

# *Fordham Urban Law Journal*

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*Volume 5, Issue 1*

1976

*Article 2*

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## Restoring the Balance: The Second Amendment Revisited

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# Restoring the Balance: The Second Amendment Revisited

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## **Abstract**

In this article, the Second Amendment is analyzed through a discussion of the history of the right to private arms under English common law, the Second Amendment's legislative history and context, and the United States Supreme Court's decision in *United States v. Miller*. The article argues that the private right of keeping arms plays a fundamental role in the constitutional system of checks and balances and that the Second Amendment supports the twin goals of individual and collective defense against violence and aggression. The article concludes that efforts to limit firearms possession to the organized militia undermines these twin goals and that the theories behind such efforts do not withstand constitutional history.

**KEYWORDS:** Second Amendment, gun, guns, firearms

# RESTORING THE BALANCE: THE SECOND AMENDMENT REVISITED

David I. Caplan\*

## I. Introduction

A multitude of bills is pending in Congress on the subject of firearms control.<sup>1</sup> These bills have various purposes, ranging from repeal of the Gun Control Act of 1968<sup>2</sup> to prohibition of private possession of virtually all handguns.<sup>3</sup> Some of these bills also provide for the registration and licensing of all long guns.<sup>4</sup> However, the regulatory and prohibitory provisions of these measures fail to take into account the fundamental role that the private keeping of arms plays in the constitutional system of checks and balances.

The second amendment provides:<sup>5</sup>

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Preliminary research for this article was presented to, and reproduced in, *Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., ser. 11, pt. 7, at 2260-78 (1975).

1. Almost two hundred bills relating to gun control were introduced in the Senate and House during the 94th Congress. See, e.g., S. 2153, 94th Cong., 1st Sess. (1975) (proposal for control of handguns in high crime areas); S. 2152, 94th Cong., 1st Sess. (1975) (creation of a Firearms Safety and Control Administration to consolidate certain law enforcement functions); S. 1880, 94th Cong., 1st Sess. (1975) (proposal to ban "Saturday Night Special" handguns, providing for FBI checks on handgun purchases, and limitation of private purchases of handguns to two per year); S. 1447, 94th Cong., 1st Sess. (1975) (proposal for national registration and licensing of handguns, a ban on handguns with barrels less than six inches in length, and a handgun bounty program); S. 750, 94th Cong., 1st Sess. (1975) (proposal to ban handguns except those used for military and law enforcement purposes, and those possessed by federal licensees, antique collectors, and pistol clubs); H.R. 10442, 94th Cong., 1st Sess. (1975) (establishment of national handgun tracing center); H.R. 706, 94th Cong., 1st Sess. (1975) (prohibition of sale of handguns determined to be unsuitable for lawful sporting purposes); H.R. 626, 94th Cong., 1st Sess. (1975) (provision for systematic handgun registration); H.R. 267, 94th Cong., 1st Sess. (1975) (prohibition of "Saturday Night Specials"); H.R. 40, 94th Cong., 1st Sess. (1975) (House version of S. 750, *supra*).

2. 18 U.S.C. §§ 921-28 (1970). A measure which would repeal the Act is S. 141, 94th Cong., 1st Sess. (1975).

3. S. 750, 94th Cong., 1st Sess. (1975).

4. H.R. 9815, 94th Cong., 1st Sess. (1975).

5. See generally Feller & Gotting, *The Second Amendment: A Second Look*, 61 Nw. U. L. REV. 46 (1966); Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381 (1960); Comment, *The Right to Keep and Bear Arms; A Necessary Constitutional Guarantee or an Outmoded Provision of the Bill of Rights?*, 31 ALBANY L. REV. 74 (1967); Note, *The Right to Bar Arms*, 19 S. CAR. L. REV. 402 (1967).

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.

Underlying this amendment are the twin goals of individual and collective defense from violence and aggression, goals which have been recognized by Congress.<sup>6</sup> This Article will demonstrate that current efforts to limit firearms possession to the organized militia<sup>7</sup> undermine these goals and that the theories behind such efforts do not stand the test of constitutional history.

## II. Common Law and Colonial Development

During the reign of King Edward III, Parliament enacted the Statute of Northampton,<sup>8</sup> which forbade persons to carry weapons in public places. However, by the seventeenth century, the English courts had adopted a narrow reading of the statute and required proof that the carrying of arms had been for the purpose of "terrify[ing] the King's subjects."<sup>9</sup> British law also recognized a

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6. For example, the preamble to the Gun Control Act of 1968, Pub. L. No. 90-618, § 101, 82 Stat. 1213 provided:

The Congress hereby declares that the purpose of this title is to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence, and it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on 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, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulation of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title.

*Id.* (emphasis added).

7. See, e.g., S. 750, 94th Cong., 1st Sess. (1975). Senator James Allen (D. Ala.) recently described Congress' changing attitude with respect to gun control:

Initially, the focus of legislative proposals was on eliminating mail-order traffic in handguns. Over the years, however, a number of groups and individuals began gradually to press for more restrictive measures. By 1968, several Members of Congress were advocating both national registration of guns and national licensing of gun owners. And since that time, literally hundreds of gun control bills have been introduced in Congress.

Most of the gun control proposals of the previous Congresses have been reintroduced in the 94th Congress. The general thrust of these pending bills in varying combination is: . . . Sixth. Prohibition of the private possession of any handgun.

121 CONG. REC. S. 22280 (daily ed. Dec. 16, 1975).

8. 2 Edw. 3, C.3 (1328).

9. *Rex v. Knight*, 87 Eng. Rep. 75, 76 (K.B. 1686) (Comb. at 38, 39). See also *King v. Smith*, 2 Ir. R. 190 (K.B. 1914).

“general Connivance [encouragement by forbearance to condemn] to Gentlemen to ride armed for their Security.”<sup>10</sup>

However, beginning with the reign of King Charles II in the seventeenth century, the right to bear arms became more restricted. At first, only persons who owned lands of a yearly value of at least £100 were permitted to keep a gun.<sup>11</sup> Later developments included the disarming of Protestant subjects (while Catholics retained the right to bear arms) and the quartering of Catholic soldiers in Protestant homes.<sup>12</sup> Such use of disarmament as a means of enabling one social or economic class to suppress another was among the grievances which led to the Glorious Revolution of 1688,<sup>13</sup> the rise of William and Mary to the throne, and the enactment of the English Bill of Rights.<sup>14</sup>

The English Bill of Rights provided “that the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law.”<sup>15</sup> Since the United States Supreme Court has often looked to English court decisions as an aid to interpreting the American Bill of Rights,<sup>16</sup> it is helpful to see how the English courts construed this provision. In *Rex v. Dewhurst*,<sup>17</sup> the trial judge instructed the jury that<sup>18</sup>

[The Bill of Rights] . . . provides that, “The subjects which are Protestant may have arms for their defence suitable to their conditions, and as allowed

10. *Rex v. Knight*, 87 Eng. Rep. 75 (K.B. 1686) (Comb. at 39).

