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Comments

GUN CONTROL LEGISLATION AND THE INTENT OF THE SECOND AMENDMENT: TO WHAT EXTENT IS THERE AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS?

I. Introduction

In 1993, the United States Congress will consider a proposed bill that places controls on the sale of handguns. This gun control legislation is commonly known as the "Brady Bill," after former White House Press Secretary James Brady, who was seriously wounded by a handgun used in the 1981 assassination attempt on then President Ronald Reagan. The Brady Bill mandates that handgun buyers wait seven days before taking possession of the weapon they wish to purchase. During the waiting period, local law enforcement officials would be required to check the criminal background of the potential buyer.


There were three major differences between the initial House and Senate versions of the bill. Joan Biskupic, Senate Wrestles With Crime Bill, Approves Brady Compromise, 49 Cong. Q. 1757, 1757 (1991) [hereinafter Biskupic, Brady Compromise]. First, although both bills placed waiting periods on potential handgun purchasers, the Senate shortened the required waiting period from seven to five days. Id. Second, the Senate bill mandated that law enforcement authorities perform background checks on criminal records of potential purchasers during the waiting period. Id. By contrast, the House bill simply required that local law enforcement authorities be notified of the purchaser's application to buy a handgun. Id.; see also Joan Biskupic, Sponsors of Gun-Control Bill Vie for Procedural Edge, 49 Cong. Q. 1134, 1135 (1991) [hereinafter Biskupic, Procedural Edge]. Third, the Senate agreed that as soon as the technology became available, an immediate background check would supplant the five-day waiting period. Biskupic, Brady Compromise, supra, at 1759. A later House version of legislation mirrored the Senate version of the bill. See H.R. 3371, 102d Cong., 1st Sess. (1991). The House version provided for a five-day waiting period, a criminal background check (1407)
The possibility of the Brady Bill becoming law has sparked zealous debate between proponents and opponents of gun control legislation. Supporters argue that the Brady Bill will keep guns out of the hands of criminals and save lives. Opponents of the Brady Bill stress the Second Amendment right to keep and bear arms to support the argument that the Brady Bill will deprive law-abiding citizens of their constitutional rights. The mounting tension over the issue of gun control will most likely culminate in a constitutional challenge if the Brady Bill is enacted. Such a challenge would present the United States Supreme Court with the first opportunity to consider the scope of the Second Amendment since its 1939 decision in United States v. Miller.

check and instantaneous background checks to supplant the five-day period once such instantaneous checks are available. Id.

The Senate initially passed the Brady Bill as part of a comprehensive crime bill and sent the entire package to the House for consideration. Biskupic, Crime Bill, supra, at 1898. In addition to the Brady Bill's handgun controls, the Senate crime bill included a ban on nine classifications of assault style semi-automatic weapons. See Joan Biskupic, Senate Passed Crime Bill, 49 Cong. Q. 2102, 2130 (1991) (hereinafter Biskupic, Senate Bill) (providing list of specific types of weapons banned). On October 17, 1991, however, the House voted to strip the assault weapon ban from its version of the crime bill. Holly Idelson, House Members Duel on Crime; Assault-Gun Ban Is Rejected, 49 Cong. Q. 3038, 3038 (1991). Nonetheless, the House did include the original Senate version of the Brady Bill in the House crime bill. Kitty Dumas, House Republicans Lead Charge to Toughen Anti Crime Bill, 49 Cong. Q. 3132, 3132 (1991).

5. See Biskupic, Swing Votes, supra note 2, at 604. Various law enforcement groups as well as Handgun Control Inc., an organization lead by Sarah Brady, support the bill. Id. Sara Brady is the wife of former White House press secretary James Brady. Id.

On the other side of the debate are groups such as the National Rifle Association (NRA) who feel gun control is a violation of individual rights. Id. at 607. One member of the NRA has been quoted as saying "[w]e need to have a meat-eating NRA that won't be kind to any legislator who votes against the citizens' right to keep and bear arms." Id.

