent of civilian shootings involve an innocent civilian mistakenly identified as a criminal, whereas the police have an “error rate” of almost eleven percent—almost five times as high.¹⁷⁸

In 1980, there were between approximately 8700 and 16,600 non-fatal justifiable or excusable woundings of criminals by armed civilians.¹⁷⁹ Moreover, in 1981 there were an estimated 1266 excusable self-defense or justifiable homicides by civilians using guns against criminals.¹⁸⁰ By comparison, police officers nationwide killed only 388 felons in 1981.¹⁸¹ Indeed, estimates reveal that in America a firearm is used every 16 seconds in self-defense against a criminal, women use handguns 416 times each day to defend against rapists (which is, incidentally, twelve times more often than rapists use firearms during the commission of their crime), and a gun kept in an American home is 216 times more likely to see use in defense against a criminal than against an innocent victim.¹⁸² The facts on which these figures are based have not passed the criminals by unnoticed.¹⁸³

Fortunately, killing or wounding criminals represents only a small minority of defensive uses of firearms by civilians. Most civilians use their weapons to threaten criminals, or, at worst, to

fire warning-shots.¹⁸⁴ In fact, of the estimated 2.5 million instances where gun owners use their weapons for self-defense each year, over ninety-eight percent involve neither killings nor woundings. The owners either fire warning shots or threaten perpetrators by pointing or referring to their guns.¹⁸⁵ Moreover, the rate of accidental shooting of persons mistakenly believed to be intruders, a danger which is often emphasized in the gun control debate, is quite low—1 in 26,000.¹⁸⁶ Although the chances that an intruder will be shot are relatively small, the consequences of a gunshot wound are severe, and the mere possibility will deter many people from attempting confrontation crimes.¹⁸⁷

Testimonials from convicted felons further supports the deterrent effect of gun ownership.¹⁸⁸ Fifty-six percent of those questioned agreed that “a criminal is not going to mess around with a victim he knows is armed with a gun;” seventy-four percent agreed that “one reason why burglars avoid houses when people are at home is that they fear being shot;”¹⁸⁹ and fifty-eight percent agreed that “a store owner who is known to keep a gun on the premises is not going to get robbed very often.”¹⁹⁰ Moreover, about two-fifths of the felons interviewed admitted that they had decided not to commit a crime because they knew or believed that the intended civilian victim carried a gun.¹⁹¹

Intriguingly, gun ownership appears to have other positive externalities as well; gun owners are more likely than non-gun owners to aid a person being victimized. Of the “good Samaritans” that come to a victim’s aid, one study indicates that eighty-one percent are gun owners.¹⁹² Thus, Thomas Jefferson may have been correct when he gave the following advice to his nephew, Peter Carr:

A strong body makes the mind strong. As to the species of exercise. I advise the gun. While this gives a moderate exercise to the body, it gives boldness, enterprise and independence to the mind. Games played with the ball and others of that nature, are too violent for the body and stamp no character on the mind.¹⁹³

Jeffrey Snyder sees similar value in gun ownership when he argues that:

[o]ne who values his life and takes seriously his responsibilities to his family and community will possess and cultivate the means of fighting back, and will retaliate when threatened with death or grievous bodily injury to himself or a loved one. He will never be content to rely solely on others for his safety¹⁹⁴

The extent to which the knowledge or belief that a civilian carries a gun can affect felons' perception of risk and alter their criminal behavior is illustrated by a highly publicized Orlando Police Department gun training program for women which took place in 1966. Orlando, Florida, as well as the entire United States, was experiencing a rapid increase in rapes, so the Orlando Police Department set up training seminars to familiarize women with the use of a handgun and, thereby, reduce future victimization.¹⁹⁵ Within a year, Orlando experienced an eighty-eight percent drop in the rape rate, whereas the surrounding area and the United States as a whole experienced no such decrease.¹⁹⁶ Moreover, this drop in the rate of rapes was much greater than had occurred in Orlando during any previous year.¹⁹⁷

Other areas, such as Highland Park, Michigan; New Orleans, Louisiana; and Detroit, Michigan instituted similar programs and achieved similar results.¹⁹⁸ Kennesaw, Georgia, for example, introduced a city ordinance requiring every household to have a gun, and after seven months, the burglary rate had dropped eighty-nine percent when compared to the previous year.¹⁹⁹

The lesson from these examples is simply that, to the extent that citizens are known to be well-armed, the presence of firearms will deter criminal activity.²⁰⁰

As police officers realize, handguns are useful in deterring criminal conduct and stopping such conduct once it has occurred. But this is not the only advantage of handguns

ownership—it also reduces the likelihood of injury to the victim once the confrontation is in progress. Victimization surveys show that for both robbery and assault, the victim was less likely to be injured, and the crime was less likely to be completed, when the victim resisted with a gun as opposed to not resisting at all.²⁰¹ In fact, robbery and assault victims who used firearms for protection were less susceptible to injury than victims who responded in any other manner (with knives, physical force, threats, other weapons, or without any self-protection). Only seventeen percent of those using guns to resist attempted robbery, and twelve percent using guns to resist assault, suffered injury, whereas twenty-five percent of robbery victims and twenty-seven percent of assault victims who did not resist were injured regardless.²⁰²

It, therefore, appears that handgun ownership is beneficial to law-abiding citizens,²⁰³ and melting-point laws will not only fail in their goal of reducing violent crime involving the use of handguns, but they will also make it easier for the criminals to prey on the poor citizens rendered defenseless to the extent that their legal access to a handgun is blocked. Moreover, the fact that, despite the growing, media-fueled anti-gun movement in the United States, there has not been a single state legislature that has banned or severely restricted handgun ownership strongly suggests a general legislative agreement that handguns do have social utility.²⁰⁴

VII. GUN CONTROL IN AMERICA: A HISTORY OF DISCRIMINATION AGAINST THE POOR AND MINORITIES

One undeniable aspect of the history of gun control in the United States has been the conception that the poor, especially the non-white poor, cannot be trusted with firearms.²⁰⁵ Keeping arms away from blacks had always been an issue; in fact, the first ever mention of blacks in Virginia's laws was a 1644 provision barring free blacks from owning firearms.²⁰⁶ Similar to the English attitudes towards gun ownership by Catholics, who were

considered to be potential subversives, black slaves and Native Americans were the suspect populations of the New World.²⁰⁷

Considering that the effect of melting-point laws is the removal of the least expensive guns from the market, and that the discussion thus far has pointed to the apparent ineffectiveness of current crime control measures, one could persuasively argue that the legislatures have a desire to keep guns out of the hands of the poor and minorities. Acceptance of the preceding arguments that melting-point laws (1) do not reduce crime, (2) actually *decrease* the likelihood of criminals being caught on the basis of their use of a handgun which passes the melting-point requirements, and (3) prevent citizens from deterring criminal activity and protecting themselves from criminals leaves few alternative explanations for the legislators' motivations. A National Institute of Justice Study found that:

The people most likely to be deterred from acquiring a handgun by exceptionally high prices or by the nonavailability of certain kinds of handguns are not felons intent on arming themselves for criminal purposes (who can, if all else fails, steal the handgun they want), but rather poor people who have decided they need a gun to protect themselves against the felons but who find that the cheapest gun in the market costs more than they can afford to pay.²⁰⁸

As David Kopel points out, “[t]he point of banning ‘cheap’ guns is that people who can only afford cheap guns should not have guns. The prohibitively high price that some firearms carry licenses (\$500 in Miami during the 1980s) suggests a contemporary intent to keep guns away from lower socioeconomic groups.”²⁰⁹

Melting-point laws take less expensive guns off the market, and while there is no shortage of expensive guns, poorer citizens may not be able to afford them and must make do with what they can afford. A closer look at the historical relationship between gun control and the poor in America reveals that a charge of dis-

crimination on the part of the legislators who enacted the melting-point laws might not be too far-fetched.

An undisguised admission of the discriminatory motive underlying attempts to make handguns more expensive appears in an article on Saturday Night Specials written by gun control advocate Philip Cook:

Individuals who would not ordinarily be able to afford an expensive gun commit a disproportionate share of violent crimes. Setting a high minimum price for handguns would be an effective means of reducing availability to precisely those groups that account for the bulk of the violent crime problem. . . . The major normative argument against a high tax is that it is *overt economic discrimination and thus unethical, or at least politically unpalatable*. . . . A high tax is not the only method of *increasing the minimum price for handguns and subtle approaches may be more acceptable politically*. One method would establish minimum standards stipulating the quality of metal and safety features of a gun. The effect of this approach would be the same as the minimum tax: to eliminate the cheapest of the domestically manufactured handguns. Unlike minimum tax, however, quality and safety standards could be justified on grounds other than economic discrimination. . . . If sufficiently high standards on safety and metal quality were adopted, the cost to manufacturers of meeting these standards would ensure a high minimum price.²¹⁰

Early firearm laws were often enacted for the sole purpose of preventing immigrants, blacks, and other ethnic minorities from obtaining a gun.²¹¹ Even today, police departments have a wide range of latitude in granting gun permits, yet they rarely issue them to the poor or to minority citizens.²¹²

The poor are often prevented from possessing a firearm even though the poor are disproportionately victims of crime.²¹³ Compounding this situation is the fact that the poorer areas of cities (where most of the crime occurs) rarely get the same po-

lice protection that the more affluent areas get (where the least crime occurs).²¹⁴ As Gary Kleck puts it:

Gun ownership costs more money than simple measures such as locking doors, having neighbors watch one's house, or avoidance behaviors such as not going out at night, but it costs less than buying and maintaining a dog, paying a security guard, or buying a burglar alarm system. Consequently, it is a self-protection measure available to many low-income people who *cannot afford more expensive alternatives*.²¹⁵

Therefore, any gun control measure which takes cheaper guns off the market and prevents the poor from obtaining a handgun for self-defense is arguably doubly unfair. In *Delahanty v. Hinckley*, a federal district court in Washington, D.C. found that Saturday Night Special laws selectively disarm minorities.²¹⁶ The court stated that:

The fact is, of course, that while blighted areas may be some of the breeding places of crime, not all residents of [sic] are so engaged, and indeed, most persons who live there are law-abiding but have no other choice of location. But they, like their counterparts in other areas of the city, may seek to protect themselves, their families and their property against crime, and indeed, may feel an even greater need to do so since the crime rate in their community may be higher than in other areas of the city. Since one of the reasons they are likely to be living in the "ghetto" may be due to low income or employment, it is highly unlikely that they would have the resources or worth to buy an expensive handgun for self defense.²¹⁷

Although bans on particular types of firearms have been enacted under the guise of controlling crime throughout American history, the actual effect they have often had was to disarm poor people and minorities.²¹⁸ Colonial Virginia set blacks apart from all other groups by denying them the important right and obliga-

tion of carrying a gun.²¹⁹ Legislators in the southern states not only restricted the rights of slaves, but also the rights of free blacks to bear arms. The intention was to restrict the availability of arms to both free blacks and slaves to the extent that the restrictions were consistent with the regional ideas of safety.²²⁰

Reflecting this attitude, Chief Justice Taney, writing for the majority in the 1856 *Dred Scott* decision, stated that if blacks were

entitled to the privileges and immunities of citizens, . . . [i]t would give persons of the negro race, who were recognized as citizens in any one state of the union, the right . . . to keep and bear arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State. . . .²²¹

Tennessee was the first state to utilize creative melting-point style draftsmanship to prevent gun ownership by blacks in the 1870s. Tennessee barred the sale of all handguns except the “Army and Navy” guns which were already owned by ex-confederate soldiers.²²² Since the poor freedmen could not afford these expensive firearms, the “Army and Navy Law” is considered the predecessor of today’s melting-point laws.²²³

After the Civil War, southerners were fearful of race war and retribution, and the mere sight of a black person with a gun was terrifying to southern whites.²²⁴ As a result, several southern legislatures adopted comprehensive regulations which were known as the “Black Codes.”²²⁵ These codes denied the newly freed men many of the rights that whites enjoyed. In 1867, the Special Report of the Anti-Slavery Conference noted that under the Black Codes, blacks were “forbidden to own or bear firearms, and thus were rendered defenseless against assaults.”²²⁶ As an illustration of such legislation, the Mississippi Black Code contained the following provision:

Be it enacted . . . [t]hat no freedman, free negro or mulatto, not in the military . . . and not licensed to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any ammunition, . . . and all such arms or ammunition shall be forfeited to the former²²⁷

In *United States v. Cruikshank*,²²⁸ a case which is often cited as authoritative by Handgun Control, Incorporated and many other gun-control organizations,²²⁹ the United States Supreme Court upheld the Ku Klux Klan's repressive actions against blacks who wanted to own guns, thus allowing the Klan and other racist groups to forcibly disarm the freedmen and impose white supremacy.²³⁰ "Firearms in the Reconstruction South provided a means of political power for many. They were the symbols of the new freedom for blacks In the end, white southerners triumphed and the blacks were effectually disarmed."²³¹ The legislators' intent to disarm blacks also appears in the voiding of a 1941 conviction of a white man, where Florida Supreme Court Justice Buford, in his concurring opinion, stated that "[t]he Act was passed for the purpose of disarming the negro laborers [It] was never intended to be applied to the white population and in practice has never been so applied."²³²

But blacks were not the only ones whom legislators wanted to disarm; various states also placed restrictions on gun-ownership for certain "undesirable" whites.²³³ For example, the 1911 Sullivan Law²³⁴ was passed to keep guns out of the hands of immigrants (chiefly Italians—"[i]n the first three years of the Sullivan Law, [roughly] 70 percent of those arrested had Italian surnames"²³⁵). Two New York newspapers reveal the mind-set which gave rise to the Sullivan Law: the *New York Tribune* grumbled about pistols found "'chiefly in the pockets of ignorant and quarrelsome immigrants of law-breaking propensities,'"²³⁶ and the *New York Times* pointed out the "affinity of 'low-browed foreigners' for handguns."²³⁷

Tennessee Senator John K. Shields introduced a bill in the United States Congress to prohibit the shipment of pistols through the mails and by common carrier in interstate commerce.²³⁸ The report supporting the bill that Senator Shields inserted into the Congressional Record asked: “Can not we, the dominant race, upon whom depends the enforcement of the law, so enforce the law that we will prevent the colored people from preying upon each other?”²³⁹ In addition to blacks and foreigners, the legislators in the southern states also targeted agrarian agitators and labor organizers at the end of the nineteenth century (particularly in Alabama, in 1893, and Texas, in 1907).²⁴⁰ Furthermore, heavy transaction and business taxes were imposed “on handgun sales in order to resurrect the economic barriers to [gun] ownership.”²⁴¹

Similarly, today’s melting-point laws arguably reflect the old American prejudice that lower classes and minorities cannot be trusted with weapons. While the legislative bias which originated in the South may have changed in form, it apparently still exists.²⁴² But pro-gun groups are not the only ones to acknowledge this unfortunate reality. Gun control proponent and journalist Robert Sherrill frankly admitted that the Gun Control Act of 1968 was “passed not to control guns but to control blacks,”²⁴³ and Barry Bruce-Briggs stated in no uncertain terms that “[i]t is difficult to escape the conclusion that the ‘Saturday night special’ is emphasized because it is cheap and is being sold to a particular class of people.”²⁴⁴ The names given to Saturday Night Specials and provisions aimed at limiting their availability provide ample evidence—the name of this gun type derived from the racist phrase “nigger-town Saturday night,”²⁴⁵ and the reference is to “ghetto control” rather than gun control.²⁴⁶

As noted, poor blacks are disproportionately the victims of crime,²⁴⁷ and in 1992, black males between the ages of twenty and twenty-four were four times more likely to be victimized in a handgun crime than white males in the same age group.²⁴⁸ As Stefan Tahmassebi points out:

[Although blacks are disproportionately victimized], these citizens are often not afforded the same police protections that other more affluent and less crime ridden neighborhoods or communities enjoy. This lack of protection is especially so in the inner city urban ghettos. Firearms prohibitions discriminate against those poor and minority citizens who must rely on such arms to defend themselves from criminal activity to a much greater degree than affluent citizens living in safer and better protected communities.²⁴⁹

Victims must be able to defend themselves and their families against criminals as soon as crime strikes, and the ability to defend oneself, family, and property is more critical in the poor and minority neighborhoods, which are ravaged by crime and do not have adequate police protection.²⁵⁰ Since the courts have consistently ruled that the police have no duty to protect the individual citizen,²⁵¹ and that there is “no constitutional right to be protected by the state against being murdered by criminals or madmen,”²⁵² citizens, regrettably, are in the position of having to defend themselves. While the deterrent effect of the police surely wards off many would-be criminals (particularly in areas where the police patrol more frequently—*i.e.*, more affluent areas), the many citizens who need *personal* protection must face the reality that the police do not and cannot function as bodyguards for ordinary people.²⁵³ Therefore, individuals must remain responsible for their own personal protection, with the police providing only an auxiliary general deterrent.

Far from being an implement of destruction, a handgun can inspire a feeling of security and safety in a person living in this crime-ridden society.²⁵⁴ And inexpensive handguns provide affordable protection to lower income individuals who are the most frequent victims of crime.²⁵⁵ People who accept the preceding analysis with regard to the deterrent value of handguns and the lack of justification for melting-point laws must face the troubling prospect that melting-point laws purposefully reduce poor citizens' access to handguns, significantly impairing their

ability to survive in the harsh environments in which they must subsist.

VIII. DO MELTING-POINT LAWS VIOLATE THE EQUAL PROTECTION CLAUSE?

As discussed in Section VII, it is reasonable to suspect that covert discriminatory purposes underlie the passage of the melting-point laws and similar gun-control legislation.²⁵⁶ While it is unrealistic to expect the Supreme Court, given its present composition, to rule that melting-point laws are constitutionally impermissible in the near future, it is possible to argue that the case of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*²⁵⁷ provides a possible framework for invalidating the legislation on the basis of racial discrimination in violation of the Fourteenth Amendment.

Arlington Heights concerned the refusal by a local zoning board to change the classification of a tract of land from single-family to multifamily. While the Seventh Circuit Court of Appeals held that the “ultimate effect” of the rezoning denial, in light of its “historical context,”²⁵⁸ was racially discriminatory and, therefore, a violation of equal protection,²⁵⁹ Justice Powell, writing for the majority, overturned this verdict. The Court held that “[o]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. ‘Disproportional impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.’”²⁶⁰ A racially discriminatory intent, as evidenced by such factors as disproportionate impact, the historical background of the challenged decision, the specific antecedent events, departures from normal procedures, and contemporary statements of the decision-makers must be shown.²⁶¹ While proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause, the plaintiff is not required to “prove that the challenged action rested *solely* on racially discriminatory purposes.”²⁶² The Court held that “[w]hen there is a proof that a

discriminatory purpose has been a *motivating factor* in the decision, this judicial deference is no longer justified.”²⁶³

To determine whether “invidious” discriminatory purpose was a motivating factor, the court must engage in a “sensitive inquiry” into such circumstantial and direct evidence of intent as may be available, and the Court has held that the “impact of the official action whether it ‘bears more heavily on one race than another’ may provide an important starting point.”²⁶⁴ The Court stated that the “historical background of the decision is one evidentiary source.”²⁶⁵ Given the history of racist gun control legislation in the United States,²⁶⁶ a case can be made that the historical background of legislation such as the melting-point laws, the apparent lack of rational justification for the laws, and the laws’ ultimate effect of making handguns less accessible to the poor lends some potency to the argument that the passage of the melting-point laws was motivated at least in part by the legislators’ improper discriminatory considerations.

Of course, proof that an official decision was racially motivated does not necessarily invalidate a statute, but instead shifts the burden to the defendant to show that the “same decision would have resulted even had the impermissible purpose not been considered.”²⁶⁷ While it may be possible to argue that, given the apparent lack of justification for melting-point laws, the legislators would not have enacted melting-point laws in the absence of a discriminatory motive, this argument is unlikely to succeed as a practical matter, given the difficulty of proving discriminatory intent, particularly through direct evidence, on the part of the politically astute legislators.²⁶⁸

In the absence of an avowed racial motive, disproportionate impact does not trigger strict scrutiny (thus, the melting point law is tested only under the *rational relationship* test, under which it likely will stand).²⁶⁹ However, if the activity at issue implicates a fundamental right,²⁷⁰ courts will apply a strict scrutiny test, requiring a showing that a *compelling* need for the different treatment exists and that the means chosen are *necessary*.²⁷¹ If strict scrutiny applies, the law cannot be substantially

overinclusive or underinclusive or both.²⁷² To find strict scrutiny applicable in the absence of a clearly racial motive or effect, however, the classification must touch on a substantive constitutional right.²⁷³ Considering that the Second Amendment guarantees individuals the right to own arms, courts should apply strict scrutiny. And in light of the language in *Arlington* and the previous discussion of the apparent counter-productiveness of melting-point laws, the legislation appears unconstitutional.²⁷⁴

IX. CONCLUSION

The justifications for melting-point laws appear to lack merit: they do not prevent ballistics and forensics experts from tracing a particular gun to a particular shooter; they do not contribute to crime reduction; they are arbitrary; and they may be motivated by discriminatory intentions. Melting-point laws, therefore, should be abandoned and legislative action should instead be aimed at reducing gun possession among persons with prior records of violence. While melting-point legislation prevents many of the nation's poorer citizens from legally protecting themselves from their dangerous environment, no convincing factual, public policy, or legal arguments justify this outcome. Although handgun violence undeniably is a serious problem in American society, preventing those who have a legal right to protect themselves with a handgun from doing so on the basis of socioeconomic considerations simply cannot be the solution. Blaming the instrument for its misuse by a minority of criminals itself seems perverse. As criminologist Gary Kleck pointed out:

Fixating on guns seems to be, for many people, a fetish which allows [gun-control advocates] to ignore the more intransigent causes of American violence, including its dying cities, inequality, deteriorating family structure, and the all-pervasive economic and social consequences of a history of slavery and racism All

parties to the crime debate would do well to give more concentrated attention to more difficult, but far more relevant, issues like how to generate more good-paying jobs for the underclass, an issue which is at the heart of the violence problem.²⁷⁵

Legislators should consider methods such as mandatory penalties for the misuse of guns in violent crimes and for the possession of stolen guns.²⁷⁶ After the 1975 adoption of mandatory penalties for the use of a firearm in the commission of a violent crime, the murder rate in Virginia dropped thirty-six percent and the robbery rate dropped twenty-four percent in twelve years.²⁷⁷ South Carolina recorded a thirty-seven percent murder rate decline between 1975 and 1987 with a similar law.²⁷⁸ Other notable declines in states using mandatory penalties occurred in Arkansas (homicide rate down thirty-two percent in thirteen years), Delaware (homicide rate down twenty-six percent in fifteen years), and Montana (homicide rate down eighteen percent in eleven years).²⁷⁹

Mandatory gun-training seminars are also effective.²⁸⁰ Describing the differences between rural and urban gun owners, criminologist Gary Kleck stated:

Most gun ownership is culturally patterned, linked with a rural hunting sub-culture. The culture is transmitted across generations, with gun owners being socialized by their parents into gun ownership and use from childhood. Defensive handgun owners, on the other hand, are more likely to be disconnected from any gun subcultural roots, and their gun ownership is usually not accompanied by association with other gun owners by the training in the safe handling of guns.²⁸¹

Mandatory gun-safety training, therefore, may go far in preventing firearm accidents by training those who have no background in hunting or shooting how to use a firearm properly.

Legislators should also seriously consider proposals calling for the appointment of at least one Assistant U.S. Attorney per

District who is charged with prosecuting felon-in-possession cases which involve violent offenses under 18 U.S.C. § 924.²⁸² Moreover, the reform and streamlining of probation revocation in such a way that those persons eligible for probation who commit violent armed felonies will have their probation revoked immediately, the creation of prison facilities that are designed solely for the purpose of ensuring that violent repeat offenders actually serve their full sentences,²⁸³ and the establishment of a task force which can informally pressure the entertainment industry to put an end to the incessant and reckless portrayal of criminal misuse of firearms²⁸⁴ are all policy proposals that present realistic alternatives to the troubling movement towards handgun prohibition.²⁸⁵

Both the Constitution and the history of the United States grant citizens the right to own a handgun. All of the states and several territories of the United States, as well as the federal government itself, recognize the sale of firearms as a lawful activity,²⁸⁶ and both practical experience and empirical evidence appear to indicate that the right to own a handgun benefits society as a whole.

Some legislators, apparently due to either misinformation or personal biases (both racial and socioeconomic), have enacted melting-point laws that remove many of the lower-cost guns from the market as a method of crime prevention. Melting-point laws, however, merely bar those of lesser economic means from having a way to protect themselves against the criminals that prey on them, and such an outcome is neither fair, nor is it criminologically sound.

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1. Philip Cook, The "Saturday Night Special": An Assessment of Alternative Definitions from a Policy Perspective, 72 *J. Crim. L. & Criminology* 1735, 1740 (1981).
2. U.S. Dep't of Justice, *Guns and Crime* 1 (1994).
3. *Id.*
4. See 720 ILCS 5/24-3(h) (Smith-Hurd 1993); S.C. Code Ann. § 23-31-180 (Law. Co-op. 1990); Haw. Rev. Stat. § 134-16 (1985); Minn. Stat. Ann. § 624.712(4) (West 1987).
5. 720 ILCS 5/24-3(h) (Smith-Hurd 1993).
6. The Minnesota Legislature has adopted the following definition of a Saturday Night Special:
[H]aving a frame, barrel, cylinder, slide or breechblock: of any material having a melting point (liquidus) of less than 1,000 degrees Fahrenheit, or of any material having an ultimate tensile strength of less than 55,000 pounds per square inch, or(c) of any powdered metal having density of less than 7.5 grams per cubic centimeter.
Minn. Stat. Ann. § 624.712(4) (West 1987).
7. Monica Fennell, *Missing the Mark in Maryland: How Poor Drafting and Implementation Vitiates a Model State Gun Control Law*, 13 *Hamline J. Pub. L. & Pol'y* 37, 49 (1992) (arguing that more states should adopt melting-point laws to remove inexpensive handguns from the market).
8. *Id.* at 58. See also *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1153 n.9 (Md. 1985) (discussing widespread availability of Saturday Night Specials due to their "extremely low retail price"); *R.G. Indus., Inc. v. Askew*, 276 So. 2d 1, 2 (Fla. 1973) (characterizing Saturday Night Specials as "cheap").
9. See Cook, *supra* note 1, at 1740 (arguing that the cheapest of the domestically manufactured handguns would be eliminated from the market by establishing minimum standards stipulating the quality of metal and safety features of a gun).
10. See *id.*
11. See Fennell, *supra* note 7, at 60. See also *Kelley*, 497 A.2d at 1154 n.10.
12. See Fennell, *supra* note 7, at 58 (citing Cook, *supra* note 1, at 1740). See also *Kelley*, 497 A.2d at 1153 n.9 ("Generally, the weapon is manufactured from soft, inexpensive metal. As a result, serial numbers are easily and sometimes completely erased by either filing or melting.").
13. See Cook, *supra* note 1, at 1740 ("Individuals who would not ordinarily be able to afford an expensive gun commit a disproportionate share of violent crimes. Setting a high minimum price for handguns would be an effective

means of reducing availability to precisely those groups that account for the bulk of the violent crime problem.”).

14. In fact, 40-50% of the existing stock was purchased primarily for self-defense purposes. See James D. Wright & Peter Rossi, *U.S. Dep’t of Justice, Weapons, Crime and Violence in America* 26 (1981). See also Timothy Egan, *After the Riots: Los Angeles Riots Spurring Big Rise in Sale of Guns*, *N.Y. Times*, May 14, 1992, at A1 (noting national surge in gun purchases in wake of Los Angeles riots).

15. James D. Wright, *Public Opinion and Gun Control: A Comparison of Results From Two Recent National Surveys*, 455 *Annals Am. Acad. Pol. & Soc. Sci.* 24, 31 (1981)(stating that 49% think they need protection). See also Donald E. Santarelli & Nicholas E. Calio, *Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit*, 14 *St. Mary’s L.J.* 471, 481 (1983) (arguing that social utility of handguns for self-defense purposes cannot be “reasonably denied, no matter what position one takes on the need for gun control”).

16. Gary Kleck, *Point Blank* 102 (1991).

17. See, e.g., Don B. Kates, Jr., *The Value of Civilian Arms Possession as a Deterrent to Crime or Defense Against Crime*, 18 *Am. J. Crim. L.* 113, 164 (1991) (“The evidence from surveys of both civilians and felons is that actual defensive handgun uses are enormously more frequent than has previously been realized Widespread defensive gun ownership benefits society as a whole by deterring burglars from entering occupied premises and by deterring from confrontation offenses altogether an unknown proportion of criminals”); Hans Toch & Alan J. Lizotte, *Research and Policy: The Case of Gun Control*, in *Psych. and Soc. Pol’y* 223 (Peter Suedfeld & Philip E. Tetlock eds., 1992) (“[H]igh saturations of guns in places, or something correlated with that condition, inhibit illegal aggression.”).

18. *Gun Control Act of 1968*, Pub. L. No. 90-618 § 101, 82 Stat. 1213 (codified as amended at 18 U.S.C. § 921, et seq. (1993)) (emphasis added).

19. Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 *J. Crim. L. & Criminol.* 150 (1995).

20. Telephone Interview with Emanuel Kapelsohn, President of the Peregrine Corporation (Jan. 26, 1994).

21. *Id.*

22. See Federal Bureau of Investigation, U.S. Dep’t of Justice, *Handbook of Forensic Science* 52 (1992).

23. Kapelsohn, *supra* note 20.

24. *Id.*

25. *Id.*

26. This is because, as the bullet enters the rear of the barrel, it is slightly off-center, thereby causing a part of it to be shaved off. Telephone Interview with Richard W. Chenow, Firearms Examiner for the Chicago Police Crime Laboratory (Sept. 5, 1994).

27. See Fennell, *supra* note 7, at 58 (citing Cook, *supra* note 1, at 1740). See also Kelley v. R.G. Indus., Inc., 497 A.2d 1143, 1153 n.9 (Md. 1985) (“Generally, the weapon is manufactured from soft, inexpensive metal. As a result, serial numbers are easily and sometimes completely erased by either filing or melting.”).

28. Kapelsohn, *supra* note 20.

29. *Id.*

30. See 18 U.S.C. § 922(k) (1988).

31. See, e.g., Alaska Stat. § 11.46.270(a) (1989); 720 ILCS 5/24-5 (Smith-Hurd 1993); Ind. Code Ann. § 35-47-2-18 (West 1994); La. Rev. Stat. Ann. § 14:95.7 (West 1943); Mich. Comp. Laws Ann. § 750.230 (West 1991); Nev. Rev. Stat. § 202.277 (1992); Okla. Stat. Ann. tit. 21, § 1550(a) (West 1995); 18 Pa. Cons. Stat. Ann. § 6117(b) (1994).

32. Kapelsohn, *supra* note 20.

33. Federal Bureau of Investigation, *supra* note 22, at 56.

34. Kapelsohn, *supra* note 20.

35. *Id.*

36. See generally Carl T. Bogus, Pistols, Politics and Products Liability, 59 U. Cin. L. Rev. 1103, 1113-23 (1991) (discussing a variety of arguments counseling against firearms ownership, including the issue of increased danger of homicides committed while the perpetrator was in a “blind rage,” and the increased criminality due to accessibility of firearms); Markus Boser, Comment, Go Ahead, State, Make Them Pay: An Analysis of Washington D.C.’s Assault Weapon Manufacturing Strict Liability Act, 25 Colum. J.L. & Soc. Probs. 313, 318 (1992) (“There can be little doubt that widespread availability of firearms is a significant factor in explaining the prevalence of violent crime in the United States.”).

37. Wright & Rossi, *supra*, note 14.

38. *Id.* at 1-2 of the Abstract. See also Boser, *supra* note 36, at 319 (“[I]t is difficult to find proof that gun availability causes violent crime.”); Gary Kleck, Policy Lessons from Recent Gun Control Research, 49 Law & Contemp. Probs. 35, 39 (1986) (“[N]o reliable evidence indicates that guns have net assault-instigating effects, or that aggression-eliciting effects are anymore common than inhibiting effects. [G]uns cause some robbers to shift from one target-type to another, without, however, increasing the frequency with which they rob.”).

39. Daniel D. Polsby, *The False Promise of Gun Control*, *The Atlantic Monthly*, Mar. 1994, at 60.

40. *Id.* See also David B. Kopel, *The Samurai, the Mountie, and the Cowboy* (1992).

41. Kopel, *supra* note 40, at 282.

42. *Id.* at 283. Not only rifles are sold this way; the army sells anything from machine guns and anti-tank weapons to howitzers and cannons. *Id.*

43. *Id.*

44. *Id.* at 286.

45. Also, it is important to note that the lower rates of homicide in other countries such as Japan, Canada, Australia, Germany, and Britain are not a result of gun-control legislation, but instead are attributable to the much more pervasive social controls which underlie those societies. *Id.* In Australia, for example, the rate of robbery arrests is similar to that of the United States (20-30%). However, the conviction rate is much higher than in the United States (around 94%). *Id.* at 215. With regard to social controls, David Kopel states:

Interestingly, in the nations with the strongest social controls—Switzerland and Japan—the homicide rate is near zero, and the suicide rate is very high. . . . [S]uicide and homicide are two alternative methods of dealing with frustration. People socialized to cooperative or group-oriented behavior are more likely to choose suicide over homicide.

Id. at 409. Taking a more holistic approach, Charles Silberman notes that “American crime is an outgrowth of the greatest strengths and virtues of American society—its openness, its ethos of equality, its heterogeneity—as well as its greatest vices, such as the long heritage of racial hatred and oppression.” Charles E. Silberman, *Criminal Violence*, *Criminal Justice* 36 (1978).

46. See, e.g., Gary Kleck, *The Relationship Between Gun Ownership Levels and Rates of Violence in the United States*, in *Firearms and Violence* 99 (Don B. Kates, Jr. ed., 1984); David McDowall, *Gun Availability and Robbery Rates: A Panel Study of Large U.S. Cities, 1974-1978*, 8 *Law & Pol’y* 135 (1986); Gary Kleck & E. Britt Paterson, *The Impact of Gun Control and Gun Ownership Levels on Violence Rates*, 9 *J. Quantitative Criminology* 249 (1993).

47. Don B. Kates, Jr., et al., *A Critique of Common Justifications For Banning Handguns*, October 22, 1992 draft (on file with author) (citing Chicago Police Dep’t, *Murder Analysis*, 1966-1991). See also Brendan F.J. Furnish & Dwight H. Small, *The Mounting Threat of Home Intruders* 53-54 (1993) (“The typical murderer has a prior criminal history extending over at least six years.”); Kates, *supra* note 17, at 127-28 (stating that murderers are aberrant individuals who show a consistent indifference to human life, including their own); David B.

Kopel, *Peril or Protection? The Risks and Benefits of Handgun Prohibition*, 12 *St. Louis U. Pub. L. Rev.* 285, 324 (1993) (asserting that “two-thirds to four-fifths of homicide offenders have arrest records, frequently for violent felonies.”) [hereinafter *Peril or Protection?*]; Kleck, *supra* note 38, at 40-41 (70-75% of domestic homicide offenders have a previous arrest, and about half have a previous conviction); David B. Kopel, *Trust the People: The Case Against Gun Control*, 3 *J. on Firearms and Pub. Pol’y* 77, 83 (1990) (discussing studies which have shown that two-thirds to four-fifths of homicide offenders have prior arrest records); Gary Kleck & David J. Bordua, *The Factual Foundation for Certain Key Assumptions of Gun Control*, 5 *Law & Pol’y Q.* 271 (1983) (estimating that three-fourths of domestic homicide offenders have been previously arrested for some assaultive crime, half have been convicted, and 90% have been the cause of at least one disturbance report to the police); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 *Mich. L. Rev.* 204, 266 (1983) (finding that a “substantial majority” of murderers have prior felony convictions) [hereinafter *Handgun Prohibition*].

48. Due to expungement statutes and the like. See generally T. Markus Funk & Daniel D. Polsby, *Young & Arrestless, Reason*, Feb. 1996, 50; T. Markus Funk, *Prior Indiscretions: The Questionable Efficacy of Expunging Juvenile Records*, *Mich. J.L. Ref.* (forthcoming, 1996).

49. See Cook, *supra* note 1, at 1740.

50. Chenow, *supra* note 26; Kleck, *supra* note 16, at 44.

51. Gregory Inskip, *Our Right to Bear Arms*, 8-WTR *Del. Law.* 21, 24 (1991). See also Gary S. Becker, *Stiffer Jail Terms Will Make Gunmen More Gun-Shy*, *Business Week*, February 28, 1994, at 18 (“Guns continue to be smuggled onto the illegal market from abroad, from military stock, and from crooked gun dealers.”); Robert Friedman & Barry Meier, *Far Beyond Law’s Controls*, *Newsday*, July 31, 1988, at 5 (arguing that if drug dealers can penetrate United States borders and reap millions of dollars in illegal profits, they will arm themselves accordingly).

52. See Kopel, *supra* note 40, at 96.

53. *Id.*

54. *Id.* at 98-106.

55. *Id.* at 164.

56. Don B. Kates, Jr., *Handgun Control: Prohibition Revisited*, *Inquiry*, Dec. 5, 1977, 20, n.1.

57. *Peril or Protection?*, *supra* note 47, at 322.

58. *Furnish & Small*, *supra* note 47, at 216.

59. Ted R. Gurr, *The History of Violent Crime in America: An Overview*, in *1 Violence in America 17* (Ted R. Gurr ed., 1989). See also Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 *Yale L.J.* 2593, 2616-17 (1994) (discussing why prohibitions on both drugs and guns will fail).
60. See generally James D. Wright et al., *Under the Gun: Weapons, Crime, and Violence in America 315* (1983) (describing theft as one of the “marketing mechanisms” in the circulation of weapons).
61. See Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, *Protecting America: The Effectiveness of Federal Armed Career Criminal Statute 26* (1992) (estimating that 37% of firearms acquired by criminals have been bought or traded on the black market). See also Kopel, *supra* note 40, at 416. Even in countries which have strict handgun laws such as Japan and Britain, criminals can purchase handguns on the black market with relative ease. *Id.* at 287.
62. Telephone Interview with Sergeant David Lindman, Minneapolis Police Department Identification Unit, Minneapolis, Minn. (Nov. 11, 1993). There are also studies which show that felons generally obtain their weapons through unlicensed and unregulated channels (i.e., from “friends” and “from family members”), and not necessarily from those engaged in illegal gun selling. Kleck, *supra* note 16, at 46.
63. Jeffrey R. Snyder, *A Nation of Cowards*, 113 *Pub. Interest* 40, 46 (1993).
64. See Polsby, *supra* note 39, at 64.
65. John G. Frey, *Tooling for Economical Investment Casting, Tool and Manufacturing Engineer*, February 1969, at 47.
66. Charles H. Chandler, *Gun-Making as a Cottage Industry*, 3 *J. on Firearms & Pub. Pol’y* 155, 160 (1990).
67. David B. Kopel, *Trust the People: The Case Against Gun Control*, 3 *J. on Firearms & Pub. Pol’y* 77, 81 (1990).
68. *Id.* See also Lee H. Bowker, *Victimizers and Victims in American Correctional Institutions*, in *The Pains of Imprisonment 63, 64* (Robert Johnson & Hans Toch eds., 1982).
69. See Kleck, *supra* note 38, at 37. See also *infra* notes 194 to 195 and accompanying text.
70. Kleck, *supra* note 38, at 37.
71. National Ass’n of Chiefs of Police, *7th National Survey of Law Enforcement Officers in the United States 2* (1995).
72. *Id.*
73. Furnish & Small, *supra* note 47, at 60.

74. See, e.g., Wright et al., *supra* note 60, at 1-2 (“The gun may not constitute the very heart of American culture and civilization, but it is assuredly an important component.”); Franklin E. Zimring & Gordon Hawkins, *The Citizen’s Guide to Gun Control* 68-69 (1987) (“It would be idle to deny that firearms ownership in the United States has been a feature of the American tradition.”); Richard Hofstadter, *America as a Gun Culture*, 21 *Am. Heritage* 4 (1970) (“[T]he United States is the only modern industrial urban nation that persists in maintaining a gun culture. It is the only industrial nation in which the possession of rifles, shotguns, and handguns is lawfully prevalent among large numbers of its population.”); Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 *Rutgers L.J.* 1, 10 (1992) (discussing Americans’ “almost spiritual attachment” to firearms).

75. U.S. Const. amend. II.

76. The view is known as the “individual right” interpretation. See, e.g., Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* (1984); Joyce Lee Malcolm, *To Keep and Bear Arms* (1994); David I. Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 1982 *Det. C.L. Rev.* 789; *Handgun Prohibition*, *supra* note 47, at 206; Sanford Levinson, *The Embarrassing Second Amendment*, 99 *Yale L.J.* 637 (1989); William W. Van Alstyne, *The Second Amendment and the Personal Right to Bear Arms*, 43 *Duke L.J.* 1236 (1994).