11. *See Aymette v. State*, 21 Tenn (2 Humph.) 119, 121 (1840).

12. *Id.*

13. *See Note; The Right to Bear Arms*, 19 S. CAR. L. REV. 402, 403-04 (1967):

In England, the great pressure for a people's right to organize a militia arose in response to the attempts of Charles II (1660-1685) to maintain a standing army of 5,000. His successor, James II (1685-1688) increased the troop strength to 30,000, used them to suppress Monmouth's rebellion and as a consequence . . . , deprived many Protestant militiamen of arms.

14. 1 W. & M., sess. 2, c. 2 (1688).

15. *Id.*, sess. 2, ¶7.

16. *See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680 (1974) (common law on forfeitures governs fifth and fourteenth amendment taking of private property clauses); *United States v. Robinson*, 414 U.S. 218, 225, 230 (1973) (fourth amendment on searches); *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (fifth amendment on double jeopardy); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 57, 66, 77 (1964) (fifth amendment on self-incrimination).

17. 1 State Trials, New Series 529 (1820).

18. *Id.* at 601 (citation omitted).

by law." ( . . . ). But are arms suitable to the condition of the people in the ordinary class of life, and are they allowed by law? A man has a clear right to arms to protect himself in his house. A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is travelling or going for the ordinary purposes of business. But I have no difficulties in saying you have no right to carry arms to a public meeting, if the number of arms which are so carried are calculated to produce terror and alarm. . . .

Thus, by 1820 the "general Connivance to Gentlemen to ride armed for their Security," which had pre-dated the English Bill of Rights, had matured into a right of every person to carry arms in a quiet and peaceful manner.

The English commentators are in near-unanimous accord with this view. In his *Institutes of the Laws of England*, Sir Edward Coke wrote that "one is allowed to repel force with force"<sup>19</sup> and "the laws permit the taking up of arms against armed persons."<sup>20</sup> Similarly, Hawkins' *Pleas of the Crown*<sup>21</sup> stated the common law rule to be that "every private person seems authorized by the Law to arm himself for [various] purposes."<sup>22</sup> Among these purposes were the "killing of dangerous rioters"<sup>23</sup> who could not otherwise be suppressed and individual and collective defense against such persons.<sup>24</sup> In his *Commentaries on the Laws of England*,<sup>25</sup> Sir William Blackstone articulated the strong and clear common law tradition in favor of the citizen's right to possess and carry arms for individual self-preservation and collective defense. He listed the right of "having and using arms for self-preservation and defense"<sup>26</sup> among the "absolute rights of individuals."<sup>27</sup> It is noteworthy that our founding fathers considered Blackstone's *Commentaries* an authoritative exposition of the common law.

Accordingly, under British law at the time the American colonies

19. 1 E. COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 162a (Johnson & Warner ed. 1812) (Eng. transl.)

20. 2 E. COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 574 (Johnson & Warner ed. 1812) (Eng. transl.)

21. 1 HAWKINS, *PLEAS OF THE CROWN*, ch. 28, § 14 (7th ed. 1795).

22. *Id.*

23. *Id.*

24. *Id.*

25. 1 W. BLACKSTONE, *COMMENTARIES* \*144.

26. *Id.*

27. *Id.* at \*121.

separated from the Crown, a clear individual right to carry arms in a non-threatening manner existed; the only prior restraints on this right were the subsequently abandoned restrictions based on property ownership<sup>28</sup> and religion.<sup>29</sup> By 1776, British law recognized the "universal citizen's right to bear defensive arms, and . . . the [English Bill of Rights of 1689] established a general right on the part of all persons in England, falling within the classification of citizens, to retain arms for their protection and according to their condition, subject only to a reasonable control by law."<sup>30</sup>

The enactment of the English Bill of Rights, with its guarantee of the right to bear arms, was a reaction to the use of disarmament as a technique for economic or religious suppression. However, the same protection was not extended to British subjects in North America. A basic cause of the American Revolution was the failure of the Crown to grant the colonists all of the common law rights of Englishmen,<sup>31</sup> including the right to possess arms. In Massachusetts Bay Colony, the cradle of the revolution, the colonists complained of deprivations of this right and of the repeated efforts of the British Governor, General Gage, to prevent the formation of a militia by the tactic of disarming the colonists and confiscating their stores of arms.<sup>32</sup> One notable confiscation took place at Lexington, Massa-

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28. See text accompanying note 11 *supra*.

29. See text accompany note 12 *supra*.

30. See *People ex rel. Ferris v. Horton*, 147 Misc. 506, 508-09, 264 N.Y.S. 84, 88 (Otsego County Ct. 1933).

31. See, e.g., 1 SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY*, 215, 217 (1971). Declaration and Resolves of the First Continental Congress, 1774: "Resolved, . . . [t]hat the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." *Id.*

32. See 2 SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1107-08 (1971); Feller & Gotting, *The Second Amendment: A Second Look*, 61 *Nw. U. L. REV.* 46, 52 n.30 (1966).

In the "Declaration of the Causes and Necessity of Taking Up Arms" delivered on July 6, 1775 at the Continental Congress, the colonial representatives described Governor Gage's arms' confiscation program in Boston:

The inhabitants of Boston being confined within that town by the general their governor, and having, in order to procure their dismission, entered into a treaty with him, it was stipulated that the said inhabitants having deposited their arms with their own magistrates, should have liberty to depart, taking with them their other effects. They accordingly delivered up their arms, but in open violation of honour, in defiance of the obligation of treaties, which even savage nations esteemed sacred, the governor ordered the arms deposited as aforesaid, that they might be preserved for their owners, to be seized by a body of soldiers; detained the greatest part of the inhabitants in the town,

chusetts.<sup>33</sup> The Crown's arms-confiscation schemes effectively thwarted any attempt by the legislative Assembly of Massachusetts to form a people's militia, thus leaving the colonists largely defenseless against acts of oppression and terrorism by the standing British army.<sup>34</sup> Mass arrests of disarmed colonists were perpetrated by British soldiers, who committed illegal searches, break-ins, and raids on colonists' homes, under the pretext of the infamous General Writs of Assistance.<sup>35</sup> As former Chief Justice Warren noted:<sup>36</sup>

Among the grievous wrongs of which [the colonists] complained in the Declaration of Independence were that the King had subordinated the civil power to the military, that he had quartered troops among them in times of peace, and that through his mercenaries he had committed other cruelties. Our War of the Revolution was, in good measure, fought as a protest against standing armies. Moreover, it was fought largely with a civilian army, the militia, and its great Commander-in-Chief was a civilian at heart.