6. See id.


Furthermore, while there have been numerous attacks on state gun control legislation since Miller, many courts have continued to follow two nineteenth century Supreme Court cases, Presser v. Illinois and United States v. Cruikshank, which held that the Second Amendment is not applicable to the states. See Presser v. Illinois, 116 U.S. 252, 253 (1886) (holding "that the right of the people to keep and bear arms shall not be infringed," is a limitation only on the power of Congress and the national government, and not of the States"); United
II. Background

The Second Amendment provides that "[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."9 The current controversy surrounding gun control legislation finds its roots in two divergent interpretations of the scope of this Amendment.10

First, most federal courts and some commentators adopt a "state's right view" of the Second Amendment.11 Many of these courts and commentators take the position that the Amendment guarantees noth-


For a detailed discussion and critique of additional cases following Presser and Cruikshank, see Don B. Kates Jr., Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L. Rev. 204, 251-57 & n.201 (1983); Ralph J. Rohner, The Right to Bear Arms: A Phenomenon of Constitutional History, 16 Cath. U. L. Rev. 53, 66 n.69 (1966). For a critical discussion of the theory that the Second Amendment was not incorporated by the Fourteenth Amendment, see Stanford Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637, 652-54 (1989); Rohner, supra, at 66-70.

9. U.S. Const. amend. II.

10. See Kates, supra note 8, at 206-07 (supporting individual right to keep and bear arms); Levinson, supra note 8, at 638-42; Roy G. Weatherup, Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment, 2 Hastings Const. L.Q. 961, 962-63 (1975) (supporting state's right interpretation of the Second Amendment).

11. See, e.g., Stevens v. United States, 440 F.2d 144 (6th Cir. 1971) (interpreting Second Amendment as protecting right of states to arm organized military units). For a discussion of federal case law supporting the state's right view, see infra notes 32-39 and accompanying text. See also Kates, supra note 8, at 206; Levinson, supra note 8, at 640-45. Mr. Kates and Professor Levinson both cite the position of the American Civil Liberties Union (ACLU) as an example of the state's right view. Kates, supra note 8, at 207-08 & n.15; Levinson, supra note 8, at 644. The ACLU's view is that "the individual's right to bear arms applies only to the preservation of the efficiency of a well regulated militia" and that "[e]xcept for lawful police and military purposes, the possession of weapons by individuals is not constitutionally protected." Levinson, supra note 8, at 644 (quoting ACLU, POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION, Policy No. 47 (rev. ed. 1992)). Therefore, according to the ACLU, there is no constitutional impediment to the regulation of firearms. See Kates, supra note 8, at 207-08 & n.15 (citing summary of ACLU meeting of June 14-15, 1980).

In addition, Professor Levinson cites Professor Laurence Tribe's position that "the history of the [Second] Amendment 'indicate[s] that the central concern of [its] framers was to prevent such federal interferences with the state militia as would permit the establishment of a standing national army and the consequent destruction of local autonomy.'" Levinson, supra note 8, at 640 & n.19 (quoting Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 299 n.6 (2d ed. 1988)).
ing more than the right of states to arm and maintain organized military units.12 According to proponents of this view, gun control legislation does not threaten any individual right of the people.13

On the other side of the debate are those who promote an “individual right view.”14 Supporters of this view argue that the right to keep and bear arms is an individual right.15 They contend that the only connection between the Second Amendment and the militia is that by protecting the individual right to keep and bear arms, an effective militia will be preserved.16 Because the Amendment protects the right of individuals, proponents of the individual right view argue that the Amendment’s guarantee extends to the purpose of self-defense.17

Judicial interpretation of the Second Amendment has provided little guidance as to which of these views is correct, in part because the Supreme Court’s last interpretation of the scope of the Second Amendment was over fifty-three years ago, in United States v. Miller.18 Much of the twentieth century case law evaluating the scope of the Second Amendment tends to support the state’s right interpretation.19 This

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12. See, e.g., Stevens, 440 F.2d at 144 (holding that Second Amendment applies only to right of states to arm organized military units). For a discussion of federal case law supporting the state’s right view, see supra notes 32-39. For an example of commentaries adopting the state’s right view of the Second Amendment, see Peter Buck Feller & Karl L. Gotting, The Second Amendment: A Second Look, 61 NW. U. L. REV. 46, 64 (1966); Weatherup, supra note 10, at 962-63.

In support of the state’s right position, one commentator equates the word “regulated” as used in the Second Amendment with the word “organized.” See Rohner, supra note 8, at 53-55. Professor Rohner claims that the Constitution, on its face, ties the right to bear arms to an organized militia. Id. at 55. For the text of the Second Amendment, see supra note 9 and accompanying text.