77. This view is known as the “collective right” interpretation. See, e.g., Zimring & Hawkins, *supra* note 74, at 139-47; Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 *J. Am. Hist.* 22, 42 (1984); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen your Militia Lately*, 15 *U. Dayton L. Rev.* 5 (1989); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 *Val. U. L. Rev.* 107 (1991); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of The Second Amendment*, 2 *Hastings Const. L.Q.* 961 (1975).

78. See, e.g., Peter B. Feller & Karl L. Gotting, *The Second Amendment: A Second Look*, 61 *Nw. U. L. Rev.* 46, 67-70 (1966) (“[T]he ideal of the supremacy of state militia over federal military power is a fading echo. The second amendment as the embodiment of that ideal is therefore obsolete.”); M. Truman Hunt, Note, *The Individual Right to Bear Arms: An Illusory Public Pacifier?*, 1986 *Utah L. Rev.* 751, 757 (stressing Court’s emphasis on well-regulated militia as lending support to collective rights interpretation of Second Amendment).

79. See, e.g., Maynard H. Jackson, Jr., *Handgun Control: Constitutional and Critically Needed*, 8 *N.C. Cent. L.J.* 189, 196 (1977). See also *United States v. Nelson*, 859 F.2d 1318, 1320 (8th Cir. 1988) (interpreting the Second Amend-

ment purely in terms of protecting state militia, rather than individual rights); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) (“[T]he Second Amendment only confers a collective right of keeping and bearing arms.”).

80. For a historically-based analysis, see Levinson, *supra* note 76, at 649-51; David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 *J.L. & Pol.* 1 (1987); *Handgun Prohibition*, *supra* note 47, at 211-43.

81. In defining the “militia” after the passage of the Second Amendment, Congress referred to the “whole militarily qualified citizenry and required that every member of this group possess his own firearm.” Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 *Ala. L. Rev.* 103, 106 n.6 (1987) (citing *First Militia Act*, 1 *Stat.* 271 (1792)).

82. See Kopel, *supra* note 40, at 311. In fact, the whole Prussian notion of military duty was absolutely foreign to the American militiamen. The English commander at Louisburg complained that the American militiamen “have the highest notions of the Rights, and Libertys . . . and indeed are almost Levellers, they must know when, how, and what service they are going upon, and be treated in a manner that few Military Bred Gentlemen would condescend to. . . .” Douglas Edward Leach, *Roots of Conflict: British Armed Forces and Colonial Americans, 1677-1763*, at 69 (1986).

83. Kopel, *supra* note 40, at 311-12.

84. 10 U.S.C. § 311(a) (1993).

85. See Kopel, *supra* note 40, at 319.

86. *Id.*

87. *Id.*

88. *Id.*

89. See *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (“[S]ince all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States, . . . ; States cannot . . . prohibit the people from keeping and bearing arms . . .”).

90. U.S. Const. amend. II.

91. See Earl R. Kruschke, *The Right to Keep and Bear Arms, A Continuing American Dilemma* 12 (1985) (considering possibility that Second Amendment was intended to protect individual right to bear arms); Malcolm, *supra* note 76, at 162 (“[The] idiosyncratic definition [advanced by the collectivists] flounders because it cannot be reasonably applied to the First, Fourth, Ninth, and Tenth Amendments, where reference is also made to the right of ‘the people’.”); David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles versus Supreme Court Practice*, 78 *Va. L. Rev.* 1521, 1522 (1992) (arguing that spheres protected by Bill of Rights “should not be

the subject of majoritarian definition”). See also Levinson, *supra* note 76, at 652-54.

92. Thomas M. Cooley, *The General Principles of Constitutional Law* 298 (1898).

93. 107 S.E. 222, 223 (N.C. 1921), cited in Stefan B. Tahmassebi, *Gun Control and Racism*, 2 *Geo. Mason U. Civ. Rts. L. J.* 67, 89 (1991).

94. *Id.* at 224, cited in Tahmassebi, *supra* note 93, at 93.

95. *Id.* See also Tahmassebi, *supra* note 93, at 90 (discussing disarming of citizens by governments of both Nazi Germany and South Africa); Letter from the Federal Farmer to the Republican No. XVIII (Jan. 25, 1788), in *Letters from the Federal Farmer to the Republican* 124 (William H. Bennett ed., 1978) (the Federal Farmer believed that the general populace needed to possess arms to avoid the formation of a select body of military men, against which the populace would be defenseless).

96. Jay R. Wagner, Comment, *Gun Control Legislation and the Intent of the Second Amendment: To What Extent is There an Individual Right to Keep and Bear Arms?*, 37 *Vill. L. Rev.* 1407, 1426 (1992).

97. Malcolm, *supra* note 76, at 162-63.

98. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (“[T]he people’ protected by the . . . Second Amendment[] . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”), Lund, *supra* note 81, at 107.

99. See Lund, *supra* note 81, at 111.

100. See *id.* at 108; Michael J. Quinlan, *Is there a Neutral Justification for Refusing to Implement the Second Amendment or is the Supreme Court Just “Gun Shy”?*, 22 *Cap. U. L. Rev.* 641, 677 (1993).

101. Lund, *supra* note 81, at 108.

102. *Id.* at 109.

103. See Lee Kennett & James L. Anderson, *The Gun in America; The Origins of a National Dilemma* 202-04 (1975).

104. 26 U.S.C. § 5801 et seq. (1988).

105. *United States v. Miller*, 26 F. Supp. 1002 (W.D. Ark. 1939) (holding that the demurrer should be sustained because the National Firearms Act of 1934 provision prohibiting delivery of firearms in interstate commerce without a stamp-affixed order was a violation of the constitutional amendment providing the right of the people to keep and bear arms).

106.. 307 U.S. 174 (1939). The Supreme Court, in dicta, twice has cited the holding in Miller with approval. See *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980); *Adams v. Williams*, 407 U.S. 143, 150-51 (1972).

107. Miller, 307 U.S. at 178.

108. *Id.*

109. See Jackson, *supra* note 79, at 196 (pointing to Court's reasoning in prohibiting the use of a sawed-off shotgun because the weapon does not contribute to effectiveness of militia as support for collective rights interpretation). See also Wagner, *supra* note 96, at 1412 n.30 ("The Court apparently felt that the purpose of the militia was limited to defense of the nation against insurrection and foreign invasion.").

110. Lund, *supra* note 81, at 110.

111. *Id.* at 109.

112. See *id.* (emphasizing lack of evidence, defendant's failure to brief the other side of the argument, and defendant's disappearance following trial court's decision to dismiss as contributing to defendant's loss); Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. Dayton L. Rev. 59, 73-88 (1989) (arguing that Miller was defective because the Court only considered Government's view).

113. Lund, *supra* note 81, at 109 (quoting Miller, 307 U.S. at 178).

114. See *id.* (citing *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) ("[I]n the so called 'Commando Units' some sort of military use seems to have been found for almost any modern lethal weapon. In view of this, if the rule of the Miller case is general and complete, the result would follow that, under present day conditions, the federal government would be empowered only to regulate the possession or use of weapons such as a flintlock musket or a matchlock harquebus."), cert. denied, 319 U.S. 770 (1943)).

115. See *id.*

116. See *United States v. Warin*, 530 F.2d 103, 106 (6th Cir.) ("If the logical extension of the defendant's argument for the holding of Miller was inconceivable in 1942, it is completely irrational in this time of nuclear weapons."), cert. denied, 426 U.S. 948 (1976).

117. *Id.* See also *Cases*, 131 F.2d at 922. The Court in *Cases* noted that

[a]nother objection to the rule of the Miller case as a full and general statement is that according to it 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 distinctly military arms, such as machine guns, trench mortars, anti-tank or anti-aircraft guns

Id. See also Jacob Sullum, Devaluing the 2d Amendment, Chi. Trib., May 7, 1991, at 23 (claiming that under the Miller test, weapons such as assault rifles and machine guns are clearly covered by the Second Amendment).

118. Miller, 307 U.S. at 178.

119. Lund, *supra* note 81, at 110.

120. Miller, 307 U.S. at 179 (emphasis added), cited in Lund, *supra* note 81, at 110. See also Wagner, *supra* note 96, at 1414 (arguing that the collectivist position is not supported by the Miller opinion, which states that civilians themselves, and not the states, would supply arms used by the militia).

121. 494 U.S. 259 (1990).

122. Id. at 264-65.

123. See *id.* at 265.

124. See Lund, *supra* note 81, at 110. See also George D. Newton, Jr. & Franklin E. Zimring, *Firearms & Violence in American Life* 113, 253-62 (1969); Laurence H. Tribe, *American Constitutional Law* 226 n.6 (1978).

125. See, e.g., *Burton v. Sills*, 240 A.2d 432 (N.J. Super. Ct. App. Div. 1968) (holding that gun control law requiring issuance of identification cards was proper and reasonable exercise of state's police powers).

126. The surge in gun sales following the riots in the aftermath of the Rodney King beating case seems to confirm this. See Egan, *supra* note 14, at A1. See also National Inst. of Justice, U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics* 1992, at 244 (1993) (estimating that one-half of the existing stock of handguns are owned purely for self-defense purposes).

127. Furnish & Small, *supra* note 47, at 7.

128. Bureau of Justice Statistics, *supra* note 126, at 244.

129. David B. Kopel, *Hold Your Fire: Gun Control Won't Stop Rising Violence*, *Pol'y Rev.*, Winter 1993, at 58, 60.

130. Don B. Kates, Jr., *Bigotry, Symbolism and Ideology in the Battle over Gun Control*, 1992 *Pub. Interest L. Rev.* 31, 44; Kleck, *supra* note 16, at 111.

131. See Jonathan Simon, *Poor Discipline* 2 (1993) ("Scholars of penality from the right and the left concur in the conclusion that public fear of crime is a genuine and massive feature of our present political landscape."); Federal Bureau of Investigation, U.S. Dep't of Justice, *Uniform Crime Reports for the United States*, 1992, at 12, 28 (1993) (violent crime up 23% and robberies up 24% since 1988). See also Kopel, *supra* note 40, at 374 ("The failure or inability of the modern American state to control crime makes it particularly unlikely that Americans could be persuaded by statute to give up their guns.").

132. Kopel, *supra* note 40, at 375.

133. Id.

134. See *supra* notes 71 to 73 and accompanying text.

135. See Snyder, *supra* note 63, at 43.

136. Without explicitly referring to the Second Amendment, Justice Holmes, in *Patsone v. Pennsylvania*, 232 U.S. 138, 143 (1914), seemed to accept the notion that the Framers considered the individual right to repel immediate and proximate threats as basic. He summarized that a ban on aliens' possession of long arms was permissible as a hunting control measure, because the ban did not extend to handguns, which he said might be needed "occasionally for self-defense." *Id.* See also Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 *J. Am. Hist.* 599 (1982); Wagner, *supra* note 96, at 1449.

137. See Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 *Const. Commentary* 87, 90, 93 (1992).

138. *Id.* See also Johnson, *supra* note 74, at 7-10. Whether this frontier ethos is accountable for contemporary America's attraction for guns is questionable, however. Historian W. Eugene Hollon argues that the Western frontier was actually much more peaceful and safe than contemporary society. See W. Eugene Hollon, *Frontier Violence: Another Look* (1974). See also Don B. Kates, Jr., *Toward a History of Handgun Prohibition in the United States*, in *Restricting Handguns: The Liberal Skeptics Speak Out* 10-12 (Don B. Kates, Jr. ed., 1979); Roger D. McGrath, *Treat Them to a Good Dose of Lead*, *Chronicles*, January 1994, at 16.

139. See generally Robert J. Cottrol, *Gun Control and the Constitution* xv (1994).

140. Kopel, *supra* note 40, at 323.

141. Lund, *supra* note 81, at 117-18. For an argument that the Framers' intent must be liberally construed, and that inherent in the right to bear arms to secure a well-regulated militia was the right to self-defense, see Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 *Okl. L. Rev.* 65, 100-01 (1983).

142. See Lund, *supra* note 81, at 118. See also *Wingfield v. Stratford*, 96 *Eng. Rep.* 787 (K.B. 1752) (upholding right to bear arms for diverse lawful purposes, explicitly including self-defense).

143. John Locke, *Second Treatise on Government*, in *Two Treatises of Government* 289 (P. Laslett rev. ed., 1960), cited in Lund, *supra* note 81, at 118 n.8. See generally Thomas Hobbes, *Leviathan* 66 (Crawford B. Macpherson ed., 1968) (1651) ("A Law of Nature, (Lex Naturalis) is a Precept or generall Rule, found out by Reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same"), cited in Lund, *supra* note 81, at 119.

144. See Halbrook, *supra* note 76, at 37-76. See also Walter Berns, In Defense of Liberal Democracy 37-59 (1984) (emphasizing Framers' reliance on theories of natural right and self-interest developed by Hobbes, Locke, and Montesquieu); David T. Hardy, Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment, 9 Harv. J.L. & Pub. Pol'y 559, 562-71 (1986) ("The concept that there is a relationship between individual ownership of weaponry and a unique status as 'free Englishmen' antedates not only the invention of firearms but also the Norman-English legal system. . . .").

145. Handgun Prohibition, *supra* note 47, at 230-35; Halbrook, *supra* note 76, at 7-35. See also Kates, *supra* note 17, at 129 ("[L]ater thinkers from Grotius, Locke, Montesquieu, Beccaria, and the Founding Fathers on through Bishop, Pollock, Brandeis, Perkins, and beyond have deemed self defense unqualifiedly beneficial to society. It is only the unnecessary or excessive use of force that is harmful or illegal."). See also F.A. Hayek, *The Road to Serfdom* 17 (1944) (discussing the basic individualism "inherited . . . from Erasmus and Montaigne, from Cicero and Tacitus, Pericles and Thucydides" in the context of the need to respect an individual's "tastes as supreme in his own sphere").

146. Quoted in Lance K. Stell, Guns, Politics and Reason, 3 J. on Firearms & Pub. Pol'y 125, 136 (1990).

147. See Handgun Prohibition, *supra* note 47, at 215 n.46; Thomas M. Moncure, Jr., The Second Amendment Ain't About Hunting, 34 How. L.J. 589 (1991).

148. For a discussion of the historical roots of the Second Amendment, see Malcolm, *supra* note 76, at 4.

149. See Stuart R. Hays, The Right to Bear Arms, A Study in Judicial Misinterpretation, 2 Wm. & Mary L. Rev. 381, 388 (1960). See also Handgun Prohibition, *supra* note 47, at 214 (noting that colonial America required every male to keep and maintain his own arms); *United States v. Miller*, 307 U.S. 174, 180-81 (1939) (discussing Massachusetts' organized militia, which in 1784 required every man to be responsible for providing his own firearm).

150. Malcolm, *supra* note 76, at 139.

151. See Lund, *supra* note 81, at 118.

152. Hobbes, *supra* note 143, at 189.

153. See generally Thomas Aquinas, *On Kingship* 9-10 (Ian Eschmann ed., 1949).

154. See generally Richard Epstein, *Takings, Private Property and the Power of Eminent Domain* 7-18 (1985); Hobbes, *supra* note 143, at 228-39; John Locke, *An Essay Concerning the True Origin, Extent and End of Civil Government* ch. 8 (1690); Locke, *supra* note 143, at 367.

155. See Lund, *supra* note 81, at 119-20.

156. See Federal Bureau of Investigation, *supra* note 22, at 12.
157. 1 William Blackstone, *Commentaries On the Laws of England* 144 (William Carey Jones ed., 1916) (contending that the right to have arms for self-defense is based on the “natural right of resistance and self-preservation.”). Consider, however, that the Canadian legal authorities reject the very idea of armed self-defense in any form, including the use of Mace, tear-gas canisters, and electric stun-guns. See Kopel, *supra* note 40, at 148. As the father of Canada’s modern gun-control legislation, University of Toronto Professor M. Friedland, puts it, “A person who wishes to possess a handgun should have to give a legitimate reason. . . . To protect life or property . . . should not be a valid reason. . . . Citizens should rely on the police, security guards, and alarm systems for protection.” *Id.* at 384.
158. *The Federalist* No. 28, at 127 (Alexander Hamilton) (George Macy Co. ed., 1945).
159. Lund, *supra* note 81, at 120.
160. *Id.*
161. *Id.*
162. See, e.g., Robert F. Drinan, *Gun Control: The Good Outweighs the Evil*, in *The Great Gun Control Debate* 12-14 (1976). But see Michael I. Krauss, *Americans and their Guns; Canadians and their Government* 1 (1995) (unpublished manuscript, on file with author) (“The individual right to keep and bear arms is, like all natural rights, deontological. It emphatically does not depend for its existence on the maximization of some social utility function. Even if prohibiting private possession of guns would lower the overall crime rate, private possession of guns should not be outlawed.”) (emphasis omitted).
163. Lund, *supra* note 81, at n.45.
164. See generally Kleck, *supra* note 16, at 132. See also Becker, *supra* note 51, at 18 (“[G]reater certainty of apprehension and conviction is an effective deterrent to robbery and most other serious crimes.”).
165. Furnish & Small, *supra* note 47, at 15.
166. *Id.*
167. James Q. Wilson & Richard J. Herrnstein, *Crime and Human Nature* 173-209, 389-96 (1985).
168. See *id.*
169. See Furnish & Small, *supra* note 47, at 57 (finding that only 20 persons were legally executed, all for murders, between mid-1967 and mid-1984, whereas thousands of criminals are killed by gun-wielding private citizens every year. “Compared to the murder rate, the probability of being executed for murder is almost statistically insignificant.”); Kleck, *supra* note 16, at 132

("Being threatened or shot at by a gun-wielding victim is about as probable as arrest and substantially more probable than conviction or incarceration.").

170. See generally Locke, *supra* note 143, at 53.

171. Lund, *supra* note 81, at 123.

172. See Polsby, *supra* note 39, at 58-59. Cf. Lund, *supra* note 81, at 112 (arguing that the Second Amendment is not an "anachronism").

173. *Id.*

174. See Kleck, *supra* note 16, at 138-39.

175. *Id.* at 43-45.

176. *Id.* at 104. Cf. Kates *supra* note 17, at 155 ("[S]ociety only benefits from deterrence if criminals react by totally eschewing crime, or at least confrontation crime. If the effect when particular individuals or neighborhoods or communities are perceived as well armed is only to displace the same crime elsewhere, the benefit to one set of potential victims comes at the expense of others who are, or are perceived as being, less capable of self-protection.").

177. Kleck & Bordua, *supra* note 47, at 282-84.

178. See Snyder, *supra* note 63, at 50.

179. Kleck, *supra* note 16, at 116 (estimating that these figures are equal to less than 2% of all defensive gun uses).

180. Kleck, *supra* note 38, at 44.

181. *Id.*

182. Krauss, *supra* note 162, at 2.

183. *Id.* at 46.

184. *Id.* at 44.

185. See Kleck, *supra* note 16, at 111-17.

186. Furnish & Small, *supra* note 47, at 50.

187. Note, *Handguns and Products Liability*, 97 *Harv. L. Rev.* 1912, 1915 (1984).

188. James Wright & Peter Rossi, *Armed and Considered Dangerous: A Survey of Felons and Their Firearms* 145-46 (1986).

189. This fear of being shot is also the reason why burglary is the one category of violent crime where the American rate does not exceed the British rate. A 1982 survey showed that only 13% of U.S. burglars try to enter occupied homes, whereas 59% of British burglars enter homes that are not empty targets. Kopel, *supra* note 40, at 92.

190. *Id.*

191. Kleck, *supra* note 16, at 133.

192. *Id.*

193. Letter from Thomas Jefferson to Peter Carr in 8 *The Papers of Thomas Jefferson*, at 407 (Julian Boyd ed., 1953).

194. Snyder, *supra* note 63, at 44.

195. Kleck, *supra* note 16, at 134.

196. *Id.*

197. *Id.*

198. Tahmassebi, *supra* note 93, at 87.

199. *Id.* Cf. Handgun Prohibition, *supra* note 47, at 155 (“Again, it is debatable exactly why this ordinance had such an effect. . . . However, once again the publicized passage of the ordinance may have served to remind potential burglars in the area of the fact of widespread gun ownership, thereby heightening their perception of the risks of burglary.”).

200. Kleck & Bordua, *supra* note 47, at 282-83. This conclusion is also supported by the low rate of crime in Switzerland, where criminals know that their potential victims are likely to be armed. (The Swiss society’s strong social controls also contribute to the low crime rate). See Kopel, *supra* note 40, at 286-90.

201. Kopel, *supra* note 40, at 289-91.

202. *Id.*

203. In many instances, handguns will be safer than other firearms when used for self-defense purposes, because the various potential side effects of firing a rifle or shotgun in an urban environment make their use problematic. See Kates, *supra* note 47, at 245.

204. See *Richman v. Charter Arms Corp.*, 571 F. Supp. 192, 202 (E.D. La. 1983) (“[T]he social utility of an activity that . . . enables some people to defend themselves cannot be denied.”).

205. See Tahmassebi, *supra* note 93, at 67.

206. See Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812*, at 78 (1968). See also Comment, *Carrying Concealed Weapons*, 15 Va. L. Rev. 391-92 (1909) (“It is a matter of common knowledge that in this state and several others, the more especially in the Southern states, where the negro population is so large, that this cowardly practice of ‘toting’ guns has been one of the most fruitful sources of crime. . . . Let a negro board a railroad train with a quart of mean whiskey and a pistol in his grip and the chances are that there will be a murder, or at least a row, before he alights.”).

207. See Malcolm, *supra* note 76, at 140.

208. Wright and Rossi, *supra* note 188, at 238.

209. Kopel, *supra* note 40, at 344.
210. See Cook, *supra* note 1, at 1740 (emphasis added) (citations omitted).
211. Tahmassebi, *supra* note 93, at 67. See also Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 *Geo. Wash. L. Rev.* 1, 21-24 (1981); Raymond G. Kessler, *Gun Control and Political Power*, 5 *Law & Pol’y Q.* 381 (1983).
212. See Tahmassebi, *supra* note 93, at 67.
213. *Id.* at 68. See also Charles Murray, *Losing Ground: American Social Policy, 1950-1980*, at 119-20 (1984).
214. See Tahmassebi, *supra* note 93, at 68.
215. Kleck, *supra* note 16, at 104 (emphasis added).
216. *Delahanty v. Hinckley*, 686 F. Supp. 920 (D.D.C. 1986).
217. *Id.* at 928.
218. See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Towards an Afro-American Reconsideration*, 80 *Geo. L.J.* 309, 354-55 (1991). The notion of restricting gun ownership to the rich is nothing new, however. The English Game Act of 1609, for example, required a would-be hunter to have income from land of at least £40 a year, or a life estate of £80, or personal property worth at least £400. See Malcolm, *supra* note 76, at 71-75 (“The use of an act for the preservation of game was a customary means to curb lower-class violence.”).
219. *Jordan*, *supra* note 206, at 78, cited in Tahmassebi, *supra* note 93, at 69-70.
220. See, e.g., *An Act Concerning Slaves*, § 6, 1840 *Laws of Tex.* 171, 172, ch. 58 of the *Texas Acts of 1850* (prohibiting slaves from using firearms altogether from 1842-1850); *Act of Mar. 15, 1852*, ch. 206, 1852 *Laws of Miss.* 328 (forbade ownership of firearms to both free blacks and slaves after 1852); *Kentucky Acts of 1818*, ch. 448 (providing that, should free blacks or slaves “willfully or maliciously” shoot a white person, or otherwise wound a free white person while attempting to kill another person, the slave or free black should suffer the death penalty).
221. *Dred Scott v. Sandford*, 60 *U.S.* 393, 416-17 (1856).
222. See Kopel, *supra* note 40, at 336. See also Kates, *supra* note 138, at 14 (“Klansmen were not inconvenienced [by the legislation], having long since acquired their guns . . . , nor were the company goons, professional strike-breakers, etc., whose weapons were supplied by their corporate employers. By 1881 white supremacists were in power in the neighboring state of Arkansas and had enacted a virtually identical ‘Saturday Night Special’ law with virtually identical effect.”).

223. Kates, *supra* note 138, at 14 (“The ‘Army and Navy Law’ is the ancestor of today’s ‘Saturday Night Special’ laws.”).
224. See Kopel, *supra* note 40, at 333.
225. See generally Cong. Globe, 39th Cong., 1st Sess. 588-891 (statement by Sen. Donelley giving examples of enacted codes).
226. Reprinted in Harold Hyman, *The Radical Republicans and Reconstruction* 219 (1967), cited in Tahmassebi, *supra* note 93, at 71. For compelling anecdotal evidence showing the necessity for blacks to defend themselves through the use of firearms during the civil rights era, see Don B. Kates, Jr., *The Necessity of Access to Firearms by Dissenters and Minorities Whom Government is Unwilling or Unable to Protect*, in *Restricting Handguns* (1979); John R. Slater, Jr., *Civil Rights and Self-Defense, Against the Current*, July/August 1988, at 23.
227. 1866 Miss. Laws ch. 23, § 1, at 165 (1865), cited in Tahmassebi, *supra* note 93, at 71.
228. 92 U.S. 542 (1875) (holding that the right to assemble and the right to bear arms were natural rights predating the Constitution, and that the Constitution merely gave validity to these rights. “[B]earing arms for a lawful purpose . . . is not a right granted by the Constitution.”). Many feel that this decision essentially ruined the Fourteenth Amendment as a check on state abuses of human rights until its resurrection in the 1920s. See, e.g., Kopel, *supra* note 40, at 335.
229. Tahmassebi, *supra* note 93, at 75.
230. See Kopel, *supra* note 40, at 335.
231. Laurence Kennet & James L. Anderson, *The Gun in America: The Origins of a National Dilemma* 50 (1975), cited in Tahmassebi, *supra* note 93, at 69.
232. *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941), cited in Tahmassebi, *supra* note 93, at 69.
233. See Kates, *supra* note 138, at 14; Tahmassebi, *supra* note 93, at 77.
234. N.Y. Penal Law § 1897 (Consol. 1909) (amended 1911).
235. Kopel, *supra* note 40, at 343. See also Kates, *supra* note 138, at 15 (“Across the land, legislators in conservative states were importuned by business lobbyists bearing glowing endorsements of the Sullivan Law concept from such (then) arch-conservative institutions as the New York Times and the American Bar Association.”).
236. Kopel, *supra* note 40, at 342-43 (quoting New York Tribune, Nov. 19, 1903, at 6).
237. *Id.* at 343.

238. 65 Cong. Rec. S3945 (daily ed. Mar. 11, 1924).
239. *Id.* § 3946.
240. See Tahmassebi, *supra* note 93, at 76.
241. Kates, *supra* note 138, at 15. “Moreover, in ensuing years those who ruled the South found that there were challengers other than the blacks against whom the forces of social control might have to be exerted. Agrarian agitators arose to inform poor whites that they were trading their political and economic group identity for a fraudulent racial solidarity with a false imperative of preserving white supremacy.” *Id.* at 13.
242. Tahmassebi, *supra* note 93, at 80.
243. Robert Sherrill, *The Saturday Night Special* 280 (1973), cited in Tahmassebi, *supra* note 93, at 80.
244. Barry Bruce-Briggs, *The Great American Gun War*, 45 *Pub. Interest* 37, 50 (1976).
245. *Id.*
246. See Kleck, *supra* note 16, at 89.
247. See Murray, *supra* note 213, at 120.
248. See U.S. Dep’t of Justice, *supra* note 2, at 1.
249. Tahmassebi, *supra* note 93, at 68.
250. Don B. Kates, Jr., *Handgun Control: Prohibition Revisited*, *Inquiry*, Dec. 5, 1977, at 21. See also Kleck, *supra* note 16, at 86-87 (“Effective [Saturday Night Special] measures would disproportionately affect the law-abiding poor, since it is they who are most likely to own [Saturday Night Specials] and obey the laws, and who are least likely to have the money to buy better quality, and therefore higher-priced, weapons. . . . Whereas it might not be easy for the law-abiding poor to buy a more expensive gun, few career criminals willing to assault and rob would lack the additional \$50—100 it would take to purchase a gun not falling into the [Saturday Night Special] category.”). The reality that criminals do not utilize the less expensive variety of handguns is underscored by the dramatic increase in the use of high quality (and high capacity) handguns during criminal episodes. Chenow, *supra* note 26.
251. See, e.g., *DeShaney v. Winnebago County Dep’t of Social Servs.*, 489 U.S. 189, 196 (1989) (“[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests”); *Warren v. District of Columbia*, 444 A.2d 1, 3 (D.C. 1981) (“[G]overnment and its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen.”). See also *Everton v. Willard*, 468 So. 2d 936 (Fla. 1985); *South v. Maryland*, 59 U.S. 396 (1855).

252. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).
253. *Kates*, supra note 17, at 124 (“If the circumstances permit, the police will protect a citizen in distress. But they are not legally duty bound to do even that, nor to provide any direct protection A fortiori the police have no responsibility to, and generally do not, provide personal protection to private citizens who have been threatened.”).
254. See Note, supra note 187, at 1915 (“[H]andguns provide their owners with a psychic security that cannot be easily measured.”).
255. See *Kleck*, supra note 16, at 86.
256. Senator Daniel P. Moynihan’s proposed tax on gun sales and on the purchase of ammunition is one example. See *Becker*, supra note 51, at 18 (arguing that such a tax would increase the number of guns in the hands of criminals and raise the incidence of crime).
257. 429 U.S. 252 (1977).
258. *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 517 F.2d 409, 413 (7th Cir. 1975).
259. *Id.*
260. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (citation omitted).
261. *Id.* at 253. See also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 25 (1973) (holding that mere disproportionate impact on the poor is legal).
262. *Arlington Heights*, 429 U.S. at 265 (emphasis added).
263. *Id.* at 265-66 (emphasis added).
264. *Id.* at 266.
265. *Id.* at 267.
266. See supra notes 204 to 284 and accompanying text.
267. *Arlington Heights*, 429 U.S. at 271.
268. See, e.g., Edward Patrick Boyle, *It’s Not Easy Bein’ Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 *Vand. L. Rev.* 937, 939 (1993) (arguing that legislators will rarely include racist reasoning in the public record and that plaintiff is unlikely to have access to other evidentiary sources).
269. See John E. Nowak & Ronald D. Rotunda, *Constitutional Law*, § 14.3, at 576 (4th ed. 1991).
270. See generally *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).
271. Nowak & Rotunda, supra note 269, at 575-76 (describing the strict scrutiny test).

272. See Troy R. Holroyd, Comment, *Homosexuals and the Military: Integration or Discrimination?*, 8 *J. Contemp. Health L. & Pol'y* 429, 441-42 (1992).

273. See Shapiro, 394 U.S. at 638; Skinner, 316 U.S. at 541. See also Holroyd, *supra* note 272, at 441-42.

274. This raises a question similar to whether the First Amendment could void a building code which applies to all buildings, including churches and newspapers, and which results in higher costs which may mean that poor people cannot afford to build a church or operate a newspaper. Analogy raised in letter from Don B. Kates, Jr. (Oct. 9, 1994) (on file with author).

275. Gary Kleck, *Guns and Violence: A Summary of the Field*, Paper Presented at the American Political Science Association 18 (Aug. 29, 1991), cited in Kopel, *supra* note 40, at 391.

276. See Robert A. O'Hare, Jr. & Joroge Pedreira, *An Uncertain Right: The Second Amendment and the Assault Weapon Legislation Controversy*, 66 *St. Johns L. Rev.* 179, 204-05 (1992) (arguing that as long as "dealers can penetrate U.S. borders and reap millions of dollars in illegal profits," they will be able to arm themselves accordingly—therefore, it is not the criminal, but the law-abiding citizen who will be affected most by gun control). It follows that those who misuse firearms should be severely penalized and those who merely possess them should not. Becker, *supra* note 51, at 18 ("[A] state mandatory term sends a clear signal about the risk of using guns to perpetrate crimes.").

277. NRA Inst. for Legislative Action, *Ten Myths About Gun Control* 21 (1989).

278. *Id.*

279. *Id.*

280. See *Peril or Protection?*, *supra* note 47, at 290. ("[C]itizens willing to invest some time can be schooled in defensive firearms use to at least the same level of competence as the average police officer.").

281. See Kleck, *supra* note 16, at 47. See also Furnish & Small, *supra* note 47, at 51 ("[F]irearms need not be a source of accidents if the householder and other occupants of the home are adequately trained in their proper use and care, and especially in the manner in which they are kept inaccessible to others besides the owner . . .").

282. Eric C. Morgan & David B. Kopel, *The 'Assault Weapon' Panic* 67 (1993) (Independence Institute issue paper) ("More consistent enforcement of existing statutes would directly target criminal misuse of all firearms. State and localities could also assign prosecutors to felons perpetrating violent crimes with firearms.")

283. *Id.* (“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.”).

284. *Id.* (“While a direct link between [the glamorizing of ‘assault weapon’ misuse in prime-time television shows such as *Riptide*, *21 Jump Street*, and *Miami Vice*] 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.”).

285. *Id.*

286. See Bureau of Alcohol, Tobacco and Firearms, U.S. Dep’t of the Treasury, *State Laws and Published Ordinances—Firearms* (1989); *Gun Control Act of 1968*, 18 U.S.C. §§ 921-28 (1988). The Act allows persons to engage in firearm trade upon compliance with applicable licensing procedures. *Id.* § 923. Additionally, the Act delineates exemptions from the prohibition of firearm ownership or control. *Id.* § 925.

Controlling the populace by controlling weapons is not a novel idea. Examining archeological evidence from gravesites in ancient Britain, the author details the link between individual freedom and ownership of weapons. This article was originally published in the April-May 1995 issue of Handgunner, a bi-monthly British firearm magazine, and an outstanding source of information regarding historic and modern weapons control in Britain. Subscriptions in the United States are available for \$30 surface mail, \$60 airmail. Handgunner is published by Piedmont Publishing, Ltd., Seychelles House, Brightlingsea, Essex CO7 0NN, United Kingdom. Telephone 01206-305204.

The Rite to Bear Arms

Heinrich Härke

The ancestor cult has, in modern times, been replaced by history, but the function remains the same: legitimization of the powers that be. Even in our fast-paced and future-oriented times, the past still provides some of the most powerful arguments for or against political actions and social attitudes.

Thus, arguments against the private ownership of certain weapons have frequently pretended to draw on history: that the unregulated possession of such weapons may have been acceptable under the uncertain conditions of the distant past, when upright men had to defend their farms and homesteads against robbers and vagrants, but that the spread of civilization and of benevolent state power had obviated the need for this; indeed, that in a largely urban and industrial society, the rule of law and the imperatives of order even require the state to remove this anachronistic right of individuals to bear arms because it poses a danger to society. This is the point at which the “civilization” argument against private ownership of weapons merges with the “inherent danger” argument.

That the latter is a myth, has been demonstrated time and again on the basis of criminal statistics and international comparisons. That the former argument is a myth as well, is harder to prove because the degree of “civilization” cannot be quantitatively tested. But it is the aim here to show that social attitudes to weapons have not been altered by the civilizing influence of “progress,” but by changes in the make-up and structure of society, and by the changing interests of those who run society.

The best way to demonstrate this may be to go right back to the beginnings of European Christian civilization—that civilization which is supposed to have removed the practical need for, and moral right to, individual ownership of weapons. If there is a test case, the post-Roman Dark Ages should provide it. And at a superficial glance, the evidence appears to support the argument. After the collapse of Roman rule in Western Europe around A.D. 400, the mostly pagan Germanic tribes taking control of what is now Germany, Belgium, France and England buried their men with weapons. However, after their conversion to Christianity, they gave up that habit at the same time as their rulers laid the foundations of Christian states with institutions of government, law and religion. Does not his process show the transition from Dark Age lawlessness to Christian civilization in which the newly emergent state organization imposed peace and order, and individuals no longer needed to be armed to protect their families, their freedom and their possessions?

Actually, no, it does not. This interpretation is about as logically coherent as seeing smoke from a distance and telling your child: “See, this happens when you play with matches.” On closer inspection, the “Dark Age-to-Civilization” case tells a rather different story. Let us, therefore, go back to the actual evidence and give it a second, critical inspection. We shall concentrate on England because this is where some of the most relevant research has been undertaken; but comparisons with other areas of Western Europe will be made where necessary and useful.

The Romans who had conquered most of Britain in the first century A.D., had suppressed the warlike inclinations of the Celtic natives and imposed the *pax Romana*—in other words: they

imposed and enforced a state monopoly of force much in the way that we know it today. When Britain, and indeed all of Western Europe, slipped from their control in the fourth and fifth centuries A.D., the incoming Germanic tribes from across the Rhine and the North Sea replaced the Roman state with a different type of society: that of the tribal kingdom based not on territoriality, taxation and laws, but on kinship and personal loyalty. And whereas the Roman Empire had maintained a professional army, the post-Roman kingdoms used tribal levies of free men, led by members of the nobility, although some of the latter also kept professional bodyguards.

Initially, most of the Germanic tribes settling on formerly Roman soil, like the Franks in Germany and France and the Anglo-Saxons in England, were pagans and practiced burial with grave-goods. Individuals would be buried or cremated fully dressed, and whilst additional household items (like knives, pots or spindle whorls) were deposited in female burials, about 50% of the males were buried with weapons: swords, seaxes (single-edged battle knives), axes, spears, shields, and occasionally body armour. There never seemed to be any doubt about how to explain this: Germanic warriors were buried here with the tools of their Dark Age trade making sure that (according to their pagan religion) they would be able to ply it in the hereafter.

However, a detailed analysis suggest that this explanation of the weapon burial is much too simplistic and may, in fact, obscure the key point.¹ For a start, a quarter of all weapon sets deposited in Anglo-Saxon graves were incomplete (e.g. shields without offensive weapons, throwing axes or javelins on their own, etc.). Also, there was absolutely no connection between the frequency of weapon burials and the level of military activity as reported in contemporary texts. But it is the bones which provide the most intriguing information. Many of the individuals buried with weapons were too young or too old to have wielded them effectively. The youngest was a mere 12 months old. Furthermore, individuals buried with weapons were exactly as healthy or unhealthy, and as fit or unfit to fight, as those without

weapons. Not even severe disabilities barred a man from burial with weapons. But perhaps most significantly, unambiguous cases of wounds, usually in the form of cut marks on skulls or long bones, occur in both groups. This demonstrates that even men who had clearly been in a fight could be buried without weapons.

The decisive factors which determined who was buried with weapons, seem to have been kinship and ethnicity. In a number of cemeteries where there is enough detailed evidence, it can be shown on the basis of inherited traits that weapon burial was tied to certain families, whereas other families did not participate in this rite. The evidence points to the weapon-burying families as being Germanic: men with weapons were, on average, between 2 and 5 cm (1 to 2") taller than the men without weapons in the same cemeteries. This is exactly the average difference between the immigrant Anglo-Saxons of Germanic origin and the native Britons of Celtic stock. Alternative explanations of the stature differential, like differential quality of the diet, can be excluded on the basis of other skeletal evidence.

Thus, burial with weapons had nothing to do with warriors. It was purely symbolic—it was the “family badge” of the immigrants, a way of expressing their ethnicity, their being different from the natives who were buried without weapons.

The immigrant Germanic did that not just in England, but in most areas where they lived alongside Romanized natives of other ethnic groups. However, there is a significance in this conclusion which goes well beyond the observation of ethnic differences. Law codes and other written sources of this period inform us that once England had come under the control of the Anglo-Saxons, the vast majority of the surviving natives (called “Welsh,” meaning “foreigners” in the Old English tongue) lost their freedom: they became semi-free tenants or even serfs.² In other words: the “family badge” of weapon burial was the mark of the free—the men of the unfree families were buried without weapons.

This link between weapons and freedom seems to be an ancient tradition in Germanic society. It certainly goes back to,

at least, the first century A.D. The Roman writer Tacitus observed that a Germanic youth, on achieving adulthood, would be accepted into the assembly of free men by being given a shield and a spear in a public ceremony. Tacitus leaves us in no doubt as to the meaning of this ceremony:

*These (i.e. shield and spear), among the Germans, are the equivalent of the man's toga with us—the first distinction publicly conferred upon a youth, who now ceases to rank merely as a member of a household and becomes a citizen.*³

Why, then, did that symbolic link disappear, and with it the rite of burying with weapons? During the seventh century, weapon burials became less frequent and by the mid-eighth century, the rite had disappeared both in England and in Continental Western Europe. At a superficial glance, that may well look like the result of Christianization and civilization. The conversion of the pagan Anglo-Saxons began with the mission of St. Augustine who arrived at Canterbury in A.D. 596. Over the following century, Christianity spread throughout England, and the weapon burial rite declined steadily until it ceased altogether. However, this is mere coincidence. The Church never prohibited the deposition of grave-goods, in general, nor of weapons, in particular. And on the Continent, the Franks were Christianized around A.D. 500, but they continued to bury large numbers of their men with weapons for another two centuries. There are even cases of Frankish aristocrats buried in *churches* with full sets of weapons or (in the case of women) other possessions and offerings.