Unilateral disarmament of the people thus enabled the British standing army to impose police state despotism on the colonists and set the stage for the American revolution.

### III. The Second Amendment: Legislative History

Hard-won independence did little to allay colonial suspicions concerning the role of standing armies. Indeed, fears of monarchy or military despotism<sup>37</sup>

. . . were uppermost in the minds of the Founding Fathers when they drafted the Constitution. Distrust of a standing army was expressed by many. Recog-

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and compelled the few who were permitted to retire, to leave their most valuable effects behind.

By this perfidy wives are separated from their husbands, children from their parents, and the aged and the sick from their relations and friends, who wish to attend and comfort them, and those who have been used to live in plenty and even elegance, are reduced to deplorable distress.

*Id.*, reprinted in Documents Illustrative of the Formation of the Union of the American States, H.R. Doc. No. 398, 69th Cong., 1st Sess. 14-15 (1927).

33. *Id.*

34. See generally Declaration of the Causes and Necessity of Taking Up Arms, reprinted in Documents Illustrative of the Formation of the Union of the American States 10-17 (69th Cong., 1st Sess., H.R. Doc. No. 398 (1927)), quoting 1 *Journal of [Continental] Congress*.

35. See generally 2 STORY, COMMENTARIES ON THE CONSTITUTION 647, § 1901, n.(c). (5th ed. 1891).

36. Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 183-84 (1962).

37. *Id.* at 184.

dition of the danger from Indians and foreign nations caused them to authorize a national armed force begrudgingly.

These apprehensions led the framers of the Constitution to formulate carefully their concept of the militia and of the role of firearms in the national defense. The Constitution conferred upon Congress the power “[t]o 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 . . . .”<sup>38</sup> This limitation of congressional authority to that *part* of the militia as may be in federal service indicates the existence of a residual unorganized or “reserve militia of the United States.”<sup>39</sup> Although the Constitution provided for an organized people’s militia (*i.e.*, “civilians primarily, soldiers on occasion . . . bearing arms supplied by themselves”),<sup>40</sup> there was a gnawing fear among the populace that the federal government might neglect to bring about the formation of such a militia,<sup>41</sup> thus exposing their newly-won rights to the mercy of the standing army. Furthermore, the framers were conscious of the abuses that any professional armed body in the employ of government might visit on the people. In *The Federalist No. 24*,<sup>42</sup> Hamilton stressed that any “permanent corps in the pay of government amounts to a standing army in time of peace; a small one indeed, but none the less real for being small.”<sup>43</sup> However, Hamilton was equally aware that some standing armed force was required to guard the “Western frontier,”<sup>44</sup> and conceded that a civilian “select corps of moderate size”<sup>45</sup> would be maintained and that the “people at large [would be] properly armed”<sup>46</sup> in order to serve as fundamental checks against the standing army, that most dreaded of institutions. It is this “select corps” which we know as the “organized militia,” while the “people at large” constitute the “unorganized militia.”<sup>47</sup>

38. U.S. CONST., art I, § 8, cl. 16.

39. *Presser v. Illinois*, 116 U.S. 252, 265 (1886).

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

41. T. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 298 (3rd ed. 1898).

42. *THE FEDERALIST* No. 24 (Mentor ed. 1961) (A. Hamilton).

43. *Id.* at 161.

44. *Id.*

45. *THE FEDERALIST* No. 29 (Mentor ed. 1961) at 185 (A. Hamilton).

46. *Id.* Similar fears of a standing army were expressed by Noah Webster and Melancthon Smith (a New York delegate to the Continental Congress).

47. Congress has specifically provided for this “unorganized militia”. 10 U.S.C. § 311(a) (1970) stated in pertinent part:

The deterrent effect of an unorganized militia would be significant, however, only if coupled with a clear and unequivocal right of the people to have and bear arms. Thus:<sup>48</sup>

Despite [all] safeguards, the people were still troubled by the recollection of the conditions that prompted the charge of the Declaration of Independence that the King had "effected to render the military independent and superior to the civil power." They were reluctant to ratify the Constitution without further assurances, and thus we find in the Bill of Rights Amendments 2 and 3, specifically authorizing a decentralized militia, guaranteeing the right of the people to keep and bear arms, and prohibiting the quartering of troops in any house in time of peace without the consent of the owner.

Five of the eleven states which originally ratified the Constitution in 1789 submitted amendatory proposals dealing with the right to keep and bear arms.<sup>49</sup> This compares with only five state proposals for a free press amendment<sup>50</sup> and only three for a free speech amendment.<sup>51</sup> The spirit of such proposals was unmistakable; for example, the New Hampshire ratifying convention advanced a proposal which provided that "Congress shall never disarm any citizen [except] such as are or have been in Actual Rebellion."<sup>52</sup> Moreover, the wording of other state proposals closely paralleled their proposals regarding the individual freedoms of press and speech.

James Madison's proposal for what was to become the second amendment contained a qualification that "no person religiously scrupulous shall be compelled to bear arms."<sup>53</sup> This proviso was met with vehement opposition from Congressman Elbridge Gerry of Massachusetts,<sup>54</sup> later a Governor of that state and a Vice-President

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The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens who are commissioned officers of the National Guard.

48. Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 185 (1962).

49. See 2 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1167 (1971).

50. *Id.*

51. *Id.*

52. *DEBATES IN THE FEDERAL CONVENTION OF 1787 AS REPORTED BY JAMES MADISON* 658 (Hunt & Scott ed. 1920).

53. 2 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1026, 1107 (1971).