13. See Kates, supra note 8, at 207 (analyzing state’s right view); Levinson, supra note 8, at 644 (same). This view is based on the preamble to the Second Amendment, which begins: “A well regulated Militia, being necessary to the security of a free State . . . .” U.S. CONST. amend. II; see also Levinson, supra note 8, at 640 (discussing state’s right commentators’ reliance on the Second Amendment’s preamble (citing Laurence Tribe, American Constitutional Law 299 n.6 (2d ed. 1988)); Kates, supra note 8, at 206 (same).

14. See, e.g., Earl R. Kruschke, The Right to Keep and Bear Arms, A Continuing American Dilemma 12 (1985) (noting that Second Amendment was intended to protect individual right to bear arms).

15. Id.

16. Id. (“It was through an attempt to protect the individual that protection of the militia was achieved. The ‘people’ referred to in the Amendment are, therefore, to be viewed as the same people referred to in the first, fourth, ninth, and tenth amendments . . . .”); see also Kates, supra note 8, at 213 (“Indeed, the evidence suggests [that] it was precisely by protecting the individual that the framers intended to protect the militia.”).

17. Kates, supra note 8, at 206. Professor Kates also argues that the general populace supports the individual right view. Id. at 206 & n.11.


19. See, e.g., Stevens v. United States, 440 F.2d 144, 149 (6th Cir. 1971) (holding that there is no individual right to keep and bear arms). For a discus-
case law, however, is based on misinterpretations of the Miller decision. Furthermore, the Miller holding itself is of questionable validity.

In Miller, the United States Supreme Court addressed the scope of the Second Amendment in the context of a challenge to the National Firearms Act of 1934. The Miller Court ruled that the Framers of the Constitution only intended the Second Amendment to ensure the existence of a well-regulated militia as provided for in Article I, Section 8, Clause 16 of the Constitution. Thus, the Court concluded that the Second Amendment protects only the right to keep and bear arms that have "some reasonable relationship to the preservation or efficiency of a well regulated militia."

In some ways the Miller holding appears consistent with the state's right interpretation of the Second Amendment. This conclusion is questionable, however, if one considers the Court's interpretation of what the Framers of the Constitution meant by the term militia. The
Court stated that the "[m]ilitia comprised all males physically capable of acting in concert for the common defense." 27 When called to defend the country, these citizens were to "appear bearing arms supplied by themselves and of the kind in common use at the time." 28 Under the Miller Court's holding, the right to keep and bear arms rests in the hands of each individual citizen, not the states. 29 However, this right is limited to the types of arms used for militia purposes. 30

27. Id. The Miller Court explained that the people of the 18th century "strongly disfavored" standing armies. Id. Thus, the civilian population itself provided for the national defense and law enforcement. Id.

28. Id. (emphasis added).

29. See id.

30. Id. at 178. The Miller Court's interpretation of the word "militia," as used in the Second Amendment, was probably correct. For a discussion of the 18th century meaning of the word militia, see infra notes 100-01 & 157-68 and accompanying text. However, it is unclear whether the Miller Court's analysis of the purpose of the militia, as it relates to the Second Amendment, was correct. The Court apparently felt that the purpose of the militia was limited to defense of the nation against insurrection and foreign invasion. See Miller, 307 U.S. at 178-79 (stating that weapon must be part of ordinary military equipment or be able to contribute to common defense to be protected under Second Amendment).

In addition to providing for the national defense, however, the Framers and state constitutions cited other purposes for the right to keep and bear arms. See, e.g., PA. CONST. OF 1776, A Declaration of the Rights of the Inhabitants of the Commonwealth, or State of Pennsylvania, 13th declaration [hereinafter PA. CONST. OF 1776] (expressly including self-defense as purpose for right to keep and bear arms), repealed by PA. CONST. OF 1790, reprinted in 2 BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 265-66, 342 (1980). For a discussion of the historical purposes of the right to keep and bear arms, see infra notes 45-202 and accompanying text.