So, the reasons for the disappearance of the weapon burial rite must lie elsewhere, and they are suggested by the historical context. During the seventh and eighth centuries A.D., the “Dark Age,” tribal kingdoms of Western Europe were being transformed by a gradual, but fundamental political and social change. The more aggressive kingdoms gobbled up their neighbors, creating a smaller number of larger, more powerful polities. Their greater size and complexity required the creation of more permanent administrative structures, weakening the traditional reliance on kinship ties and personal loyalty, and

replacing them with formalized rights and obligations. Militarily, the new rulers relied increasingly on professional warriors who owed allegiance only to their employers, but not to their kin and tribe. This, in turn, reduced the military importance of the tribal levies of free men. The arrival of the stirrup in Western Europe in the eighth century led to the introduction of mounted shock combat and the rise of the heavy cavalryman with his expensive equipment, totally overshadowing the lightly armed tribesman on foot.⁴ At the same time, the political status of the free man was further undermined by the increasing wealth and power of the local aristocracy which acquired more and more land, usually as a royal fief in return for military service. The extent of communally held land shrank, and the number of free farmers decreased while the proportion of tenant farmers and serfs increased.

In other words: the social hierarchies were accentuated, the rich became richer, the powerful became even more powerful, while the political weight of the ordinary free man declined. It is in this period that we see the beginnings of feudal society, with its rigid social order, its sharp class distinctions and minimal social mobility. We also see the beginnings of state organization, with a centralized administration run by full-time court officials and an incipient bureaucracy. The ideological support for this was supplied by the Christian Church which—in contrast to pagan Germanic religion—was strictly hierarchical and centralized, and preached obedience to the powers that be: *Render therefore unto Caesar the things which are Caesar's, and unto God the things that are God's*.⁵ In return, it was rewarded with a large share of the power. This process reached its first climax in Charlemagne's Frankish Empire of the late eighth and early ninth centuries, and England lagged not far behind.

It is not surprising then, that throughout this process, the weapon burial rite—the mark of the free man—declined and eventually disappeared.⁶ It is also significant that among the last to be buried with weapons were the aristocrats themselves. The famous royal grave mound at Sutton Hoo in Suffolk where, in all probability, King Raedwald of East Anglia was interred in the

seventh century, with the most spectacular Anglo-Saxon armory ever found, is a case in point.

In the Frankish kingdom, the last burials with weapons date in the eighth century, and they are believed to be the graves of the local aristocracy. Thus, the first to lose the “rite to bear arms” in the grave were the men of ordinary, free families, was curtailed more and more by the land-owning aristocracy and increasingly centralized state and church structures. When all power was concentrated in the hands of the royal and noble allies, they could easily renounce this expression of their status: they, too, stopped burying with weapons, and switched from displaying symbols of freedom with the dead, to displaying symbols of power among the living.

Thus, far from being the result of “civilization,” the disappearance of weapons from Dark Age graves was the consequence of social change induced and controlled by the political elite. The declining importance of weapons in the rituals of early medieval society signaled not increasing law and order, but increasing social divisions, increasing ideological manipulation, and decreasing personal freedom for the majority of the population.

Key parts of this pattern can be observed in other historical situations right up to the present day. Ruling élites of one description or other, from kings to dictators to “democratic” parties, have exploited social change and engendered changes in public opinion to enhance their own positions and deprive their subjects or potential opponents of what they feared could be the means of actively resisting the power of the increasingly centralized state. Only details have changed over time. Today, the social process exploited is not the rise of a military aristocracy, but the large-scale urbanization of society and the emergence of a rapidly growing underclass. And the rôle of the church in advertising the aims of the élite has been taken over by the mass media, which allow the manipulation of public opinion on a large enough scale to achieve by “democratic” means what can no longer be imposed by simple order and coercion. One of the

prime examples of disenfranchisement by “democratic” process behind a smoke screen of false arguments must be the first British Firearms Act of 1920, which was introduced ostensibly to curb crime, but in reality to forestall a feared popular uprising.⁷

The gradual implementation of the hidden agenda of the political and social élites of our time has resulted in the strange dichotomy of unarmed, and indeed disarmed, citizens in a heavily armed state. Whatever arguments are presented to legitimize this situation, there is no way that it can be justified by reference to higher standards of “civilization.” Two examples may suffice to highlight how morally dubious and indefensible this dichotomy is. In Germany, stringent firearms laws were enacted by the Nazis who militarized the nation, but were wary of weapons in the hands of potential enemies within.⁸ Today we are witnessing the systematic vilification of the idea of private firearms ownership, whilst being subjected to unparalleled propaganda about the state-sanctioned use of violence in international relations, most recently during the Gulf War. And at the same time as the state is claiming ever more urgently and oppressively the monopoly of access to, and use of, weapons, we see the political rôle of ordinary citizens downgraded more and more to what the Germans have aptly called *Stimmvieh* (“ballot fodder”).

Perhaps that ancient Germanic link between ownership of weapons and individual freedom was never severed—and the ideologically supported and legally enforced removal of weapons from private ownership in our Western societies may carry a message about what is happening to civil liberties and individual freedom.

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While the Second Amendment to the United States Constitution garners a great deal of attention in the gun rights debate, the rights to arms provision contained in state constitutions have historically been more important in actual litigation. This article examines decisions from three states—Oregon, Colorado, and Ohio—upholding the constitutionality of “assault weapon” laws in the early 1990s. The article suggests that the decisions were result-oriented, disingenuous, and illegitimate. The article first appeared in the annual state constitutional law issue of the Temple Law Review, volume 68, beginning on page 1177, in 1995.

A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts

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Introduction

Among legal scholars, the Second Amendment to the United States Constitution¹ has received ever-increasing attention over the last decade.² From being ignored as “the Embarrassing Second Amendment,”³ the Constitution’s right to keep and bear arms is now discussed by the most prestigious law journals⁴ and by the most important constitutional law professors.⁵ Yet the increased scholarly attention paid to the Second Amendment has not been matched by commensurately increased judicial attention. The Supreme Court in the last five years has offered dicta twice which suggest that the Court shares the academy’s view of the Second Amendment as an individual right.⁶ Yet the number of cases (two) which have relied on the Second Amendment to

declare a law unconstitutional is no higher today than it was twenty years ago.⁷ During this period, the only law which was even (slightly) judicially jeopardized by the Second Amendment was the federal Gun-Free School Zones Act of 1990.⁸ In declaring the law outside the scope of the Congressional power over interstate commerce,⁹ the Fifth Circuit suggested in passing that the law might also be problematic on Second Amendment grounds.¹⁰ The Supreme Court, affirming the Commerce Clause holding, did not mention the Second Amendment.¹¹

The story of the right to keep and bear arms under state constitutions is just the opposite. From the 1820s until the present, courts have used state constitutional rights to arms to strike down various gun control laws. Altogether, twenty weapons laws have been declared void as a result of a state right to keep and bear arms.¹² Forty-three state constitutions contain some kind of right to bear arms provision, making the right to arms among the more ubiquitous civil liberties guaranteed by state constitutions.¹³

Yet popular debate over gun control, which focuses intensely on the federal Second Amendment, largely neglects state constitutional provisions, provisions which are usually far more relevant to proposed state and local gun controls than the Second Amendment. Compared to the Second Amendment, legal scholarship has paid relatively little attention to state constitutional arms provisions.¹⁴

This article attempts to redress the imbalance, at least a little. It examines three recent major state constitutional decisions dealing with the right to arms, in particular municipal bans or controls on so-called “assault weapons.” In *Oregon State Shooting Ass’n v. Multnomah County*,¹⁵ an Oregon county had enacted a relatively mild restriction on “assault weapons”; although the law did not place extra restrictions on possession or acquisition, it did ban the sale of “assault weapons” at a government facility which hosted gun shows, and also required “assault weapons” to be unloaded when transported in public.¹⁶ When challenged in Oregon district court, the law was upheld.¹⁷ The Oregon Court of Appeals voted to affirm the lower court,

but was divided as to the rationale. The dissent would have upheld the law on the grounds that relatively minor restrictions on a small class of unusually dangerous firearms did not amount to an infringement of the right to arms.¹⁸ The majority, however, went much further, holding that, under a historical test developed by the Oregon Supreme Court,¹⁹ the Oregon constitutional right to arms did not even extend to the firearms in question.²⁰ The Oregon Supreme Court denied review.

In *Robertson v. City of Denver*,²¹ the Colorado Supreme Court considered the constitutionality of a 1989 Denver City Council ordinance that was much more restrictive and covered a wider variety of firearms than did the ordinance at issue in Oregon.²² Upon cross motions for summary judgment, the district court declared the ordinance invalid under the Colorado Constitution, although the court opined that a much more narrowly drafted law would have been constitutional.²³ A 6-1 majority of the Colorado Supreme Court reversed and upheld the law.²⁴ The case has been remanded for trial on issues unrelated to this article.²⁵

Also in 1989, Cleveland enacted an ordinance²⁶ that covered even more firearms than the Denver ban.²⁷ Like the Denver law, the Cleveland law was a total ban on possession and sale, with an exception made for current owners who registered with the city. The majority of the Ohio Supreme Court held that the right to arms in Ohio was a fundamental individual right,²⁸ but the court affirmed the district court's grant of Cleveland's motion to dismiss, reasoning that no set of facts could prove the ordinance, or any part of it, unconstitutional.²⁹ The dissenters would have remanded the case for trial, to test the truth of the Cleveland ordinance's assertions that the banned guns were unusually dangerous and frequently used for criminal purposes.³⁰

In each of the cases the state Attorney General became involved, although in different ways. In Oregon, the Attorney General wrote an opinion stating that the restrictions violated the Oregon Constitution, but he did not participate further in the case.³¹ In Ohio, Attorney General Lee Fisher, a member of the Board of Directors of Handgun Control, Inc., wrote amicus

briefs in support of the Cleveland gun ban.³² In Colorado, the Attorney General has the statutory right to intervene in all cases challenging the constitutionality of an ordinance.³³ After Denver was sued by private plaintiffs who thought the Denver gun ban unconstitutional, Attorney General Duane Woodard exercised his right to intervene, and joined the case on the side of the plaintiffs.³⁴

In the three cases we will examine,³⁵ the majority opinions did not take the right to arms seriously, at least not in the sense of viewing the right as one entitled to judicial protection. Rather, the majority opinions not only upheld the laws in question, but also disabled the constitutional right itself. With the exception of a concurring opinion in the Colorado case,³⁶ none of these rights-disabling opinions had the intellectual honesty to acknowledge that the opinion's authors strongly disfavored the right to arms and wanted to relegate it to a second-class constitutional status. Rather, the opinions claimed to be nothing more than narrow technical legal analyses, although the analyses were often conducted in an intellectually dishonest manner.

Part I of this article sets forth the intellectual and historical background of state constitutional litigation involving the right to arms, paying special attention to different theoretical bases for determining which kinds of arms should receive constitutional protection. The remainder of the article examines issues which the different courts considered in interpreting their state constitutions' right to arms. Part II looks at history and original intent, with special reference to Oregon, where the Oregon Supreme Court has created a historical intent test for interpreting the Oregon Constitution's right to arms.³⁷ Part III examines the issue of whether the right to arms is a fundamental right, a question that was central to the Colorado decision.³⁸ Part IV analyzes the standard of review for arms right cases, a central issue in the Ohio decision.³⁹ Part V examines the fact-finding engaged in by all three state courts. The conclusion places the cases in their broader social context and explains how, paradoxically, legal decisions which suggest that gun owners have no rights which a

court is bound to respect result in the political strengthening of the gun rights movement.

I. Historical Interpretations of State Constitutional Rights to Arms

A. The Underlying Theories

American courts have generally interpreted the state constitutional arms guarantees according to two theories, which we call “civic republicanism” and “classical liberalism.” Both theories recognize an individual’s right to possess arms, but the right serves a different purpose under each theory.⁴⁰ Under the civic republicanism theory, guarantees of the right to keep and bear arms protect individual ownership of arms that would be appropriate to restraining tyrannical government, but do not necessarily protect a right to carry arms:

The section under consideration, in our bill of rights, was adopted in reference to these historical facts, and in this point of view its language is most appropriate and expressive. Its words are, “the free white men of this state have a right to keep and bear arms for their common defence.” It, to be sure, asserts the right much more broadly than the statute of 1 William & Mary.⁴¹ . . . But, with us, every free white man is of suitable condition, and, therefore, every free white man may keep and bear arms. But to keep and bear arms for what? If the history of the subject had left in doubt the object for which the rights is secured, the words that are employed must completely remove that doubt. It is declared that they may keep and bear arms for their common defence The object, then, for which the right of keeping and bearing arms is secured is the defence of the public. The free white men may keep arms to protect the public liberty, to keep in awe those who are in power, and to maintain the supremacy of the laws and the constitution.⁴²

Under this theory, reflected in early court interpretations of the Second Amendment, the right to keep and bear arms only protects arms appropriate to military purposes:

What then, is he protected in the right to keep and thus to use? Not every thing that may be useful for offense or defense, but what may properly be included or understood under the title of “arms, “ taken in connection with the fact that the citizen is to keep them, as a citizen. Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the State. Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained, we hold that the rifle, of all descriptions, the shot gun, the musket and repeater, are such arms, and that, under the Constitution, the right to keep such arms cannot be infringed or forbidden by the legislature.⁴³

Similarly, the West Virginia Supreme Court limited protection to only certain types of arms:

[I]n regard to the kind of arms referred to in the amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets—arms to be used in defending the State and civil liberty—and not to pistols, bowie-knives, brass knuckles, billies, and such other weapons as are usually employed in brawls, street-fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the State.⁴⁴

Much of the case-law development of the civic republicanism theory took place in the South after the Civil War. The former slave states needed new mechanisms for keeping the newly freed slaves in their “proper” place in the economic and

social structure.⁴⁵ At the same time, the state legislatures recognized that overtly racially discriminatory laws would run afoul of the Civil Rights Act of 1866 or the Fourteenth Amendment's guarantee of equal protection.⁴⁶ While historians must infer the legislature's intent in enacting these laws (as historians have done with respect to the contemporaneous vagrancy laws),⁴⁷ there are occasional direct statements of purpose for these new, more restrictive, gun control laws. For example:

The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. . . . The statute was never intended to be applied to the white population and in practice has never been so applied.⁴⁸

The civic republicanism theory provided a way to justify bans or restrictive regulation of concealable handguns, Bowie knives, and a variety of other defensive weapons that were not military arms.

The classical liberalism theory of the right to keep and bear arms protected any arms that could be used for self-defense. The theory has protected not only the right to possess arms at home, but has also struck down many statutes prohibiting the carrying of arms—as we will see when we examine the Oregon decisions of the 1980s.⁴⁹ The earliest of these decisions comes from the Kentucky Supreme Court, striking down a prohibition on the carrying of concealed weapons:

And can there be entertained a reasonable doubt but the provisions of the act import a restraint on the right of the citizens to bear arms? The court apprehends not. The right existed at the adoption of the constitution; it had then no limits short of the moral power of the citizens to exercise it, and it in fact consisted in nothing else but in the liberty of the citizens to bear arms For, in principle, there is no difference between a law prohibiting the wearing of concealed arms, and a law forbidding the

wearing such as are exposed; and if the former be unconstitutional, the latter must be so likewise.⁵⁰

In a more recent decision, the Idaho Supreme Court followed in the classical liberal tradition with respect to the Second Amendment when it interpreted the Idaho Constitution's similar provision:⁵¹

The second amendment to the federal constitution is in the following language: "A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

Section 11, article 1, of the Idaho Constitution reads: "The people have the right to bear arms for their security and defense, but the legislature shall regulate the exercise of this right by law." Under these constitutional provisions, the legislature has no power to prohibit a citizen from bearing arms in any portion of the state of Idaho, whether within or without the corporate limits of cities, towns, and villages. The legislature may, as expressly provided in our state constitution, regulate the exercise of this right, but may not prohibit it. A statute prohibiting the carrying of concealed deadly weapons would be a proper exercise of the police power of the state.

But the statute in question does not prohibit the carrying of weapons concealed, which is of itself a pernicious practice, but prohibits the carrying of them in any manner in cities, towns, and villages. We are compelled to hold this statute void.⁵²

The two theories, civic republicanism and classical liberalism, are not necessarily two discrete boxes, with state cases falling neatly into one or the other. One reason for the doctrinal overlap is that the federal Second Amendment implicitly contains both theories, with civic republicanism in the subordinate clause ("a well-regulated militia"), and classical liberalism in the main clause ("the right of the people").⁵³ Thus, it should not be

surprising that decisions would often use both theories. In *Cockrum v. State*,⁵⁴ the Texas Supreme Court explained why both the Second Amendment and the similar guarantee of the Texas Constitution⁵⁵ limited the authority of the state government to regulate the carrying of arms:

The object of the first clause [of the Second Amendment] cited, has reference to the perpetuation of free government, and is based on the idea, that the people cannot be effectually oppressed and enslaved, who are not first disarmed. The clause cited in [the Texas] bill of rights, has the same broad object in relation to the government, and in addition thereto, secures a personal right to the citizen. The right of a citizen to bear arms, in the lawful defence of himself or the State, is absolute. He does not derive it from the state government, but directly from the sovereign convention of the people that framed the state government. It is one of the “high powers” delegated directly to the citizen, and “is excepted out of the general powers of government.” A law cannot be passed to infringe upon or impair it, because it is above the law, and independent of the law-making power.⁵⁶

Likewise, a 1900 Ohio Supreme Court decision explained the Ohio right in terms of both political liberty and personal defense.^{57]}

B. What Arms Are Protected?

As Part II will discuss, the Oregon courts are the only state courts in recent decades to have developed a substantial body of case law regarding what types of weapons are the “arms” which the state constitution guarantees the right to possess and carry. The few other state court decisions on the subject suggest that a ban on semi-automatic firearms might be constitutionally problematic.⁵⁸ In some cases, courts offered the conclusion that a particular firearm was protected without great theoretical elaboration. For example, in a 1984 case,⁵⁹ the Washington Supreme

court determined that a murderer's ownership of a Colt CAR-15 semiautomatic rifle (an "assault weapon" under current formulations) could not be used as a death penalty enhancement because to do so would unnecessarily "chill" or penalize the assertion of the constitutional right to bear arms.⁶⁰ The court found that the defendant's right to bear arms was directly implicated, and to hold otherwise would violate the Washington Constitution's mandate that "[t]he right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired" ⁶¹ With similarly spare analysis, the Missouri Court of Appeals found "pistols and ammunition clips" to be protected because "every citizen has the right to keep and bear arms in defense of his home, person and property."⁶²

A historical decision in a West Virginia case explained that a previous version of the state constitution had protected militia-type weapons, because "arms" included "the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets—arms to be used in defending the State and civil liberty . . ."⁶³ This militia-weapons test, commonly known as the "civilized warfare" test,⁶⁴ appears to have been adopted by the United States Supreme Court in the 1939 decision *United States v. Miller*.⁶⁵ *Miller* allowed an individual who was not a National Guard member to raise a right to bear arms claim, but held that only arms which were suitable for use in a militia were protected by the Second Amendment.⁶⁶

In contrast, a Florida case found semiautomatic firearms to be protected, but not by inquiring into their suitability for militia use.⁶⁷ Instead, the court based its holding on a determination that such firearms were commonly used for protection by law-abiding people (a classical liberal formulation). "We, therefore, hold that the statute does not prohibit the ownership, custody and possession of weapons not concealed upon the person, which, although designed to shoot more than one shot semi-automatically, are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property, such as semi-automatic shotguns, semiautomatic pistols and rifles."⁶⁸

A North Carolina decision⁶⁹ pointedly rejected the “civilized warfare” test (an implementation of the civic republicanism theory), even while affirming civic republicanism as the theoretical foundation of the right to arms:

To him [the ordinary private citizen] the rifle, the musket, the shotgun, and the pistol are about the only arms which he could be expected to “bear, “ and his right to do this is that which is guaranteed by the Constitution. To deprive him of bearing any of these arms is to infringe upon the right guaranteed to him by the Constitution. It would be mockery to say that the Constitution intended to guarantee him the right to practice dropping bombs from a flying machine, to operate a cannon throwing missiles perhaps for a hundred miles or more, or to practice in the use of deadly gases The intention was to embrace the “arms, “ an acquaintance with whose use was necessary for their protection against the usurpation of illegal power—such as rifles, muskets, shotguns, swords, and pistols.⁷⁰

With this historical case law background in mind, let us now turn to Oregon, where the courts have gone far beyond their twentieth-century peers in developing and applying historical tests which use both the civic republican and the classical liberal theories.

II. Historical Tests and the Right to Arms

A. Oregon Case Law in the 1980s

In the 1980s, the Oregon courts repeatedly struck down laws regulating the possession and carrying of a variety of weapons based on Article I, Section 27 of the Oregon Constitution, which provides that “[t]he people shall have the right to bear arms for the defence of themselves, and the State.”⁷¹ The courts did so by developing a jurisprudence which looked at the historical evolution of weapons technology.

The first case was the 1980 decision *State v. Kessler*,⁷² in which the Oregon Supreme Court declared void an Oregon statute⁷³ that prohibited “possession of a slugging weapon”—in this case, a billy club—in the defendant’s home.⁷⁴ The court traced the ancestry of article I, section 27 back to the Indiana Constitution of 1816,⁷⁵ and from there to the state constitutions of Kentucky (1799)⁷⁶ and Ohio (1802),⁷⁷ thence backward through the Second Amendment and ultimately to the 1689 English Bill of Rights.⁷⁸ The court also cited the Michigan case of *People v. Brown*⁷⁹ for the proposition that concern about the dangers of standing armies was a major motivation behind the right to keep and bear arms, but that the right also reflected a personal self-defense requirement.⁸⁰

The dispute about which arms are protected represents one of the significant differences between the classical liberalism and civic republicanism theories. For this reason, the court discussed which arms the Oregon Constitution protects, and concluded that the 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 ordnance not kept by militiamen or private citizens.⁸¹

Up to this point, the Oregon Supreme Court fell squarely in the classical liberal and civic republicanism traditions of judicial interpretation of the right to keep and bear arms. The court then drew a line between constitutionally protected arms and unprotected weapons:

The development of powerful explosives in the mid-nineteenth century, combined with the development of mass-produced metal parts, made possible the automatic weapons, explosives, and chemicals of modern warfare These advanced 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.⁸²

Because the Oregon Constitution's provision included "defense of themselves,"⁸³ the court concluded that defensive arms, even though "unlikely to be used as a militia weapon, " would include any weapon commonly used for personal defense.⁸⁴ However, the court also clearly stated that "automatic weapons" and "[m]odern weapons used exclusively by the military are not 'arms' " protected by the Oregon Constitution.⁸⁵

We do not wish to criticize the Kessler decision for not taking the right to arms seriously. Kessler is a careful decision that works hard to protect the rights of people who wish to own firearms, while drawing a workable test that clearly excludes modern military weapons from ordinary civilian possession. However, as a historical matter, the court may have been wrong to imply that the drafters of the 1859 Constitution could not imagine the automatic weapons developed as a result of the mid-nineteenth century's industrial advances.⁸⁶ In fact, the mid-century technological advances did not lead to unanticipated developments in small arms. Instead, this era perfected concepts that were already well-known or under development. As early as 1663, Palmer presented a paper to the Royal Society describing the operating principle of the modern gas-operated semiautomatic firearm. Similarly, James Puckle's "A Portable Gun or Machine called a Defence," patented in May 1718, bears many similarities to the Gatling gun, the first of the practical machine guns.⁸⁷ The Puckle gun was ridiculed at the time as an impractical design, and called a scheme for separating investors from their money. But it demonstrates that the concept of machine guns existed, even if the metal working technology of the day was not capable of making the weapon.⁸⁸

The court also erred in asserting that "advanced weapons of modern warfare" such as "automatic weapons," "have never been

intended for personal possession and protection.”⁸⁹ Machine guns were originally designed for military purposes. Nevertheless, from the beginning they had a civilian market: “As early as 1863 H. J. Raymond, the owner of the *New York Times*, had bought three Gatling guns to protect his offices against feared attacks by mobs of people protesting against the Conscription Act of March of that year, of which the *Times* had come out in support.”⁹⁰ Company goon squads used machine guns in suppressing strikes throughout the period between the Civil War and the 1930s—a disreputable use, but lawful under the laws of the day.

The Thompson submachine gun provides the best example of the complex relationship between private and public ownership. Since the anticipated government contracts did not materialize, the “Tommy” guns were successfully marketed to private citizens for self-defense—especially in New York City, where the Sullivan Law had made it difficult to legally buy handguns.⁹¹ Even today, private ownership of automatic weapons in the United States, while heavily regulated and highly taxed,⁹² remains legal in most states.

The year after the *Kessler* decision, the Oregon Supreme Court decided in *State v. Blocker* that while the state legislature could prohibit the carrying of a concealed billy club, the statute in question⁹³ had prohibited possession of a billy club anywhere—and had made no distinction between concealed carry and open carry.⁹⁴ The court did acknowledge that some types of regulation of the bearing of arms were constitutional, but:

On the other hand, ORS 166.510, with which we are here concerned, is not, nor is it apparently intended to be, a restriction on the manner of possession or use of certain weapons. The statute is written as a total proscription of the mere possession of certain weapons, and that mere possession, insofar as a billy is concerned, is constitutionally protected.⁹⁵

The legislature could prohibit carrying arms with criminal intent; it could prohibit carrying concealed arms; but unless

some form of carry was protected, the statute would violate the constitutional protection of the right to bear arms for self-defense.⁹⁶

In *State v. Delgado*, the Oregon Supreme Court faced a precursor to the “assault weapon” issue, a case involving switchblade knives.⁹⁷ The *Kessler* decision had recognized that “hand-carried weapons commonly used by individuals for personal defense” were constitutionally protected.⁹⁸ In *Delgado*, the state argued that switchblades were not commonly used for defense, and therefore fell outside the protection of the Oregon Constitution.⁹⁹

The Oregon Supreme Court rejected the prosecution’s evidence that switchblade knives are “almost exclusively the weapon of the thug and delinquent,”¹⁰⁰ calling the material “no more than impressionistic observations on the criminal use of switch-blades.”¹⁰¹ The court also dismissed the distinction between “offensive” and “defensive” arms:

More importantly, however, we are unpersuaded by the distinction which the state urges of “offensive” and “defensive” weapons. All hand-held weapons necessarily share both characteristics. A kitchen knife can as easily be raised in attack as in defense. The spring mechanism does not, instantly and irrevocably, convert the jackknife into an “offensive” weapon. Similarly, the clasp feature of the common jackknife does not mean that it is incapable of aggressive and violent purposes. It is not the design of the knife but the use to which it is put that determines its “offensive” or “defensive” character.¹⁰²

The court then elaborated on the historical test that had first been announced in *Kessler*:

The appropriate inquiry in this case at bar is whether a kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during either the revolutionary and post-revolutionary era, or in 1859 when Oregon’s constitution was adopted. In particular, it must be determined

whether the drafters would have intended the word “arms” to include the switch-blade knife as a weapon commonly used by individuals for self defense.¹⁰³

After a setting forth a history of pocket knives, fighting knives, sword-canes, and Bowie knives, the court found that the switch-blade knife was of the same “sort” as the knives in common use in 1859:

We are unconvinced by the state’s argument that the switch-blade is so “substantially different from its historical antecedent” (the jackknife) that it could not have been within the contemplation of the constitutional drafters. They must have been aware that technological changes were occurring in weaponry as in tools generally. The format and efficiency of weaponry was proceeding apace. This was the period of development of the Gatling gun, breach loading rifles, metallic cartridges and repeating rifles. The addition of a spring to open the blade of a jackknife is hardly a more astonishing innovation than those just mentioned¹⁰⁴

By acknowledging that “repeating rifles” were under development when Oregon adopted its 1859 Constitution, the court strongly implied that repeating rifles were constitutionally protected, a point which will be important when we examine the “assault weapon” decision.

While the Oregon Court of Appeals had been reversed in *Kessler*¹⁰⁵ and *Delgado*,¹⁰⁶ subsequent decisions of the intermediate court appeared to fall in line with the state supreme court’s approach. In *Barnett v. State*, the court of appeals recognized the blackjack as an “arm” protected under the Oregon Constitution.¹⁰⁷ In *State v. Smoot*, the court of appeals upheld a conviction for concealed carry of a switchblade knife, since the statute in question restricted only the manner of carrying this constitutionally protected arm.¹⁰⁸ The court observed that “[a] person may possess and carry a switchblade as long as it is not concealed.”¹⁰⁹

Each of the Oregon decisions involved a weapon that has an unsavory image: a billy club, a switch-blade knife, and a blackjack. Yet the Oregon courts recognized that while these weapons were sometimes used by criminals, they could also be used for lawful defense. The next decision, however, showed that the Oregon Court of Appeals found certain weapons more unsavory than a switch-blade knife.

B. Oregon's Historical Test Applied to Semiautomatics

In 1990, Multnomah County (where Portland is located) passed Ordinance 646, a mild "assault weapon" regulatory law.¹¹⁰ It prohibited possession for sale at the Exposition Center, a public facility where gun shows were often held. It also required "assault weapons" in a public place "to be unloaded, locked in a gun case and, if in a vehicle, placed in an inaccessible portion of the vehicle when being transported."¹¹¹ Oregon State Shooting Ass'n v. Multnomah County was filed seeking declaratory judgment against the county ordinance, as well as against a city ordinance charging a fee for background checks on gun purchasers.¹¹² Much of the decision relates to the question of whether state firearms laws preempted local regulation, and is uninteresting from the standpoint of what arms are constitutionally protected.¹¹³

The Oregon Supreme Court's Kessler decision acknowledged both the classical liberalism theory ("weapons used by settlers for . . . personal . . . defense") and civic republicanism theory ("military defense")¹¹⁴ of the right to keep and bear arms. Kessler protects both militia weapons and personal defense weapons. The later decisions (Blocker, Delgado, Barnett, and Smoot) involved weapons that were not military weapons, and consequently those cases did not discuss the civic republicanism theory. Yet the Oregon Court of Appeals, in deciding Oregon State Shooting Ass'n, ignored the civic republicanism theory of the right to keep and bear arms. Kessler does not protect modern weapons of warfare, defined as "automatic weapons" and those

“used exclusively by the military;” however, it does protect the sort of weapons used for militia purposes in 1859.¹¹⁵

Ignoring the Kessler decision’s test for which kinds of military arms were protected, the Oregon State Shooting Ass’n court looked exclusively to Delgado’s test.¹¹⁶ But of course Delgado had involved only the “personal protection” prong of Kessler, since Kessler’s militia prong plainly did not protect switchblade knives, the weapon at issue. The court of appeals might as well have cited a decision stating that both commercial speech and political speech were protected, and then applied only a test for commercial speech from a later case.

In Oregon State Shooting Ass’n, the court found that, under the Delgado personal defense test, a weapon must satisfy three criteria: (1) although the weapon may subsequently have been modified, it must be “of the sort” in existence in the mid-nineteenth century; (2) the weapon must have been in common use; and (3) it must have been used for personal defense.¹¹⁷ Let us now examine each of those criteria, as applied to semiautomatic firearms by the court of appeals.

1. “Of the sort”

The first of these criteria is nebulous, as the majority on the court of appeals observed.¹¹⁸ The court of appeals held that the banned semiautomatic weapons were not of the same “form” as mid-nineteenth century weapons.¹¹⁹ The court based its holding on an incorrect statement of fact, and a statement of “fact” that was merely an opinion. The incorrect statement of fact was that “the technology for automatic weapons did not exist until the twentieth century”¹²⁰ The opinion masquerading as fact was “the technology by which automatic weapons operate precludes a finding that a semiautomatic weapon is a ‘counterpart’ of a mid-nineteenth century repeating rifle.”¹²¹

The court of appeals was simply wrong concerning the twentieth-century birth of automatic weapons. If we define “automatic firearm” in its narrowest sense, an “automatic” is a firearm in which, as long as the trigger is depressed, will reload

and fire more rounds until the magazine (which contains the ammunition) is exhausted. The shooter does not need to press the trigger over and over. Rather, he need squeeze it only once, and until he releases, bullets will be loaded and fired automatically. Hiram Maxim demonstrated the first successful automatic weapon in 1884.¹²²

More importantly, weapons of the same “sort”—as measured by their ability to fire bullets rapidly—were in use or under development at the time Oregon adopted its 1859 Constitution. While functional automatic weapons were not invented until 1884, functional machine guns had come decades earlier. Although the terms “machine gun” and “automatic” are sometimes used interchangeably, they are not identical. An automatic gun is a subset of machine guns. A “machine gun” is a firearm in which rounds are loaded and fired by the operation of machinery—even if human action is required to operate the machine. As noted above, prototypes of machine guns were centuries old, although mass production of such weapons had proved to be beyond the skills of the time.¹²³

The practical machine gun era began in France in 1851, with the production of the Montigny Mitrailleuse, a multibarreled battery gun that fired several hundred rounds a minute. Its commercial production demonstrates that machine guns were not only a recognized concept, but operable devices when the Oregon Constitution was adopted. A major advance in machine gun technology came in 1861, when the Union Army bought small quantities of the Ager Gun, a crank-operated machine gun. Unlike most previous machine-gun models, which had needed as many barrels as there were rounds to fire, the Ager fired all of its rounds through a single barrel. The gun, also known as the Ager Coffee Mill, enjoyed only limited success, because the barrel would overheat.¹²⁴ But in 1862, Richard Gatling received patents for his “Gatling gun.” The Gatling gun used six rotating barrels, thereby allowing very rapid fire while keeping the barrels from overheating. In contrast to the automatic weapons developed two decades later, the Gatling gun did not use the energy from the gun-powder explosion to perform the work of reloading and fir-

ing the gun. Instead, the Gatling gun was powered by a hand crank. Thus, the Gatling gun was not an automatic firearm, but it was a machine gun.¹²⁵ Gatling guns were used in small quantities during the Civil War, and sold heavily overseas in the 1860s and 1870s.

The court of appeals was therefore plainly wrong in its factual assertion about the development of firearms. The case before the court of appeals was whether to regulate automatic weapons, based on the Kessler decision, the error about when automatic weapons were developed would be relatively minor, since Kessler stated that automatic weapons were not protected. The problem came when the court of appeals attempted to reason backward from the fact that automatics are not protected to prove that semiautomatics are not protected.

First, the court of appeals reiterated the trial court's claims that the named "assault weapons" "can be readily converted back into the fully automatic military configuration."¹²⁶ This factual finding was plainly incorrect, since federal law already regulates as an automatic any firearm which can be "readily converted" to automatic. As the United States Code states:

The term "machine-gun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts . . . from which a machine-gun can be assembled if such parts are in the possession or under the control of a person.¹²⁷

In other words, by long-standing federal law, if a gun can be readily converted into an automatic, it is an automatic. In 1982, the Bureau of Alcohol, Tobacco and Firearms ("BATF") used the above-quoted statute to classify as an automatic a readily-convertible semi-automatic.¹²⁸ The gun in question was the open-bolt MAC-10, which could be converted to automatic by simply inserting a paper clip in a particular place. The BATF

ruled that any subsequently-manufactured MAC-10 would be classified as a machine gun. Out of deference to the reliance interests of consumers, the BATF did not retroactively classify already-sold open-bolt MAC-10s as machine guns. After the BATF ruling, the MAC-10 manufacturer abandoned the open-bolt design, and began producing other guns which were, according to the BATF's analysis, not readily convertible to automatic.

The BATF decision would have been a solid basis for the court of appeals to find that the Oregon right to arms does not protect pre-1982 MAC-10s. But instead, the court of appeals used the BATF ruling about the MAC-10 to assert that all guns affected by the ordinance were readily convertible.¹²⁹ This reasoning is implausible. If an agency has the job of separating the sheep from the goats, examines an entire herd of animals, and removes only a single sheep, the agency's action is evidence that the other animals are not sheep.

In *State v. Delgado*, the Oregon Supreme Court implied, in passing, that the Oregon Constitution protected nineteenth-century repeating rifles and their twentieth-century counterparts.¹³⁰ Thus, if semiautomatic firearms were counterparts of nineteenth-century repeating rifles, they would be protected by the right to arms. The court of appeals held that a semiautomatic weapon could not be "a 'counterpart' of a mid-nineteenth century repeating rifle"¹³¹ because the operating mechanism for automatic and semiautomatic weapons did not exist in 1859.

To determine the meaning of "counterpart," the court of appeals stated that "counterpart" meant "to seem like a duplicate."¹³² For something to be a duplicate would mean that the Constitution protected only exact replicas of 1859 firearms. "[T]o seem like a duplicate" implies only firearms which could fool consumers into believing that the guns were 1859 replicas would be protected. If that is what the court of appeals meant, the court was rejecting the controlling rule of the state supreme court, which has already found that weapons (like switchblade knives) which are neither duplicates nor seem like duplicates of 1859 weapons are constitutionally protected.

Reading the court of appeal's "seems like a duplicate" language more generously, the court might be saying, "if it quacks like a duck and tastes like a duck, it should be treated as a duck. Even if it is a goose." If so, the court of appeals would have been stating some kind of functionality test: if a gun functions the same as an 1859 gun, then it would be protected.

Functionally, a semiautomatic rifle is not so different from the Volcanic (later Henry) rifle that was under development just before and after adoption of the 1859 Oregon Constitution. Patents were issued in 1849 for the predecessor to the Volcanic rifle, which in turn, achieved massive commercial success as the Henry, introduced in 1861.¹³³ Like a semiautomatic rifle, the Henry could be loaded and fired repeatedly, without reloading. Like a semiautomatic and every other common gun (and unlike an automatic or a machine gun), the Henry fired only one round per trigger press. To fire another round, the shooter would have to press the trigger again. One of the most comprehensive histories of repeating firearms clearly recognized the lineal relationship between the guns like the Henry and modern rifles: "These were the beginning of the long line of military repeating shoulder arms that has stretched toward us through the box magazine, bolt action, clip loading, and finally the automatic types of the present day"¹³⁴ Around 1860, the centuries-long prototype period of rapid-fire weapons was giving way to a period of mass production and refinement.¹³⁵

The court of appeals opined that the 1859 Constitutional Convention would have found it "astonishing" that some of the "assault weapons" were capable of firing "20 rounds of ammunition [with] an effective range of 440 to 600 yards."¹³⁶ If so, the Convention's members had that opportunity for astonishment within two years after Oregon adopted the 1859 Constitution. Henry rifle advertising claimed that the rifle could fire sixty shots a minute.¹³⁷ The company boasted not only of the rifle's firepower, but of its ability to penetrate wood, and to kill at long ranges: "The penetration at 100 yards is 8 inches; at 400 yards 5 inches; and it carries with force sufficient to kill at 1,000 yards. A resolute man, armed with one of these Rifles, particularly if

on horseback, CANNOT BE CAPTURED.”¹³⁸ Even accounting for the exaggerations of advertising, the capabilities of the Henry rifle are similar to those of modern “assault weapons,” and thus an accurate analysis of history suggests that modern semi-automatics may be a counterpart of the Henry rifle.