54. 1 *Annals of Cong.* 778 (1789). Gerry, an ardent States' rights advocate who sought passage of the Bill of Rights to protect both citizens and States from federal power, stated: This declaration of rights, I take it, is intended to secure the people against the mal-administration of the Government; if we could suppose that, in all cases, the rights of

of the United States. Gerry feared that this clause created an opportunity for those in power to define arbitrarily the persons who were "religiously scrupulous" and thereby to prevent them from bearing arms.<sup>55</sup> Gerry made several important points. First, the second amendment should secure the people against maladministration by government. The keeping of arms by the people in their homes and places of business would serve as a check against the possibility of arbitrary federal exercise of power.<sup>56</sup> Second, the government should not be permitted to declare who would or would not be able to bear arms on the basis of vague religious tests or any other nebulous standard or artifice.<sup>57</sup> Third, the people's ability to organize the militia would be guaranteed and strengthened by their prior anonymous keeping of arms, thus obviating the possibility of arms confiscations similar to those previously conducted in Massachusetts Bay Colony.<sup>58</sup> Fourth, the people's right to keep arms should not depend upon the actual existence of an organized militia, since the Congress could, at its discretion, terminate the organized militia or allow it to become depleted or even non-existent.<sup>59</sup> In sum, Gerry asserted,

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the people would be attended to, the occasion for guards of this kind would be removed. Now, I am apprehensive, sir, that this clause would give an opportunity to the people in power to destroy the Constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms.

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

No attempts that they made were successful, until they engaged in the struggle which emancipated them at once from their thralldom. Now, if we give a discretionary power to exclude those from militia duty who have religious scruples, we may as well make no provision on this head. For this reason, [I wish] the words to be altered so as to be confined to persons belonging to a religious sect scrupulous of bearing arms.

*Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 778-79.

the right of the people to keep and bear arms for peaceful purposes should be a real and unrestricted one.

The Constitution, by providing that the people at large would always have arms in their hands, wisely prepared the people to answer the call of the state governments to protect the people's rights from intrusions by the standing army.<sup>60</sup> Protection of the people against possible invasions of liberty by state governments was another consideration. However, Hamilton, in *The Federalist No. 28*,<sup>61</sup> continued to indicate that the armed people, "by throwing themselves into either scale, would infallibly make it preponderate"<sup>62</sup> in the event of either federal or state invasion of rights. Viewed against this historical and legislative background, it is realistic to argue that the framers intended the "well-regulated" militia contemplated by the second amendment to be well-regulated (well-controlled or well-ruled) *by the right of the people to keep and bear arms*. As Madison pointed out in *The Federalist No. 46*,<sup>63</sup> the "advantage of being armed" and the concomitant ability to form a militia when needed provide the American people with "a barrier against the enterprises of [despotic] ambition."<sup>64</sup>

The right to keep and bear arms having been established, one further notion must be made clear; namely, that the first Congress, in enacting the second amendment, intended to create a right to keep and bear arms apart from the exigencies of militia service.<sup>65</sup> The proposal for what was to become the second amendment initially stated that a well-regulated militia was the "best" security of a free state, but this was later amended to read "necessary" to the security of a free state.<sup>66</sup> It is important to note that the Congress

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60. THE FEDERALIST No. 28, at 181 (Mentor ed. 1961) (A. Hamilton).

61. *Id.* at 178.

62. *Id.* at 181.

63. THE FEDERALIST No. 46, at 299 (Mentor ed. 1961) (J. Madison).

64. *Id.*

65. See text accompanying notes 67-78 and 98-99 *infra*.

66. For a discussion of the significance of the word "necessary" in the Constitution see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Mr. Chief Justice Marshall opined that the term "necessary" when used in the Constitution, does not mean "absolutely or indispensably necessary." When the Constitution means to imply the term "absolutely necessary" it explicitly uses the very words "absolutely necessary," (as in the prohibition of collection of "[i]mposts or duties on [i]mports or exports" by the states without the consent of Congress, found in Article I, section 10). Marshall indicated that "If reference be had to its use, in the common affairs of the world, or in approved authors, we find that (the word

did not advance a proposal which would have held a well-regulated militia to be "sufficient" to the security of a free state.<sup>67</sup> Quite to the contrary, the first Congress recognized that the ordinary processes of law might not offer sufficient protection to the people during the period between the outbreak of violence and the mobilization of the organized militia. The right to keep and bear arms for purposes other than militia service thus seems to have been clearly contemplated by the second amendment. Furthermore, since the Congress considered the militia to be a "necessary" but not "sufficient" instrument for safeguarding the freedom of the nation, it seems unlikely that they would devote an article of the Bill of Rights exclusively to considerations touching upon the militia.

Nor did the first Congress intend the second amendment to serve as a grant of militia power to the states. In *Houston v. Moore*,<sup>68</sup> the Supreme Court pointed out that the power of the states to maintain their own organized militias pre-dated the Constitution, and only the Article I provision which forbids the states to keep troops in time of peace without congressional consent limited this power. The Court noted:<sup>69</sup>

But as [to] state militia, the power of the state governments to legislate on the same subjects, having existed prior to the formation of the Constitution, and not having been prohibited by that instrument . . . remains with the states, subordinate nevertheless to the paramount law of the [Federal] government, operating upon the same subject.

The New York Court of Appeals, in *People ex rel. Leo v. Hill*,<sup>70</sup> was even more explicit:<sup>71</sup>

The power to control and organize the militia resided in the several states at the time of the adoption of the Constitution of the United States and was

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"necessary") frequently imports no more than that one thing is convenient, or useful, or essential to another. *Id.* at 413.

The Chief Justice also felt that when the Constitutional Convention used the term "absolutely necessary", it was trying to import a stronger meaning than when it simply used the term "necessary"; but he pointed out that "This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view." *Id.* at 415. See also 2 B. Schwartz, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1154 (1971).

67. 2 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1154 (1971).

68. 18 U.S. (5 Wheat.) 1 (1820).

69. *Id.* at 16-17.

70. 126 N.Y. 497, 27 N.E. 789 (1891).

71. *Id.* at 504, 27 N.E. at 790.

not taken away by that instrument . . . . The system has grown up and prevails in most of the states of organizing therein under state authority certain bodies of men out of the great body of the militia, as a uniformed force known as the "National Guard." They are a part of the militia of the state.