In addition, in Cases v. United States, the Court of Appeals for the First Circuit questioned the validity of the Miller holding just three years after the Supreme Court handed down the decision. Cases v. United States, 131 F.2d 916, 922 (1st Cir. 1942), cert. denied, 319 U.S. 770 (1943), and cert. denied, 324 U.S. 889 (1945). The Cases court disagreed with the Supreme Court's decision to apply the protection of the right to keep arms only to the types of arms used in military service. Id. (questioning civilian possession of "machine guns, trench mortars, [and] anti-tank or anti-aircraft guns"). The Cases court stated that the Miller opinion did not "formulate a general rule applicable to all cases." Id. at 922. Instead, according to the Cases court, the rule in Miller "was adequate to dispose of the case before it." Id. The Cases court determined that if the Miller opinion intended to protect an individual's right to bear arms that have some reasonable relation to the maintenance and preservation of a militia, then the Second Amendment's protection would be "absolute." Id. (citing Miller, 307 U.S. at 178). The Cases court explained that "some sort of military use seems to have been found for almost any modern lethal weapon." Id. Thus, if the Miller decision were followed at the present day, "the federal government would be empowered to regulate the possession or use of . . . only weapons which can be classed as antiques." Id. In United States v. Warin, the Court of Appeals for the Sixth Circuit cited Cases with approval, stating: "If the logical extension of the defendant's argument for extending the holding of Miller was inconceivable in 1942, it is completely irrational in this time of nuclear weapons." United States v. Warin, 530 F.2d 103, 106 (6th Cir.), cert. denied, 426 U.S. 948 (1976).
Since 1939, federal courts have misinterpreted the Miller holding. In 1971, the Sixth Circuit, in Stevens v. United States, cited Miller as supporting the state’s right view. The Stevens court declared that under Miller, “the Second Amendment right to keep and bear Arms” applies only to the right of the State to maintain a militia and not to the individual’s right to bear arms. The First, Third, Fourth, and Eighth Circuit Courts of Appeals, as well as a District Court for the Southern District of Texas have adopted the same position.

31. For a discussion of federal case law misinterpreting the Miller holding, see infra notes 32-39 and accompanying text.
32. 440 F.2d 144 (6th Cir. 1971)
33. See id. at 149.
34. Id. In Stevens, the Sixth Circuit upheld the conviction of a defendant for violating the Omnibus Crime Control and Safe Streets Act of 1968, which prohibits felons from carrying firearms. Id. at 145 (citing 18 U.S.C. §§ 1201, 1202 (current version at 18 U.S.C. § 922(g)(1) (1988))). Moreover, in 1976, the Sixth Circuit reaffirmed its position that the Second Amendment is limited to a state’s right. See Warin, 530 F.2d at 106 (citing Stevens as limiting the Miller holding to provide for collective right to bear arms).

In contrast to the Sixth Circuit’s position, the Court of Appeals for the Eighth Circuit has upheld a conviction under the Omnibus Crime Control and Safe Streets Act without limiting the holding of Miller to the state’s right view. See United States v. Synnes, 438 F.2d 764, 772 (8th Cir. 1971), vacated on other grounds, 404 U.S. 1009 (1972). The Synnes court stated that prohibiting felons from carrying firearms did not impede the efficiency of a well-regulated militia and, therefore, the Omnibus Crime Control Act was constitutional under Miller. Id. Since Synnes, however, the Eighth Circuit has adopted the state’s right view. See United States v. Nelson, 859 F.2d 1318, 1320 (8th Cir. 1988) (analyzing Second Amendment “purely in terms of protecting state militia, rather than individual rights”).

35. See United States v. Nelson, 859 F.2d 1318, 1320 (8th Cir. 1988) (analyzing Second Amendment “purely in terms of protecting state militia, rather than individual rights”); United States v. Johnson, 497 F.2d 548, 550 (4th Cir. 1974) (holding that Second Amendment confers only collective right to bear arms); United States v. Kozerski, 518 F. Supp. 1082, 1090 (D.N.H. 1981) (specifically limiting Second Amendment to state’s right to arm its militia), aff’d, 740 F.2d 952 (1st Cir.), cert. denied, 469 U.S. 842 (1984); Eckert v. Pennsylvania, 331 F. Supp. 1361, 1362 (E.D. Pa.) (finding that “the Second Amendment was not adopted to guarantee the right of the individual to bear arms, but rather to protect the states in the maintenance of their militia organizations against possible encroachments of the federal power”), aff’d, 474 F.2d 1339 (3d Cir.), cert. denied, 410 U.S. 989, and cert. denied, 411 U.S. 920 (1973); Vietnamese Fisherman’s Ass’n v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 210 (S.D. Tex. 1982) (finding that right to keep and bear arms is not individual right and may only be exercised in connection with militia “organized by the state” (emphasis added)).