One ostensible difference between the banned “assault weapons” and weapons under development in the 1850s is the detachable magazine. Many of the weapons covered by the Multnomah County ordinance use detachable magazines, allowing rapid reloading. Although there were no detachable magazine firearms in the 1850s, the Colt revolver’s cylinder was removable, allowing for relatively rapid reloading.¹³⁹ While not as fast as a modern detachable magazine weapon, the Colt revolver demonstrates that the functionality of repeating, rapidly reloadable firearms was known in 1859. Thus, one may argue that modern magazines are merely a refinement of the rapid reloading technology of the revolver. In any case, neither the Portland law nor the court of appeals referred to the detachable magazine as the distinction dividing “assault weapons” from those not regulated.¹⁴⁰

2. Common Use

The second test listed by the court of appeals concerns “common use.”¹⁴¹ The Colt revolver was in common use throughout the West by the time Oregon adopted its 1859 Constitution. The Colt revolver combined two of the functions, repeating and rapid reloading, that are common to the weapons regulated by the Multnomah ordinance. The technological advantage of the Colt revolver over existing weapons was dramatic; one might even argue that they were the “assault weapons” of their time:

Unheard-of fire power was delivered by the new arms . . .
. . . In fact, it is probable that since the late 1850’s there has never been . . . such a disparity in fire power between any two armed forces as there was between the

groups armed with the Colt revolver and their opponents armed in the prevailing way of the time.¹⁴²

No serious person could argue that the Colt revolvers were not commonly used. Instead, the court of appeals ignored the Colt's place in history, and focused on the Volcanic rifle.¹⁴³ The Volcanic was the direct predecessor of the Henry, which became a major commercial success in 1861. The court of appeals insisted that because the Volcanic itself was not commercially successful, there were no counterparts to "assault weapons" in "common use" in Oregon in 1859.¹⁴⁴

3. Personal Defense

Finally, the third criterion used by the court of appeals in applying Delgado's three-part test was whether the weapon was used for personal defense.¹⁴⁵ The Kessler decision made this distinction between "advanced weapons of modern warfare" and the weapons of personal self-defense.¹⁴⁶ In Kessler, the Oregon Supreme Court made it clear that weapons "used exclusively by the military" are not "arms" protected by the Oregon Constitution.¹⁴⁷

But what weapons are "used exclusively by the military"? The fact that Multnomah County found it necessary to regulate "assault weapons" suggests that there were a significant number of non-military owners of such weapons. Indeed, none of the semiautomatic firearms regulated by Multnomah County is used by any military force anywhere in the world, because the firearms are semiautomatic, and modern militaries use automatics. Semiautomatic firearms, which constitute about half of the current supply of handguns and a large fraction of the supply of rifles and shotguns, are frequently used for self-defense.¹⁴⁸

C. Colorado History

In contrast to the Oregon cases, right to arms jurisprudence in Colorado has never looked to conditions surrounding the creation of the state constitution. Nor have the courts stated that

evidence of original intent is irrelevant. The Colorado Statehood Constitution of 1876 included the arms guarantee as it still exists today.¹⁴⁹ The record of the constitutional convention includes votes on motions and amendments, but little reporting of debates (other than a debate over government assistance to parochial schools).¹⁵⁰ The only change made by the state convention to the original proposal was that the original proposal would have restricted the guarantee to “citizens,” but the constitution broadened it to include every “person.”¹⁵¹ As in other Rocky Mountain states, the right to arms was considered fundamental and non-controversial:

The agreed-upon axioms of fundamental rights as guaranteed in the Constitution and the territorial organic acts stimulated little debate. The conventions accepted the free exercise of religion, speech, assembly, press, and petition. Delegates generally included the right to keep and bear arms although the militia often received a separate article A liberal construction and a complete enumeration of rights were prevalent features of the Rocky Mountain bills of rights.¹⁵²

The Colorado arms guarantee was taken from the Missouri Constitution of 1875.¹⁵³ The chairman of the Bill of Rights committee explained in the Missouri constitutional convention:

[T]his provision goes on and declares, that the right of every citizen to bear arms in support of his house, his person, and his property, when these are unlawfully threatened, shall never be questioned, and that he shall also have the right to bear arms when he is summoned legally or under authority of law to aid the civil processes or to defend the State.¹⁵⁴

Moreover, the framers of the Missouri Constitution felt that the state legislature would need authorization to regulate the carrying of concealed weapons, since a Kentucky state court had held that “a provision in the Constitution declaring that the right of any citizen to bear arms shall not be questioned, prohibited

the Legislature from preventing the wearing of concealed weapons.”¹⁵⁵ Since explicit authorization was necessary to regulate the bearing of concealed weapons, obviously no legislative power existed to prohibit the keeping of arms.

As to the scope of protected arms, a Missouri delegate explained the federal Second Amendment in part as a right to own and carry militia arms:

How is this to be construed? Simply a right of the citizen of a state to carry a pistol, sabre or musket? . . . The right belongs to every state, not only that its citizens shall always be free to own arms & to carry arms, but also to put those citizens thus armed & equipped in an organization called militia.¹⁵⁶

As the Colorado Supreme Court had noted in 1989, “[T]he framers looked to other states as models for almost all of our constitutional provisions.”¹⁵⁷ By 1876, the courts of several states had held that the right to keep arms protected possession of militia-type firearms.¹⁵⁸ Hornbook law in 1876 was set forth by Pomeroy’s *An Introduction to the Constitutional Law of the United States*:

It may be remarked that whatever construction is given to these clauses, [the federal Bill of Rights] will also apply to the same or similar provisions in the state constitutions. 1. The right of the people to keep and bear arms. The object of this clause is to secure a well-armed militia But a militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons. To preserve this privilege, and to secure to the people the ability to oppose themselves in military force against the usurpations of government, as well as against enemies from without, that government is forbidden by any law or proceeding to invade or destroy the right to keep and bear arms.¹⁵⁹

The Colorado framers and the people in 1876 were familiar with the latest repeating firearms and the continuing technologi-

cal revolution in arms. For instance, the book *Draft of a Constitution Published under the Direction of a Committee of Citizens of Colorado* included an advertisement on its last page for the sale of “all kinds of latest improved breech loading guns, rifles, pistols, Colts and Smith & Wesson’s revolvers, Sharp’s, Wesson’s, Winchester and Remington rifles”¹⁶⁰ The Volcanic Rifle, marketed as early as 1856, held twenty-five to thirty rounds. The Winchester Model 1866 (a successor to the Henry) was advertised in 1867 as firing “at a rate of one hundred and twenty shots per minute,” and was recommended both for Army use and “for a home or sporting arm.”¹⁶¹

Thus, the issue that was at least arguably a close call with regard to the Oregon Constitution of 1859 was well-settled by the time of the Colorado Constitution of 1876. Rapid fire, powerful firearms, suitable for both military and civilian use, were ubiquitous, and were commonly sold to civilians. Since the framers of the Colorado Constitution thought it necessary to grant specific authorization for regulation of concealed carry, it is implausible that the framers contemplated a legislative body having the authority to ban the type of rapid-fire military/civilian rifles which were common at the time the constitution was written.

Further evidence about original intent is supplied by the most important jurist in early Colorado law—E.T. Wells—a highly respected justice of the territorial and the state supreme court, a delegate to the constitutional convention, author of the leading nineteenth-century treatise on Colorado law, and a president of the Colorado Bar Association. In the Colorado State Supreme Court Library is a book owned by Wells titled *The Constitution of the State of Colorado Adopted in Convention, March 14, 1876; Also the Address of the Convention to the People of Colorado*.¹⁶² Handwritten notes on the constitution appear on blue-lined note paper before the text begins. Item 68 is: “The provision that the right to bear arms shall be [not called?] in question refers only to military arms: not dirks, bowie knives, etc.” Along with this, Justice Wells cited a case from Texas, *English v. State*.¹⁶³

English v. State held that the Texas Constitution “protects only the right to ‘keep’ such ‘arms’ as are used for purposes of war.”¹⁶⁴ In addition to this civic republicanism standard, the English court stated:

The word “arms” in the connection we find it in the constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense. The arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, holster pistols and carbine¹⁶⁵

All of this history makes it hard to believe that, under the original intent of the Colorado Constitution, semiautomatic firearms can be outlawed simply by dubbing them “military” and “rapid-fire.” Obviously a demonstration could have been proffered (which may or may not have been factually persuasive) that modern semiautomatics are actually so much more powerful than the Henry’s and Winchester-type rifles of the 1870s that the modern guns could not be within the contemplation of the framers. No such demonstration was attempted. While the U.S. Supreme Court has stated that proof that the framers of the Constitution would have found a particular law offensive will suffice to declare the law unconstitutional,¹⁶⁶ other courts have not been so deferential to original intent. For example, a court may view original intent as only one factor among several to be considered. Or a court may simply declare that it does not care what the original intent of the Constitution was. The Colorado Supreme Court, when faced with overwhelming, uncontested evidence of original intent, could have done the same thing. But the court did not do so. Instead, it simply ignored the entire issue of original intent as if it had never been raised.¹⁶⁷

D. Evolving Technology

The Oregon Court of Appeals, in suggesting that the state constitution protects only guns which “seem like duplicates” of 1859 guns, seemed to reject the idea that constitutional rights

evolve along with the technology to exercise them. It is true that the authors of the Second Amendment and of the Colorado, Ohio, and Oregon constitutions never specifically intended to protect the right to own semi-automatics (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 (or 1859) 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.

Does “freedom of the press” in the Constitution’s First Amendment, and its state counterparts, apply only to printing presses “of the sort” in use in 1789? Are printing technologies that rely on lead type protected, while xerographic processes are not? Is a pamphlet distributed on floppy diskette or through electronic mail unprotected? Should the Supreme Court hold that presses capable of printing thousands of pages of libels per hour are not protected?

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 applies to every new technology. For example, in *United States v. Katz*,¹⁶⁸ 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.¹⁶⁹

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 a publisher uses a Franklin press to produce a hundred copies of a pamphlet, or laser printers to produce a hundred thousand. In 1791, it was easy to start a newspaper. But today, starting a major paper requires large financial resources. The changed conditions

provided a reason to uphold a law guaranteeing a right of reply to persons who were attacked in a newspaper. But the Supreme Court had no trouble rejecting changed conditions as a reason for retreating from the historical understanding of the First Amendment.¹⁷⁰

It is true that an individual who misuses a semiautomatic today can shoot more people than could an individual misusing a musket 200 years ago.¹⁷¹ Yet if greater harm were sufficient cause to invalidate a right, there would be little left to the Bill of Rights. 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 few 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. Correspondingly, a libelous television program can ruin a person's reputation throughout the nation, a feat no single newspaper could have accomplished. Likewise, 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.

In short, the proposition that the (arguably) greater dangers of semiautomatics justify a ban on modern firearms technology proves too much, since it allows a ban on many other modern objects used to exercise constitutional rights in harmful ways.

Virtually every freedom guaranteed in the Bill of Rights causes some damage to society. 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 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.

Persons who find the above argument 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 the government is so trustworthy, then a constitutional amendment to abolish or limit the right may be proposed. But, it is not appropriate for courts to flout an existing constitutional guarantee, even if they personally think it is unimportant.¹⁷² As Justice Frankfurter answered when the Supreme Court's self-incrimination decisions were assailed as medieval technicalism inconsistent with modern government's need to detect criminals and subversives: "If it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion."¹⁷³

Recognizing that the right to arms is not limited to technology in existence when the particular arms guarantee was written does not mean that appropriate laws may not deal with new technologies. For example, although sound trucks did not exist when the First Amendment was written, they have been held to be within the scope of the First Amendment, while subject to reasonable time, place, and manner regulation.¹⁷⁴

Accepting the evolution of firearms technology does not necessarily mean accepting the parade of horrors which typically ends with the question "what if everyone owned a nuclear weapon?" The right to arms is typically phrased in terms that refer to carrying the weapon (i.e. "keep and bear"). This suggests that the guarantee protects only arms which one can carry in the hands, and not tanks or jet fighters.

If we want to examine historical conditions in more detail, we can see that the personal arms which existed at the time of the Second Amendment (and the Colorado, Ohio, and Oregon constitutions) were all hand-carried weapons which could be precisely aimed at a particular target. Such weapons included firearms, edged weapons, and bows. In contrast to weapons which can be skillfully directed to single targets, weapons such as grenades or other explosives cannot be directed at a single

target, but can kill everyone in the area. The historical reasoning would support constitutional protection for firearms accessories which make firearms even more accurate, such as scopes and laser sights, even though scope technology was not commercially applied to early firearms, and laser technology was not even contemplated. Likewise, should the weapon itself fire a precisely-directed laser, the laser gun itself would be protected. In contrast, a new weapon which fired projectiles indiscriminately (such as a device which fired dozens of arrows at once, at random angles) would not be protected, even though the projectile itself (an arrow) clearly is within the historical intent of the right to arms.

In sum, as Indiana Supreme Court Chief Justice Emmert wrote:

Nor can it be maintained that the right to bear arms only protects the use of muskets, muzzle-loading rifles, shot-guns and pistols, because they were the only ones used by the Colonists at the time. It might as well be argued that only a house of the architectural vintage of the Revolution would be protected against a present unreasonable search and seizure. Modern guns suitable for hunting and defense are within the protection of our Bill of Rights just the same as the owner of a modern ranch house type home is protected against unlawful searches.¹⁷⁵

Finally, we should point out that the Oregon Court of Appeals could have upheld the Portland law with a much narrower, simpler rationale. In doing so, the court could have avoided making the radical, rights-eviscerating assertion that the Oregon Constitution protects only duplicates of the exact arms technology that existed in 1859.¹⁷⁶ Indeed, this is the approach of the Oregon dissent.¹⁷⁷

The Oregon State Shooting Ass'n concurring and dissenting opinion stated that the majority opinion "is an example of judicial manipulation of the constitution to meet a perceived localized social need."¹⁷⁸ "The listed weapons are the 'sort of

weapons commonly used for personal defense in 1859. They are rifles, pistols and shotguns.”¹⁷⁹ The majority opinion “will come as a great shock to the many gun owners in Oregon who have possessed semi-automatic rifles and pistols for decades.”¹⁸⁰ However, the ordinance did not unreasonably interfere with the right to bear arms because it is not “a complete ban on the possession of the listed firearms in public places”¹⁸¹ and “does not interfere with a citizen’s defense capacity in their homes or other private places.”¹⁸²

The authors of this article would not have upheld the Multnomah County law under any rationale, because we believe that the law did not have a close enough connection to public safety (in terms of the guns at issue being commonly used in crime, and the gun restrictions having any real effect on crime), and because we believe that the Portland restrictions were more onerous than the Oregon dissenters did. Nevertheless, the Oregon dissent represents a judicial approach which respects the right to keep and bear arms.

III. A Fundamental Right?

The “assault weapon” cases also implicated the issue of whether the right to arms is fundamental. This issue never really arose in Oregon, since the focus was on the supreme court’s historical tests.¹⁸³ In Ohio, the court disposed of the issue quickly, noting that the right to arms was listed in the Ohio Bill of Rights along with other rights, all of them fundamental, and hence the right to arms was fundamental.¹⁸⁴ In the Colorado decision *Robertson v. City of Denver*,¹⁸⁵ the issue proved to be more complex. The complexity arose from a difference among the members of the Robertson court concerning the need to decide whether the right to keep and bear arms in Colorado was fundamental in order to resolve the case.¹⁸⁶

The argument in favor of the right being considered fundamental ran as follows: all specific rights in the Colorado Bill of Rights are fundamental, since the article containing the Bill of Rights contains a prefatory clause declaring that these rights are

“the principles upon which our government is founded”¹⁸⁷ The Colorado Constitution states the right to arms in forceful terms which are stronger than words used to delineate some other rights in Colorado Constitution:¹⁸⁸ “[t]he right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.”¹⁸⁹

Prior to the “assault weapon” case, the Colorado Supreme Court had reviewed two cases involving restrictions on the right to arms by law-abiding persons. The first case, *People v. Nakamura*,¹⁹⁰ invalidated a state law prohibiting aliens from possessing a shotgun, rifle, or pistol:

[The state] cannot disarm any class of persons or deprive them of the right guaranteed under section 13, article 2 of the Constitution, to bear arms in defense of home, person, and property. The guaranty thus extended is meaningless if any person is denied the right to possess arms for such protection [I]n so far as it denies the right of the unnaturalized foreign-born resident to keep and bear arms that may be used in defense of person or property, [the law] contravenes the constitutional guaranty and therefore is void. “The police power of a state cannot transcend the fundamental law, and cannot be exercised in such manner as to work a practical abrogation of its provisions.”¹⁹¹

The Nakamura majority rejected the dissenting opinion’s argument that a trial court may determine whether a specific firearm is possessed for the purpose of defense of home, person, or property.¹⁹² When Nakamura was decided in 1936, the court was aware of the wide availability of semiautomatic firearms,¹⁹³ a fact which made the court’s refusal to inquire as to whether a particular type of firearm was being possessed for defense of “home, person, and property” all the more significant for whether a legislative body could make a blanket declaration that

certain types of semiautomatic firearms could not be possessed for defense. The Colorado Supreme Court never discussed this implication of Nakamura in Robertson.¹⁹⁴

The major gun law case in Colorado was *City of Lakewood v. Pillow*,¹⁹⁵ a unanimous 1972 decision which invalidated a local ordinance which prohibited the possession of a revolver, pistol, shotgun or rifle, except within one's domicile, one's business, or at a target range, unless licensed by the city. Finding the ordinance to be "unconstitutionally overbroad," the court explained:

An analysis of the foregoing ordinance reveals that it is so general in its scope that it includes within its prohibitions the right to carry on certain businesses and to engage in certain activities which cannot under the police powers be reasonably classified as unlawful and thus, subject to criminal sanctions. As an example, we note that this ordinance would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on a substantial part of their business. Also, the ordinance appears to prohibit individuals from transporting guns to and from such places of business. . . . Several of these activities are constitutionally protected. Colo. Const. art. II, § 13. Depending upon the circumstances, all of these activities and others may be entirely free of any criminal culpability yet the ordinance in question effectively includes them within its prohibitions and is therefore invalid. A governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.¹⁹⁶

From the plaintiffs' viewpoint, Lakewood's observation that the restrictive gun law impermissibly served to "broadly stifle fundamental personal liberties" removed any doubt about whether the right to arms was fundamental.¹⁹⁷ In cases decided in later years, the Colorado Supreme Court continued to cite Lakewood and its "fundamental personal liberties" language.¹⁹⁸

As a final argument, the plaintiffs pointed to U.S. Supreme Court language emphasizing that the courts have no authority to declare that some Bill of Rights freedoms "are in some way less 'fundamental' than" others: "Each establishes a norm of conduct which the Federal Government is bound to honor—to no greater or lesser extent than any other inscribed in the Constitution. . . . Moreover, we know of no principled basis on which to create a hierarchy of constitutional values . . ." ¹⁹⁹

The City of Denver responded to the plaintiffs' and the Attorney General's fundamental rights argument. First, Denver asserted that not all Constitutional rights are fundamental.²⁰⁰ Plaintiffs responded that the only rights ever declared non-fundamental were those not contained in the Bill of Rights.²⁰¹

Defendants suggested that the right to bear arms "is not essential to individual liberty."²⁰² Defendants also argued that the supreme court in Lakewood had misapplied U.S. Supreme Court precedent on the First Amendment by using First Amendment overbreadth doctrine to analyze a gun restriction.²⁰³ In an amicus brief, the Denver District Attorney stated that "it is important for this Court to limit [Lakewood v.] Pillow" and to provide "a contemporary construction" of that case.²⁰⁴

Defendants also pointed to several post-Lakewood cases in the 1970s where the supreme court had used the word "reasonable" in upholding restrictions on the possession of arms by convicted felons and drunks.²⁰⁵ Plaintiffs argued that while restrictions on felons and drunks might be evaluated on a "reasonableness" standard, the lower standard had not been applied to law-abiding, responsible gun owners.²⁰⁶

Denver also pointed to decisions stating the right to arms is not "absolute."²⁰⁷ The plaintiffs conceded this but pointed out

that being non-absolute is not the same as being non-fundamental.²⁰⁸

Although courts of sister states are not definitive interpreters of Colorado law, Lakewood had been prominently quoted by the courts of other states to invalidate firearms prohibitions, most notably for its statement that the right to arms is “fundamental.”²⁰⁹

What did the Colorado Supreme Court do with the fundamental rights issue? The court could have followed Lakewood and its progeny and again stated that the right to arms was fundamental. Or the court could have followed the Denver District Attorney’s suggestion and revisited the Lakewood decision. Or the court could have followed Denver’s advice and ruled that, regardless of Lakewood’s holding, subsequent decisions have construed the right to arms as non-fundamental. The court did none of these things.

In a concurring opinion in *Robertson v. City of Denver*, Justice Vollack (subsequently promoted to Chief Justice) stated that he considered the right to arms non-fundamental because it was, in his view, not an important part of liberty in contemporary society.²¹⁰ At least Justice Vollack announced what he was doing: lowering the right to arms to a level of rational basis review because he did not like it.²¹¹

In contrast, the majority opinion asserted that the Colorado Supreme Court had never decided whether the right to arms was fundamental—as if the court’s repeated reference to “fundamental personal liberties” in Lakewood and its progeny had never been written. Indeed the court carefully avoided quoting the “fundamental personal liberties” language. Having sidestepped the very issue that all litigants treated as the heart of the case, the court then went on to apply rational basis review to the ordinance in question—effectively treating the right to arms as non-fundamental, but without having the honesty to say so.

IV. Standard of Review

In *Arnold v. City of Cleveland*,²¹² history was no issue. The parties framed the issue in terms of fundamental rights and the Ohio Supreme Court settled that question at the outset, by declaring that the right to arms under the Ohio Constitution was fundamental.²¹³ In almost every other state, an infringement on a fundamental right is subjected to the strict scrutiny test. The Ohio Court, however, held that restrictions on fundamental rights are subject only to a reasonableness test.²¹⁴ Notably, the Ohio holding was not limited to arms rights cases, so any right under the Ohio Constitution will henceforth be protected only by reasonableness review.

Section A of this part examines how the Ohio court chose a reasonableness test. Section B of this part discusses the standard of review in Colorado, while sections C and D argue that the Ohio, Oregon, and Colorado courts could (and should) have declared the ordinances unconstitutional, without even needing to consider a standard of review.

A. Ohio's Standard of Review

The result in *Arnold* was almost foreordained by the first paragraph:

In determining the constitutionality of an ordinance, we are mindful of the fundamental principle requiring courts to presume the constitutionality of lawfully enacted legislation. *Univ. Hts. v. O'Leary*, 429 N.E.2d 148, 152 (1981); and *Hilton v. Toledo*, 405 N.E.2d 1047, 1049 (1980). Further, the legislation being challenged will not be invalidated unless the challenger establishes that it is unconstitutional beyond a reasonable doubt. *Id.* See also *Hale v. Columbus*, 578 N.E.2d 881, 883 (1990).²¹⁵

We will now turn to each of the three cases that formed the foundation for the *Arnold* standard of review; the cases are important not just to *Arnold*, but to how the Ohio court erred on all constitutional issues.

1. City of University Heights v. O'Leary²¹⁶

O'Leary involved a challenge to municipal ordinances which prohibited individuals from purchasing, owning, possessing, or transporting handguns without an identification card.²¹⁷ The citizen charged with violating these ordinances was a private detective carrying several unloaded firearms in cases locked in the trunk of his automobile²¹⁸ in compliance with the state regulations for transporting firearms.²¹⁹ The portion of the decision cited in Arnold states:

A duly enacted municipal ordinance is presumed constitutional; the burden of establishing the unconstitutionality of an ordinance is upon the one challenging its validity. *East Cleveland v. Palmer* (1974), 40 Ohio App. 2d 10, 317 N.E.2d 246. Appellee has failed to sustain this burden. Sections 626.04(a) and 626.09(a) are not violative of due process. They are not vague. It is clear what is required: a firearm owner's identification card issued by either a non-resident's home municipality, or by the city of University Heights. The method for acquiring a card is clearly set forth in Chapter 626.²²⁰

In O'Leary the trial court and intermediate appellate court both ruled that the University Heights ordinances were unconstitutional because of overbreadth, vagueness, and unenforceability.²²¹ The appellate court additionally ruled the ordinances violative of due process because they penalized innocent conduct.²²² The Ohio Supreme Court reversed after very little discussion of Ohio law or the case itself. Its decision centered on a discussion of three federal cases and one from the District of Columbia: *Lambert v. California*,²²³ *United States v. Mancuso*,²²⁴ *United States v. Freed*,²²⁵ and *McIntosh v. Washington*.²²⁶

In *Lambert v. California* the Supreme Court ruled unconstitutional a Los Angeles municipal ordinance which required convicted felons to register with the Chief of Police shortly after

their arrival in the city.²²⁷ The Court was persuaded in part by the passive nature of the defendant's activity.²²⁸ Lambert's activity, remaining in Los Angeles, otherwise would be considered harmless and an exercise of her freedom of association and travel, both protected by the First Amendment. Her conduct would not ordinarily lead one to inquire about the lawfulness of the conduct. Additionally, the court found that registration of convicted felons is done primarily for the convenience of law enforcement agencies.²²⁹

In *United States v. Mancuso*²³⁰ the U.S. Court of Appeals for the Second Circuit reversed the conviction of a defendant for violating 18 U.S.C. Section 1407, requiring convicted drug offenders to register with customs officials before and after leaving the country.²³¹ The Second Circuit relied on Lambert because of the passive nature of the defendant's conduct, a crime of omission.²³² Like the defendant in Lambert, Mancuso was exercising his freedom of association and travel. Both the district court and the Second Circuit considered Mancuso's lack of knowledge about the registration requirement in making their decisions.²³³ The Second Circuit determined that knowledge of the registration requirement was required:

Since the district court specifically found that there was "no knowledge" of the statute, we hold that Mancuso did not violate 18 U.S.C. 1407 On practical, purposive grounds, it is difficult to understand how elimination of the requirement of knowledge would have furthered the Congressional aim to make detection of illegal narcotics importation easier. . . . When there is no knowledge of the law's provisions, and no reasonable probability that knowledge might be obtained, no useful end is served by prosecuting the "violators."²³⁴

By imposing a knowledge requirement before penalizing a felon for exercising the right to travel, Mancuso seems to militate in favor of a knowledge requirement before penalizing a non-felon exercising the right to transport a firearm.

United States v. Freed²³⁵ limited Lambert and Mancuso's passive activity defense. Defendant Freed was prosecuted for possession of unregistered hand grenades, in violation of the National Firearms Act.²³⁶ Enacted in 1934, the Act restricts the possession or transfer of unregistered machine guns, short-barreled rifles or shotguns, and "destructive devices," including hand grenades.²³⁷ Writing for the Court, Justice Douglas distinguished Lambert, using the rationale of Mancuso: "This is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act. They are highly dangerous offensive weapons . . ."²³⁸ With the aforesaid cases forming the background, the Ohio Supreme Court in O'Leary mirrored the analysis of McIntosh v. Washington,²³⁹ in which the District of Columbia Court of Appeals upheld the firearms registration requirement enacted by the District of Columbia in 1976. Both courts relied on Freed's "dangerous or deleterious devices" rationale. The conclusion of both the Ohio Supreme Court in O'Leary and the District of Columbia Court of Appeals in McIntosh was based on the premise that firearms are dangerous or deleterious devices.²⁴⁰

The problem with this line of reasoning is that ownership and use of firearms—unlike ownership of hand grenades or heroin—is a fundamental right, as confirmed by the Ohio Supreme Court in Arnold.²⁴¹

Traditionally, the items held to be "dangerous or deleterious devices" have not been items for which Congress wants to promote the regulated use.²⁴² Rather, as the Third Circuit noted in a similar case, "[Congress's] purpose was to prohibit this conduct, not to encourage registration prior to engaging in it."²⁴³ So how did O'Leary find the innocent possession of unloaded firearms to be "dangerous or deleterious"?

The core of the O'Leary decision rests on a three-part test derived from the Lambert factors:

First, mere passive conduct is not involved here. To violate the law, one must acquire possession of a firearm. United States v. Crow (C.A. 9, 1971), 439 F.2d 1193,

1196, vacated on other grounds, 404 U.S. 1009, 92 S. Ct. 687, 30 L.Ed.2d 657 (1972); *State v. Drummonds* (1975), 43 Ohio App. 2d 187, 188-89, 334 N.E.2d 538. Second, the regulated conduct here, possession of a firearm, is one which by its nature suggests the possibility of governmental regulation. *United States v. Freed, supra*; *United States v. Weiler, supra*. Third, the gun registration ordinance involved here is not designed solely for the convenience of law enforcement agencies. The purpose of the ordinance is to protect the citizens of University Heights from violence arising from handguns and other firearms by keeping firearms out of the hands of unfit persons, that is, those ineligible to receive a Restricted Weapons Owner's Identification Card. See *Mosher v. Dayton* (1976), 48 Ohio St. 2d 243, 358 N.E.2d 540; *State v. Drummonds, supra*; *Photos v. Toledo* (1969), 19 Ohio Misc. 147, 250 N.E.2d 916.²⁴⁴

The first proposition, that acquiring a gun is not passive, was clearly true. The third proposition, that the gun registration ordinance was not solely for the convenience of the government, was at least arguably true.²⁴⁵ The second proposition, however, revealed the Ohio court's hostility to the right to keep and bear arms. As noted above, a case involving grenades and other unusual destructive devices (not covered by the right to arms) is no precedent for ordinary firearms being considered "dangerous or deleterious."²⁴⁶

The other cases relied on by the Ohio court, *United States v. Crow*,²⁴⁷ *State v. Drummonds*,²⁴⁸ and *United States v. Weiler*,²⁴⁹ all involved convicted felons. *Crow* was convicted of murder ten years before his firearms offense.²⁵⁰ *Drummonds* was convicted of stabbing with intent to kill or wound before he was charged with the later firearms offense.²⁵¹ A court citing these cases for the result that gun owners are presumed to know they may need to register their weapons with any locality they pass through is equating all gun owners with convicted murderers.

The O'Leary decision was written before Arnold announced that the right to arms was fundamental in Ohio. Given that announcement, it was incongruous for Arnold to rely on O'Leary, which is based on the proposition that the owning of firearms is "dangerous or deleterious."²⁵²

In early 1994, the United States Supreme Court announced a decision which made O'Leary and Arnold all the more untenable.²⁵³ A gun owner possessed a semiautomatic Colt rifle which sometimes malfunctioned by firing two shots at once.²⁵⁴

The two-shot malfunction made the gun (by federal definition) a "machine gun," since one trigger press would sometimes fire two bullets.²⁵⁵ The gun owner was prosecuted for possessing an unregistered machine gun.²⁵⁶ The government conceded the defendant's lack of knowledge, but argued that as a possessor of a semiautomatic rifle, he should have been on notice that he owned an object which might be subject to regulation.²⁵⁷ In *Staples v. United States*, the Court held that ownership of a semiautomatic firearm was not the type of activity that should put one on notice that one may be subject to regulation.²⁵⁸

Having equated gun owners with convicted murderers and guns with grenades, O'Leary relied upon *City of East Cleveland v. Palmer*²⁵⁹ to establish its standard of review for municipal ordinances.²⁶⁰ *Palmer* was a challenge to a \$75 parking ticket for violation of a municipal ordinance prohibiting parking along the city streets for more than five hours at night.²⁶¹ Parking on the street at night is hardly a fundamental right, but the Ohio Supreme Court seems to equate gun control measures with parking violations in using *Palmer* as its standard of review.

2. *Hilton v. City of Toledo*²⁶²

In announcing its standard of review, the Arnold court also relied on *Hilton*, a case involving a challenge to a municipal ordinance prohibiting certain advertising signs.²⁶³ The ordinance prohibited flashing portable advertising signs, and limited use of any portable sign to a total of 15 days in one location;²⁶⁴ however, it allowed the use of permanent electric signs.²⁶⁵ In approving

this ordinance as a valid exercise of the municipal police power to regulate commercial activity,²⁶⁶ the Ohio Supreme Court applied the following standard of review:

An enactment of the legislative body of a municipality is entitled to a presumption of constitutionality. The presumption may be rebutted by showing that the ordinance lacks a real or substantial relationship to the public health, safety, morals or general welfare, or that it is unreasonable or arbitrary Furthermore, it is incumbent upon the party alleging unconstitutionality to bear the burden of proof, and to establish his assertion beyond a reasonable doubt.²⁶⁷

This passage from *Hilton* is a source of the standard of review used in *Arnold*.²⁶⁸ Conspicuously absent from the *Arnold* test is the second sentence from *Hilton*, which explains how the presumption of constitutionality may be rebutted.²⁶⁹ The full test for a review of a municipal ordinance, as announced in *Hilton*, is substantially similar to the test employed by the court in *Cincinnati v. Correll*,²⁷⁰ another case cited by the *Arnold* court.²⁷¹ More of this comparison will be made later, but it suffices to say that the *Arnold* court edited the *Correll* test to remove its full effect.²⁷² Both tests require that the challenged ordinance must have a “real or substantial relationship” to the public health and welfare.

Hilton’s test for review is derived from several Ohio cases, which tested the constitutionality of municipal ordinances, dating back to 1918: *City of Dayton v. S.S. Kresge Co.*,²⁷³ *Alsenas v. City of Brecksville*,²⁷⁴ *State v. Renalist, Inc.*,²⁷⁵ *State ex rel. Ohio Hair Products Co. v. Rendigs*,²⁷⁶ *City of East Cleveland v. Palmer*,²⁷⁷ and *City of Cincinnati v. Criterion Advertising Company*.²⁷⁸ All cases cited, except *Renalist*, were constitutional challenges to municipal ordinances. The challenged ordinances limited commercial conduct or practices. In most cases, no freedom of speech issue was even raised. To the extent that the right to speech did appear, it was in the context of commercial speech

which (whether rightly or wrongly) is entitled to significantly less judicial protection than “core” First Amendment speech.²⁷⁹

3. *Hale v. City of Columbus*²⁸⁰

Arnold cited *Hale v. City of Columbus*²⁸¹ for the proposition that a constitutional challenge to a municipal ordinance must meet a burden of proof “beyond a reasonable doubt” in order to prove unconstitutionality.²⁸² Once again, as shown by the edited test from *Hilton*, the court has engaged in selective quotation to achieve its desired end. When the full test is considered, the minimum rationality standard applied in *Arnold* appears incomplete. The full paragraph from *Hale* reads as follows:

Legislative acts enjoy a strong presumption of constitutionality and any challenge must establish beyond a reasonable doubt that the enactment is unconstitutional The person challenging the legislation must show evidence that the legislation lacks the requisite nexus to its stated purpose. . . . Thus, the issue in the facts before this court is, whether the ordinance bears a real and substantial relation to a proper subject of municipal police power under Section 3, Article XVIII of the Ohio Constitution.²⁸³

None of the cases cited in *Hale* to develop the standard of review involved constitutionally protected activity. Instead, the cases involved a public interest group’s complaint that the legislature had not controlled utility advertising strictly enough,²⁸⁴ a complaint that the legislature should not have given money to a veterans’ group,²⁸⁵ a challenge to an ordinance requiring the use of rubber tires on city streets,²⁸⁶ and a challenge to a law banning pinball machines.²⁸⁷

4. *Arnold’s Balancing Test*

The *Arnold* court quoted a passage from *Cincinnati v. Correll*:²⁸⁸ “Laws or ordinances passed by virtue of the police power

which limit or abrogate constitutionally guaranteed rights must not be arbitrary, discriminatory, capricious or unreasonable and must bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public.²⁸⁹ In quoting this passage, the Arnold court left out the paragraph from Correll which states: “The Courts of this country have been extremely zealous in preventing the constitutional rights of citizens being frittered away by regulations passed by virtue of the police power.”²⁹⁰ “Therefore,” the unzealous Ohio Supreme Court announced, “the test is one of reasonableness.”²⁹¹ But, of course, “reasonableness” was only one part of the test which the Arnold court itself quoted. What about whether there is “a real and substantial relation to the object sought to be obtained?”²⁹² It should not be asking too much for a court that announces a test on one page to actually use the test on the next page.

After examining the Arnold court’s misapplication of municipal cases involving commercial law to a fundamental rights case, the reader may wonder why the Ohio court did not follow precedents which required a strict scrutiny standard of review for infringements of state constitutional rights. The answer is that in Ohio, there were no such cases. The Ohio dissent, which argued for a strict scrutiny standard, could cite not cite any Ohio precedents.²⁹³ Instead, it cited cases from other states, including the *City of Lakewood v. Pillow* decision from Colorado, a case consistently interpreted, until the 1994 Colorado Supreme Court decision, to mean that infringements on the state right to arms of law-abiding citizens should be subjected to rigorous judicial scrutiny.²⁹⁴

B. Narrow Tailoring and Overbreadth

As noted above, the Arnold court quoted a two-part test for its low-level review of the Cleveland ordinance, but applied only the first part of the test.²⁹⁵ Similarly, in *Lakewood*, the Colorado Supreme Court, in announcing that it could rely on tests from prior cases without needing to decide if the right to arms was

fundamental, used only a single component of the tests in the prior cases: whether the ordinance was within “the police power.”²⁹⁶ The Colorado court carefully ignored language from its earlier cases which dictated that a law could not be within the police power if it was “overbroad” or not “narrowly tailored.”²⁹⁷ Relying on *Lakewood*, Colorado courts had repeatedly used the overbreadth doctrine to strike down laws, even when fundamental rights were not involved.²⁹⁸ Additionally, courts from other states had cited *Lakewood* while applying the overbreadth analysis to gun restrictions.²⁹⁹ Yet, in *Robertson*, the supreme court ruled the trial court was wrong, as a matter of law, to have applied overbreadth analysis to the Denver gun ban.³⁰⁰ However, prohibiting lawful acquisition of a constitutionally-protected object simply because some criminals might misuse it had already been declared unconstitutional.³⁰¹

A requirement for narrow tailoring had also been articulated in *Lakewood*.³⁰² Instead of implementing a blanket gun ban, Denver could have more vigorously enforced existing laws involving criminal misuse of firearms, or passed a licensing law designed to allow law-abiding citizens to obtain semi-automatic firearms, while preventing criminals from obtaining the weapons. Again, the district court’s use of narrow tailoring analysis was ruled erroneous,³⁰³ even though the district court had merely been following the Colorado Supreme Court’s 1972 *Lakewood* decision.³⁰⁴

C. Bans as Illegitimate Per Se

Ohio Justice Hoffman argued in dissent that “a stricter standard must be utilized when the legislation places restrictions upon fundamental rights, particularly where the legislation prescribes an outright prohibition of possession as opposed to mere regulation of possession.”³⁰⁵ We would go further still than Justice Hoffman. We would argue that the entire debate over standard of review should have been superfluous, for a gun prohibition applied to law-abiding citizens could never be constitutional—even if it could pass strict scrutiny.

In cases implicating the First Amendment (entitled to no more, and no less protection than the Second Amendment), it is well-established that no amount of demonstrated harm may justify banning speech.³⁰⁶ In a due process case involving vagrants, an earlier Colorado Supreme Court had affirmed that no law enforcement necessity could justify an infringement of rights.³⁰⁷

It is true that a gun prohibition ordinance may be an attempt to serve the compelling state interest in reducing violence. But also compelling is the interest in suppressing Nazi speech, for what Nazi speech led to in Germany, it might lead to in America. In addition, there is a well-developed compelling state interest in censorship of television based on numerous studies showing that prolonged exposure of children to television leads to increased homicide and other violent crime.³⁰⁸ Another compelling state interest could be asserted in altering the racial balance of a student body or increasing the number of lawyers of a particular racial or ethnic group. Yet courts will invalidate such laws, “not as insubstantial but as factually invalid.”³⁰⁹ No compelling state interest can support the banning of writings or movies because they might legitimize rape or adultery, because “the First Amendment’s basic guarantee is of freedom to advocate ideas.”³¹⁰

D. Explicitly Stated Anti-constitutional Legislative Purpose

Suppose that a restrictive municipal zoning ordinance declared that its purpose was: “1. To reduce traffic congestion; 2. To reduce fire hazards associated with excessive density; and 3. To prevent racial minorities from living in the city.” While the first two purposes of the ordinance are generally considered legitimate zoning purposes, the third purpose (racial discrimination) is plainly illegitimate. The existence of the illegitimate motive would be sufficient (even if the ordinance were otherwise flawless) for the ordinance to be declared unconstitutional.³¹¹ While illegitimate motivations usually must be ferreted out through litigation, the Portland,³¹² Cleveland,³¹³ and Denver³¹⁴ city council majorities believed so deeply in their

illegitimate motives that they placed them in black and white at the beginning of the statutes. If the right to arms were being treated like the right to freedom of speech or the right to be free of state-sponsored racial discrimination, the Portland, Cleveland, and Denver ordinances would have been instantly struck down on the basis of illegitimate motivation, without need for further inquiry.

The Cleveland City Council asserted that the guns it was banning were made for “anti-personnel” purposes, while the guns which it was not banning “are primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities.”³¹⁵ Likewise, “assault weapons” were banned because the Denver City Council found they were “designed primarily for military or antipersonnel use,”³¹⁶ and were regulated in Portland because their anti-personnel purpose outweighed “any function as a legitimate sports or recreational firearm.”³¹⁷ The Ohio, Oregon and Colorado constitutions explicitly guarantee the right to bear arms for personal protection, and for defense of the state—two firearms uses which are “non-sporting” and “anti-personnel.”³¹⁸ Although the city councils had, in effect, openly declared their illegitimate purpose (restricting of guns used for constitutionally protected anti-personnel purposes), neither the Oregon, Ohio nor Colorado courts considered for a moment that an explicitly stated, anti-constitutional purpose might invalidate the ordinance.³¹⁹

The Colorado Constitution, article II, section 3 states: “All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of . . . protecting property; and of seeking and obtaining their safety.” The Denver Ordinance allows persons who owned “assault weapons” before the effective date of the Ordinance to retain their guns by registering them with the police.³²⁰ But these “grandfathered” registrants were forbidden to use their registered guns for self-defense, even against a deadly attack in their own home. The lower court declared the self-defense prohibition unconstitutional; while requiring the registration of certain guns might be permissible,

forbidding the use of a lawfully owned gun for protection was not.³²¹

On appeal, even the Center to Prevent Handgun Violence (the legal arm of the lobby which helped create the whole “assault weapon” prohibition issue) in its amicus brief did not attempt to justify a ban on use of a registered firearm in lawful self-defense; the Center argued instead that the ordinance had been misinterpreted.³²²

Yet the Colorado Supreme Court, after ruling that “assault weapons” (as broadly defined by the City Council) could be banned, also concluded that the Council could ban the use of lawfully registered, grandfathered guns in lawful self-defense.³²³ While Denver had offered various reasons for wanting to control the “proliferation” of “assault weapons,” the city attorney during the course of the case offered no reason for, and did not attempt to defend, the ban on use of lawfully owned guns for protection. A court which upholds a gun law which not even the gun prohibition lobby and its allies will defend is, it might be suggested, not much concerned about protecting the right to arms.