Both courts looked to the body of the Constitution in affirming the states' militia power; neither mentioned the second amendment. These cases established two things: (1) the power of the states to organize militias independently of the second amendment; and (2) the existence of the "unorganized militia," which comprises all citizens "physically capable of acting in concert for the common defense."<sup>72</sup>

A motion was introduced in the first session of the United States Senate to amend the proposal for what later became the second amendment by inserting the qualifying phrase "for the common defence" after the words "to bear arms." The motion was soundly defeated,<sup>73</sup> thus indicating an early congressional intent that the right to bear arms not be limited to the necessities of common defense.<sup>74</sup> A principal reason for the unwillingness of the Congress to delimit the right to bear arms stems from their familiarity with the writings of Blackstone, whom they considered an authoritative source regarding the rights recognized at common law.<sup>75</sup> Blackstone wrote of the "absolute right of individuals"<sup>76</sup> to "hav[e] and us[e] arms for self-preservation and defense,"<sup>77</sup> and noted that this right had been secured by the English Bill of Rights of 1689. The individual citizen, said Blackstone, was entitled to exercise his "natural right of resistance and self-preservation, when the sanctions of so-

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

73. See 2 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1153-54 (1971).

74. In testimony before the Senate Subcommittee to Investigate Juvenile Delinquency, Senator James L. Buckley (R.-N.Y.) reiterated this position during the course of discussion of proposed handgun regulation:

At the time of the adoption of the Bill of Rights, this country's statesmen were concerned with the need to protect citizens from government itself, and the passage of almost two centuries has not negated the validity of this concern. The fact that Article I, section 8, clause 16 of the Constitution grants Congress the power to organize, arm, and discipline the militia clearly indicates a quite different intention for the Second Amendment.

121 CONG. REC. S. 6889 (daily ed. April 28, 1975) (remarks of Senator Buckley).

75. See text accompanying notes 24-26 *supra*.

76. 1 W. BLACKSTONE, *COMMENTARIES* \*121.

77. *Id.* at 144.

ciety and laws [were] found insufficient to restrain the violence of oppression."<sup>78</sup>

#### IV. The Miller Case and Judicial Interpretation of the Second Amendment

The Supreme Court has examined the scope and purposes of the second amendment only once in the twentieth century. In *United States v. Miller*,<sup>79</sup> defendants had been charged with illegal transportation of a sawed-off shotgun in violation of the National Firearms Act of 1934.<sup>80</sup> They demurred to the charges on second amendment grounds, and the district court dismissed the action.<sup>81</sup> Defendants were released from federal custody and promptly disappeared. On direct appeal by the government, the Supreme Court reversed, stating that there was no evidence that a sawed-off shotgun had any "relationship to the preservation or efficiency of a well regulated militia"<sup>82</sup> and that defendants' second amendment defense was thus without merit. The Court further declared that it could not say "that the Second Amendment guarantees the right to keep and bear such an instrument,"<sup>83</sup> since such a weapon could not be judicially assumed to be "ordinary military equipment or that

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78. *Id.* See also *People v. Brown*, 253 Mich. 537, 541, 235 N.W. 245, 246 (1931), in which the Supreme Court of Michigan upheld the right of an alien to "possess a revolver for the legitimate defense of his person and property . . ." 253 Mich. at 541, 235 N.W. at 246.

79. 307 U.S. 174 (1939). Prior Supreme Court decisions construing the second amendment include *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (the states may not prohibit the people from keeping and bearing arms irrespective of the second amendment); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (the second amendment declares a right which may not be infringed by Congress). However, neither *Presser* nor *Cruikshank* involved a direct challenge to a federal or state statute purporting to interfere with the second amendment right to keep and bear arms. In 1902 the Idaho Supreme Court held that a statute which prohibited the carrying of deadly weapons was violative of both the Idaho Constitution and the second amendment. *In re Brickey*, 8 Idaho 597, 70 P. 609 (1902).

80. National Firearms Act, ch. 757, 48 Stat. 1236 (1934), as amended, INT. REV. CODE OF 1954 §§ 5801-72. The Act was passed in order to deal with the activities of gangsters armed with machine guns. It sought to end private ownership of machine guns, sawed-off shotguns, silencers, and other weapons used by gangsters, by imposing prohibitive transfer taxes and registration requirements. See *American Enterprise Inst.*, GUN CONTROL 3 (1976). Certain sections of the Act were later held violative of the fifth amendment's safeguard against self-incrimination. *Haynes v. United States*, 390 U.S. 85 (1968). The statute was later amended and cured of fifth amendment defects. *United States v. Freed*, 401 U.S. 601 (1971).

81. 26 F. Supp. 1002 (W.D. Ark. 1939).

82. 307 U.S. at 178.

83. *Id.*

its use could contribute to the common defense."<sup>84</sup>

While the Court in *Miller* clearly implied that there was indeed a category of arms such that "the Second Amendment guarantees the right to keep and bear such an instrument"<sup>85</sup> its overall approach must be colored by its dictum that the second amendment must be "interpreted and applied with that end [a well-regulated militia] in view."<sup>86</sup> This conclusion, and indeed, the very development of the *Miller* opinion suffered from several shortcomings of a fundamental nature.

Defendants did not appear and were not represented before the Supreme Court;<sup>87</sup> the Court therefore did not benefit from the vigorous presentation of conflicting views which is considered a basic advantage of our adversary system of justice. The case was argued solely by government attorneys, who failed to alert the Court to the existence of several holdings clearly in favor of the individual's right to keep and bear arms independently of militia participation. For example, the government cited two nineteenth century North Carolina cases<sup>88</sup> in its brief, without mentioning that they were effectively explained by a twentieth-century decision of the North

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 175; see also Hardy and Stompoly, *Of Arms and the Law*, 51 CHICAGO-KENT L. REV. 62, 65 (1974).

88. *State v. Roten*, 86 N.C. 701 (1883); *State v. Huntley*, 25 N.C. 418 (1843). In addition, the government brief took the position that "it cannot be doubted that at least the carrying of weapons without lawful occasion or excuse was always a crime under the common law of England and was a part of our common law derived from the nation." Brief for United States at 9, *United States v. Miller*, 307 U.S. 174 (1939). Examination of the several common law authorities cited discloses material which flatly contradicts the government position. See, e.g., 3 F. WHARTON, A TREATISE ON CRIMINAL LAW 2061-62 (11th ed. 1912):

A (person) cannot excuse wearing such (dangerous weapons in a manner that will naturally cause terror) in public by alleging that a particular person threatened him, and that he wears it for safety against such assault; but it is clear that no one incurs the penalty of the [S]tatute [of Northampton, 2 Edw. 3, c. 3] for assembling his neighbors and friends in his own house, to resist those who threaten to do him any violence therein, because a man's house is his castle. *Id.*

Similarly, in his PLEAS OF THE CROWN, Sir William Hawkins stated:

. . . that no wearing of arms is within the meaning of th(e) [S]tatute [of Northampton], unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems to follow, [t]hat persons of quality are in no danger of offending against this statute by wearing common weapons . . .