Notably, prior to Nelson, the Eighth Circuit had taken a less restrictive view of the Second Amendment. See Cody v. United States, 460 F.2d 34, 37 (8th Cir.), cert. denied, 409 U.S. 1010 (1972). In Cody, the Eighth Circuit held that gun control legislation is constitutional unless it obstructs the maintenance of a well-regulated militia. Id. The court did not, however, restrict the right to the state’s right to arm the militia. See id.; see also United States v. Decker, 446 F.2d 164, 167 (8th Cir. 1971) (holding that legislation requiring sellers to keep records of gun sales does not infringe on Second Amendment right to bear arms); United States v. Synnes, 438 F.2d 764, 772 (8th Cir. 1971) (holding that legislation re-
The state's right position, however, is not supported by the Miller opinion, which states that the civilians themselves would supply the arms used by the militia, not the states. The federal courts' interpretations of the Miller opinion as protecting the state's right to maintain a militia are erroneous. Nonetheless, as recently as 1990, the District Court for the Eastern District of California applied the state's right view in Fresno Rifle & Pistol Club v. Van de Kamp. The Fresno court upheld a California state gun control statute on the ground that the Second Amendment does not apply to state legislation. Moreover, the district court stated that even if the Second Amendment does apply to state legislation, the Amendment does not protect individual rights.

These cases, as well as most commentators on the state's right and individual right views of the Second Amendment, are based primarily on different interpretations of the Second Amendment's original intent. The purpose of this Comment is to evaluate these interpretations through an independent examination of the historical antecedents of the Second Amendment right to keep and bear arms.

First, Part III of this Comment examines the common law history of the right to keep and bear arms. Part IV then discusses the legislative history of the Second Amendment. Finally, Part V considers the views of some of the major political figures of the late eighteenth century.

stricting possession of firearms will not be invalidated if the court sees no conflict between the legislation and the Second Amendment, *vacated on other grounds*, 404 U.S. 1009 (1972).


38. *Id.* at 1417-18 (upholding constitutionality of assault weapons ban).

39. *Id.* The Court of Appeals for the Seventh Circuit also has taken this position with regard to state gun control legislation. See Quilici v. Village of Morton Grove, 695 F.2d 261, 269-70 (7th Cir. 1982) (upholding complete ban on handguns), *cert. denied*, 464 U.S. 863 (1983).

40. See, e.g., Stephen P. Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment*, 1787-1791, 10 Ky. L. Rev. 13 (1982). Mr. Halbrook devoted his article, which supports an individual right to keep and bear arms, to an examination of the Second Amendment's history. *Id.* Mr. Kates, however, noted that the origins, and perhaps fallacies, of the individual right view have not been subject to much scrutiny, because supporters of this view concentrate on rebutting the state's right view, and not on formulating their own arguments. Kates, *supra* note 8, at 209-11. Thus, it is unclear to what extent individual right supporters rely on the Second Amendment's legislative history to support their argument. *Id.* Mr. Kates himself is an individual right advocate who relied primarily on historical evidence to support his argument. See *id.* at 211-43 & nn.31-167 (providing historical analysis of Second Amendment).

41. For a discussion of the common law history of the right to keep and bear arms, see *infra* notes 45-72 and accompanying text.

42. For a discussion of the legislative history of the Second Amendment, see *infra* notes 73-142 and accompanying text.

43. For a discussion of the views of some of the major political figures of
After determining whether there is an individual right to keep and bear arms, Part VI presents a proposed constitutional analysis of federal gun control legislation.\textsuperscript{44}

III. \textbf{THE COMMON LAW DEVELOPMENT OF THE RIGHT TO KEEP AND BEAR ARMS}

A. \textit{The Right to Keep and Bear Arms in England}

An examination of the development of the right to keep and bear arms in England is essential to an understanding of the origin of the same right in the United States. The American Colonial Charters, which had a substantial impact on the American Bill of Rights, were largely based on the English Bill of Rights.\textsuperscript{45} Many colonial charters declared that Americans retained all rights possessed by the English.\textsuperscript{46}

The English right to keep arms dates back as far as 870 A.D., when British laws required all free men to own arms and be prepared to defend the nation.\textsuperscript{47} In an effort to put England under Catholic control,
however, during the seventeenth century, King Charles II enacted legislation that gave him a pretense to disarm the English people. Charles' successor, King James II, continued this disarmament until he was overthrown in the Glorious Revolution of 1688.

Following the Glorious Revolution, the British Parliament drafted the English Bill of Rights of 1689. This document declared that "raising or keeping a standing army in time of peace, unless it be with the consent of Parliament, is against the law; that the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowable by law." The bill was promulgated in response to the various acts of King James II that were taken to subvert and extirpate the Protestant religion and the laws and liberties of [the English] kingdom by . . . raising and keeping a standing army . . . in time of peace without consent of parliament . . . [and] causing several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law . . . .