V. Fact-Finding

In Ohio, the Arnold court found that a fundamental interest was at stake, and then applied a “reasonableness” test to the infringing ordinance.³²⁴ In Colorado, the Robertson court acted as if the fundamental rights issue were undecided, and then proceeded to apply a reasonableness test.³²⁵ Even if we assume that infringements on rights contained in the Bill of Rights should be subject only to a test of “reasonableness,” the premise of any “test” is that some things will pass the test, and others will fail. But as interpreted by the Colorado and Ohio courts, the “reasonableness” test is foreordained never to find unreasonable any infringement or prohibition on the right to arms.

The Ohio case came before the supreme court following Cleveland’s successful motion to dismiss, a motion which precluded any discovery.³²⁶ The Colorado case had arisen out of cross motions for summary judgment, following discovery.³²⁷ In

either case, the trial court was required (and the appellate courts were required to make sure that the trial courts did so) to give every benefit of doubt to the non-moving party, as to which facts would be proven at trial.³²⁸ The Arnold appeal, besides involving constitutional issues, also raised the propriety of the trial court's sua sponte conversion of the motion to dismiss into a motion for summary judgment, and then granting the motion before any discovery could be had.³²⁹ The Ohio Supreme Court found any procedural error to be irrelevant, since, "we believe that appellants can prove no set of facts entitling them to relief."³³⁰

The factual showing that the Cleveland plaintiffs wanted to make in the trial court was offered in part through extensive exhibits of legal and criminological scholarship, and governmental crime statistics, in appendices to the appellate motions.³³¹ The Denver plaintiffs and the Attorney General had the opportunity to make a much more extensive showing, with exhibits to the summary judgment motion. Thus, while the Cleveland litigants complained that the Cleveland government refused to obey public information laws requiring disclosure of the government's data about the (non-)use of "assault weapons" in Cleveland crime,³³² the Colorado litigants were able to discover Denver's data.

At a hearing before the Denver City Council, Police Chief Zavaras testified that "assault weapons are becoming the weapons of choice for drug traffickers and other criminals."³³³ The City Council passed a gun ban which made the specific finding that "law enforcement agencies report increased use of assault weapons for criminal activities. This has resulted in a record number of related homicides and injuries to citizens and law enforcement officers."³³⁴ During discovery, the Colorado Attorney General and the private plaintiffs inventoried every single firearm in Denver police custody. The ordinance covered none of the 232 shotguns, nine of the 282 rifles (3.2%), and eight of the 1,248 handguns (0.6%) in the police inventory.³³⁵ Of the fourteen banned guns in Denver police custody, one had been used in a crime of violence. Half had been seized from persons who were never charged with any offense.³³⁶

Consistent with the Denver data, the plaintiffs in both the Denver and Cleveland cases presented police data from many other cities to support the proposition that “assault weapons” were almost never used in crime.³³⁷ The Ohio and Colorado majorities specifically found this evidence irrelevant.³³⁸ In other words, the city governments could outlaw firearms which had not been crime problems and which, it could be proven,³³⁹ posed no danger of becoming a crime problem. The city governments could outlaw something that might become a problem, whether or not credible evidence suggested that it might. In a free press analogy, Playboy and other non-obscene erotic literature could be outlawed because they might at some future point cause rape, even if it could be proven that they have never caused rape, and there is no evidence that they will do so in the future.³⁴⁰

Even if we presume that a government may ban unusually dangerous firearms, it remains to be proven whether the particular firearms banned are in fact unusually dangerous. Yet in upholding the grant of the motion to dismiss the plaintiffs’ case, the Ohio Supreme Court foreclosed the plaintiffs from introducing any evidence as to whether the (very large) number of firearms banned by Cleveland were in fact more powerful, more likely to be used in crime, or more dangerous in any way at all. The Cleveland City Council had avowed its intent not to ban “sporting” firearms, but only “antipersonnel” ones.³⁴¹ Yet the Ohio majority saw no need for a factual hearing as to whether any one of the numerous guns banned by Cleveland could be proven, perhaps beyond a reasonable doubt, to be in fact a “sporting” gun rather than an “antipersonnel” one.³⁴²

In the first paragraph of the Arnold opinion, the majority announced that challengers to a municipal ordinance must prove “beyond a reasonable doubt” that the ordinance is unconstitutional.³⁴³ Articulating a “reasonable doubt” standard of proof implies that proof can be made. But what kind of proof can be made when the government’s assertions when enacting the ordinance are taken as the irrefutable last word, against which no evidence can matter?³⁴⁴

Thus, as the Ohio dissent complained:

Whether the weapons banned by the Cleveland ordinance are primarily antipersonnel or whether they are equally suitable for defensive or sporting purposes has yet to be demonstrated The mere declaration by Cleveland Council that it finds the primary purpose of assault weapons to be antipersonnel and any civilian application or use of those weapons is merely incidental to such primary antipersonnel purpose . . . is, standing alone, insufficient to satisfy the government's burden when such legislation infringes upon a fundamental right The challenger must be given an opportunity to demonstrate otherwise.³⁴⁵

The Colorado majority took the same approach as the Ohio majority. The Denver City Council had proclaimed that its motive in enacting the ordinance was fighting crime.³⁴⁶ That proclamation was sufficient to prove to the court that the gun prohibition was within "the police power."

In Oregon, the majority had, in its finding that "assault weapons" are not protected by the Oregon right to arms, relied heavily on the finding that some semi-automatic "assault weapons" have evolved from military firearms.³⁴⁷ Yet, as the dissent pointed out, the majority refused to "separately analyz[e] those listed firearms that did not originate as military weapons."³⁴⁸ Likewise, the majority worked hard to prove that semiautomatic technology was unimaginable to the authors of the 1859 Oregon Constitution; yet one of the guns which the majority discussed in a footnote (a shotgun) uses a revolver mechanism (invented in the 1840s, and widespread immediately thereafter) and is not a semiautomatic.³⁴⁹ Yet the majority did not discuss how a theory about semi-automatic guns which are derivative of military guns could be applied to eliminate constitutional protection for a revolver-action gun which has no military design in its past.

"Facts are stubborn things," John Adams told the jury during the Boston Massacre trial.³⁵⁰ "Facts are stupid things," President Reagan said in a malapropism.³⁵¹ "Facts are nothing at all," the Ohio and Colorado Supreme Court majorities have stated, when the rights of gun owners are involved.

Conclusion

Not every state court in recent years has treated gun owners as having no rights that local governments were bound to respect as long as guns were not completely prohibited. For example, the same year that Portland, Denver, and Cleveland passed “assault weapon” laws, Atlanta did as well. A lawsuit soon followed, and not long thereafter the court granted the plaintiffs’ motion for a temporary restraining order.³⁵² In a brief ruling, the court held that the Atlanta prohibition conflicted with state law³⁵³ (and in dicta said that the ban would also violate the state constitutional right to arms). The City of Atlanta did not appeal the decision.

“Nothing is unsayable” in constitutional language, suggested Sanford Levinson, as he compared the Death of Constitutionalism (the notion that the Constitution is a text with bounded meaning), which he called the most important development in modern legal theory, to the Death of God, the most important development in modern theological theory.³⁵⁴ The three cases from Colorado, Ohio, and Oregon represent an apogee of the Death of Constitutionalism, for they are grounded in neither the text of the relevant state constitution, prior precedent in the relevant state court, the intent of the authors of the constitutions, nor on any factual or logical inquiry. To the contrary, the decisions are an application of Justice Powell’s rueful observation that “Constitutional law is what the Court says it is.”³⁵⁵ Yet only Justice Vollack in Colorado was forthright enough to admit that the justices would, in effect, rip the right to bear arms out of the Constitution because they did not like it.

Yet even as professors of theology proclaimed “the death of God” and their views swept through the academy, most of the American populace appears to think reports of the death highly exaggerated.³⁵⁶ Indeed the religions which most determinedly reject the academy’s world view (such as Pentacostalism) are the ones that are experiencing the most rapid growth.³⁵⁷

Something similar is happening with regard to the death of Constitutionalism. The 1993-1994 Ohio, Oregon, and Colorado decisions occurred during the period when the right to bear arms was under the greatest attack in history. The national media confidently proclaimed that the once-mighty National Rifle Association was impotent. Congress enacted, and President Clinton enthusiastically signed, the Brady Bill³⁵⁸ and then a federal “assault weapon” ban as they read polls which suggested that the controls were overwhelmingly supported by the public.

But something happened on the way to the death of the right to bear arms. The Brady Bill’s requirement for local law enforcement to perform a mandatory background check has been held unconstitutional by some courts as a violation of the Tenth Amendment.³⁵⁹ Many gun owners, regardless of the courts’ interpretation of the laws, apparently believe that the “assault weapon” bans are unconstitutional, and are behaving accordingly. While Cleveland and Denver mandated that existing owners of “assault weapons” register themselves and their guns with the police, only about one percent complied, a rate similar to compliance with other gun registration laws.³⁶⁰

After Congress passed a national “assault weapon” ban in the summer of 1994, the gun-owner backlash against it was credited by President Clinton, and other commentators, as responsible for delivering the House of Representatives to the Republicans.³⁶¹

In Ohio, Attorney General Fisher was defeated for re-election.³⁶² Four years before he had won a close victory, in part because many gun rights activists had no idea what he stood for. Four years later, they knew, and they worked very hard to deny him re-election.³⁶³

In Colorado, Democratic challenger Dick Freese made the “assault weapon” issue the centerpiece of his campaign against Attorney General Gale Norton.³⁶⁴ His major television commercial showed an “assault rifle” menacingly pointed at the viewer, while informing viewers of Attorney General Norton’s support for “assault weapons.” Gale Norton won over sixty percent of

the vote, the largest percentage received by any candidate for statewide office in Colorado in 1994.³⁶⁵

The Oregon state legislature recently enacted legislation that preempts all local gun controls.³⁶⁶

Having been told by the courts that the state constitutional right to keep and bear arms is unimportant,³⁶⁷ many people are taking it seriously anyway. The great irony of some courts acting as if gun owners have no rights which the courts are bound to respect is that the gun owners end up recognizing, correctly, that there is no judicial branch that will protect them from the excesses of the legislature. Thus, gun owners become much more intensely involved in the political process, and often succeed in shutting down any legislative attempt at gun control.

Rutgers law professor Robert Cottrol explained how judicial inaction makes moderate gun control less obtainable:

One motivation for vigorous opposition to such measures as waiting period and background checks on the part of the NRA and others is the fear, buttressed by frank admissions on the part of many gun control advocates, that such steps are simply a back door towards prohibition. That fear is further fed by those, including many in the federal judiciary, who urge that the Second Amendment provides no protection against firearms prohibition.³⁶⁸ Imagine how different the political debate on gun control might be if we simply treated the Second Amendment the way we do other provisions of the Bill of Rights. There is no viable political movement lobbying against requirements for parade permits. Why? Because the courts have made it clear that First Amendment guarantees regarding free speech and freedom of assembly will be enforced. Another strong signal of the courts' intentions to enforce the guarantees of the Second Amendment could go a long way towards furthering the cause of reasonable regulation of firearms ownership.³⁶⁹

Perhaps one should not make too much of the three state court decisions shredding the state constitutional right to keep and bear arms. State courts have been striking down unconstitutional gun laws on state grounds from 1821 through the 1980s,³⁷⁰ and the three cases discussed in article may simply represent a brief aberration in the early 1990s. But to the extent that state courts continue to disrespect the rights of the fifty percent of families who own firearms—to the extent that courts continue breaking the law in the name of the law—then courts will aggravate rather than relieve the current climate of polarization and mistrust of government.

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1. "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." U.S. Const. amend. II.

2. Virtually all of the scholarship of the last 20 years concurs that the Second Amendment was originally intended to guarantee an individual right. See, e.g., Staff of Senate Subcomm. on the Constitution, 97th Cong., 2d Sess., *The Right to Keep and Bear Arms* 1, 23 (1982) (noting that enforcement of some federal firearms laws is consistent with interpretation of Second Amendment as an individual right); 2 *Encyclopedia of the American Constitution* 1639-40 (Leonard W. Levy et al. eds., 1986) (stating that framers intended Second Amendment as guarantee of individual's right to bear arms); Leonard W. Levy, *Original Intent and the Framers' Constitution* 341 (1988) (arguing that Second Amendment is most accurately seen as protection of individual right to bear arms); *The Oxford Companion to the United States Supreme Court* 763 (Kermit L. Hall et al. eds., 1992) (discussing current debate over whether Second Amendment intended to protect individual right to bear arms or to permit states to maintain militias); *The Reader's Companion to American History* 477 (Eric Foner & John A. Garrity eds., 1991) (stating that framers intended Second Amendment to protect individual citizens); Akhil Amar, *The Bill of Rights as a Constitution*, 100 *Yale L.J.* 1131, 1164 (1991) [hereinafter *Amar, The Bill of Rights*] (discussing Second Amendment as political right of citizenry to prevent government tyranny); Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *Yale L.J.* 1193, 1264 (1992) [hereinafter *Amar, Fourteenth Amendment*] (arguing that incorporation of Bill of Rights transformed Second Amendment into individual right); David I. Caplan, *The Right of the Individual To Bear Arms: A Recent Judicial Trend*, 1982 *Det. C.L. Rev.* 789, 793 (1982) (arguing that right to bear arms is individual rather than collective right); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 *Geo. L.J.* 309, 314 (1991) (arguing that individual right interpretation of Second Amendment is more consistent with historical evidence than collective right theory); Robert Dowd, *The Right to Arms: Does the Constitution or Predilection of Judges Reign?*, 36 *Okla. L. Rev.* 65, 67 (1983) (arguing that framers guaranteed right to bear arms to individuals); Richard E. Gardiner, *To Preserve Liberty—A Look at the Right To Keep and Bear Arms*, 10 *N. Ky. L. Rev.* 63, 95 (1982) (arguing that no amount of historical revisionism can deny that right to bear arms is fundamental individual right); Stephen P. Halbrook, *The Right of the People or the Power of the*

State: Bearing Arms, Arming Militias, and the Second Amendment, 26 Val. U. L. Rev. 131, 132 (1991) (arguing that language and historical intent of Second Amendment mandates individual right to bear arms); Stephen Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 U. Dayton L. Rev. 91, 94 (1989) (arguing that broad language of Second Amendment warrants inference of individual right); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 Harv. J.L. & Pub. Pol'y 559 (1986) (discussing interpretation of Second Amendment as an individual right and its effect on gun control); Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 Const. Commentary 87, 89 (1992) (arguing that Second Amendment guarantees every adult right to possess most firearms); Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 Law & Contemp. Probs. 143, 145 (1986) (arguing that Second Amendment guarantees individual right to keep arms for self-defense); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 244-52 (1983) (arguing that Second Amendment is the basis for an individual right to bear arms, rather than a collective right to bear arms); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103, 111 (1987) (arguing that language of Second Amendment protects individual's right to keep and bear arms); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 642 (1989) (observing that armed individuals are sometimes necessary to prevent governmental tyranny); Joyce Lee Malcolm, *The Right of the People To Keep and Bear Arms: The Common Law Tradition*, 10 Hastings Const. L.Q. 285, 314 (1983) (arguing that first clause of Second Amendment amplifies scope of right to individuals); William Marina, *Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective*, in *Firearms and Violence: Issues of Public Policy* 417, 418 (Don B. Kates, Jr., ed., 1984) (arguing that individual's Second Amendment right to bear arms not outmoded by developments in technology); James G. Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. Pa. L. Rev. 287, 328 (1990) (arguing that participation by all individuals is necessary to justify resistance to government under Second Amendment); Glenn Harlan Reynolds, *The Right To Keep and Bear Arms Under the Tennessee Constitution*, 61 Tenn. L. Rev. 647, 650 (1994) (extensively discussing the Second Amendment in relation to the Tennessee Constitution); Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right To Bear Arms*, 139 U. Pa. L. Rev. 1257, 1269 (1991) (arguing that Second Amendment provides dispersal of military power across the nation); Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 Law & Contemp. Probs. 125, 141 (1986) (arguing that framers intended Second Amendment to foster communal responsibilities while guaranteeing citizens' individual rights); Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. Am. Hist. 599, 610 (1982) (arguing that history demonstrates that framers intended to guarantee individual right to arms and state right to militia); William Van Alstyne, *The Second Amendment*

and the Personal Right to Arms, 43 Duke L.J. 1236, 1242 (1994) (arguing that the phrase “well-regulated militia” necessarily contemplated individual right to bear arms); David E. Vandercoy, *The History of the Second Amendment*, 28 Val. U. L. Rev. 1007, 1008 (1994) (contending that framers intended to guarantee individual right to bear arms in order to throw off collectively the “yokes of any oppressive government which might arise”); see also Charles L. Cantrell, *The Right To Bear Arms: A Reply*, 53 Wis. Bar Bull. 21, 26 (1980) (arguing that framers intended Second Amendment to protect individual right to keep and bear arms); Robert J. Cottrol & Raymond T. Diamond, “The Fifth Auxiliary Right,” 104 Yale L.J. 995, 997-1006 (1995) (reviewing Joyce L. Malcolm, *To Keep and Bear Arms: The Origin of an American Right* (1994)); F. Smith Fussner, *Book Review*, 3 Const. Commentary 582 (1986) (reviewing Stephen Halbrook, *That Every Man Be Armed, The Evolution of a Constitutional Right* (1984)); Joyce L. Malcolm, *Essay Review*, 54 Geo. Wash. L. Rev. 582 (1986) (same); Cf. Donald L. Beschle, *Reconsidering the Second Amendment: Constitutional Protection for a Right of Security*, 9 Hamline L. Rev. 69, 103-04 (1986) (arguing that Second Amendment intended to guarantee individual’s right to personal security, not to guarantee right to arms); Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right To Arms Viewed through the Ninth Amendment*, 24 Rutgers L.J. 1, 3 (1992) (arguing that Ninth Amendment protects individual’s access to tools for self-defense); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 Yale L.J. 551, 614-15 (1991) (conceding that individual right was intended, but since state governments have neglected their duties to promote responsible gun use through drill in a “well-regulated militia,” right to arms is no longer valid); John Schoon Yoo, *Our Declaratory Ninth Amendment*, 42 Emory L.J. 967, 976 (1993) (discussing Ninth Amendment’s role in implementing individual rights). But see Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right To Bear Arms*, 71 J. Am. Hist. 22, 25 (1983) (arguing that Second Amendment intended to allow militias, not individual right); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?* 15 U. Dayton L. Rev. 5, 7 (1989) (same); Samuel Fields, *Guns, Crime and the Negligent Gun Owner*, 10 N. Ky. L. Rev. 140, 143 (1982) (arguing for gun control because of high contribution of negligent gun owners to gun violence); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 Val. U. L. Rev. 107, 110 (1991) (arguing that individual right to bear arms is contradicted by framers’ intent and text of constitution); Warren Spannaus, *State Firearms Regulation and the Second Amendment*, 6 Hamline L. Rev. 383, 384-89 (1983) (arguing that neither Supreme Court nor circuit courts have upheld individual right to bear arms).

3. Levinson, *supra* note 2, at 642 (observing that armed individuals are necessary to prevent governmental tyranny).

4. See, e.g., *id.* at 637. See also Amar, Fourteenth Amendment, *supra* note 2, at 1193; Amar, The Bill of Rights, *supra* note 2, at 1131; Kates, *supra* note 2, at 204; Scarry, *supra* note 2, at 1257.

5. See, e.g., Amar, Fourteenth Amendment, *supra* note 2, at 1193 (Professor, Yale Law School); Levinson, *supra* note 2, at 637 (Charles Tilford Professor of Law, University of Texas School of Law, University of Texas School of Law); Van Alstyne, *supra* note 2, at 1236 (William R. & Thomas L. Perkins Professor of Law, Duke University School of Law).

6. In 1990, Justice Rehnquist wrote:

“[T]he people” seems to have been a term of art employed in select parts of the Constitution The Second Amendment protects “the right of the people to keep and bear Arms,” and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to “the people.” See also U.S. Const., Amdt. 1 (Congress shall make no law ... abridging ... the right of the people peaceably to assemble) While this textual exegesis is by no means conclusive, it suggests that “the people” protected ... by the First and Second Amendments ... refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (Rehnquist, J.).

In *Casey v. Planned Parenthood*, 112 S. Ct. 2791 (1992), Justice O’Connor wrote for the majority that the scope of the due process clause is not limited to “the precise terms of the specific guarantees elsewhere provided in the Constitution... such as the freedom of speech, press, and religion; the right to keep and bear arms.” *Id.* at 2805 (quoting *Poe v. Ulman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (emphasis added)).

7. See *In re Brickey*, 70 P. 609, 610 (Idaho 1902) (holding that legislature may regulate but not prohibit right to bear arms under Second Amendment); *Nunn v. State*, 1 Ga. (1 Kelly) 243 (1846) (using Second Amendment to invalidate firearms regulation).

8. Pub. L. No. 101-647, 104 Stat. 4844 (codified at 18 U.S.C. §§ 921-924 (Supp. V 1993)).

9. *United States v. Lopez*, 2 F.3d 1342, 1367-68 (5th Cir. 1993), *aff’d*, 115 S. Ct. 1624 (1995).

10. *Id.* at 1364 n.46.

11. *United States v. Lopez*, 115 S. Ct. 1624 (1995).

12. See *Wilson v. State*, 33 Ark. 557, 558 (1878) (pistol carrying statute); *City of Lakewood v. Pillow*, 501 P.2d 744, 745 (Colo. 1972) (restriction on sale, possession, and carrying); *People v. Nakamura*, 62 P.2d 246, 247 (Colo. 1936) (ordinance prohibiting possession by aliens of a firearm for hunting); *In re Brickey*, 70 P. 609, 609 (Idaho 1902) (gun carrying statute); *Junction City v. Mevis*, 601 P.2d 1145, 1152 (Kan. 1979) (gun carrying ordinance as too

broad); *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (Ct. App. 1822) (concealed carrying statute; state constitution was later amended to allow regulation of concealed carrying of arms); *People v. Zerillo*, 189 N.W. 927, 928 (Mich. 1922) (ordinance prohibiting possession of firearm); *City of Las Vegas v. Moberg*, 485 P.2d 737, 738 (N.M. Ct. App. 1971) (gun carrying ordinance); *State v. Kerner*, 107 S.E. 222, 224 (N.C. 1921) (ordinance requiring license to carry pistol); *In re Reilly*, 31 Ohio Dec. 364, 365 (C.P. 1919) (ordinance forbidding hiring armed guard to protect property); *State v. Delgado*, 692 P.2d 610, 610 (Or. 1984) (ordinance prohibiting possession of switchblade knife); *State v. Blocker*, 630 P.2d 824, 824 (Or. 1981) (prohibition of carrying a club); *State v. Kessler*, 614 P.2d 94, 95 (Or. 1980) (prohibition of possession of a club); *Barnett v. State*, 695 P.2d 991, 991 (Or. Ct. App. 1985) (ordinance prohibiting possession of black-jack); *Glasscock v. City of Chattanooga*, 11 S.W.2d 678, 678 (Tenn. 1928) (gun carrying ordinance); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 168 (1871) (pistol carrying statute); *Smith v. Ishenhour*, 43 Tenn. (3 Cold.) 214, 215 (1866) (gun confiscation law); *Jennings v. State*, 5 Tex. Crim. App. 298 (Ct. App. 1878) (ordinance requiring forfeiture of pistol after misdemeanor conviction); *State v. Rosenthal*, 55 A. 610, 611 (Vt. 1903) (pistol carrying ordinance as too restrictive); *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139, 149 (W. Va. 1988) (gun carrying law as too restrictive).

13 Alabama: "That every citizen has a right to bear arms in defense of himself and the state." Ala. Const. art. I, § 26.

Alaska: "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." Alaska Const. art. 1, § 19.

Arizona: "The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men." Ariz. Const. art. II, § 26.

Arkansas: "The citizens of this State shall have the right to keep and bear arms for their common defense." Ark. Const. art. II, § 5.

Colorado: "The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons." Colo. Const. art. II, § 13.

Connecticut: "Every citizen has a right to bear arms in defense of himself and the state." Conn. Const. art. I, § 15.

Delaware: "A person has the right to keep and bear arms for the defense of self, family, home and state, and for hunting and recreational use." Del. Const. art. I, § 20.

Florida: "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law." Fla. Const. art. I, § 8(a).

Georgia: "The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne." Ga. Const. art. I, § 1, P 8.

Hawaii: "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." Haw. Const. art. I, § 17.

Idaho: "The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent the passage of any legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony." Idaho Const. art. I, § 11.

Illinois: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." Ill. Const. art. I, § 22.

Indiana: "The people shall have a right to bear arms, for the defense of themselves and the State." Ind. Const. art. I, § 32.

Kansas: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power." Kan. Const. Bill of Rights, § 4.

Kentucky: "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: ... Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons." Ky. Const. Bill of Rights § 1, P 7.

Louisiana: "The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person." La. Const. art. I, § 11.

Maine: "Every citizen has a right to keep and bear arms; and this right shall never be questioned." Me. Const. art. I, § 16.

Massachusetts: "The people have a right to keep and to bear arms for the common defense. And as, in times of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the Legislature; and the military power shall always be held in an exact subordination to the Civil authority, and be governed by it." Mass. Const. Part the First, art. xvii.

Michigan: "Every person has a right to keep and bear arms for the defense of himself and the state." Mich. Const. art. I, § 6.

Mississippi: "The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons." Miss. Const. art. III, § 12.

Missouri: "That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons." Mo. Const. art. I, § 23.

Montana: "The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons." Mont. Const. art. II, § 12.

Nebraska: "All persons are by nature free and independent, and have certain inherent and unalienable rights; among these are life, liberty, and the pursuit of happiness and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof." Neb. Const. art. I, § 1.

Nevada: "Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes." Nev. Const. art. I, § 11(1).

New Hampshire: "All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state." N.H. Const. Part First, art. 2-a.

New Mexico: "No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons." N.M. Const. art. II, § 6.

North Carolina: "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; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice." N.C. Const. art. I, § 30.

North Dakota: "All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and for lawful hunting,

recreational, and other lawful purposes, which shall not be infringed.” N.D. Const. art. I, § 1.

Ohio: “The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.” Ohio Const. art. I, § 4.

Oklahoma: “The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons.” Okla. Const. art. II, § 26.

Oregon: “The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power.” Or. Const. art. I, § 27.

Pennsylvania: “The right of the citizens to bear arms in defense of themselves and the State shall not be questioned.” Pa. Const. art. I, § 21.

Rhode Island: “The right of the people to keep and bear arms shall not be infringed.” R.I. Const. art. I, § 22.

South Carolina: “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. As, in time of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it.” S.C. Const. art. I, § 20.

South Dakota: “The right of the citizens to bear arms in defense of themselves and the state shall not be denied.” S.D. Const. art. VI, § 24.

Tennessee: “That the citizens of this State have a right to keep and bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.” Tenn. Const. art. I, § 26.

Texas: “Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime.” Tex. Const. art. I, § 23.

Utah: “The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the Legislature from defining the lawful use of arms.” Utah Const. art. I, § 6.

Vermont: “That the people have a right to bear arms for the defence of themselves and the State—and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under

strict subordination to and governed by the civil power.” Vt. Const. ch. I, art. 16.

Virginia: “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, therefore, the right of the people to keep and bear arms shall not be infringed; 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.” Va. Const. art. I, § 13.

Washington: “The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.” Wash. Const. art. I, § 24.

West Virginia: “A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use.” W. Va. Const. art. III, § 22.

Wyoming: “The right of citizens to bear arms in defense of themselves and of the state shall not be denied.” Wyo. Const. art. I, § 24.

14. The fact that only two books have been written on the subject of state constitutional rights to arms indicates the relative dearth of scholarship on the subject. Clayton E. Cramer, *For the Defense of Themselves and the State: The Original Intent and Judicial Interpretation of the Right To Keep and Bear Arms* (1994) (discussing right to bear arms as construed by state and federal courts); Stephen Halbrook, *A Right To Bear Arms: State and Federal Bills of Rights and Constitutional Guarantees* (1989) (tracing evolution of individual right to bear arms and loss of framers’ original intent in judicial interpretation).

For law review articles, see Caplan, *supra* note 2, at 789 (discussing 1981 decisions on carrying of arms in Indiana and Oregon); Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. Dayton L. Rev. 59 (1989) (analyzing development of right to bear arms at federal and state level); Dowlut, *supra* note 2, *passim*; Robert Dowlut & Janet Knoop, *State Constitutions and the Right To Bear Arms*, 7 Okla. City U. L. Rev. 177 (1982) (comparative analysis of state constitutional provisions concerning right to bear arms); Stephen Halbrook, *Second Class Citizenship and the Second Amendment in the District of Columbia*, 5 Geo. Mason U. Civ. Rts. L.J. (forthcoming 1995); Stephen Halbrook, *Rationing Firearms Purchases and the Right To Keep Arms: Reflections on the Bills of Rights of Virginia, West Virginia, and the United States*, 96 W. Va. L. Rev. 1, 3 (1993) (comparative analysis of right to bear arms provisions from two state constitutions and state gun control legislation); Stephen Halbrook, *The Right To Bear Arms in Texas: the Intent of the Framers of the Bills of Rights*, 41 Baylor L. Rev. 629 (1989) (comparative analysis of Second Amendment with right to bear arms in Texas Constitution); Stephen Halbrook, *The Right To Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, 10 Vt. L. Rev. 255 (1985)

(comparing states' Bills of Rights and rights to bear arms); Reynolds, *supra* note 2 (discussing Second Amendment in relation to Tennessee constitution).

15. 858 P.2d 1315 (Or. Ct. App. 1993), review denied, 877 P.2d 1202 (Or. 1994). Multnomah County includes the city of Portland.

16. Multnomah County, Or., Ordinance No. 646 (1990). The Oregon legislature effectively invalidated this ordinance by passing, over the governor's veto, 1995 Ore. HB 2784.

17. Oregon State Shooting Ass'n v. Multnomah County, No A9008-04628 (Or. Cir. Ct., Aug. 22, 1991).

18. Oregon State Shooting Ass'n, 858 P.2d at 1330 (Edmonds, J., concurring in part, dissenting in part).

19. One prong of the Oregon Supreme Court's test requires that the weapon "as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during either the revolutionary or post-revolutionary era or in 1859 when Oregon's constitution was adopted." State v. Delgado, 692 P.2d 610, 612 (1984) (footnote omitted).

20. Oregon State Shooting Ass'n, 858 P.2d at 1320.

21. 874 P.2d 325 (Colo. 1994).

22. Denver, Colo. Municipal Code art. IV § 38-130 (1989) (placing restrictions on semiautomatic "assault weapons").

23. Robertson v. City of Denver, No. 90CV603, slip. op. at 12 (Denver Dist. Ct., Feb. 28, 1993).

24. Robertson, 874 P.2d at 336.

25. The issue on remand is the claim of plaintiffs and the Attorney General that many of the semiautomatic firearms are named improperly, because the ordinance specifies the name of an automatic firearm, or a firearm that does not exist. For example, the ordinance attempts to outlaw "Norinco, Mitchell and Poly Technologies Avtomat Kalashnikovs (all models)." Den. Rev. Mun. Code, § 38-130(h)(1)a. "Avtomat" is Russian for "1. any automatic device ... 4. sub-machine gun." Kenneth Katzner, English-Russian/Russian-English Dictionary 418 (1984). The three companies listed (Norinco, Mitchell, and Poly Technologies) have never sold any automatic firearms or submachine guns in the United States. Yet the city attorney of Denver insists that the language bans semiautomatics made by those companies, as well as by numerous other companies.

26. Cleveland, Ohio, Ordinance No. 415-89, § 628.02 (1989). The original version of the ordinance violated the Supremacy Clause as it conflicted with 18 U.S.C. § 926A (guaranteeing target shooters' right to transport unloaded guns in interstate commerce notwithstanding gun control laws in jurisdictions they passed through). The Cleveland City Council re-enacted and amended the law to resolve the problem. See Arnold v. City of Cleveland, 616 N.E.2d 163, 165 n.2 (Ohio 1993) (noting that conflict corrected).

27. Section 628.02 of Cleveland Ordinance No. 415-89 defines what was considered to be an “assault weapon” under the ordinance. The Arnold court quoted the relevant portion of this section:

(a) ‘Assault weapon’ means:

(1) any semiautomatic action, center fire rifle or carbine that accepts a detachable magazine with a capacity of 20 rounds or more;

2) any semiautomatic shotgun with a magazine capacity of more than six rounds;

any semiautomatic handgun that is:

A. a modification of a rifle described in division (a)(1), or a modification of an automatic firearm; or

B. originally designed to accept a detachable magazine with a capacity of more than 20 rounds.

(4) any firearm which may be restored to an operable assault weapon as defined in divisions (a)(1), (a)(2) or (a)(3).

(5) any part, or combination of parts, designed or intended to convert a firearm into an assault weapon as defined in divisions (a)(1), (a)(2) or (a)(3), or any combination of parts from which an assault weapon as defined in divisions (a)(1), (a)(2) or (a)(3), may be readily assembled if those parts are in the possession or under the control of the same person.

(b) Assault weapon does not include any of the following:

(1) any firearm that uses .22 caliber rimfire ammunition with a detachable magazine with a capacity of 30 rounds or less.

(2) any assault weapon which has been modified to either render it permanently inoperable or to permanently make it a device no longer defined as an assault weapon.

Arnold, 616 N.E.2d at 163 (quoting Cleveland, Ohio, Ordinance No. 415-89, § 628.02).

28. *Id.* at 166 (citing Ohio Const. art. I, § 4).

29. *Id.* at 173.

30. *Id.* at 177 (Hoffman, J., dissenting).

31. 1992 Ore. AG LEXIS 27 (1992).

32. Arnold, 616 N.E.2d at 166.

33. Colo. Rev. Stat. § 13-51-115 (1984).

34. While the case was in progress, Gale Norton defeated Attorney General Woodard. Norton continued Colorado’s participation in the case.

35. Before going further, we must point out that one of the authors of this article was involved in the Colorado litigation. David Kopel represented the State of Colorado in district court. After leaving the Attorney General’s office, he was one of several attorneys who submitted an amicus brief to the Colorado

Supreme Court on behalf of the Colorado Law Enforcement Firearms Instructors Association, the American Federation of Police, the Congress on Racial Equality, and other organizations. Readers should, of course, be skeptical about analyses written by attorneys who participated in a case discussed in an article. Accordingly, it will not be the objective of this article to prove that any of these three cases should have come to a different ultimate result. As we will detail, the laws in question (or at least the core of the laws) could have been upheld by courts which took the right to arms seriously, but which viewed the right somewhat more narrowly than we do. For those who take the right to arms very seriously, parts IV.C and IV.D, *infra*, suggest that the laws were void per se. See *infra* text accompanying notes 305-23.

36. *Robertson v. City of Denver*, 874 P.2d 325, 339 (Colo. 1994) (Vollack, J., concurring).

37. See *infra* text accompanying notes 71-180.

38. *Robertson*, 874 P.2d at 339.

39. *Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993).

40. With respect to differing legal interpretations of the right to keep and bear arms, see, e.g., Cramer, *supra* note 14, at 33-35.

A third theory concerning the right to keep and bear arms is that the Second Amendment and its state constitutional analogs guaranteed a right of the states to organize their own militias. This rationale was almost unknown in American political discourse until the 1960s. It appeared because unlike prior gun control movements, whose goal was disarmament of particular segments of the population (e.g., convicted felons, blacks, and aliens) modern gun control movement needed a theory that allowed disarming the entire civilian population.

Only one decision using this theory appears before 1900. See *State v. Buzzard*, 4 Ark. 18, 23-24, 28 (1842) (upholding statute creating criminal penalty for carrying concealed weapons). Many of the decisions supporting the state militia rationale are based on state constitutions that declare the right exists “for the common defense.” See, e.g., *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) (upholding federal statute prohibiting convicted felons from transporting firearms across state lines); *United States v. Tot*, 131 F.2d 261, 266-67 (3d Cir. 1942) (upholding federal statute prohibiting person convicted of violence to receive firearm transported across state lines), rev’d on other grounds, 319 U.S. 463 (1943); *City of Salina v. Blaksley*, 83 P. 619, 620 (Kan. 1905) (applying protection only to arms appropriate for militia); *Commonwealth v. Davis*, 343 N.E.2d 847, 850 (Mass. 1976) (applying protection only to members of state militia); *Harris v. State*, 432 P.2d 929, 930 (Nev. 1967) (upholding statute making possession of tear gas pen unlawful).

Other decisions have found that “for the common defense” included a right of individual ownership of military weapons. E.g., *Dabbs v. State*, 39 Ark. 353, 356-57 (1882); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 179 (1871); *State v. Ishenhour*, 43 Tenn. (3 Cold.) 214, 215-17 (1866); *Aymette v. State*, 21 Tenn.

(2 Hump.) 154, 159-60 (1840); *Simpson v. State*, 13 Tenn. (5 Yerg.) 356, 359-60 (1833).

41. English Bill of Rights (1689). The best analysis of the history of the right to arms in England is Joyce Malcolm, *Arms for Their Defense* (1994).

42. *Aymette v. State*, 21 Tenn. (2 Hump.) 154, 157-58 (1840) (emphasis added) (upholding statute making carrying concealed Bowie knife a misdemeanor because such weapon not suitable for the common defense).

43. *Fife v. State*, 31 Ark. 455, 460 (1876) (emphasis added) (holding that easily concealed pistol not protected by constitution because not useful in defense of country but only of self).

44. *State v. Workman*, 35 W. Va. 367, 373 (1891).

45. *Cottrol & Diamond*, *supra* note 2, at 344, 349.

46. For a discussion of the relationship between racism and the development of American gun control jurisprudence, see Cramer, *supra* note 14, at 97-141; Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 Kan. J. L. & Pub. Pol. 17, 22-24 (1995) (calling for strict scrutiny of gun control legislation in light of its racial effect); Robert J. Cottrol & Raymond T. Diamond, *Never Intended To Be Applied to the White Population: Firearms Regulation and Racial Disparity*, Chi.-Kent L. Rev. (forthcoming 1995); Cottrol & Diamond, *supra* note 2, at 319, 359-61 (arguing that African Americans need more protection from the State).

47. See Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* 201 (1988) (discussing legislation of antebellum South). Foner notes that: [U]nlike the Mississippi and South Carolina codes, many subsequent laws made no reference to race, to avoid the appearance of discrimination and comply with the federal Civil Rights Act of 1866. But it was well understood, as Alabama planter and Democratic politico John W. DuBois later remarked, that "the vagrant contemplated was the plantation negro."

Id.

48. *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring specially).

49. Decisions of the Oregon Supreme Court during the 1980s reflect the classic liberalism theory. See *infra* notes 73-111 and accompanying text for a full discussion of these issues.

50. *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 92 (1822) (emphasis added).

51. Idaho Const. art. I, § 11. This provision was replaced with that quoted in note 13, *supra*.

52. *In re Brickey*, 70 P. 609 (Idaho 1902).

53. U.S. Const. amend. II. For the best explanation of how the Second Amendment combined two threads of arms-rights theory, see Hardy, *supra* note 2, at 560.

54. 24 Tex. 394 (1859).

55. Texas Const. art. I, § 13. The Texas Constitution in effect at the time provided that “[e]very citizen shall have the right to keep and bear arms, in the lawful defense of himself and the state.” *Id.*

56. Cockrum, 24 Tex. at 401-02.

57. *State v. Hogan*, 58 N.E. 572, 575 (Ohio 1900):

The constitutional right to bear arms is intended to guaranty to the people, in support of just government, such right, and to afford the citizen means for defense of self and property. While this secures to him a right of which he cannot be deprived, it enjoins a duty in execution of which, that right is to be exercised. If he employs those arms which he ought to wield for the safety and protection of his country, his person, and his property, to the annoyance and terror and danger of its citizens, his acts find no vindication in the bill of rights.... A man may carry a gun for any lawful purpose, for business or amusement, but he cannot go about with that or any other dangerous weapon to terrify and alarm a peaceful people.

Id. at 575.

58. See, e.g., *Rinzler v. Carson*, 262 So. 2d 661, 666 (Fla. 1972) (holding that semi-automatic weapons protected because commonly used by law-abiding people); *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921) (striking down local ordinance requiring permit to carry unconcealed pistol).

59. *State v. Rupe*, 683 P.2d 571 (Wash. 1984).