1 W. Hawkins, PLEAS OF THE CROWN 267 (6th ed. 1788).

Carolina Supreme Court<sup>89</sup> which held a pistol-licensing statute to be an infringement of the state constitution's guarantee that law-abiding citizens could not be forbidden to carry "their pistols . . . openly and protect their persons and their property from unlawful violence without going before an official and obtaining a license and giving bond."<sup>90</sup> More importantly, while the government cited an 1871 Tennessee Supreme Court case in support of its position,<sup>91</sup> it neglected to mention the view of the Tennessee Attorney General that the right to keep and bear arms was "not a civil right";<sup>92</sup> the Court rejected this view and stated the right to be instead "a private individual right, guaranteed to the citizen, not the soldier."<sup>93</sup>

While the *Miller* Court made it clear that the scope of the "militia" clause of the second amendment was to be derived from the debates in the Constitutional Convention, the "history and the legislation of Colonies and States, and the writings of approved commentators,"<sup>94</sup> the Court failed to mention any common law or second amendment legislative history in its opinion. Again, if there had been an opposing brief filed, the Court might have been better informed of the relevant material.

Perhaps as a result of this uneven presentation, the Court cited only a single case in support of its position that second amendment protection was limited to weapons of ordinary military warfare or whose use could contribute to the common defense. The Supreme Court of Tennessee decided that case, *Aymette v. State*,<sup>95</sup> nearly a

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89. *State v. Kerner*, 181 N.C. 574, 578; 107 S.E. 222, 225 (1921).

90. *Id.*, 107 S.E. at 225.

91. *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 8 Am. Rep. 8 (1871).

92. *Id.* at 182, 8 Am. Rep. at 16.

93. *Id.*

94. 307 U.S. at 179.

95. 21 Tenn. 119, 2 Humph. 154 (1840). *Aymette* held that the second amendment guarantee was limited to those weapons of ordinary warfare or whose use "could contribute to the common defense." By inference it would therefore appear that the *Miller* case stands for the proposition that an individual person has a right to keep and bear such instruments of "ordinary military equipment [whose] use could contribute to the common defense,"<sup>307</sup> U.S. at 178, since it is only by such private keeping of arms that the individual citizen could fulfill his responsibilities towards the "continuation" and the "effectiveness" of the organized militia. 307 U.S. at 178. *But see* *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976), *cert. denied*, 44 U.S.L.W. 3736 (1976), where the Sixth Circuit Court of Appeals upheld the constitutionality of the machine gun registration and transfer tax provisions of Title II of the Federal Gun Control Act of 1968, 26 U.S.C. §§ 5801-72 (1970).

The *Warin* Court considered the question of what type of arms are embraced by the second

century earlier than *Miller*, solely on the basis of its constitutional provision on the right of a free citizenry to keep and bear arms.<sup>96</sup> However, this clause was then, as now, explicitly limited by the qualification "for their common defense"<sup>97</sup> and the *Aymette* court took careful note of that qualification.<sup>98</sup> Yet the first Senate of the United States *defeated* a proposal to limit the second amendment right to the purposes of common defense.<sup>99</sup> Moreover, today only four state constitutions contain a "common defense" limitation to the right to keep and bear arms.<sup>100</sup> Of the thirty-five states which now have explicit constitutional provisions on the right to keep arms, thirteen clearly refer to the individual's right to keep and bear arms for defensive purposes,<sup>101</sup> while five state constitutions protect the individual's right to keep arms for the defense of his home, person and property.<sup>102</sup> Twelve states have found it necessary to add a state constitutional proviso to the effect that the state legislature may regulate or forbid the carrying of concealed (but not merely concealable) weapons,<sup>103</sup> thus suggesting an individual right to keep and carry arms openly even if these arms are concealable.

The government brief in the *Miller* case quoted from *Aymette* at length.<sup>104</sup> However, counsel for the government did not mention or

amendment. 530 F.2d at 106. It seems that a balance of private individual rights and public safety must be struck and that at least those arms which are primarily defensive in nature and are useful for legitimate self protection are covered by the second amendment. See *People ex rel. Ferris v. Horton*, 147 Misc. 506, 264 N.Y.S.84 (Ostego County Ct. 1933); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165 (1871).

96. TENN. CONST. art. 1, § 26. See also 21 Tenn. at 121-22, 124, 2 Humph. at 156, 158, 160.

97. TENN. CONST. art. 1, § 26.

98. 21 Tenn. at 121, 2 Humph. at 156.

99. See text accompanying notes 73-74 *supra*.

100. ARK. CONST. art. 2, § 5; MAINE CONST. art. 1, § 16; MASS. CONST. art. 17, § 18; TENN. CONST. art. 1, § 26.

101. ALA. CONST. art. 1, § 26; ARIZ. CONST. art. 2, § 26; COLO. CONST. art. 2, § 13; CONN. CONST. art. 1, § 15; ILL. CONST. art. 1, § 22; MAINE CONST. art. 1, § 16; MISS. CONST. art. 3, § 12; MO. CONST. art. 1, § 23; MONT. CONST. art. 3, § 13; N.M. CONST. art. 2, § 6; OKLA. CONST. art. 2, § 26; TEX. CONST. art. 1, § 23; WASH. CONST. art. 1, § 24.

102. COLO. CONST. art. 2, § 13; MISS. CONST. art. 3, § 12; MO. CONST. art. 1, § 23; MONT. CONST. art. 3, § 13; OKLA. CONST. art. 2, § 26.

103. COLO. CONST. art. 2, § 13; FLA. CONST. art. 1, § 8 (1968); GA. CONST. § 2-122; IDAHO CONST. art. 1, § 11; ILL. CONST. art. 1, § 22; KY. CONST. BILL OF RIGHTS, ch. 7, § 1; LA. CONST. art. 1, § 8; MISS. CONST. art. 3, § 12; MO. CONST. art. 1, § 23; OKLA. CONST. art. 2, § 26; TEX. CONST. art. 1, § 23; UTAH CONST. art. 1, § 6.

104. Brief for the United States at 12-15, 18-19, *United States v. Miller*, 307 U.S. 174 (1939).

comment on what was perhaps the most significant point made by the *Aymette* court:<sup>105</sup>

The citizens have the unqualified right to *keep* the weapon, it being of the character before described as being intended by this provision [ordinary military equipment under state constitutional provision on right to keep and bear arms). But the right to *bear* arms is not of that unqualified character.