60. *Id.* at 594.

61. *Id.* at 596 (quoting Wash. Const. art. I, § 24).

62. *Taylor v. McNeal*, 523 S.W.2d 148, 150 (Mo. App. 1975) (right of people to bear arms limited by right of police to seize arms incident to lawful arrest).

63. *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139, 143 (W. Va. 1988).

64. See, e.g., *State v. Swanton*, 629 P.2d 98, 99 (Ariz. Ct. App. 1981) (defining “arms” in Arizona Constitution as arms used in civilized warfare).

65. 307 U.S. 174 (1939).

66. *Id.* at 178.

67. *Rinzler v. Carson*, 262 So. 2d 661 (Fla. 1972). The statute in question in *Rinzler* made it unlawful for “any person to own or to have in his care, custody, possession or control any short-barreled rifle, short-barreled shotgun, or machine gun which is, or may be readily operable.” *Rinzler*, 262 So. 2d at 664.

68. *Id.* at 666. While the court held that machine-guns were not constitutionally protected, Florida allowed possession of machine-guns registered under federal law, and thus a local ordinance purporting to ban machine-guns was preempted and held invalid. *Id.* at 667-68. Constitutional protection for machine-guns would appear to be stronger under the civic republicanism theory (suitable for

militia use) than the classical republican theory (commonly used for personal protection and sport).

69. *State v. Kerner*, 107 S.E. 222, 224 (N.C. 1921).

70. *Id.* (invalidating a prohibition on the unlicensed open carrying of pistols). Again, doctrinal lines are not always precise; while civic republicanism theory was often invoked to uphold restrictions on the carrying of firearms, in *Kerner* civic republicanism was affirmed along with the right to unlicensed carrying.

71. See, e.g., *State v. Blocker*, 630 P.2d 824, 825 (Or. 1981) (upholding constitutional right to possess billy club in public).

72. 614 P.2d 94 (Or. 1981).

73. Or. Rev. Stat. § 166.510 (1973) (repealed 1985).

74. *Kessler*, 614 P.2d at 95-97.

75. Ind. Const. art. I, §§ 32, 33 (1816).

76. Ky. Const. of 1799, art. X, §§ 23, 24 (1799).

77. Ohio Const. of 1802, art. VIII, § 20.

78. *Kessler*, 614 P.2d at 97.

79. 235 N.W. 245, 246-47 (Mich. 1931). The Michigan court upheld the conviction of a felon who possessed a blackjack, noting that legislation “cannot constitutionally result in the prohibition of the possession of those arms which, by the common opinion and usage of law-abiding people, are proper and legitimate to be kept upon private premises for the protection of person and property.” *Id.* at 247. A later Michigan decision found that an electrical shocking device (stun gun) was not a commonly possessed, constitutionally protected arm. *People v. Smelter*, 437 N.W.2d 341, 342 (Mich. Ct. App. 1989).

80. *Kessler*, 614 P.2d at 97.

81. *Id.* at 98.

82. *Id.* at 99.

83. Or. Const. art. I, § 27.

84. *Kessler*, 614 P.2d at 99.

85. *Id.*

86. *Id.*

87. Melvin M. Johnson Jr. & Charles F. Haven, *Automatic Weapons of the World* 71-72 (1945).

88. See John Ellis, *The Social History of the Machine Gun* 13-15(1975) (discussing Puckle’s problems in developing gun).

89. *Kessler*, 614 P.2d at 99.

90. Ellis, *supra* note 88, at 42. For an argument using the Second Amendment to suggest that conscription is unconstitutional, see Amar, *The Bill of Rights*, *supra* note 2, at 1168-73.

91. William J. Helmer, *The Gun That Made The Twenties Roar* 75-76, plate after 86 (1969).

The substitution of machine guns for handguns is but one example of the unintended consequences that flow from handgun-only controls. Such laws may increase firearms fatalities by encouraging criminals to switch to sawed-off shotguns, which are as concealable as a large handgun, and far deadlier. If only a third of handgun criminals switched to long guns, while the rest gave up crime entirely, firearms deaths would skyrocket. See Gary Kleck, *Point Blank: Guns and Violence in America* 91-94, 97 (1991); David T. Hardy & Don B. Kates, Jr., *Handgun Prohibition and Crime*, in *Restricting Handguns* 118, 129 (Don B. Kates ed., 1984) (citing increased danger from robbery by shotgun or rifle); Gary Kleck, *Handgun-Only Control*, in *Firearms and Violence: Issues of Public Policy* 195-99 (Don B. Kates ed., 1984) (same); David Kopel, *Peril or Protection? The Risks and Benefits of Handgun Prohibition*, 12 *St. Louis U. Pub. L. Rev.* 285, 326-32 (1993).

92. National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended at I.R.C. §§ 5801-5872 (1988 & Supp. V. 1993)) (procedure for paying federal tax allowing possession of an automatic weapon).

93. Or. Rev. Stat. § 166.150 (1993).

94. 630 P.2d 824, 825-26 (Or. 1981).

95. *Id.* at 826.

96. *Id.* at 825-26.

97. 692 P.2d 610 (Or. 1984).

98. *State v. Kessler*, 614 P.2d 94, 100 (Or. 1980).

99. *Delgado*, 692 P.2d at 612.

100. *Id.* (quoting S. Rep. No. 1980, 85th Cong., 2d Sess. (1958)).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 614.

105. *State v. Kessler*, 602 P.2d 1096 (Or. Ct. App. 1979), *aff'd* in part, *rev'd* in part, 614 P.2d 94 (Or. 1980).

106. *State v. Delgado*, 684 P.2d 630 (Or. Ct. App. 1984), *aff'd*, 692 P.2d 610 (Or. 1984).

107. *Barnett v. State*, 695 P.2d 991 (Or. Ct. App. 1985).

108. 775 P.2d 344, 345 (Or. Ct. App. 1989).

109. *Id.*

110. Media coverage of “assault weapon” regulations often shows automatic weapons blazing away. The Multnomah County ordinance, and its many coun-

terparts around the United States, however, regulate not machine guns, but guns that fire one shot for every pull of the trigger.

111. Multnomah County Ordinance No. 646 § IIIB.

112. Oregon State Shooting Ass'n v. Multnomah County, 858 P.2d 1315, 1317 (Or. Ct. App. 1993), review denied, 877 P.2d 1202 (Or. 1994).

113. The courts held that Oregon's preemption law did not cover the section of the ordinance relevant here. *Id.* at 1323.

114. State v. Kessler, 614 P.2d 94, 98 (Or. 1980).

115. *Id.*

116. Oregon State Shooting Ass'n, 858 P.2d at 1318.

117. *Id.*

118. *Id.* at 1319.

119. *Id.*

120. *Id.*

121. *Id.*

122. Johnson & Haven, *supra* note 87, at 85.

123. See *supra* notes 87-90 and accompanying text.

124. Ellis, *supra* note 88, at 25-26, 33; Johnson & Haven, *supra* note 87, at 82-84.

125. "This was probably the first real 'machine gun' in that the charges were fed into the chambers, fired, and extracted by the actual operation of machinery." Johnson & Haven, *supra* note 87, at 85.

126. Oregon State Shooting Ass'n v. Multnomah County, 858 P.2d 1315, 1321 (Or. Ct. App. 1993), review denied, 877 P.2d 1202 (Or. 1994).

127. 26 U.S.C. § 5845(b) (1995) (emphasis added).

128. 27 C.F.R. § 179.11 (1982).

129. Oregon State Shooting Ass'n, 858 P.2d at 1320-21.

130. 692 P.2d 610, 614 (Or. 1984).

131. Oregon State Shooting Ass'n, 858 P.2d at 1319.

132. *Id.*

133. Pollard's History of Firearms 256-57 (Claude Blair ed., 1983).

134. Johnson & Haven, *supra* note 87, at 77.

135. *Id.* at 69-77.

136. Oregon State Shooting Ass'n, 858 P.2d at 1319 n.5.

137. Pollard's History of Firearms, *supra* note 133, at 256-57; see also Advertisement, *infra* note 138.

138. Advertisement for Henry Rifles, reprinted in Harold F. Williamson, Winchester, the Gun that Won the West 36 (1952).
139. C. Meade Patterson & Cuddy De Marco, Jr., Civil War Revolvers, in American Handguns & Their Makers 36-37 (Mike Day ed., 1981).
140. At least four of the “assault weapons” in the ordinance do not use detachable magazines: the Striker-12, Street Sweeper, SPAS-12, and LAW-12 shotguns.
141. Oregon State Shooting Ass’n v. Multnomah County, 858 P.2d 1315, 1318 (Or. App. 1993), review denied, 877 P.2d 1202 (Or. 1994).
142. Johnson and Haven, *supra* note 87, at 74-75.
143. Oregon State Shooting Ass’n, 858 P.2d at 1321.
144. *Id.*
145. *Id.* at 1318.
146. State v. Kessler, 614 P.2d 94, 98-99 (Or. 1980).
147. *Id.* at 99.
148. Kleck, *supra* note 91, at 70-82.
149. 2 W. Swindler, Sources and Documents of United States Constitutions 60, 66 (1973).
150. Proceedings of the Constitutional Convention Held in Denver, Dec. 20, 1875 (1907).
151. *Id.* at 90, 204-05. A “civic republicanism” theory would tend to limit the arms right to citizens, since militia service (like jury duty) was the exclusive province of citizens. The classical liberal theory, focusing on self-defense as a fundamental human right, would be more likely to embrace the broader vision of an arms right for all persons.
152. Gordon M. Bakken, Rocky Mountain Constitution Making, 1850-1912 23-24 (1987).
153. 2 W. Swindler, *supra* note 149, at 94 (noting that guarantee taken from Mo. Const., art. II, § 17 (1875)).
154. 1 Debates of the Missouri Constitutional Convention of 1875 439 (1930).
155. *Id.* (referring to Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822)).
156. *Id.* at 119.
157. People v. Ford, 773 P.2d 1059, 1066 (Colo. 1989).
158. See, e.g., Fife v. State, 31 Ark. 455, 458 (1876) (holding that constitution guarantees citizens right to keep and bear arms ordinarily used by a well regulated militia, and those necessary to resist oppression); Hill v. State, 53 Ga. 472, 474 (1874) (holding that ‘arms’ meant weapons ordinarily used in battle: guns of every kind, swords, bayonets, horseman’s pistols, etc.); Andrews v. State, 50 Tenn. (3 Heisk) 165, 179 (1871) (holding that right covers arms in use of which a soldier should be trained including rifles of all descriptions:

shot-guns, muskets, and repeaters; and that constitutional right to keep such arms cannot be infringed or forbidden by legislature); *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840) (holding that arms include those usually employed in civilized warfare and ordinary military equipment).

159. John N. Pomeroy, *An Introduction to the Constitutional Law of the United States* 152 (3d ed. 1877).

160. *Draft of a Constitution Published Under the Direction of a Committee of Citizens of Colorado* (Denver 1875).

161. Williamson, *supra* note 138, at 13, 36, 49. Henry rifles were commonly sold in Denver as early as 1865, and were “a strong competitor in the civilian market in the late 1860s” in Colorado. Louis A. Garavaglia & Charles G. Worman, *Firearms of the American West* 106, 116 (1984). Civil War military rifles were sold at Denver Arsenal. *Id.* at 111. Also on the scene were Winchester lever action rifles which fired 18 rounds in 9 seconds. *Id.* at 128. In 1871, the Evans rifle appeared, “manufactured as a sporting rifle, military rifle, and carbine,” which held 34 cartridges and was sold by a Denver dealer. *Id.* at 189-91. The Denver Armory advertised the latest firearms in the *Rocky Mountain News* in 1876. For example, the issues of April 28 and June 3, 1876 advertised “Sharp’s Sporting and Military Creedmoor Rifles.” The July 4 edition described “A New Weapon,” namely, “a pistol that can kill at five hundred yards” for sporting and military use.

162. *The Constitution of the State of Colorado Adopted in Convention, March 14, 1876; Also the Address of the Convention to the People of Colorado* (Denver, 1876).

163. 35 Tex. 473, 475 (1871).

164. *Id.* The protection offered by the Texas Constitution was broadened by *State v. Duke*, 42 Tex. 455, 458-59 (1875) (expanding scope of protection offered to weapons “commonly kept” and those “appropriate for ... self-defense”).

165. English, 35 Tex. at 476-77.

166. *Minneapolis Star v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 583-84 n.6 (1983) (remarking that law may be invalidated when evidence shows that it would have offended Framers).

167. *Robertson v. City of Denver*, 874 P.2d 325, 328 (Colo. 1994).

168. 389 U.S. 347 (1967).

169. *Id.* at 350-53.

170. See *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 248-54 (1974) (holding that despite recognition of modern media’s increasing monopoly of dissemination of news state statute violates First Amendment by compelling newspaper to publish opposing voices).

171. It should be noted that the 1989 Stockton schoolyard murders were not made worse because murderer Patrick Purdy owned a semiautomatic. He fired

approximately 110 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. For an account of the Stockton schoolyard massacre, see Mark A. Stein & Peter H. King, *Rifleman Kills 5 at Stockton School: 29 Other Pupils Hurt; Assailant Takes Own Life*, L.A. Times, Jan. 18, 1989, at A1.

Medical technology has greatly outstripped firearms technology 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 given period (such as six minutes) today would kill fewer people today than a criminal firing a more primitive gun two hundred years ago.

172. One clearly obsolete provision of the Constitution is the guarantee of federal jury trials when the amount in controversy exceeds \$20. U.S. Const. amend. VII. 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.

173. *Ullmann v. United States*, 350 U.S. 422, 427-28 (1956) (quoting *Maffie v. United States*, 209 F.2d 225, 227 (1st Cir. 1954)).

174. See, e.g., *Kovacs v. Cooper*, 336 U.S. 77, 81-82 (1949) (explaining that municipalities may regulate soundtrucks with regard to place, time and volume but that absolute prohibition is unconstitutional).

175. *Matthews v. State*, 148 N.E.2d 334, 341 (Ind. 1958) (Emmert, C.J., concurring in part and dissenting on other grounds) (footnote omitted).

176. This interpretation places about half of all handguns and a huge fraction of commonly-used rifles and shotguns completely outside the scope of the Constitution.

177. The Oregon dissent/concurrence wrote that “taken to its logical extension, “the majority’s reasoning means that “a wide swath” would be cut “out of a constitutional guarantee.” *Oregon State Shooting Ass’n v. Multnomah County*, 858 P.2d 1315, 1327 (Or. App. 1993) (en banc) (Edmonds, J., concurring in part; dissenting in part), review denied, 877 P.2d 1202 (Or. 1994). The majority replied that other semiautomatics were not at present before the court. *Id.* at 1321.

178. *Id.* at 1324.

179. *Id.* at 1325.

180. *Id.* at 1327.

181. *Id.* at 1329-30.

182. *Id.* at 1330.

183. See *id.* at 1318-20 (using Oregon Supreme Court’s historical test to determine whether weapon is within meaning of ‘arms’ in Or. Const. art. I, § 27).

184. See *Arnold v. Cleveland*, 616 N.E.2d 163, 169 (Ohio 1993) (holding that state constitution “secures to every person a fundamental individual right to bear arms for ‘their defense and security’

185. See *Robertson v. City of Denver*. ”). 874 P.2d 325 (Colo. 1994).

186. See *id.* at 339. (Vollack, J., concurring) (expressing disagreement with majority over whether case required determination of whether right to bear arms is “fundamental”).

187. Colo. Const., art. II. Cf. *Stilley v. Tinsley*, 385 P.2d 677, 680 (Colo. 1963) (en banc) (referring to “all rights reserved to the people and guaranteed rights which go to the very foundation of our government, as set forth in Article II, Bill of Rights”); *Rabinoff v. District Court*, 360 P.2d 114, 128 (Colo. 1961) (en banc) (Frantz, J., dissenting on other grounds). In *Rabinoff*, Justice Frantz explained that “[p]lacing the Bill of Rights immediately after Article I, defining the boundaries of the state, establishes the pre-eminence of these rights in the order of constitutional commands.... Investiture of governmental power and of the rule of the majority shall be made only after certain natural, essential and inalienable rights of the individual are indelibly inscribed in the Constitution in such manner as will assure that their integrity remains intact.” *Id.*

188. See, e.g., Colo. Const. art. II, § 7 (prohibiting only “unreasonable” searches and seizures); cf. *Alexander v. People*, 2 P. 894, 897 (Colo. 1884) (remarking that framers of constitution must have used words ‘in their natural sense’ and must have intended what they said).

189. Colo. Const. art. II, § 13.

190. 62 P.2d 246 (Colo. 1936).

191. *Id.* at 247 (emphasis added) (quoting *Smith v. Farr*, 104 P. 401, 406 (Colo. 1909)).

192. *Id.* at 248. As the dissent noted, the majority “assumed that the defendant’s shotgun is necessarily included among arms which, under section 13 of article 2, he has ‘the right ... to keep and bear ... in defense of his home, person, and property.’” *Id.* at 247.

193. See, e.g., *Carlson v. People*, 15 P.2d 625, 627 (Colo. 1932) (explaining the semiautomatic mechanism).

194. *Robertson v. City of Denver*, 874 P.2d 325, 328 (Colo. 1994) (discounting applicability of *Nakamura* because it lacked an explicit analysis of whether right was fundamental).

195. 501 P.2d 744, 745 (Colo. 1972).

196. *Id.* (citations omitted) (emphasis added). The defendants in *Robertson* argued that since the word “reasonable” appeared in various places in the Colorado gun cases, gun laws were to be tested only on a standard of reasonableness. Defendant’s Brief at 14-15, *Robertson v. City of Denver* (No. 90CV603), rev’d, 874 P.2d 325 (Colo. 1994). The supreme court essentially adopted this viewpoint without quite saying so. *Robertson*, 874 P.2d at 329

(explaining that issue in each case was whether law constitutes reasonable exercise of state's power). Yet free speech jurisprudence also relies on the word "reasonable" (as in "reasonable time, place and manner restrictions"), without requiring that infringements on speech be tested only under a reasonableness standard. See, e.g., *Bock v. Westminster Mall Co.*, 819 P.2d 55, 62-63 (Colo. 1991) (conceding that mall may set reasonable restrictions but holding that they must be subjected to stringent scrutiny as free speech occupies preferred position in constellation of freedoms guaranteed by state constitution).

197. *Lakewood*, 501 P.2d at 745.

198. See, e.g., *People v. Buckallew*, 848 P.2d 904, 908 (Colo. 1993) (holding that a statute is overbroad if it infringes upon enjoyment of fundamental rights by encompassing those activities within its prohibition); *People v. Gross*, 830 P.2d 933, 939 (Colo. 1992) (holding that a penal statute is overbroad if it prohibits legitimate activity).

199. *Valley Forge Christian College v. Americans United for Separation of Church & State Inc.*, 454 U.S. 464, 484 (1982). See also *Ullmann v. United States*, 350 U.S. 422, 426-29 (1956). The Ullmann Court stated:

This constitutional protection must not be interpreted in a hostile or niggardly spirit As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.

Id.

200. Appellant's Brief at 6, *Robertson v. City of Denver* (No. 90CV603), rev'd, 874 P.2d 325 (Colo. 1994) (citing *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1017 (Colo. 1982) (referring to provisions concerning mining, irrigation, nuclear detonations, and education)).

201. See Appellees' Brief at 8 n.9, *Robertson*, (No. 90CV603) (noting that *Bowers v. Hardwick*, 478 U.S. 186, 186, 191 (1986) stated that rights involved were "not readily identifiable" in Constitution's text).

202. Appellant's Brief at 8, *Robertson* (No. 90CV603).

203. *Id.* at 14.

204. Brief of Denver District Attorney at 18, 20, *Robertson* (No. 90CV603).

205. Appellant's Brief at 11-12, *Robertson* (No. 90CV603).

206. Appellee's Brief, *Robertson* (No. 90CV603). See, e.g., *People v. Blue*, 544 P.2d 385, 390 (Colo. 1975):

These defendants, however, cannot invoke the same constitutionally protected right to bear arms as could the defendant in *Lakewood*, *supra*, for ... the right of a convicted felon to bear arms is subject to reasonable legislative regulation and limitation

... To be sure, the state legislature cannot, in the name of the police power, enact laws which render nugatory our Bill of Rights and other constitutional

protection. But we do not read this statute as an attempt to subvert the intent of Article II, Section 13. The statute simply limits the possession of guns and other weapons by persons who are likely to abuse such possession. That case [Lakewood] involved a municipal ordinance which forbade the possession, use, or carrying of firearms outside of one's own home. Such a broad prohibition, we held, unduly infringed on the personal liberty of bearing arms. However, the defendant in *Lakewood v. Pillow*, *supra*, was not, as far as the record revealed, an ex-felon, and the issue of whether like restrictions could not constitutionally be imposed on persons who had been convicted of felonies involving the use of force or violence or certain dangerous weapons was not there considered.

Id. at 390-91. In *People v. Ford*, 568 P.2d 26, 28 (Colo. 1977) the court noted that:

[I]n [Blue] the defendants did not contend that they were armed in order to defend their persons, homes or property. Therefore the court in Blue left unanswered the question whether such a defense, if established, would render unconstitutional the statute's application in a particular case The General Assembly's power to regulate in this area, however, is subject to the clear constitutional guarantee of the right to bear arms. A defendant charged under section 18-12-108 who presents competent evidence showing that his purpose in possessing weapons was the defense of his home, person, and property thereby raises an affirmative defense.

Id. (footnote omitted).

Thus, Ford carved out a special test to allow felons to possess firearms if they prove that the possession is specifically for defense. This was the same test which the Colorado Supreme Court rejected as applied to law-abiding persons in *People v. Nakamura*, 62 P.2d 228, 247-48 (Colo. 1936).

In *People v. Garcia*, the Colorado Supreme Court upheld a restriction on actual, immediate possession of a firearm while intoxicated. 595 P.2d 228, 231 (Colo. 1979) (en banc). The court reaffirmed the idea that possession of firearms (absent intoxication) is a fundamental right by explaining that:

The overbreadth doctrine is applicable to legislative enactments which threaten the exercise of fundamental or express constitutional rights, such as ... the right to bear arms. *City of Lakewood v. Pillow* 180 Colo. 20, 501 P.2d 744 (1972) In *City of Lakewood*, *supra*, we noted that the ordinance at issue there prohibited legitimate acts, such as business operations of gunsmiths, pawnbrokers and sporting goods stores, or keeping a gun for the purpose of defense of self or home and that such acts could not reasonably be considered unlawful under an exercise of police power. Subjecting legitimate behavior to criminal sanctions thus rendered the ordinance overbroad. Such is not the instant case. It is clearly reasonable for the legislature to regulate the possession of firearms by those who are under the influence of alcohol or drugs. Unlike *City of Lakewood*, *supra*, the statute here proscribes only that behavior which can rationally

be considered illegitimate, and thus properly prohibited by the state's exercise of its police power.

Id. at 230.

206. Although Garcia did use the word "rational," that word does not prove that the right to bear arms is non-fundamental and subject only to a rational basis test. After all, it is keeping and bearing arms, not carrying firearms while drunk or drugged, that is a fundamental right. By analogy, the right to assemble does not sanction being intoxicated in public, just because one is at an assembly. A restriction on drunken behavior, not being a constitutional right, would be judged by the rational relation test.

207. Appellant's Brief at 27-28, Robertson (No. 90CV603), rev'd, 874 P.2d 325 (Colo. 1994) (citing *Douglass v. Kelton*, 610 P.2d 1067, 1069 (Colo. 1980) (sheriff had no statutory authority to issue permit to carry a concealed weapon; statement that "right to bear arms is not absolute" reflects explicit constitutional provision against "carrying concealed weapons")).

208. Cf. *People v. County Court*, 551 P.2d 716, 718 (Colo. 1976) ("The right of free speech is not absolute at all times and under all circumstances.").

209. See, e.g., *Junction City v. Mervis*, 601 P.2d 1145, 1151 (Kan. 1979) (holding prohibition on firearms possession not on one's own property "constitutionally overbroad and an unlawful exercise of the city's police power"); *Bowers v. Maryland*, 389 A.2d 341, 347 (Md. 1978) (citing *Lakewood* for proposition that "fundamental freedoms protected under the Bill of Rights [include] right to bear arms"); *State v. Buckner*, 377 S.E.2d 139, 143-44 (W. Va. 1988) (declaring that statute which required license to carry a gun overbroad and violative of constitution). In *Buckner*, the West Virginia Supreme Court declared:

W.Va.Code, 61-7-1 [1975] thus prohibits the carrying of weapons for defense of self, family, home and state without a license or statutory authorization. Article III, section 22 of the West Virginia Constitution, however, guarantees that a person has the right to bear arms for those defensive purposes. Thus, the statute operates to impermissibly infringe upon this constitutionally protected right to bear arms for defensive purposes.

Id. at 144.

210. *Robertson v. City of Denver*, 874 P.2d 325, 339-40 (Colo. 1994) (Vollack, J., concurring).

211. *Id.* at 346 (explaining that since ordinance did not trammel an important constitutional right, rational basis should be applied).

212. 616 N.E.2d 163 (Ohio 1993).

213. *Id.* at 171.

214. *Id.*

215. *Id.* at 166.

216. 429 N.E.2d 148 (Ohio 1981).

217. *Id.* at 149-50.
218. *Id.* at 149.
219. *Id.* at 152 (Celebrezze, C.J., dissenting).
220. *Id.* (Celebrezze, C.J., dissenting).
221. *Id.* at 149.
222. *Id.*
223. 355 U.S. 225 (1957).
224. 420 F.2d 556 (2d Cir. 1970).
225. 401 U.S. 601 (1971).
226. 395 A.2d 744 (D.C. 1978).
227. Lambert, 355 U.S. at 229.
228. *Id.*
229. *Id.* The Third Circuit noted these factors in distinguishing Lambert when it faced the issue of whether a convicted felon charged with possession of a firearm in contravention of the Gun Control Act of 1968 could assert a Lambert defense. *United States v. Weiler*, 458 F.2d 474, 479 (3d Cir. 1972). Lambert had no knowledge that she would give up her right to travel. Lambert, 355 U.S. at 229. However, it is common knowledge that convicted felons give up other rights, including the right to possess or transport firearms. *Weiler*, 458 F.2d at 479.
230. 420 F.2d 556 (2d Cir. 1970).
231. *Id.*
232. *Id.* at 557.
233. *Id.* at 558-59.
234. *Id.*
235. 401 U.S. 601 (1971).
236. *Id.* Freed was accused of violating 26 U.S.C. § 5812, which requires weapons covered by the Act to be registered prior to transfer, the transferor and transferee to make application to the Secretary of the Treasury, and the transfer be approved by the Secretary of the Treasury. *Id.* at 604.
237. *Id.* at 616 (Brennan, J. concurring).
238. *Id.* at 609.
239. See *McIntosh v. Washington*, 395 A.2d 744, 756 (D.C. 1978) (finding that Supreme Court has indicated that dangerous or deleterious devices are proper subject of regulatory measures adopted in the exercise of state's police power); *City of Univ. Heights v. O'Leary*, 429 N.E.2d 148, 151 (1981) (finding that Supreme Court had indicated that dangerous or deleterious devices are proper subject of regulations adopted pursuant to state's police power).

240. *Id.*
241. *Arnold v. City of Cleveland*, 616 N.E.2d 163, 171 (1993).
242. *United States v. Weiler*, 458 F.2d 474, 479 (3d Cir. 1972) (discussing interstate transportation of firearms by convicted felons).
243. *Id.*
244. *City of Univ. Heights v. O’Leary*, 429 N.E.2d 148, 151 (Ohio 1981).
245. The public safety concerns that motivated the registration ordinance could, however, also have been said to be present in *Lambert*. The government wanted to know where felons were at all times not merely so that it could accumulate records, but so that the government could prevent felons from harming other persons. Cf. *People v. Lambert*, 355 U.S. 217, 229 (1957) (asserting that registration statutes exist for convenience of law enforcement).
246. See *supra* note 238 and accompanying text for a discussion of the Supreme Court’s view of what constitutes a “dangerous and deleterious device.”
247. 439 F.2d 1193 (9th Cir. 1971), vacated on other grounds, 404 U.S. 1009 (1972).
248. 334 N.E.2d 538 (Ohio Ct. App. 1975).
249. 458 F.2d 474 (3d Cir. 1972).
250. *Crow*, 439 F.2d at 1194.
251. *Drummonds*, 334 N.E.2d at 539.
252. See *Arnold v. City of Cleveland*, 616 N.E.2d 163, 173 (1993)
253. *Staples v. United States*, 114 S. Ct. 1793 (1994).
254. *Id.* at 1795.
255. *Id.* at 1796.
256. *Id.* at 1793.
257. *Id.* at 1800.
258. *Id.* at 1794. See also *United States v. Anderson*, 853 F.2d 313, 317-19 (5th Cir. 1988) (discussing the M10 pistol—an “assault weapon”—and stating that possession of conventional semi-automatic pistol is generally an innocent act and that thousands of law-abiding Americans innocently purchase new semi-automatic guns), modified, 885 F.2d 1248 (5th Cir. 1989).
259. 317 N.E.2d 246 (Ohio App. 1974).
260. See *City of Univ. Heights v. O’Leary*, 429 N.E.2d 148, 152 (Ohio 1981) (citing *City of East Cleveland v. Palmer*, 317 N.E.2d 246, 248 (Ohio App. 1974) (finding that duly enacted municipal ordinance is presumed constitutional and burden of establishing unconstitutionality is upon challenger)).
261. *Palmer*, 317 N.E.2d at 247-48.
262. 405 N.E.2d 1047 (Ohio 1980).
263. *Id.* at 1050.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at 1049 (citations omitted).

268. *Arnold v. City of Cleveland*, 616 N.E.2d 163, 166 (Ohio 1993).

269. In *Arnold*, the court stated:

In determining the constitutionality of an ordinance, we are mindful of the fundamental principle requiring courts to presume the constitutionality of lawfully enacted legislation Further, the legislation being challenged will not be invalidated unless the challenger establishes that it is unconstitutional beyond a reasonable doubt.

Id. (citations omitted). See text accompanying note 267, *supra*, for the standard of review as articulated by the Hilton court.

270. 49 N.E.2d 412, 415 (Ohio 1943).

271. *Arnold*, 616 N.E.2d at 171.

272. Compare *supra* note 269 with *Correll*, 49 N.E.2d at 415:

Respecting, as we do, the legislative authority of the city council and its right to determine what ordinances shall be passed, yet when an act of such body is challenged we must determine whether the act conforms to rules of fundamental law designed to curb and check unwarranted exercise of unreasonable and arbitrary power. With these principals in mind, let us consider whether this ordinance bears a real and substantial relation to the health, safety, morals or general welfare of the public.

273. 151 N.E. 775 (Ohio 1926), *aff'd*, 275 U.S. 505 (1927). *Kresge* involved a challenge to a municipal ordinance requiring all commercial and industrial buildings to have outward opening doors, and prohibiting rolling, sliding, or revolving doors. *Id.* at 776. These restrictions were deemed necessary to protect occupants in case of fire. The restrictions were challenged as an undue restriction of the plaintiff's business. *Id.* The court of common pleas and the Ohio Court of Appeals both found the restrictions unreasonable, granting the plaintiff's request for an injunction. The Ohio Supreme Court reversed these decisions, upholding the constitutionality of the municipal restriction. *Id.*

274. 281 N.E.2d 21 (Ohio Ct. App. 1972). *Alsenas* was a challenge to a municipal zoning ordinance. The plaintiff was restricted to developing only single family residences on land on which he held a purchase option instead of the multi-family apartments which he wished to build. *Id.* at 22. The plaintiff was limited in the number of single family residences he could build because of the topography of the land in question. *Id.* The plaintiff challenged the zoning ordinance as a taking. The trial court found that only 38% of the plots on the land could be developed under existing zoning restrictions, and declared the zoning

ordinance unconstitutional as applied to the land in question. The court of appeals reversed, finding the ordinance constitutional. *Id.* at 26.

275. 383 N.E.2d 892 (Ohio 1978). Renalist was a challenge to a state restriction on acting as a real estate broker without a license. The defendant had compiled information about rental properties and sold it to potential renters. *Id.* at 893. The defendant challenged the licensing requirement as a violation of its right to engage in commercial speech. *Id.* at 894.

276. 120 N.E. 836 (Ohio 1918). This case concerned a petition for a writ of mandamus to the City Building Commissioner to reissue a building permit previously issued and revoked. *Id.* at 837. The petitioner had received a building permit and was building an animal hair processing plant within the limits of Cincinnati. After the petitioner had begun construction, the city council proposed and passed an ordinance prohibiting the construction or use of any building in Cincinnati for the purpose of processing animal hair. *Id.*

277. 317 N.E.2d 246, 248 (Ohio Ct. App. 1974) (upholding ordinance prohibiting parking at night on city streets for longer than five consecutive hours, effectively prohibiting overnight parking, because appellant failed to rebut presumption of constitutionality given to ordinance).

278. 168 N.E. 227, 229 (Ohio Ct. App. 1929) (upholding municipal ordinance charging license and inspection fee for erection of commercial signage where no evidence that fee was unreasonable).

279. See, e.g., *Posades de Puerto Rico Ass'n v. Tourism Co.*, 478 U.S. 328, 340 (1986) (remarking that commercial speech receives limited First Amendment protection so long as it concerns lawful activity and is not misleading or fraudulent); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) (noting that protection available for particular commercial speech turns on nature both of the expression and of governmental interest served by its regulation). To the extent that the Ohio cases did involve First Amendment commercial speech, they may have been wrongly decided. See *Edenfield v. Fane*, 113 S. Ct. 1792, 1799 (1993) (government carries burden of proof that regulation on commercial speech advances the government interest in a direct and material way).

280. 578 N.E.2d 881 (Ohio Ct. App. 1990), review denied, 877 P.2d 120 (Ohio 1994).

281. *Id.*

282. *Arnold v. City of Cleveland*, 616 N.E.2d 163, 166 (Ohio 1993).

283. *Hale*, 578 N.E.2d at 883-84 (citations omitted).

284. *Ohio Pub. Interest Action Group, Inc. v. Public Utilities Comm'n*, 331 N.E.2d 730 (Ohio 1975). In this case, a public interest group challenged the Ohio Legislature's prohibition of any state agency from restricting advertising by any regulated public utility. *Id.* at 733. The interest group wanted the regulatory boards to prohibit the utilities from advertising. *Id.* at 735. The constitutional challenge involved the group's assertion that allowing advertis-

ing by the utilities was contrary to the “common welfare” clauses of the United States and Ohio Constitutions. *Id.* at 733.

285. *State ex rel. Dickman v. Defenbacher*, 128 N.E.2d 59, 60-61 (Ohio 1955), was a challenge to an act of the Ohio Legislature appropriating funds to several veterans organizations for the purposes of rehabilitating war veterans and promoting patriotism. The challengers were taxpayers who questioned the constitutionality of giving state funds to private organizations solely for the benefit of those organizations’ members. *Id.* at 61. The Ohio Supreme Court upheld the appropriation as a proper legislative determination of what constituted a public good. *Id.* at 65, 67.

286. *Cincinnati v. Welty*, 413 N.E.2d 1177 (Ohio 1980), cert. denied, 451 U.S. 939 (1981). The appellees were convicted of violating this ordinance by driving a Sherman tank and a “half-track” on the city streets. *Id.* The supreme court upheld the ordinance, stating that the appellees, who had prevailed in the court of appeals, had the burden of proving by “clear and convincing evidence” that the ordinance lacked a “real and substantial relation” to the purpose of preserving street surfaces. *Id.* at 1178.

287. *Benjamin v. City of Columbus*, 146 N.E.2d 854, 857 (Ohio 1957), cert. denied, 357 U.S. 904 (1958). Benjamin involved a municipal ordinance making it a misdemeanor to possess pinball games because of the possibility that the games could be converted to gambling devices, regardless of whether the games had been converted. *Id.* The Ohio Supreme Court upheld this ordinance using a standard which presumed that an exercise of the police power was valid. *Id.* at 859. The court indicated that legislative enactments were presumed to “bear a real and substantial relation to the public health, safety, morals or general welfare of the public.” *Id.* at 860. The court also indicated that it would not invalidate an enactment unless the legislative decisions on the constitutional questions were “clearly erroneous.” *Id.*

288. 49 N.E.2d 412, 414 (Ohio 1943).

289. *Arnold v. City of Cleveland*, 616 N.E.2d 163, 171 (Ohio 1993) (quoting *Cincinnati v. Correll*, 49 N.E.2d 412, 414 (Ohio 1943)).

290. *Correll*, 49 N.E.2d at 414.

291. *Arnold*, 616 N.E.2d at 172 (emphasis added).

292. *Correll*, 49 N.E.2d at 414.

293. *Arnold*, 616 N.E.2d at 176-77 (Hoffman, J., concurring in part and dissenting in part).

294. The *Arnold* dissent characterized the appropriate standard of review as follows:

[A] stricter standard must be utilized when the legislation places restrictions upon fundamental rights, particularly where the legislation prescribes an outright prohibition of possession as opposed to mere regulation of possession. A “strict scrutiny, “ test, i.e., whether the restriction is necessary to promote a

compelling governmental interest, as opposed to the less demanding “reasonable” or “rational relationship test” ought to be applied.... Exercise of the police power may not be achieved by a means which sweeps unnecessarily broadly.

Lakewood v. Pillow (1972), 180 Colo. 20, 501 P.2d 744. Arnold, 616 N.E.2d at 176.

295. *Id.* at 171-172.

296. Lakewood, 501 P.2d at 745.

297. *Id.*; see also State v. Nieto, 130 N.E. 663, 664 (Ohio 1920) (remarking that police power has bounds and noting that state constitution contains no prohibition against legislature making police regulations “as may be necessary for the welfare of the public at large as to the manner in which arms shall be borne”) (emphasis added).

298. *Id.* at 6. For example, one Colorado case invoked Lakewood to find as unconstitutional overbroad a statute prohibiting operation of a motor vehicle with a suspension system altered from the manufacturer’s original design. People v. Von Tersch, 505 P.2d 5, 6 (Colo. 1973).

299. See *supra* note 209 for a discussion of some cases that cited Lakewood’s application of the overbreadth doctrine.

300. Robertson v. City of Denver, 874 P.2d 325, 331 nn.13, 14 (Colo. 1994).

301. People v. Seven thirty-five East Colfax, 697 P.2d 348, 370 (Colo. 1985) notes, “the state has demonstrated no interest in the broad prohibition of these articles sufficiently compelling to justify the infringement on the privacy right of those seeking to use them in legitimate ways. Thus, we hold the statutory prohibition against the promotion of obscene devices to be unconstitutional.” *Id.*

302. City of Lakewood v. Pillow, 501 P.2d 744, 745 (Colo. 1972) (stating narrow means should be employed when end can be achieved in that way). Cf. People v. French, 762 P.2d 1369, 1374-75 (Colo. 1988) (various restrictions on fundraising, a First Amendment activity, were unconstitutional because more narrowly tailored options were available to achieve desired end).

303. Robertson, 874 P.2d at 334-35.

304. Lakewood, 501 P.2d at 745.

305. Arnold v. City of Cleveland, 616 N.E.2d 163, 176 (Ohio 1993) (Hoffman, J., dissenting).

306. See, e.g., American Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986). The Hudnut court stated:

[W]e accept the premises of this legislation [against sexualized depictions of women]. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turns leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets Yet all is protected as speech, however insidious. *Id.* at 329-30.

307. Arnold, 464 P.2d at 517-18 (vagrancy ordinance stricken, although city argued “forcefully and quite compellingly” that ordinance was necessary to fight crime). The Arnold court described the limits of the state police power as follows:

[N]o matter how necessary to law enforcement a legislative act may be, if it materially infringes upon personal liberties guaranteed by the constitution, then that legislation must fail. Grim as it may be, if effective law enforcement must be dependent upon unconstitutional statutes, then the choice of the way ahead is for the people to act or fail to act under the amendatory processes of the constitution.

Id.

308. Compare Brandon Centerwall, Homicide and the Prevalence of Handguns: Canada and the United States, 1976 to 1980, 134 Am. J. Epidemiology 1245, 1248 (1992) (analyzing handgun homicides in United States and Canada and concluding that prevalence of handguns does not increase homicide rate) with Brandon Centerwall, Exposure to Television As a Risk Factor for Violence, 129 Am. J. Epidemiology 643, 651 (1989) (concluding that exposure to television is responsible for major fraction of inter-personal violence in United State) and Brandon Centerwall, Young Adult Suicide and Exposure to Television, 25 Soc. Psy. And Psychiatric Epidemiol. 121, 151-52 (1990) (comparing suicide trends in United States, Canada and South Africa and concluding that exposure to television is significant risk factor for young adult suicide).

309. University of Cal. Regents v. Bakke, 438 U.S. 265, 307 (1978) (plurality opinion of Powell, J.). Similarly, no matter how compelling a state interest in differentially distributing services in light of its citizens’ length of residence may be, “that objective is not a legitimate state purpose” under equal protection and the right to travel. Zobel v. Williams, 457 U.S. 55, 63 (1982).

310. Kingsley Int’l Pictures Corp. v. Regents of the Univ. of New York, 360 U.S. 684, 688-89 (1959) (stating that Constitutional guarantee is not confined to expression of ideas that are conventional or shared by majority); see also American Booksellers, 771 F.2d at 330-33 (holding unconstitutional ordinance which regulated pornography).

311. Cf. Hunter v. Underwood, 471 U.S. 222, 233 (1985) (observing that statute violates equal protection when legislature motivated by both legitimate and illegitimate purposes).

312. Multnomah County, Or., Ordinance No. 646 (1990).

313. Cleveland, Ohio, Ordinance ch. 628 (1989) provides in pertinent part:

Findings

The Council finds and declares that the proliferation and use of assault weapons is resulting in an ever-increasing wave of violence in the form of uncontrolled shootings in the City, especially because of an increase in drug trafficking and drug-related crimes, and poses a serious threat to the health,

safety, welfare and security of the citizens of Cleveland. The Council finds that the primary purpose of assault weapons is anti-personnel and any civilian application or use of such weapons is merely incidental to such primary antipersonnel purpose. The Council further finds that the function of this type of weapon is such that any use as a recreational weapon is far outweighed by the threat that the weapon will cause injury and death to human beings. Therefore, it is necessary to establish these regulations to restrict the possession or sale of these weapons. It is not the intent of the Council to place restrictions on the use of weapons which are primarily designed for hunting, target practice, or other legitimate sports or recreational activities.

Id.

314. Denver, Colo. Rev. Mun. Code art. IV, § 38-130 (1989) provides in pertinent part:

Legislative intent. The city council hereby finds and declares that the use of assault weapons poses a threat to the health, safety and security of all citizens of the City and County of Denver. Further, the council finds that assault weapons are capable both of a rapid rate of fire as well as of a capacity to fire an inordinately large number of rounds without reloading and are designed primarily for military or antipersonnel use.

Id.

315. Cleveland, Ohio, Ordinance ch. 628, see *supra* note 313.

316. Denver, Colo. Rev. Mun. Code art. IV, § 38-130. See *supra* note 314.

A later paragraph did disavow any intent to restrict “weapons which are primarily designed and intended for ... legitimate sports or recreational activities and the protection of home, person and property.” Denver, Colo. Rev. Mun. Code, art. IV, § 38-130(a) (emphasis added). The disavowal’s dishonesty is evident by comparison to the California Roberti-Roos Act after which the Denver Ordinance is modeled. California’s constitution has no right to keep and bear arms and the Roberti-Roos Act made no pretense that defensive firearms were exempted. Cal. Penal Code § 12275.5 (West 1989) disavows only the intent to restrict “weapons which are primarily designed and intended for ... legitimate sports or recreational activities.” Denver made no independent examination of the arms to be banned. Denver simply parroted the California list of banned firearms and the California disavowal of intent to harm sports, but added a false disavowal of intent to ban arms designed for self-defense. Indeed, so blithely did Denver follow California that Denver banned various misnamed and non-existent firearms which were on the California list. Compare Denver, Colo. Rev. Mun. Code, art. IV, § 38-130(h) (listing specific prohibited “assault weapons”) with Cal. Penal Code § 12276 (West 1989).

317. Multnomah County, Or., Ordinance No. 646, § 1, H provides:

Assault weapons are identified as such herein because their design, high rate of fire and capacity to cause injury render the a substantial danger to human life

and safety, outweighing any function as a legitimate sports or recreational firearm.

Id.

318. See *supra* note 13 and accompanying text illustrating explicit language of state constitutions.

319. Factually, the argument that “assault weapons” are different from “sporting” weapons devolves into a complaint that the guns are too well-made. The Denver city attorney complained that the banned guns “do not move off target as much after each shot.” Appellant’s Brief at 19, *Robertson v. City of Denver*, No. 90CV603 (Denver Dist Ct. Feb. 28, 1993), rev’d, 874 P.2d 325 (Colo. 1994). Councilwoman Cathy Reynolds, sponsor of Denver’s “assault weapon” prohibition, complained that the guns “are very easy to use.” Cathy Reynolds, Headlines, Summer 1989 (newsletter).

320. Denver, Colo. Rev. Mun. Code, art. IV, § 38-130(f)(2).

321. *Robertson*, No. 90CV603. The lower court stated:

The Court finds that limiting the use of the weapons in such a manner that the weapons cannot be legally used for the purpose of defense of person, property or home is in direct conflict with Article II, Section 3 and 13, of the Colorado Constitution. The ordinance makes unlawful the possession of an assault weapon, notwithstanding that the possessor is otherwise in legal possession, when the possessor uses the weapon for defense of home person or property. Therefore, Section 38-130(e)(3) of the ordinance is unconstitutionally overbroad as it pertains to persons in legal possession of an assault weapon. It precludes Constitutionally protected conduct.

Id., slip op. at 12.

322. Center to Prevent Handgun Violence Amicus Brief at 21, *Robertson v. City of Denver*, 874 P.2d 325 (Colo. 1994).

323. *Robertson*, 874 P.2d at 331.

324. *Arnold v. City of Cleveland*, 616 N.E.2d 163, 169-73 (Ohio 1993).

325. *Robertson*, 874 P.2d at 328-30.

326. *Arnold*, 616 N.E.2d at 165.

327. *Robertson*, 874 P.2d at 327.

328. See Colo. R. Civ. P. § 56(c) (stating that trial court must accept plaintiff’s pleadings as true on motion for summary judgment) and Ohio Rev. Code Ann. § 56(c) (*Anderson* 1994) (benefit of truth of facts given to non-moving party).

329. *Arnold*, 616 N.E.2d at 165, 176-77.

330. *Id.* at 173.

331. *Id.*

332. See, e.g., Brief of Amici Curiae, The League of Ohio Sportsmen, Law Enforcement Alliance of America, American Fed’n of Police, Ohio Gun

Collectors Ass'n, Jews for the Preservation of Firearms Ownership, Heartland Inst., Ohio Women, and Ohio Rifle & Pistol Ass'n, at 30, *Arnold v. City of Cleveland*, 616 N.E.2d 165 (Ohio 1993).

333. Denver City Council: Hearing, Nov. 6, 1989, at 6, reproduced at Defendants' exhibit B (affidavit of Barbara Romero, Senior Secretary for City Council) in support of Defendants' Motion for Summary Judgment, in *Robertson v. City of Denver*, 874 P.2d 325 (Colo. 1994).

334. Denver, Colo., Rev. Mun. Code art. IV, § 38-130(a).

335. Police Firearms Data, plaintiffs' exhibit 65, in *Robertson*, 874 P.2d 325.

336. Plaintiffs' exhibit 64, in *Robertson*, 874 P.2d 325.

337. For a more recent version of such data, see David B. Kopel, Rational Basis Analysis of "Assault Weapon" Prohibition, 20 *J. Contemp. L.* 381, 404-10 (1994) (summarizing police data from around nation).

The defendants and their amici did not challenge the veracity or reliability of the police data, but did offer as counter-evidence (1) numerous assertions (without any data) from various government employees that "assault weapons" were a serious problem; and (2) a series of newspaper articles from the Atlanta Constitution which, after reviewing BATF trace data, reported that "assault weapons" were ten percent of crime guns. Jim Stewart & Andrew Alexander, Assault Guns Muscling in on Front Lines of Crime, *Atlanta J.-Atlanta Const.*, May 21, 1989, at A1, A8. Only two percent of crime guns were traced, and many gun traces do not involve crime guns. Thus, as the courts were told, the Bureau of Alcohol, Tobacco & Firearms (BATF), the bureau which conducted the traces, specifically denied the Atlanta newspaper's assertions. Letter from Daniel M. Hartnett, Director, Bureau of Alcohol, Tobacco & Firearms, to Rep. Richard T. Schulze, 3 (March 31, 1992) ("concluding that assault weapons are used in 1 of 10 firearms related crimes is tenuous at best since traces and/or the UCR [FBI Uniform Crime Reports] may not truly be representative of all crimes").

338. See *Robertson*, 874 P.2d at 333 (terming irrelevant, for constitutional purposes, statistics which support inference that ban on weapons unlikely to have effect on crime); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993) (stating that even if statistics presented are accurate, threat to public safety is not diminished).

339. Given that both cases involved pretrial motions, the courts had to assume that all facts would be found as the plaintiffs might have been able to prove at trial. See *supra* note 328 and accompanying text.

340. It is true that while courts do not require strong proof that obscenity causes harm, courts still uphold obscenity laws. But in contrast to non-obscene, erotic speech, obscene speech may not be considered "speech" within the meaning of "speech" when used as a First Amendment term of art. See, e.g., Frederick Schauer, Causation Theory and the Causes of Sexual Violence, 1987 *Am. B. Found. Res. J.* 737, 763 & n.57 (1987); Frederick Schauer, Codifying

the First Amendment: *New York v. Ferber*, 1982 Sup. Ct. Rev. 285, 285-86 (1982) (noting that child pornography is unanimously held to be “unprotected by the First Amendment”). Similarly, the Oregon Court of Appeals found that certain semiautomatics were not “arms” within the meaning of the Oregon Constitution. *Oregon State Shooting Ass’n v. Multnomah County*, 858 P.2d 1315, 1318-20 (Or. Ct. App. 1993), rev. denied, 877 P.2d 1202 (1994). In contrast, the Colorado and Ohio courts never theorized that “assault weapons” were not among the “arms” protected by their states’ constitutions. See *Robertson*, 874 P.2d at 328; *Arnold*, 616 N.E.2d at 169-70 (discussing language of Ohio Constitution but not addressing definition of “arms”). Rather, those courts found that prohibition of some arms were reasonable as long as others were not prohibited. See *Robertson*, 874 P.2d at 333 (concluding that statute not invalid because it might have gone further in regulating arms); *Arnold*, 616 N.E.2d at 173 (stating city would have violated its authority had it banned all firearms).

341. “It is not the intent of the Council to place restrictions on the use of weapons which are primarily designed and intended for hunting, target practice or other legitimate sports or recreational activities.” *Cleveland, Ohio, Ordinance ch. 628 § 628.01*.

342. See *Arnold*, 616 N.E.2d at 173 (stating appellants can prove no set of facts that would entitle them to relief).

343. *Id.* at 166.

344. Similarly, the Ohio Court of Appeals in *Hale* upheld the constitutionality of Columbus’s “assault weapon” ordinance, doing so using a rational basis test that considered whether the ordinance had a real and substantial relationship to the health and welfare of the citizens of Columbus. In so doing, the court expressly declined to overrule the findings of the city council that gun registration would benefit the citizens of Columbus. *Hale v. City of Columbus*, 578 N.E.2d 881, 884-86 (Ohio Ct. App. 1990), cause dismissed, 569 N.E.2d 513 (Ohio 1991).

345. *Arnold*, 616 N.E.2d at 177.

Realistically speaking, the idea that there is some kind of distinction between “sporting” firearms and “anti-personnel” firearms is nonsense; guns have always been designed for both purposes, and often what makes a gun good for one purpose tends to make it good for the other. For example, in a gun reference book cited by the Colorado Supreme Court (and by the City of Denver), one chapter details how slide and pump action shotguns such as the Winchester Model 1897 and the Remington Model 1910 were selected by the U.S. Army for combat use. In combat, these guns “induced pure ‘battle terrorism.’” “So devastating was the “terrible effectiveness” of these “trench guns” and “riot guns” during World War I that the German government protested that their use violated the articles of war. The Winchester Model 12 and Model 97 pump action guns were widely used in the Pacific during World War II and in Korea. The Model 12 “proved ideal in the jungles of Vietnam.” The Winchester Model

97, which “can be emptied quickly by holding the trigger down and pumping the handle, “is reliable and has been the weapon of choice for many in the police and military. Jack Lewis, *Assault Weapons* 208-14 (1st ed. 1986). See also Jack Lewis, *Assault Weapons* 223 (2d ed. 1989). These Winchester and Remington shotguns are unquestionably rapid fire combat shotguns, having (unlike the shotguns banned by various “assault weapon” laws) been selected for use in combat. Yet these guns, because they are widely owned, commonly used for hunting and skeet shooting, have a traditional appearance, and were invented many decades ago, are somehow considered “legitimate” sporting firearms.

In the “assault weapon” case, the Oregon Court of Appeals claimed that “assault weapons” are not used for defense, making the point that “the listed weapons are called assault weapons for a reason.” *Oregon State Shooting Ass’n v. Multnomah County*, 858 P.2d 1315, 1320 (Or. Ct. App. 1993), review denied, 877 P.2d 1202 (1994). By doing so, the court ignored the Delgado court’s rejection of this distinction: “It is not the design of the knife but the use to which it is put that determines its ‘offensive’ or ‘defensive’ character.” *State v. Delgado*, 692 P.2d 610, 612 (Or. 1984).

346. *Denver, Colo. Rev. Mun. Code*, art. IV, § 38-130(a) (1989).

347. *Oregon State Shooting Ass’n*, 858 P.2d at 1319.

348. *Id.* at 1320-21.

349. *Id.* at 1320-21 n.8.

350. Jack Smith, *Even Short Quotations Leave a Mark*, *L.A. Times*, Mar. 7, 1994, at E1.

351. Ross & Kathryn Petras, *The 776 Stupidest Things Ever Said* 61 (1993).

352. *Coleman v. Chafin*, No. D-67151 (Fulton Sup. Ct. July 31, 1989).

353. *Id.*, slip op. (concluding that firearms restriction was pre-empted by Ga. Code Ann. § 43-16-1 et seq. (concerning licensing of firearms dealers) and Ga. Code Ann. § 16-11-120 et seq. (defining and regulating possession of weapons)).

354. See Sanford Levinson, *Constitutional Faith* 52 (1988) (arguing that “Death of Constitutionalism” and “Death of God” have arisen from same forces). See also Levinson, *supra* note 2, at 643-57 (surveying various theories of constitutional interpretation and concluding that all of them suggest treating Second Amendment as respected individual right).

355. *Owen v. City of Independence*, 445 U.S. 622, 669 (1980) (Powell, J., dissenting).

356. See Dan Pier et al., *Solace, Unity Found in Tapestry of Religions*, *Boston Globe*, August 15, 1993, at B1 (discussing rebirth of faith and 1993 Gallup Poll in which 93% of respondents expressed belief in God).

357. Larry Tye, *The World's Fastest-growing Religion Started in this Country*, Boston Globe, Nov. 21, 1994, available in 1994 WL 6010751 (discussing rise of Pentecostalism).

358. 18 U.S.C. § 922(s) (1993) (providing for waiting period of 5 business days for purchases of handguns from federally licensed gun dealers).

359. E.g., *Romero v. United States*, 883 F. Supp. 1076 (W.D. La. 1995); *Frank v. United States*, 860 F. Supp. 1030 (D. Vt. 1994); *McGee v. United States*, 863 F. Supp. 321 (S.D. Miss. 1994). *Contra Koog v. United States*, 852 F. Supp. 1376 (W.D. Tex. 1994).

360. For example, Cleveland's 1976 handgun registration law achieved less than twelve percent compliance. David T. Hardy & Kenneth L. Chotiner, *The Potential for Civil Liberties Violations in the Enforcement of Handgun Prohibition*, in *Restricting Handguns 201* (Don B. Kates ed., 1979).

361. A few weeks after the November 1994 elections, President Clinton telephoned one of the leading Democratic supporters of the "assault weapon" ban. After congratulating the Congressman on his re-election, the President opined that the "assault weapon" ban had cost the Democrats twenty-one seats in the House of Representatives. President Clinton later told the Cleveland Plain-Dealer that the "assault weapon" issue and the National Rifle Association's efforts had given the Republicans twenty additional seats. Evelyn Theiss, *Gun Lobby Shot Down Democrats in Congress: Clinton Confident of Comeback*, Plain Dealer (Cleveland) Jan. 14, 1995, at A1 ("The fight for the assault-weapons ban cost 20 members their seats in Congress The NRA is the reason the Republicans control the House").

The President's conclusion was consistent with analysis in *Campaigns and Elections* magazine, which identified numerous Congressional races in which the winning (pro-gun) candidate's margin of victory was smaller (often much smaller) than the number of self-identified NRA supporters in the district (or state). Brad O'Leary, *Fire Power*, *Campaigns & Elections*, Dec./Jan. 1995, at 32-34. Of the 55 House races and ten Senate races identified, 38 House races and seven Senate races resulted in a pro-gun Republican taking the seat away from Democratic control (by defeating an incumbent, or, more typically, winning an open seat from which a Democrat was retiring). Ten Senate races also involved a pro-gun winner winning by less than the number of self-identified NRA members in the state. *Id.*

362. T.C. Brown & Mary Beth Lane, *Fisher Vows Return to Arena: Loss Attributed to Party's Weak Slate*, National Backlash, Plain Dealer, Nov. 10, 1994, at 11B.

363. For an account of the intensity of the fervor of gun-rights advocates in the 1994 Ohio election, see Mary Beth Lane, *Protestors Come Out Gunning for Reno; Demonstrators Attack Her Gun-Control Stand*, Plain Dealer, July 7, 1994, at 5B.

364. Four years before, Freese, then the chair of the state Democratic party, had worked to re-elect incumbent Attorney General Duane Woodard, even though Woodard had sent the Attorney General's office into battle against the Denver gun ban. See Peter Blake, Dick Freese considers attorney general bid, Rocky Mountain News, May 3, 1993, at 5A.

365. George Lane, Norton Leaves Freese in Cold, Denver Post, Nov. 9, 1994, at A10.

366. H.B. 2784 was the only one of the more than 50 bills vetoed by Oregon's governor in 1995 for which the legislature overrode the veto.

367. See Levinson, *supra* note 2 at 642 (discussing reasons for elites' disdain for Second Amendment).

368. The Oregon dissent observed that "[f]or those who are concerned about 'the expanding tentacles of government gun control', the majority's holding will give credence to their worst fears." Oregon State Shooting Ass'n v. Multnomah County, 858 P.2d 1315, 1324 (Or. Ct. App. 1993) (Edmonds, J., concurring in part, dissenting in part).

369. Robert J. Cottrol, Want Gun Control? Enforce the Second Amendment, 1991 Texas Lawyer June 10, 1991, at 32.

370. See *supra* note 12 and accompanying text for a list of these cases.

Gun control advocates frequently attempt to deflect the Second Amendment by claiming that the Amendment merely guarantees a “state’s right.” But gun control advocates never explain what they mean when they claim that the Second Amendment guarantees a right to state governments, rather than a right of the people. In this article, the authors attempt to flesh out exactly what a “state’s right” interpretation of the Second Amendment would mean. They conclude that taking the Second Amendment seriously as a state’s right has enormous implications, which have not been addressed by anti-gun advocates. This article was originally published in 1995 in volume 36 of the William and Mary Law Review, beginning at page 1737.

The Second Amendment And States’ Rights: A Thought Experiment

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The Second Amendment to the United States Constitution provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”¹ As Professor Sanford Levinson has noted, this Amendment is, on its face at least, one of the murkier constitutional provisions.² In recent years, the public debate over the meaning of the Amendment has become more heated, even as the scholarly literature has grown. One major feature of this debate has been disagreement over what the Second Amendment protects. The great majority of recent law review commentary sees the Amendment as recognizing a right of individuals, enforceable by them in the courts after the fashion of, say, the First Amendment.³ While acknowledging that, like freedom of expression, the right to arms was perceived as having social values as well as individual ones,⁴ the scholarly literature portrays the Amendment as intimately connected with self-defense, which the Founders saw as the cardinal natural

right—a right of individual and collective resistance to tyranny and other forms of criminal conduct.⁵ In contrast to the individual rights view, advocates of restricting gun ownership have championed a “states’ right” view of the Second Amendment, contending that its goal is to guarantee only the states’ right to have armed militias, usually characterized as the contemporary National Guard.⁶

We will not enter that debate in this Article. Instead, we will undertake what physicists term a “thought experiment.” We will take as a given that the Second Amendment does what states’ rights advocates say it does, protecting only the right of states to maintain organized military forces such as the militia and the National Guard, without creating any rights enforceable by ordinary individuals. We will then explore an issue that has been ignored even by proponents of the “states’ rights” interpretation of the Second Amendment: If the Second Amendment grants rights to states, rather than individuals, what exactly are those rights, and what are the consequences for the Constitution and other aspects of state and federal relations? The answers to these questions turn out to be rather startling and likely will displease gun control advocates every bit as much as their opponents. From this conclusion we draw a few lessons on the contemporary state of popular constitutional scholarship and make a modest proposal for improving matters.

I. States’ Rights And Individual Rights

We all know what it means to say that the Bill of Rights creates an individual right. It means that the provision in question—for example, the First Amendment’s free-speech clause—carves out an area that is exempt from government control, except perhaps in the most compelling circumstances.⁷ Individuals whose rights are violated because the government subjects protected behavior to control absent such compelling circumstances have the right to sue and obtain an injunction or other judicial relief against the government. The meaning of an individual right to bear arms under the Second Amendment would thus be fairly

clear. An individual subjected to firearms laws not justified by highly compelling circumstances would be able to have the laws struck down by a court as unconstitutional.⁸ Such laws would be analyzed in the same fashion as laws entrenching upon other rights protected by the Bill of Rights.

What a states' right interpretation would mean is a bit less clear. The Supreme Court has not done much with states' rights in recent years, and the term itself still suffers a certain amount of opprobrium resulting from its use (more as slogan than legal argument) in the civil rights battles of the 1950s and 1960s.⁹ Nor is the Constitution very helpful. Typically, when describing state functions that are protected from federal interference (or, for that matter, when describing governmental authority generally) it uses the term "powers," rather than rights, as in the Tenth Amendment.¹⁰

Presumably, however, a "state's right" is one that is also enforceable in court. Thus the Supreme Court consistently enforces the states' Eleventh Amendment "right" not to be sued in federal courts.¹¹ By the same token, if Congress were to pass a statute establishing a new state of "Calizona" out of parts of California and Arizona without the consent of the legislatures of those states, the courts likely would strike down such an action as violative of the provision in Article IV, section 3 that "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned"¹² The right of territorial integrity guaranteed by Article IV would hardly be a right at all if courts did not enforce it.

Thus, a states' right interpretation of the Second Amendment must mean—if it is to mean anything at all—that a federal action that invades a state's protected interests can be challenged in court, and that it can be struck down where it is not justified by highly compelling circumstances. This, of course, leaves open two important questions. The first question is what state interests, exactly, are protected by a "states' rights" interpretation of the Second Amendment. The second question is what are the

consequences of recognizing such rights today. In addressing these questions, we first will look at the purposes such a right might serve, then at how it might be applied today, and finally at the relationship between states and the federal government that such an interpretation implies.

II. A State Right To Keep And Bear Arms

In trying to determine the purposes of a state right under the Second Amendment, the obvious place to look first is in the writings of those who champion such an interpretation.¹³ Unfortunately, they provide little help. The states' right interpretation appears to be employed against the individual right interpretation in much the same fashion as a chain of garlic against a vampire, pulled out and brandished at need but then hastily tossed back into the cellar lest its odor offend.

However, even in this commentary there is some guidance. For example, gun-control activist Dennis Henigan¹⁴ writes that "[t]he purpose of the [Second] Amendment was to affirm the people's right to keep and bear arms as a state militia, against the possibility of the federal government's hostility, or apathy, toward the militia."¹⁵ He describes his interpretation of the Second Amendment as providing "that the Second Amendment guarantees a right of the people to be armed only in service to an organized militia"¹⁶ and argues that James Madison interpreted the Amendment as ensuring that the Constitution does not strip the states of their militia, while conceding that a strong, armed militia is necessary as a military counterpoint to the power of the regular standing army Madison saw the militia as the military instrument of state government, not simply as a collection of unorganized, privately armed citizens. Madison saw the armed citizen as important to liberty to the extent that the citizen was part of a military force organized by state governments, which possesses the people's "confidence and affections" and "to which the people are attached." This is hardly an argument for the right of people to be armed against government per se.¹⁷

So in Henigan's view, which it seems safe to regard as representative of the "states' rights" camp,¹⁸ the purpose of the Second Amendment is to guarantee the existence of state military forces that can serve as a counterweight to a standing federal army. Thus, it seems fair to say, the scope of any rights enjoyed by the states under the Second Amendment would be determined by the goal of preserving an independent military force not under direct federal control.

The consequences of such a right are likely to be rather radical. In short, if the Second Amendment protects only a state right to maintain an independent military force, it creates no purely individual right to keep and bear arms, exactly as gun-control proponents argue (although it is possible that courts might derive some individual rights by way of inference). However, the consequences go far beyond that particular result. If the Second Amendment creates a right on the part of the states, rather than individuals, then by necessity it works a *pro tanto* repeal of certain limitations on state military power found in the Constitution proper, renders the National Guard unconstitutional, at least as currently constituted, and creates a power on the part of state legislatures to nullify federal gun-control laws, if such laws are inconsistent with that state's scheme for organizing its militia. Although these results may seem far-fetched, closer examination will reveal that they are inevitable results of a states' right formulation.

A. An Independent State Military Power

Advocates of the states' right view are certainly on firm ground when they describe the Framers' fear of a standing federal army. The evidence that the Framers entertained such fears is substantial and uncontradicted.¹⁹ The individual rights view does not deny this. It sees the right as an aspect of the natural-law right of self-defense, which was deemed to include the right to arms and which ("writ large") included the right of an armed populace to join together to resist tyranny. The difference between the two views is that the individual right approach has no

particular state versus federal implications. Indeed, one additional aspect of the armed populace was their ability to join the federal government in resisting state tyranny.²⁰

But if the Second Amendment was designed to create an independent state counterweight to federal military power, then it must at the very least protect those aspects of state military forces that are independent and that serve as counterweights to federal power. Those aspects turn out to be substantial. To begin with, a states' right version of the Second Amendment is probably inconsistent with some provisions of the preamendment Constitution; because it is later in time, it must thus be viewed as an implicit repeal or modification of those provisions. Three pre-amendment provisions of Article I appear inconsistent with the role of state armed forces as independent counterparts to the federal standing army. Article I, section 8, clause 15 (the first of the Militia Clauses) grants to Congress the power: To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.²¹ Article I, section 8, clause 16 (the other Militia Clause) grants Congress the power: To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.²² Finally, Article I, section 10, clause 3 provides that: No State shall, without the Consent of the Congress, keep Troops, or Ships of War in time of Peace.²³

What is wrong with these provisions? In the states' right formulation, we know two things about them. First, they were not sufficient in themselves to address concerns that state military forces might be under too much federal control—otherwise the Second Amendment would not have been needed. Indeed, these provisions helped give rise to precisely the kind of fears that the states' right interpretation claims the Second Amendment was intended to address. Second, they are in many ways inconsistent with the states' rights theory's stated purpose of the Second Amendment, because some of the powers granted to the

federal government in Article I, and some of the prohibitions imposed on the states, might destroy or impair the role of state military forces as a counterweight to the federal standing army.

The calling-out provision of clause 15 is the least suspect. Here, if the Second Amendment works any change at all, it would simply prevent the federal government from calling out state military forces in a way that would effectively end state control—for example, a perpetual call-up that would have the effect of placing the state forces under long-term federal command, destroying their independence. Note, however, that the clause does contain limitations on the purpose for which the militia can be called out, limiting such call-outs to execution of the laws, suppression of insurrections, and repelling invasions.²⁴

Clause 16, having to do with organization, arming, and discipline, is on shakier ground. According to Henigan, the Framers worried that congressional authority in this regard might allow the federal government to undermine or destroy the militia as an institution either by refusing to make any provision for arming, disciplining, or training the militia or by warping it into a federal rather than a state institution.²⁵ Indeed, the crux of his argument is that the Second Amendment was intended to address precisely this concern.²⁶ Thus, under a states' rights view, the authority of Congress to regulate the arming, discipline, or training of the state militia would be limited by the Second Amendment's purpose of maintaining state militias as an independent force that citizens correctly would identify as belonging to their state government, rather than as a federal institution. Accordingly, any regime providing for systems of arming, training, or disciplining state forces that is inconsistent with such a purpose would be unconstitutional. For example, a rule that state militias could be armed only from federally-controlled armories, or trained only with "dummy" or non lethal weapons, or that they must be overseen by federal political officers to ensure loyalty to the United States, would violate the independence of state military forces and thus the Second Amendment.²⁷

The Second Amendment also raises questions with regard to Article I, section 10's prohibition on states' maintaining troops

or ships of war without the consent of Congress. If the Second Amendment is intended to preserve a measure of state military independence, then a prohibition on state military forces is surely suspect, and might be regarded as having been implicitly repealed by the Second Amendment. However, it is possible to avoid at least the “Troops” part of this problem by distinguishing between “Troops,” who are probably meant to be regular professional soldiers, and the “Militia,” which was always a part-time body drawn from the citizenry at large.²⁸

Thus, it is possible to read these two provisions together as protecting the independence of a state militia made up of citizens while prohibiting the maintenance of full-time, professional armed forces by the states. Given that the Second Amendment resulted in large part from a fear of standing armies, this reading makes sense and avoids any conflict between the two provisions. Unfortunately, it runs afoul of the basic philosophy behind the states’ right approach.²⁹

Both sides in the modern Second Amendment debate recognize that Madison proposed, and the Federalist First Congress passed, the Bill of Rights in response to Antifederalist criticism of the Constitution. Unlike the individual right view, however, the states’ right view presupposes the Amendment’s hostility to parts of the Constitution to which the Antifederalists were deeply opposed. The Antifederalists had opposed ratification of the Constitution on two very different kinds of grounds. One involved deep suspicion about specific provisions, particularly those allowing a standing army and providing for federal supervision of the militia.³⁰ Entirely independent of those specifics, the Antifederalists, and many other Americans, were critical of the failure to append to the Constitution a charter of basic human rights that the federal government could not infringe under any circumstances.³¹

The individual right view sees the Second Amendment, and the Bill of Rights in general, as responding to this second kind of criticism. During the ratification debate, the Federalists vehemently denied that the federal government would have the power to infringe freedom of expression, religion, and other basic

rights—expressly including the right to arms.³² In this context, Madison secured ratification by his commitment to support the addition by amendment of a charter that would guarantee basic rights. But that commitment extended only to safeguarding the fundamental rights that all agreed should never be infringed. It did not involve conceding any issue on which the Federalists and Antifederalists disagreed, i.e., the later’s opposition to specific provisions of the Constitution. Indeed, a few days after their submission, Madison said he had “deliberately proposed amendments that would not detract from federal powers, among them a right for the citizenry to be armed.”³³

In contrast, the states’ right view points to the Militia Clause of the Second Amendment as evidence that the Amendment embodies Antifederalist opposition to the Militia Clauses of Article I. Thus, despite the general presumption that ordinarily differing provisions of the Constitution and/or its amendments ought to be harmonized whenever possible, the states’ right view freights the Second Amendment with a presumption that it conflicts with, and therefore repeals, or at least modifies, some aspects of the original Constitution.

It is inescapable, then, that the states’ right interpretation of the Second Amendment implies the repeal or modification of other language in the Constitution—something that Henigan admits, albeit without giving any examples.³⁴ The consequences of a states’ right approach, however, go much farther than these, and much beyond the abolition of an individual right to keep and bear arms, as the following discussion makes clear.

B. Present Day Consequences

If, as states’ right advocates would have it, the Second Amendment creates a right of the states to possess a measure of independent military power, what are the consequences of applying that right in the present day? Our discussion must be hypothetical, as the Court never has applied the states’ right approach in a Second Amendment case, but we will focus on a

couple of fairly easy cases: state nullification of federal gun laws and the status of the National Guard as currently constituted.

1. State Militias and Federal Gun Laws

As we have already seen, the states' right interpretation of the Second Amendment means that state militias must be sufficiently independent to serve as an effective counterweight to the federal standing army. Among other things, this requirement means that state militias must be large. Although there has been much romanticism about the effectiveness of part-time citizen soldiers, the Framers did not labor under the belief that an armed citizenry was a one-to-one match for professional soldiers. Their own Revolutionary War experience clarified this fact, which is why their discussion of the militia's usefulness tended to emphasize its size.³⁵ Unfortunately, outfitting a large force is expensive, and many states are poor—especially by comparison to the federal government. Expense was precisely the problem faced by the early Congress when it passed the Militia Act of 1792.³⁶ That act established a “Uniform Militia throughout the United States,”³⁷ consisting of every able-bodied male citizen between the ages of eighteen and forty-five and provided:

That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accoutered and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack.³⁸

One well might imagine a state choosing to equip its militia in the same fashion: rather than purchasing the equipment and distributing it to citizens, it simply might require citizens to possess the requisite arms, ammunition, clothing, etc. and keep them in readiness. It is easy to imagine why a state might want to impose such requirements, not only for the cost savings (likely the main motivation), but also recognizing the advantage that when the militia is called out, its members will be already familiar with their weapons and will not need to proceed to an armory or other facility to receive weapons and supplies. Such convenience could be very useful in the kinds of major emergencies—earthquakes, hurricanes, riots, and military coups—for which the militia is intended when travel might be disrupted. In fact, some state militia laws contain such provisions.³⁹

Under a states' right view, such an approach raises potential conflicts with federal legislation. For example, what if a state were to require its militia-eligible citizens to be equipped with "assault rifles"—that is, semiautomatic rifles of military styling (perhaps derived from military designs) and equipped with military-type features such as bayonet lugs, flash suppressers, folding stocks, bipods, or large-capacity magazines? Or, for that matter, what if a state were to require actual military weapons capable of fully automatic fire? (After all, countries like Switzerland and Israel do this as a matter of course.)⁴⁰ Such weapons normally cannot be possessed by individuals without running afoul of various federal firearms laws.⁴¹

Yet the states' rights approach would make such federal laws unconstitutional as applied to the members of state militias, so long as the state required, or permitted, them to keep such weapons at hand. Because the purpose of the Second Amendment is, according to the states' right interpretation, to protect the independence of state militias vis-à-vis the federal government, allowing the federal government to fully or partially disarm state militias would frustrate the core purpose of the amendment. Thus, most federal firearms laws would not be applicable to citizens covered by state militia laws—though no

doubt the federal government would retain the power to outlaw weapons obviously unsuited for militia use such as derringers, wallet-guns, umbrella-guns, and sawed-off shotguns.⁴²

Furthermore, because the militia is conceived as a large body of citizens (which it must be if it is to counter the federal standing army) federal gun control laws could, in effect, be nullified by state legislation that requires militia members to possess banned weapons—legislation that might well reach a majority of the state’s population. Some citizens would not benefit from such an action,⁴³ but the loophole thus opened in federal gun control laws would be large enough through which to march an army—or at least a militia. Under a states’ right interpretation, the states themselves would be free to regulate, or even entirely forbid, gun ownership, subject only to general constitutional guarantees, such as due process and equal protection.⁴⁴

But this result would not be achieved without cost: Federal power to restrict firearms ownership necessarily would be concomitantly limited. By long-established tradition, states do not arm civilians they call upon for armed service: Militiamen, civilian volunteers, and persons called for service in the *posse comitatus* are expected to provide their own arms.⁴⁵ At the same time, however, the great majority of states allow law-abiding, responsible adults to possess a wide variety of firearms under extensive regulation,⁴⁶ while felons and juveniles, for example, generally are forbidden firearms.⁴⁷ Given the tradition of extensive firearms regulation and of a self-armed militia, a state’s failure to outlaw general possession of particular kinds of weapons could be deemed to reflect an affirmative judgment that such possession serves a policy of maintaining an armed citizenry as the state’s ultimate military reserve.⁴⁸ If so construed, a state’s mere failure to outlaw certain arms would preempt the application in that state of any federal law banning those arms. Such a “negative pregnant” application of state gun laws would give suitable deference to the imperative for state control over militia arms, which is basic to the view that the Second Amendment confers a states’ right.

If the courts accepted a negative pregnant application of state gun laws, it would, as a matter of constitutional law, confine federal gun legislation to the limited role to which it traditionally has been confined as a matter of policy—reinforcing state gun laws by prohibiting the movement of firearms in interstate commerce from those states in which they are legal to states in which they are prohibited.⁴⁹ This result would have many interesting implications, not the least of which would be its effect on the long-standing (and surprisingly large) American market for denatured World War II fighter planes and Soviet jet fighters, which are currently available at prices as low as \$50,000.⁵⁰ In the many states whose laws allow machine gun ownership, the “recreational fighter pilots” who flock to buy these denatured aircraft could re-equip them with machine guns and automatic cannon for service in the unorganized militia. Although seemingly farfetched, this result is a natural consequence of the states’ right approach, though not, as will be discussed, of the individual right approach.⁵¹

Nor is this prospect illusory even if the negative pregnant interpretation of state gun law patterns is rejected. In addition to the states that simply do not outlaw machine guns, other states license appropriate applicants, such as security company operators, to possess them.⁵² Such laws are currently thought to be preempted by federal legislation.⁵³ Under the states’ right view of the Second Amendment, however, such affirmative permission could be construed as preempting application to those licensees of the federal law prohibiting civilian purchases of machine guns manufactured after May 19, 1986.⁵⁴

It bears emphasis that the issues raised in the last two paragraphs involve only the particular means by which state preemption of federal gun laws would operate. That such preemption would operate cannot be doubted under the states’ right approach because it is inherent in that view. Certainly, any state could preempt the operation of any contrary federal gun law within its borders by enacting laws affirmatively authorizing the military-age citizenry of the state to arm themselves with any kind of weaponry specified, including machine guns, bazookas,

fighter planes, armored personnel carriers, tanks, PT- boats, and other armed ships.⁵⁵ Without such preemptive power, the “right” of the states under the states’ right theory would be illusory.

Moreover, under the states’ right view, the Second Amendment guarantees a vastly greater range of weaponry (to state-authorized civilians or to the states themselves) than is implied by the individual right view. Exponents of the latter view have been at some pains to show that the Amendment extends to small arms only. Warships, tanks, artillery, missiles, atomic bombs, and so forth are excluded from its guarantee for several reasons, including the Amendment’s text,⁵⁶ the history of the common law right to arms,⁵⁷ and the logic of the individual right position.⁵⁸

Of course, none of the limitations implicit in the individual right view applies to the states’ right view because the common law imposed no limitations on the kinds of arms the government might possess. If the incongruity of the Amendment describing a state as “bearing” arms can be ignored, which the states’ right view necessarily does, a state is obviously no more incapable of “bearing” cannon than any other kind of arms. Moreover, if the purpose of the Second Amendment is to guarantee the existence of state military forces that can serve as “a military counterpoint to the regular standing army,”⁵⁹ the arms it guarantees the states logically could include even the most destructive implements of modern war. However unsettling these results may be, they inevitably result from the Antifederalist critique of the original Constitution upon which proponents of the states’ right view rely.

Although it is doubtful that Mr. Henigan and other enthusiasts of the states’ right approach desire this result, it seems an unavoidable consequence of arguing that the Second Amendment protects the right of states to maintain militias. One might attempt to avoid this consequence by arguing that the only militia covered by the Second Amendment is the National Guard, but, as demonstrated below, the consequences of that approach are also rather radical.

2. The National Guard and the Second Amendment

If the Second Amendment serves to protect the independence of state militias, or as former Chief Justice Burger calls them, “state armies,”⁶⁰ can the National Guard as currently constituted withstand Second Amendment scrutiny? Although the Supreme Court has never addressed this issue, the answer appears to be no because, as the Supreme Court has held, the National Guard is not at all independent.⁶¹

Originally, the militia was organized as the entire able-bodied male citizenry between eighteen and forty-five years of age, self-equipped, and required to turn out regularly (usually once per year) to demonstrate that it was properly equipped and armed.⁶² Unfortunately, the militia was not adequate to the needs of an expanding nation with territorial ambitions outside its borders. There were repeated incidents in which the militia refused to invade Canada, Mexico, and various other locations, or in which federal attempts to so employ the militia were held illegal.⁶³ This produced a series of “reforms” that created a force far more effective on the battlefield and, more importantly, far better suited to employment in wars abroad.⁶⁴

However, in the process of transforming the traditional militia into the modern-day National Guard, these reforms transformed the National Guard into a federal, rather than state, institution.⁶⁵

Under the current system, National Guard officers have dual status: They are members of both the State Guard and the federal armed forces.⁶⁶ They are armed, paid, and trained by the federal government.⁶⁷ They can be called out at will by the federal government, and such call-outs cannot be resisted, in any meaningful fashion, by their states.⁶⁸ They are subject to federal military discipline on the same basis as members of the national government’s armed forces.⁶⁹ And they are required to swear an oath of loyalty to the United States government, as well as to their states.⁷⁰

This *de facto* federal control makes it difficult to argue that the National Guard is capable of carrying out the militia’s role,

central to the states' right interpretation, of serving as a counterweight to the power of the federal standing army. As one military officer states:

By providing for a militia in the Constitution, the Framers sought to strengthen civilian control of the military. They postulated that a militia composed of citizen-soldiers would curb any unseemly ambitions of the small standing army. Today's National Guard is often perceived as the successor to the militia, and observers still tout the Guard's role as the ultimate restraint on the professional military. The reality, however, is much different. Today's National Guard is a very different force from the colonial-era militia. With 178,000 full-time federal employees and almost all of its budget drawn from the federal government, the National Guard is, for all practical purposes, a federal force. Indeed, one commentator concluded that it is very much akin to the "standing army" against which the Founding Fathers railed.⁷¹

If the National Guard is organized in a way that makes it inconsistent with the role that the Second Amendment envisions—and, under the states' right view, mandates—for the militia, there are only two possibilities. One is that the National Guard is not the militia to which the Second Amendment refers; the other is that the National Guard is that militia, but that its current configuration, however well-suited to support foreign military ventures, is unconstitutional because it is inconsistent with the Second Amendment.