Further examination reveals that other portions of the *Aymette* opinion, limiting the right to bear arms to collective purposes only (and heavily relied upon in the government's *Miller* brief), had been largely rejected by subsequent Tennessee authorities. In 1866, the Tennessee Supreme Court declared that the confiscation of guns in the hands of the citizenry by the secessionist state government during the civil war had been a flagrantly unconstitutional attempt to "disarm the people by legislation."<sup>106</sup> In *State v. Foutch*,<sup>107</sup> an 1896 decision, that same court upheld a citizen's constitutional right to use a pistol to shoot an armed intruder in his home and declared:<sup>108</sup>

Under our constitution, *every citizen* of the state has the right to keep and bear arms for his proper defense . . . . He has a right also to protect his own house and family . . . .

Most significantly, just eleven years prior to the *Miller* decision, the Tennessee Supreme Court held unconstitutional a Chattanooga city ordinance which banned the carrying of any sort of pistol in any manner.<sup>109</sup> Clearly, the courts of Tennessee recognized the legitimacy of non-militia arms possession; the requirement in *Miller* that the weapons bear some significant relationship to militia activities seems ill-supported by the precedent cited.

As a consequence of the failure of government counsel to direct the Supreme Court's attention to the subsequent treatment of the right to keep and bear arms in Tennessee, and the failure of the

105. 21 Tenn. at 124, 2 Humph. at 159-60.

106. *Smith v. Ishenhour*, 43 Tenn. (3 Cold.) 214, 217 (1866).

107. 96 Tenn. (12 Pickle) 242, 34 S.W. 1 (1896).

108. *Id.* at 247, 34 S.W. at 2.

109. *Glasscock v. City of Chattanooga*, 157 Tenn. (4 Smith) 518, 520, 11 S.W.2d 678 (1928). It is also noteworthy that in 1871, after the Tennessee Constitution had been amended to include a proviso that ". . . the Legislature shall have power by law, to regulate the wearing of arms, with a view to *prevent crime*," the Tennessee Supreme Court made clear that the legislature may not "arbitrarily prohibit the carrying [of] all manner of arms", because the power to regulate "does not fairly mean the power to prohibit." *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 177, 8 Am. Rep. 8, 12, 14-15 (1871).

Court to consider the legislative history of the second amendment, the *Miller* case should be narrowly read, even assuming that the Court decided it correctly. In *Cases v. United States*,<sup>110</sup> decided shortly after *Miller*, the Court of Appeals for the First Circuit suggested that the *Miller* holding be confined to its particular facts. Defendant in *Cases* was charged with violating the Federal Firearms Act of 1938; he interposed a second amendment defense. Although the court sustained the constitutionality of the Act, it did discuss the *Miller* case and stated "we do not feel that the Supreme Court . . . was attempting to formulate a general rule applicable to all cases."<sup>111</sup> One major objection to the *Miller* holding has been its lack of a clear standard for determining when the keeping and bearing of arms will be given second amendment protection. As one commentator has noted,<sup>112</sup>

The arms that the *Miller* case refers to must be given a technical meaning and construed to be only the normal ones that a citizen of today would be expected to keep and bear for the common defense or to maintain the public security, such as rifles, shotguns, and certain types of handguns.

In any event, contrary to the widespread popular belief that the Supreme Court of the United States has definitively spoken on the issue of the constitutionality of gun-control legislation, the issue remains far from settled, even in the view of impartial authorities.

*Miller* furnishes scant support for the argument that the second amendment should be limited to a collective, rather than individual, right to keep and bear arms. Rather, the amendment guarantees both a collective and a private individual right to the citizen. It has been argued that the term "right of the people" in the second amendment refers exclusively to collective and not individual rights.<sup>113</sup> However, the first amendment's "right of the people peace-

110. 131 F.2d 916 (1st Cir. 1942).

111. *Id.* at 922.

112. Note, Comment *The Right to Keep and Bear Arms; A Necessary Constitutional Guarantee or an Outmoded Provision of the Bill of Rights?*, 31 ALBANY L. REV. 74, 78-79 (1967). An analysis prepared by the Congressional Research Service of the Library of Congress has noted that:

At what point regulation or prohibition of what classes of firearms would conflict with the Amendment, whether there would be a conflict the . . . [Miller] case does little more than cast a faint degree of illumination toward answering.

Congressional Research Service, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* 1035-36 (citations omitted).

113. See, e.g., *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971); *Burton v. Sills*, 53 N.J. 86, 97, 248 A.2d 521, 526 (1968). For further discussion, see *Hearings Before Sub-*

ably to assemble, and to petition . . ."<sup>114</sup> has been repeatedly held by the Supreme Court to guarantee an individual and not merely a collective right.<sup>115</sup> The fourth amendment's "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"<sup>116</sup> has likewise been held to guarantee an individual right.<sup>117</sup> The ninth amendment's "rights . . . retained by the people"<sup>118</sup> has also been held to refer to individual rights.<sup>119</sup> In these uses of the phrase "right of the people" in the Bill of Rights reference to individual rights and *not* to states' rights (or powers) has repeatedly been upheld. Indeed, the tenth amendment makes this distinction between individual rights and states' rights even more sharp by stating: "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."<sup>120</sup> Thus, contemporary attempts to restrict the second amendment's right of the people to keep and bear arms to a collective right, or to a right of the states to maintain an organized militia, pose a threat to the rest of the Bill of Rights.

### V. The Ninth Amendment And The Right To Keep Arms

Many of the founding fathers opposed enactment of an explicit Bill of Rights because they feared that an enumeration of particular rights might work to disparage others that were not included in such a document.<sup>121</sup> Accordingly, James Madison proposed what was to

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*comm. No. 5 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess., Ser. 3, pt. 1, at 242, 247 (1967); Feller & Gotting, *The Second Amendment: A Second Look*, 61 *Nw. U.L. Rev.* 46, 63-64 (1966).

114. U.S. CONST. amend. I.

115. See, e.g., *Schneider v. Smith*, 390 U.S. 17, 25 (1968); *Shelton v. Tucker*, 364 U.S. 479 (1960).

116. U.S. CONST. amend. IV.

117. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Boyd v. United States*, 116 U.S. 616 (1886).

118. U.S. CONST. amend. IX.

119. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 94-95 (1947).