The existing case law suggests the former answer. In *Perpich v. Department of Defense*,⁷² the Supreme Court addressed the question of what limitations are imposed on the National Guard under the militia clauses. The question before the Court was whether state governors could prevent their National Guard units from being sent abroad for highly controversial training missions in Central America.⁷³ In short, the Court concluded that Congress's powers to raise armies and make war, rather than its

militia powers, were implicated.⁷⁴ While not dispositive on the Second Amendment issue (perhaps significantly, the Court did not discuss the Second Amendment at all) this case suggests that the National Guard should be viewed constitutionally as it really is—a fundamentally federal force with a (very) thin patina of state control rather than the “well-regulated militia” that the Second Amendment deems “necessary to the security of a free State.”⁷⁵

That militia must be found elsewhere—and it is. Although the National Guard may have its roots in the classical militia, it clearly has been transformed into something else entirely—a federal institution with only tenuous ties to the states. However, the National Guard is not the last word in militias, even today. While the National Guard may be an organized militia⁷⁶ (what the Framers would have called a “select” militia)⁷⁷ there exists, both at the federal and state level, a militia of the sort that the Framers intended. Federal law continues to recognize an unorganized militia composed of males age eighteen to forty-five,⁷⁸ as do the laws of most states,⁷⁹ except that many now include women.⁸⁰

Under the states’ right theory, the existence of state militias of this kind would have to be protected against federal interference by the Second Amendment—even, as mentioned above,⁸¹ to the extent of nullifying federal firearms laws. It is not clear whether the Second Amendment would create an affirmative duty on the part of the states to maintain state militias. However, if the state role is as important as the states’ right interpretation insists, such a duty is at least plausible. With regard to most states, however, state constitutional provisions probably create such a duty anyway.⁸²

Regardless, states clearly do not serve the ends of the Second Amendment by maintaining a National Guard. Rather, they serve the ends (however admirable) of the national government.

III. The States’ Right View Of State-Federal Relations

Under the classical view of the Constitution, authority is delegated by the people to two kinds of governments, state and federal. State governments are not creations of the federal government, nor is the federal government the creature of the states. Both exercise authority delegated to them by the true sovereigns, the people.⁸³ The real question in assessing any governmental action is whether that action is consistent with the authority delegated by the people, or whether it exceeds that authority and is thus *ultra vires*.⁸⁴

But there is another view. In this view, the state governments represent the “real” governments of the people. The federal government exists as a somewhat mistrusted agent of the states, with states retaining the power to protect their people by checking the actions of the federal government when necessary to prevent overreaching. This view seems to be that embodied by the states’ right interpretation, in which state organizations are set against the federal government and in which state legislators retain the power to nullify federal firearms laws that would otherwise frustrate state prerogatives.⁸⁵

If applied across the board, this view would have rather dramatic consequences, going far beyond those outlined above. States’ rights, and a view of state governments as interposed between the federal government and their citizens, after all, formed the core of the losing argument in *Brown v. Board of Education*⁸⁶—and, for that matter, of the Civil War.⁸⁷ Yet if we are to decide that the Second Amendment embodies this general theory of the relations between the state and federal governments, there seems no reason to assume that the Framers had different intentions elsewhere in the same Constitution. Thus, unless we are to be entirely incoherent, we must seriously consider rethinking constitutional history all the way back to *Brown* and, indeed, to *McCulloch v. Maryland*. Yet it seems unlikely that we will be willing to go that far. The view of states as the primary constituents of our Constitution, although it has an ancient (if not always honorable) history, is not one that enjoys great esteem or adherence today given the past circumstances of its invocation.

Nor is it particularly consistent with either the language or the history of the Constitution. The Preamble, after all, states that the Constitution was ordained and established by “We the People,” not “We the States.”⁸⁸ And the Constitution was ratified by special conventions of the people, not by state legislatures.⁸⁹ So there seems to be good reason to label the states’ right theory “Can of Worms” and set it on the shelf. Under the individual right view, on the other hand, the Second Amendment is seen as protecting precisely what its language describes: a “right of the people,”⁹⁰ with the militia seen as an organization of the people—regulated to some degree by the state, but there to serve the interests not of the state (or the States) but of the people. This view, unlike the states’ right view, is consistent with both the text of the Second Amendment and the interpretive approach taken with regard to the rest of the Constitution. It also avoids the kind of state-federal confrontations that the states’ right approach seems likely—and even intended—to create.

The only problem with the individual right approach is that it requires precisely what advocates of the states’ right approach wish to deny: an individual right to keep and bear arms. But criticism of a constitutional provision on the basis that it grants people rights that one does not like—though an approach also possessed of a long, if not distinguished, history—is not very persuasive. The purpose of the Constitution, after all, and especially of the Bill of Rights, is not to make it easy for us to do what we want. For those unhappy with the notion of an individual right to arms, the solution is to amend the Constitution through the procedures set out in Article V, not to amend the Constitution through specious interpretive schemes.⁹¹

Conclusion

Our thought experiment has thus produced two noteworthy results. The first is the realization that the states' right interpretation of the Second Amendment, if taken seriously, would produce rather radical consequences—consequences that (perhaps deliberately) have not been discussed by its proponents. In light of those radical consequences, and the interpretation's general inconsistency with the rest of the Constitutional scheme, the states' right theory looks like a dud.⁹² What is amazing is that it has achieved such currency, at least in the popular constitutional debate.

And that is the second lesson. Although the states' right interpretation has obtained very little in the way of scholarly support in journals that require footnotes,⁹³ it has been widely circulated in the popular press, even by respectable scholars who should (and, one suspects, do) know better.⁹⁴ And this suggests a rather unfortunate fact: the constitutional currency has become rather debased. In the Reagan era, right-wing scholars and spokespeople were trying to narrow constitutional rights through specious interpretations. Now, with political power having shifted, the disease has spread to those on the left. Meeseism, it would seem, respects no ideological bounds.

This state of affairs is unfortunate, and for those of us who at least try to take the Constitution seriously, it is frustrating. And, because the Constitution is our blueprint for living together without killing or tyrannizing each other, it may even be dangerous. Interpreting the Constitution faithfully is hard work and is certain to generate some answers that the interpreter does not like—at least, it is certain to do so if the interpreter is being honest.⁹⁵ We thus should be suspicious of those whose theories generate only results that they like, whatever their ideological stripe.⁹⁶

Although it is certainly true that constitutional interpretation is an inexact science, and that there may be a wide range of “right” answers to constitutional questions, it is also true that some answers are better than others: more in accord with principles of craft, more consistent with the constitutional scheme, or better grounded in history.⁹⁷ By this standard, the states' right

argument fails. But by the more modern standard, of newspaper advertisements and political talking-head shows, that matters little. It may well be that there is a “Gresham’s Law” of pop constitutionalism, with the bad scholarship (if that is the word) driving out the good.

The solution to this problem is beyond the scope of this Article, which has merely served to illustrate its existence in one particular context. But having already made use of the “thought experiment” technique, perhaps we could take another lesson from the world of scientists, where publication of research is seen as a test of its authors’ seriousness. Instead of allowing law professors to opine freely based on some general sense of their expertise, perhaps we should challenge them by asking if their views are supported by published articles—their own, or other people’s. This rather minimal requirement, that arguments be set out in writing and supported by research, would nonetheless provide a substantial amount of discipline to the world of talking-head constitutionalism. It also would ensure to some degree that those who make constitutional arguments in the public arena have spent some time thinking them through first. That too, to judge from current circumstances, would be a step forward.

Until the happy day arrives when this proposal is adopted, we can at least criticize talking-head constitutionalism in the law reviews, with the hope that such criticism will percolate back into the general society. (Such criticism, after all, is a major reason for having law reviews.) The Constitution, and especially the Bill of Rights, is a package deal: It is all or nothing, and for each of us there are likely to be parts we dislike. Where such parts exist, the answer is either to live with them or to amend the Constitution, not to interpret pieces of it out of existence. There always will be a market for those who feel otherwise just as there always will be a market for “miracle” diets that purport to let people eat all they want and not exercise. But the Constitution, unlike the diet industry or the mass media, is not founded on giving the people what they want. We forget that at our peril, and as the mass-marketing of the states’ right interpretation of

the Second Amendment demonstrates, we appear perilously close to forgetting it now.

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1. U.S. CONST. amend. II.

2. "No one has ever described the Constitution as a marvel of clarity, and the Second Amendment is perhaps one of the worst drafted of all its provisions." Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 643-44 (1989).

3. E.g., Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1205-11, 1261-65 (1992); Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1162-73 (1991); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Stephen Halbrook, *What the Framers Intended: A Linguistic Analysis of the Second Amendment*, 49 LAW & CONTEMP. PROBS. 151 (1986); Don B. Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87 (1992) [hereinafter Kates, *Self-Protection*]; Don B. Kates, *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143 (1986) [hereinafter Kates, *A Dialogue*]; Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 203 (1983) [hereinafter Kates, *Original Meaning*]; Levinson, *supra* note 2; Robert Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125 (1986); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994); F. Smith Fussner, *Book Review*, 3 CONST. COMMENTARY 582 (1986) (reviewing STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984)); Joyce Malcolm, *Book Review*, 54 GEO. WASH. L. REV. 452 (1986) (reviewing HALBROOK, *supra*); see also James G. Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 328 (1991) (opining that a right of resistance held by the people was incorporated by the Second Amendment); Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257, 1268-86 (1991) (stating that the right to bear arms is a distribution of political power, like taxation and voting); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991) (observing that the Second

Amendment guarantees a personal right to bear arms under a republican interpretation).

4. “When James Madison and his colleagues drafted the Bill of Rights, they firmly believed in two distinct principles: (1) Individuals had the right to possess arms to defend themselves and their property; and (2) states retained the right to maintain militias composed of these individually-armed citizens.” Shalhope, *supra* note 3, at 133.

5. Kates, Self-Protection, *supra* note 3, at 89; see JOYCE L. MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 162 (1994).

The Second Amendment was meant to accomplish two distinct goals First, it was meant to guarantee the individual’s right to have arms for self-defense and self-preservation. These privately owned arms were meant to serve a larger purpose [defense of public liberties] as well. [I]t is the coupling of these two objectives that has caused the most confusion.

Id.

6. See Keith A. Ehrman & Dennis A. Henigan, The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?, 15 U. DAYTON L. REV. 5 (1989); Dennis A. Henigan, Arms, Anarchy and the Second Amendment, 26 VAL. U. L. REV. 107 (1991); Warren Spannaus, State Firearms Regulation and the Second Amendment, 6 HAMLINE L. REV. 383 (1983).

7. See, e.g., West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (First Amendment rights “are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.”); Near v. Minnesota, 283 U.S. 697, 716 (1931) (permitting prior restraint only in exceptional circumstances akin to “publication of the sailing dates of transports or the number and location of troops”).

8. A further point that is likely to be of more import to enforcement of the Second Amendment than other rights, is that the compelling interest must not be of a kind, or pursued in a manner, that is fundamentally inconsistent with the right. This point is so clear in relation to other rights that it is rarely necessary to emphasize. No matter how compelling the interests in suppressing rape, child abuse, adultery, homophobic violence, or even genocide, those interests may not be pursued by banning writings or movies on the ground that they promote beliefs or ideas that cause such behavior for “the First Amendment’s basic guarantee is of freedom to advocate ideas.” Kingsley Int’l Pictures v. Regents, 360 U.S. 684, 688-89 (1959); see R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542-44 (1992) (speech or expressive conduct cannot be proscribed because of disapproval of the ideas expressed); American Booksellers Ass’n, Inc. v. Hudnut, 771 F.2d 323, 327-32 (7th Cir. 1985), *aff’d* without opinion, 475 U.S. 1001 (1986). “Under the First Amendment the government must leave to the people the evaluation of ideas.” *Id.* at 327.

Concomitantly, within the individual right view of the Second Amendment, a law barring visitors to prison inmates from carrying weapons may well be justified as representing an interest that is at once compelling and not fundamentally inconsistent. That could not be said of banning all guns (or any guns) under the rationales commonly offered. Examples of such rationales include the assertion “that lethal violence even in self-defense only engenders more lethal violence and that gun control should override any personal need for safety,” HEALTH, Mar./Apr. 1994, at 54 (quoting Betty Friedan), that “the only reason for guns in civilian hands is for sporting purposes,” David B. Kopel, Assault Ban Chicanery, WASH. TIMES, May 5, 1994, at A18 (quoting Sarah Brady, Chairperson, Handgun Control, Inc.), and that self-defense is an atavistic usurpation of the prerogatives of the state, RAMSEY CLARK, CRIME IN AMERICA 106-07 (1970).

9. See, e.g., Dwight L. Greene, Justice Scalia and Tonto: Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in *Bostick v. Florida*, 67 TUL. L. REV. 1979, 2044 (1993).

10. “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. Indeed, a reading of the Constitution will demonstrate that grants of governmental authority are generally described as “powers.” See, e.g., U.S. CONST. art. I, § 1 (describing “legislative Powers”); U.S. CONST. art. II, § 1 (“executive power”); U.S. CONST. art. III, § 1 (“judicial Power”).

11. E.g., *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974).

12. U.S. CONST. art. IV, § 3.

13. See sources cited *supra* note 6.

14. Henigan is Director of the Legal Action Project at the Center to Prevent Handgun Violence in Washington, D.C.

15. Henigan, *supra* note 6, at 119.

16. *Id.* at 120.

17. *Id.* at 121 (citations omitted).

18. Henigan is the author of two law review articles that adopt this approach. See *supra* note 6. The late Chief Justice Warren Burger also made this argument, although not in a scholarly publication. See Press Conference Concerning Introduction of the Public Health and Safety Act of 1992, June 26, 1992, available in LEXIS, Nexis Library, ARCNEWS File.

[O]ne of the frauds—and I use that term advisedly—on the American people has been the campaign to mislead the public about the Second Amendment. The Second Amendment doesn’t guarantee the right to have firearms at all. [The Framers] wanted the Bill of Rights to make sure that there was no standing army in this country, but that there would be state armies. Every state during the revolution had its own army. There was no national army.

Id. (statement of Warren Burger). At any rate, taking Henigan as representative of his school of thought is unlikely to work any substantial unfairness, as Henigan himself makes similar use of an article by Professor Sanford Levinson. See Henigan, *supra* note 6, at 110.

19. See, e.g., MALCOLM, *supra* note 5, at 146; 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 646 (Melville M. Bigelow ed., 5th ed. 1891); THE FEDERALIST NO. 8, at 67 (Alexander Hamilton) (Willmore Kendall & George W. Carey eds., 1966); THE ANTIFEDERALISTS 57 (Cecilia M. Kenyon ed., 1966).

20. See Kates, Self-Protection, *supra* note 3.

21. U.S. CONST. art. I, § 8, cl. 15.

22. U.S. CONST. art. I, § 8, cl. 16.

23. U.S. CONST. art. I, § 10, cl. 3.

24. In fact, when the Army wanted to use militia units to chase Mexican bandits south of the border, Attorney General Wickersham opined that this clause prohibited the use of militia units outside American borders. 29 Op. Att’y Gen. 322 (1912). Nor are fears that such a call-up might destroy the independence—or even the existence—of a state militia unfounded; they have some historical basis. As the Supreme Court noted in *Perpich v. Department of Defense*, 496 U.S. 334 (1990), “[t]he draft of the individual members of the National Guard into the Army during World War I virtually destroyed the Guard as an effective organization.” *Id.* at 345. Obviously, militia call-ups might have the same effect.

25. Henigan, *supra* note 6, at 118-20.

26. See *supra* notes 15-18; see also Henigan, *supra* note 6, at 116-17.

The Bill of Rights was the outgrowth of the Antifederalist critique. One consistent Antifederalist theme was that the Constitution had created an excessively powerful central authority, which would lead to the destruction of the states. For example, the Antifederalists feared that the Militia Clauses of the Constitution had given the central government excessive control over the state militia, which was regarded as the guardian of the states’ integrity. The Virginia debate is replete with expressions of fear that federal control over the militias would destroy them.

Id.

27. Of course, a requirement that such forces be commanded by federal officers, rather than officers appointed by the states, would not only raise Second Amendment concerns but also would violate the specific language of Article I, section 8, clause 16 reserving the appointment of militia officers to the states.

28. Compare Malcolm, *supra* note 5, at 4 (“The militia was first and foremost a defensive force and could not be taken out of the realm. Members were even reluctant to leave their own counties.”) with *id.* at 23 (“With the Commonwealth threatened by internal insurrection and foreign invasion [after the

English Civil War] the new rulers had ample excuse to maintain a large standing army. And the country that had always depended upon an impromptu militia found itself supporting a standing army respected and feared throughout Europe.”); see also THE FEDERALIST NOS. 8, 19, 20, *supra* note 19, at 67-68, 131, 135 (using the word “troops” to refer to members of a professional standing army, as opposed to the militia, which is made up of citizen-soldiers). Note, however, that this interpretation does not dispose of the question of “ships of war,” which the states presumably would remain free to keep, or of the issuance of letters of marque and reprisal, also prohibited by Article I, section 10.

29. This discussion raises another crucial difference between the states’ right and individual right views. The latter clearly distinguishes the “militia,” as that term is used in the Second Amendment, from “troops.” The individual right view rests on the 18th-century meaning of “militia”—not a formal military unit but a system that required each household and virtually every military-age male to own arms and mandated the appearance of military-age males for training or service when called to do so. See Kates, *Original Meaning*, *supra* note 3, at 214-18. But in the states’ right view, “militia” refers to a formal military unit—a body of troops serving the state. Indeed, it is an item of faith among partisans of that view that today the “militia” means the National Guard. As discussed, if by “militia” the Amendment means a formal military body, and if the Amendment should be read as a guarantee of state power to arm such a body, the Article I, section 10, clause 3 prohibition on states keeping “troops” without the consent of Congress seems vulnerable. *Id.* These problems are inescapable in the context of a states’ right approach, unless we entirely ignore the text of the Constitution and the Second Amendment.

30. See MALCOLM, *supra* note 5, at 155-59; Henigan, *supra* note 6, at 116-17.

31. MALCOLM, *supra* note 5, at 155-59.

32. *Id.*; see STEVEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 65-66 (1984); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL’Y 559, 598 (1986).

33. MALCOLM, *supra* note 5, at 159 (emphasis added). For Madison’s long record of support for stronger federal military powers, see RUSSELL F. WEIGLEY, *HISTORY OF THE UNITED STATES ARMY* 79, 88 (1967).

Significantly, Madison’s own proposal for integrating the Bill of Rights into the Constitution was not to add them at the end (as they have been) but to interlineate them into the portions of the original Constitution they affected or to which they related. If he had thought the Second Amendment would alter the military or militia provisions of the Constitution he would have interlineated it in Article I, section 8, near or after clauses 15 and 16. Instead, he planned to insert the right to arms with freedom of religion, the press and other personal

rights in § 9 following the rights against bills of attainder and ex post facto laws.

Kates, Original Meaning, *supra* note 3, at 223.

34. “Of course, it must be acknowledged that the Second Amendment did effect some change in the Constitutional scheme; presumably the Framers did not adopt the Bill of Rights in 1791 with the intent to leave things as they were in 1787.” Henigan, *supra* note 6, at 116.

35. See, e.g., THE FEDERALIST NO. 29, at 184-85 (Alexander Hamilton) (Willmore Kendall & George W. Carey eds., 1966).

Little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped. This will not only lessen the call for military establishments, but if circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and the use of arms, who stand ready to defend their rights and those of their fellow citizens.

Id. Likewise, in THE FEDERALIST NO. 46, Madison notes that a regular army that threatened liberty would find itself opposed by “a militia amounting to near a half a million citizens with arms in their hands.” *Id.* at 299.

36. Act of May 8, 1792, ch. 33, 1 Stat. 271 (1792).

37. *Id.*

38. *Id.*

39. See Kates, Original Meaning, *supra* note 3, at 249.

40. See SWITZ. CONST. art. 18 (“All members of the armed forces shall be given their first arms, equipment and clothing free of charge. The soldiers shall keep their personal arms under the conditions federal legislation shall determine.”); ZE’EV SCHIFF, A HISTORY OF THE ISRAELI ARMY 50 (1985); Kates, Original Meaning, *supra* note 3, at 249 n.193. Indeed, the Swiss go so far as to allow private ownership of everything from howitzers to anti-aircraft guns and missiles. See DAVID KOPEL, THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES? 283, 292, 295 (1992).

41. 26 U.S.C. § 5861 (1988) governs the sale, transportation, or possession of “destructive devices,” defined in 18 U.S.C. § 921(a)(4) (1988), as including rockets, bombs, and grenades. 18 U.S.C. § 922(o) (1988), prohibits civilian purchase of fully automatic weapons, except for those manufactured prior to May 19, 1986. As to the permitted, pre-1986 firearms, purchase is subject to registration requirements and a \$200 transaction fee. 26 U.S.C. §§ 5811, 5812. Under the states’ right view, this tax likely could not be applied to prohibit the purchase of fully automatic firearms by persons whom a state has licensed to possess them.

42. Cf. *United States v. Miller*, 307 U.S. 174, 178 (1939) (discussing suitability of sawed-off shotguns for militia use).
43. For example, infants and the elderly, as well as criminals and the insane, would not benefit from nullification. See *infra* note 47 and accompanying text.
44. See *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250 (6th Cir. 1994) (finding the definition of “assault weapon” to be unconstitutionally vague).
45. Compare *Kates, Original Meaning*, *supra* note 3, at 271-72 (discussing various state militia forces during World War II) and *William O. Treacy, Maryland Minute Men*, 6 GLADES STAR 214 (1988) (same) with *United States v. Miller*, 307 U.S. 174, 179 (1939) (“[W]hen called for [militia] service [militia] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”).
46. See, e.g., CAL. PENAL CODE §§ 12000-12809 (West 1992). A generally accepted estimate is that as of 1980 there were about 20,000 firearms laws of one sort or another already on the books. JAMES D. WRIGHT ET AL., *UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICA* 244 (1983). For a survey of current federal gun laws, see *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), cert. granted, 114 S. Ct. 1536 (1994); GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 323-58 (1991).
47. See, e.g., CAL. PENAL CODE §§ 12100-01, 12021 (West 1992).
48. In fact, the “unorganized militia” constitutes the ultimate military reserve resource of both federal and state governments for call-up in dire emergency; for example, in case earthquake, flood, other natural disaster, or riot overwhelms police in circumstances in which the National Guard and Army are overseas or otherwise unavailable, perhaps because of transportation disruption. See, e.g., 10 U.S.C. § 311 (1988); CAL. MIL. & VET. CODE §§ 121, 122 (West 1988); COLO. REV. STAT. §§ 18-8-107, 28-3-102, -103(6) & (8), -104 (1989) (classifying the male population aged 18 to 45 as the unorganized militia of, respectively, the United States, California, and Colorado, subject to call at the command of designated public officers).
49. See *Lopez*, 3 F.3d at 1348-59 (providing a history of federal firearms laws).
50. For more on this unusual market sector, see Gavin Cordan, *The Private Pilots with Jet Warplanes*, Press Assoc. Newsfile, Apr. 5, 1994, available in LEXIS, Nexis Library, CURNWS File (describing growth of private market for military jets); Neal Gendler, *An Air Affair*, STAR TRIBUNE (Minneapolis-St. Paul), June 26, 1994, at 1G (describing privately owned fighters including MiG-15s, F-86 Sabres, Saab Drakens, and even a privately owned B-57 Canberra jet bomber); Dave Hirschman, *Three Area Pilots Upsize in Jet from British Military*, COMMERCIAL APPEAL (Memphis), June 5, 1994, at 1C (reporting the existence of over 200 privately owned fighter jets in the United States, with MiG-17 and F-86 Sabre jets selling for \$50,000 or less).

51. See *infra* note 57 and accompanying text.

52. See, e.g., ARK. CODE ANN. § 5-73-209 (Michie 1993); CAL. PENAL CODE § 12230 (West 1992); MD. ANN. CODE art. 27, § 379 (1992).

53. See 18 U.S.C. § 927 (1988).

54. 18 U.S.C. § 922(o) (1988) (limiting civilian purchase of fully automatic weapons to those manufactured prior to May 19, 1986, subject to registration requirements under 26 U.S.C. § 5812 (1988), and to a \$200 transaction fee under 26 U.S.C. § 5811 (1988)). Under the states' right view of the Second Amendment it is arguable that this prohibitory \$200 fee probably could not be applied to purchases of fully automatic firearms by persons whom a state has licensed to possess them.

55. The sale, transportation, or possession of "destructive devices," defined in 18 U.S.C. § 921(a)(4) (1988), as rockets, bombs, grenades missiles, and mines, is governed by 26 U.S.C. § 5861 (1988).

A further interesting question is whether localities, which are legally agencies of the state, could engage in such preemptive activity. If so, the several localities that have enacted resolutions purporting to nullify all, or most, federal gun laws by creating local militias have been doing more than simply expressing their anger. See, e.g., Mike Tharp, *The Rise of Citizen Militias*, U.S. NEWS & WORLD REP., Aug. 15, 1994, at 34 (describing efforts at organizing previously dormant militia organizations).

Some sort of government sponsorship, however, is crucial to the legitimacy of a militia, whether or not such membership has anything to do with Second Amendment rights. Although the militia was conceived as external to the state in the sense of being an institution of the people, the expectation was that the state, not private groups, would provide the foundation upon which the structure of the militia would be erected. This dual character is difficult for many modern Americans, with more European-influenced ideas of the state and its institutions, to appreciate. But perhaps the best analogy would be to the institution of the jury. The jury was traditionally intended not just as a protection for individuals, but far more importantly as a check against overweening state power, since it could always refuse to convict in cases of political prosecution. And, like the militia, the jury was intended to reflect the community, and to function in many ways independent of state direction. But the state provides the structure within which the jury operates: no one can get together with eleven friends and proclaim themselves a jury.

Similarly, although First Amendment associational rights may provide some protection for individuals who band together and call themselves a "militia," they do not thereby become the well-regulated militia that the Second Amendment describes, nor do they acquire any additional Second Amendment rights by virtue of doing so. As David Williams explains, "[R]epublicans did not intend to leave the universality of the militia to the chance decision of every citizen to arm herself. The state was supposed to erect the necessary scaffolding

on which the militia could build itself, to muster the militia, and to oblige every citizen to own a gun.” Williams, *supra* note 3, at 593.

One might argue that the state and federal governments have defaulted on this obligation, but that does not create additional rights for groups formed without government sponsorship.

There are similar problems with militia theorists’ invocation of the right of revolt. While the Framers certainly believed in such a right, they also developed a rather exacting test for when it properly might be exercised, a test that many theorists of discontent do not address.

In short, as Williams summarizes: This right of resistance is the second result of entrusting force to the militia. It is the only purpose of the Second Amendment explicitly mentioned during its discussion in Congress. Republicans were aware of the danger implicit in vouchsafing this right of resistance in the citizenry and sensitive to the charge that they were inciting violence. They developed a number of limits on the right: It must be a product of the “body” of the people, i.e., the great majority acting by consensus; it must be a course of last resort; its inspiration must be a commitment to the common good; and its object must be a true tyrant, committed to large-scale abuse, not merely randomly unjust or sinful in private life. An uprising that failed to meet these criteria was considered an illegitimate rebellion, rather than an act of true republican resistance. *Id.* at 582.

The failure until recently of the academic community to take the Second Amendment seriously, a topic discussed in more detail later on in this essay, may in part be responsible for many of these misunderstandings. The consequences of such confusion may be serious: Constitutional theory matters, not just in the academic world, but in the real world as well. For a considerably more detailed treatment of these issues see Glenn H. Reynolds, A Critical Guide to the Second Amendment, 62 TENN. L. REV. 461 (1995); Glenn H. Reynolds, Up in Arms About a Revolting Movement, CHI. TRIB., Jan. 30, 1995, at 11 [hereinafter Reynolds, Up in Arms].

56. Implicit in an individual’s “right to keep and bear arms” is a limitation on the kinds of arms an individual can possess; that is, they include only weapons that can be picked up. See Kates, *supra* note 3, at 261.

57. See David T. Hardy, The Second Amendment and the Historiography of the Bill of Rights, 4 J.L. & POL. 1, 29 (1987).

58. The individual right view sees the Second Amendment as expressing the Founders’ belief that the right to arms is implicit in the cardinal natural right of self-defense. Kates, Self-Protection, *supra* note 3, at 89-103. The basic arms with which one might defend home and family were, and are, the same ordinary civilian small arms with which one would render militia service. In contrast, cannons and warships are not the kinds of arms with which one would repel burglars and rapists, they are not the kinds of weapons one can “bear,” nor do they conform to the history of the common law right the Amendment incorporates. See David I. Caplan, The Right of the Individual To Bear Arms: A

Recent Judicial Trend, 1982 DET. C.L. REV. 789, 804-11; Halbrook, *supra* note 3, at 157-60; Kates, A Dialogue, *supra* note 3, at 146-48; Kates, Original Meaning, *supra* note 3, at 259.

59. Henigan, *supra* note 6, at 119; see text accompanying *supra* note 15.

60. See *supra* note 18.

61. *Perpich v. Department of Defense*, 496 U.S. 334, 351 (1989).

62. See *supra* notes 38-39 and accompanying text.

63. See *supra* note 24. For a litany of complaints about the militia's unsuitability in providing the kind of "global reach" needed by a nascent superpower, see Frederick B. Wiener, The Militia Clause of the Constitution, 54 HARV. L. REV. 181, 189-93 (1940).

64. See Peter A. Fish, Note, The Constitution and the Training of National Guardsmen: Can State Governors Prevent Uncle Sam from Sending the Guard to Central America?, 4 J.L. & POL. 597, 605-10 (1988).

65. See *id.* at 612.

66. 10 U.S.C. § 311 (1988).

67. 10 U.S.C. § 101(10)(C) (1988).

68. 10 U.S.C. § 332 (1988); see also *infra* notes 72-75 and accompanying text (discussing *Perpich v. Department of Defense*, 496 U.S. 334 (1990)).

69. 10 U.S.C. § 802(a)(3) (1988).

70. See 32 U.S.C. § 304 (1988) (National Guardsmen's oath); 10 U.S.C. § 3261(a)(2) (1988) (requiring members of the Guard to take the oath).

71. Col. Charles J. Dunlap, Jr., Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military, 29 WAKE FOREST L. REV. 341, 384-85 (1994) (citing William S. Fields & David T. Hardy, The Militia and the Constitution: A Legal History, 136 MIL. L. REV. 1, 2 (1992)).

72. 496 U.S. 334 (1990).

73. *Id.* at 336-38.

74. *Id.* at 349-51.

75. Indeed, the Court was explicit on this point:

The Governor argues that this interpretation of the Militia Clauses has the practical effect of nullifying an important state power that is expressly reserved in the Constitution. We disagree. It merely recognizes the supremacy of federal power in the area of military affairs. The Federal Government provides virtually all of the funding, the material, and the leadership for the State Guard units.

Id. at 351 (footnotes omitted).

76. Some commentators have suggested that the National Guard should be considered "troops" raised with consent of Congress, under Article I, section 10, rather than a militia of any sort. See, e.g., Fields & Hardy, *supra* note 71.

See, e.g., Kates, Original Meaning, *supra* note 3, at 216-17; Malcolm, *supra* note 5, at 142, 156. Note also the following:

Nowadays, it is quite common to speak loosely of the National Guard as “the state militia,” but 200 years ago, any band of paid, semiprofessional, part-time volunteers, like today’s Guard, would have been called “a select corps” or “select militia”—and viewed in many quarters as little better than a standing army. In 1789, when used without any qualifying adjective, “the militia” referred to all Citizens capable of bearing arms. [Thus] the “militia” is identical to “the people.”

Amar, *supra* note 3, at 1166 (footnotes omitted).

78. 10 U.S.C. § 311 (1988); see also Fields & Hardy, *supra* note 71, at 42 n.160 (noting that while the United States technically continues to maintain a national “general” militia, for practical purposes this militia does not play any significant role in the national defense).

79. See, e.g., ARIZ. CONST. art. XVI, § 1; IOWA CONST. art. VI, § 1; KY. CONST. § 219; N.M. CONST. art. XVIII, § 1; N.D. CONST. art. XI, § 16; OHIO CONST. art. IX, § 1; S.C. CONST. art. XIII, § 1; S.D. CONST. art. XV, § 1; UTAH CONST. art. XV, § 1; WYO. CONST. art. 17, § 1; ALA. CODE § 31-2-2 to 31-2-5 (1975); ARK. CODE ANN. § 12-61-101(b) (Michie 1987); CAL. MIL. & VET. CODE § 122 (West 1988); CONN. GEN. STAT. ANN. § 27-2 (West 1990); GA. CODE ANN. § 38-2-3(d) (1982 & Supp. 1994); IDAHO CODE § 46-102 (1977); IND. CODE ANN. § 10-2-3-1 (Burns 1992); KAN. STAT. ANN. § 48-904(e) (1983); MINN. STAT. ANN. § 190.06 (West 1992); MISS. CODE ANN. § 33-5-1 (1990); N.M. STAT. ANN. § 20-2-2 (Michie 1989); N.Y. MIL. LAWS § 2 (Consol. 1989); OR. REV. STAT. § 396.105(3) (1994); R.I. GEN. LAWS § 30-1-2 (1994); S.D. CODIFIED LAWS ANN. § 33-2-2 (1994); TENN. CODE ANN. § 58-1-104(d) (1989); WYO. STAT. § 19-2-102(a) (1977).

80. See, e.g., OHIO CONST. art. IX, § 1; CAL. MIL. & VET. CODE § 554 (West 1988 & Supp. 1995); IDAHO CODE § 46-105 (1977); KAN. STAT. ANN. § 48-904(e) (1983).

81. See *supra* notes 35-58 and accompanying text.

82. See, e.g., Glenn H. Reynolds, The Right To Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought, 61 TENN. L. REV. 647, 649-50 (1994).

83. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402 (1819); STORY, *supra* note 19, at 151, 154, 160. For a more extensive discussion of sovereignty and federalism issues, see Akhil R. Amar, Of Sovereignty and Federalism, 96 YALE L.J. 1425 (1987).

84. See, e.g., *McCulloch*, 17 U.S. (4 Wheat.) at 421 (noting that under the Constitution “the powers of the [federal] government are limited, and that its limits are not to be transcended”).

85. One interesting aspect of this view is that it seems inconsistent with the view of state and federal relations generally held by those favoring gun control (who are usually, though not always, liberals). As Sanford Levinson has noted, the debate over the Second Amendment creates a peculiar inversion, with conservatives taking the approach of liberals and vice versa. See Levinson, *supra* note 2, at 643-44. Gary Kleck has also commented on this phenomenon, noting that:

When the issue is gun control, liberals and conservatives switch places. Many liberals support gun laws that confer broad power on government to regulate individual behavior, especially in private places, whereas conservatives oppose them. Some liberals dismiss the Second Amendment to the Constitution as an outmoded historical curiosity whereas conservatives defend a view of this amendment that is every bit as broad as the American Civil Liberties Union's (ACLU) view of the First Amendment

Kleck, *supra* note 46, at 3-4.

Although a states' right approach to constitutional affairs generally tends to be identified with reactionary causes, it is identified here with the "progressive" cause of gun control. (Meanwhile, as Kleck notes, anti-gun control forces wax eloquent about the importance of individual rights and the dangers of overbearing law enforcement officials—complaints that are conspicuous by their absence in similar contexts, for example, the drug war. *Id.* at 4.) The conservative right, however, has almost given up on states' right arguments as a loser, and the left clings to them only in this one instance, which seems more a case of constitutional wishful thinking than serious analysis.

86. 347 U.S. 483 (1954).

87. See generally DON E. FEHRENBACHER, *CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVE-HOLDING SOUTH* 46-47 (1989) (describing John Calhoun's theories of state government power to nullify federal legislation, which the South Carolina legislature adopted as official state doctrine); John C. Calhoun, *A Discourse on the Constitution and Government of the United States*, in 1 *THE WORKS OF JOHN C. CALHOUN* 168-81 (Richard K. Cralle ed., 1851) (reissued 1968) (arguing that our system of governance is by its nature a federal government with the states, and not individuals, as its constituents).

88. U.S. CONST. pmb1.

89. See U.S. CONST. art. VII (calling for ratification by "Conventions of nine States"). For a general history of the ratification process, see DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 175-218 (1990).

90. U.S. CONST. amend. II. Compare the Second Amendment's use of the phrase "right of the people" with the use of the same phrase in the First, Fourth, and Ninth Amendments.

91. Regarding the right against self-incrimination, the Supreme Court has stated: “If it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to [amend] it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion.” *Ullmann v. United States*, 350 U.S. 422, 427-28 (1956) (quoting *Maffie v. United States*, 209 F.2d 225, 227 (1st Cir. 1954)).

The other problem with specious interpretive schemes is that the law of unintended consequences applies with a vengeance where constitutional law is concerned. Indeed, the modern “militia movement” appears to have arisen primarily as a response to anti-gun arguments that the Second Amendment only protects militias. See generally Glenn H. Reynolds, *Up in Arms supra*, note 55, at 11; Patriot Games, *TIME*, Dec. 19, 1994, at 48.

92. It would be possible, of course, to avoid these problems by proclaiming that the Second Amendment protects only a right of the states and then concluding that the right does not “do” anything, but such an approach is so obviously deficient as to merit no rebuttal. As Henigan notes, and as its presence in the hotly debated and highly important Bill of Rights rather obviously indicates, the Second Amendment was certainly intended to do something. Henigan, *supra* note 6, at 116. Although there may be debate about what it was intended to do, unquestionably, the Second Amendment has a purpose. To doubt that the Second Amendment does anything, or to argue that it is now obsolete and should be ignored might be called the “inkblot approach” after Robert Bork’s similar treatment of the Ninth Amendment, which he likened to a Rorschach “inkblot” whose meaning could not be deciphered by judges. See *The Bork Disinformers*, *WALL ST. J.*, Oct. 5, 1987, at 22. Bork’s treatment of the Ninth Amendment was rightly ridiculed as an abdication of judicial—and intellectual—responsibility, and a similar approach to the Second Amendment deserves the same degree of scorn.

93. Cf. sources cited in *supra* notes 3, 6.

94. For example, an advertisement, signed by 27 law professors smart enough to know better, appeared in the *New York Times*. That advertisement said that the Second Amendment protects only state militias “i.e., the National Guard.” The advertisement also suggested that any belief to the contrary was a “fraud” that no respectable constitutional scholar endorsed. *N.Y. TIMES*, May 2, 1994, at A9. Compare *id.* with Glenn H. Reynolds, Letter to the Editor, *N.Y. TIMES*, May 12, 1994, at A24 (quoting published articles by eminent professors of constitutional law who support the interpretation that the Second Amendment creates an individual right, and does not simply protect the National Guard).

95. See, e.g., H. Jefferson Powell, *Rules for Originalists*, 73 *VA. L. REV.* 659, 677 (1987) (“Rule 8: If your history uniformly confirms your predilections, it is probably bad history.”).

96. “When, despite this distance [between 1787 or 1870 and the present] the Framers] seem to confirm our deepest wishes, we must suspect that our portrait of them is in fact a mirror of ourselves.” *Id.* at 677-78.

97. See Glenn H. Reynolds, *Penumbra Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1347-48 (1992) (arguing that there are good reasons for paying closer attention to the text and the intent of the Framers, not in order to constrain judges, but rather, because “paying attention to the text and to what its drafters were trying to accomplish is what the craft of lawyering is all about”); Glenn H. Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110, 114 (1991) (noting that “it is unlikely that the Court will ever reach a truly ‘final’ answer to very many questions that come before it”); Glenn H. Reynolds, *Sex, Lies and Jurisprudence: Robert Bork, Griswold, and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045, 1108 (1990) (“[N]o additional judicial discipline would be imposed by the adoption and honest implementation of ‘original understanding’ jurisprudence.”).