120. U.S. CONST. amend. X.

121. See *Griswold v. Connecticut*, 381 U.S. 479, 488-89 (1965). Madison himself admitted that:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would' disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I

become the ninth amendment:<sup>122</sup>

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

It would seem that any restriction of the right to keep and bear arms to the organized militia is violative of both the letter and the spirit of the ninth amendment. The private individual right to keep and bear arms both for individual self-defense as well as for the common defense (militia service) thus appears to be guaranteed by the Bill of Rights in its totality.

## VI. Modern Second Amendment Issues

Although many people today believe that the organized militia (*i.e.*, the National Guard) is sufficient to guarantee the security of a free state, it should be borne in mind that it is the President who is Commander-in-Chief of the National Guard,<sup>123</sup> and that he may order it "federalized" at any time.<sup>124</sup> Moreover, the federal government, through the Secretary of the Army, retains full ownership and control of all National Guard weapons, conducts a yearly inspection and inventory of all such property "held by the Army National Guard,"<sup>125</sup> and keeps a list of all "members of the Army National Guard."<sup>126</sup>

The founding fathers did not appear to intend that the National Guard, subject as it is to centralized federal control, be the sole

can see that it may be guarded against. I have attempted it as you gentlemen may see by turning to [the ninth amendment].

1 ANNALS OF CONG. 456 (1789).

122. The ninth amendment's guarantee of rights retained by the people was originally introduced by the Virginia delegation as a proposed 17th amendment. The Virginia proposal stated in original form:

17th. That those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever, to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.

2 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 844 (1971).

123. U.S. CONST. art II, § 2 provides:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States. . .

(emphasis added).

124. See *Gilligan v. Morgan*, 413 U.S. 1, 7 (1973).

125. 32 U.S.C. § 105 (a)(1) (1970).

126. *Id.* § 105 (a)(3).

repository of the second amendment's "security of a free State." In particular, the potential ability of a usurping President to obtain the arms and records of the National Guard cripples the Guard's effectiveness as a strong moral check against arbitrary government. The President is privy to all data concerning the placement and distribution of all National Guard arms, thus making possible—indeed, feasible—their quick confiscation by the armed forces. This is precisely the possibility that the framers sought to prevent when they enacted the second amendment. They were all too familiar with previous British confiscations of organized militia stores (especially the infamous Lexington incident),<sup>127</sup> and they recognized the consequent need for the keeping of arms by the people at large *anonymously*. Such weapons could not be "called up" or confiscated by the federal authority.

The founding fathers were, after all, revolutionaries who had seen that the success of the American Revolution was in no small part attributable to militia action, some of it in the nature of guerrilla-type warfare. In striving to protect the "security of a free state" from tyranny, the second amendment draftsmen apparently believed that the private keeping of arms played a significant role in deterring any Presidential attempts at usurpation.<sup>128</sup> While some writers have questioned the utility and effectiveness of private arms in resisting the power of a modern army,<sup>129</sup> the unwelcome but likely prospect of urban guerrilla warfare<sup>130</sup> would tend to make the idea of usurpation singularly unattractive. The deterrent effect is largely psychological, but ultimately physical.<sup>131</sup>

It is therefore abundantly plain that the founding fathers recognized the type of danger incident to the registration of arms; the

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127. See text accompanying notes 32-33, *supra*.

128. The possibility of Executive abuse of the military power was recently discussed in connection with the Watergate scandal. See N.Y. Times, Aug. 25, 1974, at 1.

129. See, e.g., Feller & Gotting, *The Second Amendment: A Second Look*, 61 Nw. U. L. Rev. 46, 69 (1966); Note, *Restrictions on the Right to Bear Arms: State and Federal Firearms Legislation*, 98 U. Pa. L. Rev. 905, 906 (1950).

130. Jewish resistance with small arms (pistols, rifles, and machine guns) was so fierce that the Germans were forced to burn down the ghetto, house-by-house. See Y. SUHL, *THEY FOUGHT BACK: THE STORY OF THE JEWISH RESISTANCE IN NAZI EUROPE* 98-106 (1967).

131. See, e.g., Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 Wm. & Mary L. Rev. 381, 390, 397 (1960); Note, Comment *The Right to Keep and Bear Arms; A Necessary Constitutional Guarantee or an Outmoded Provision of the Bill of Rights?*, 31 Albany L. Rev. 74, 76 (1967).

second amendment seeks to curtail the possibility of widespread or politically selective confiscation. Thus, any type of gun control legislation, especially at the federal levels, appears to be at odds with the intent of the second amendment. As one commentator has noted,<sup>132</sup>

The prohibition of the second amendment is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.

To say that the people have a right to keep arms, unregulated by government, is not to say that the people have a right of insurrection or a right of secession from the irrevocable "compact" formed by the constituent act of adopting the Constitution.<sup>133</sup> Nor, as Alexander Hamilton warned, does the right to keep and bear arms mean that the people are supposed to "rush tumultuously to arms."<sup>134</sup> But what it does mean is that the people are to be allowed by government to retain the ability to obtain, keep, and practice with arms, in order that they may always be in a position to exercise their right of self-preservation and defense, as well as to join and serve effectively in the appropriate militia to restore the Constitution, should the need ever arise.

The keeping of arms by the individual citizen has been aptly called "the palladium of the liberties of a republic."<sup>135</sup> Indeed, as Mr. Justice Brandeis noted in his dissenting opinion in *Olmstead v. United States*:<sup>136</sup>

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

The record-keeping and inspection provisions of present federal

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132. W. RAWLE, A VIEW OF THE CONSTITUTION 125 (1st ed. 1825).

133. THE FEDERALIST No. 22, at 152 (Mentor ed. 1961) (A. Hamilton).

134. *Id.*, No. 28 at 180.

135. 2 STORY, COMMENTARIES ON THE CONSTITUTION 646 (5th ed. 1891).

136. 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

gun-control statutes<sup>137</sup> enhance the probability of government-sponsored arms confiscation and usurpation of power. This is precisely what the second amendment sought to prevent. In considering gun-control legislation, both existing and proposed, it should be borne in mind that this nation is founded under a Constitution that, in the words of Mr. Justice Story "was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence."<sup>138</sup>

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137. See, e.g., 18 U.S.C. §§ 922(a)(2), (a)(3), (b)(3); 18 U.S.C. § 922(c) (1970) (purchase records of rifles, shotguns, and handguns); 26 U.S.C. § 5841 (central registration of all machine guns).

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