This passage illustrates that the English right to keep and bear arms evolved from the need to prevent future abuses of the people's liberties by the Crown.


48. Report of the Subcommittee, supra note 46, at 2; Hardy, supra note 47, at 30-31. The Militia Act of 1662 gave Charles II the power to disarm those persons judged "dangerous to the peace of the kingdom." Hardy, supra note 47, at 30 (citing Militia Act of 1662, 14 Car. 2, ch. 3 (Eng)). In addition, the English Game Acts, which purported to limit the keeping of arms to kill game, actually barred most nonproperty owners from keeping arms. Id. at 32 (citing Game Act of 1671, 22 & 23 Car. II, ch. 25 (Eng.)). For further discussion of the Game Acts and their use to disarm the people, see Kates, supra note 8, at 235-36.

49. Hardy, supra note 47, at 35; see also Report of the Subcommittee, supra note 46, at 3 (discussing Glorious Revolution); 1 Schwartz, supra note 46, at 40 (same).

50. Hardy, supra note 47, at 35; 1 Schwartz, supra note 30, at 41.

51. 1 Schwartz, supra note 30, at 43 (citing English Bill of Rights of 1689). In addition to drafting a right to bear arms into the Bill of Rights, Parliament amended the Game Acts to omit guns from a list of prohibited weapons. Report of the Subcommittee, supra note 46, at 3; see also Hardy, supra note 47, at 38 (discussing Game Acts (citing 4 & 5 Wm. & Mary, ch. 23 (1692) (Eng.); 5 Ann, ch. 14 (1705) (Eng.))).

52. 1 Schwartz, supra note 30, at 42 (quoting statement accompanying English Bill of Rights of 1689).

53. Id. This Comment will demonstrate that fear of deprivation of liberty through disarmament was also a driving force behind the American right to keep...
This purpose, defending liberty, does not contradict either the state’s right view or the individual right view. The people of the United States could achieve independence from the threat of tyranny by the federal government either by having an armed state militia or by allowing individuals to maintain private arms.

Defense of liberty, however, was not the only reason given in support of the English right to keep arms. Courts and commentators recognized at least three other purposes supporting the right to keep and bear arms in England. In post-Bill of Rights prosecutions for unlawful possession of firearms, the King’s Bench upheld the right to keep arms for personal defense. The court defined personal defense to include self-defense, defense of property and all other lawful purposes. Commentaries of eighteenth century English legal officials further evidence a belief that the right to keep and bear arms extended to enforcement of local laws and defense against foreign invaders.

and bear arms. For a discussion of the origins of the American right to keep and bear arms, see infra notes 62-202 and accompanying text.

54. State’s right advocates have argued that even if the English Bill of Rights had an effect on the American Bill of Rights, the English Bill of Rights does not support an individual right to bear arms. See Rohner, supra note 8, at 59. Professor Rohner contended that the English right to keep and bear arms was limited to a collective right of the populace to defend against military action by the government. Id. Even if Professor Rohner is correct, however, his argument raises the question: Who was to supply these arms? Because there were no state governments in England, the source of arms must have been the individual citizens themselves. Therefore, even if the English right to keep and bear arms was limited to the use of arms for collective purposes, the possession of arms by individuals was not limited. For a discussion of the state’s right view, see supra notes 11-13 and accompanying text.

55. For a discussion of other purposes for the right to keep and bear arms in England, see infra notes 56-58 and accompanying text.


57. Stratford, 96 Eng. Rep. at 787. In Stratford, the bench stated that because "guns are not expressly mentioned in the [Game Acts] ... and as a gun may be kept for the defense of a man’s house, and for diverse other lawful purposes, it [is necessary for a conviction] to allege ... that the gun had been used for killing game." Id.; see also Mallock v. Eastly, 87 Eng. Rep. 1370, 1374 (K.B. 1744) ("The mere having a gun was no offense within the game laws, for a man may keep a gun for the defense of his house and family, but the party must use the gun to kill game before he can incur any penalty."); King v. Gardner, 87 Eng. Rep. 1240, 1241 (K.B. 1739) (holding that to obtain conviction under Game Acts, defendant must have actually used gun to kill game; mere possession of gun is not prohibited).

58. See HARDY, supra note 47, at 39-40 (citing W. BLIZZARD, DESULTORY REFLECTIONS ON POLICE (London, 1785)). Mr. Hardy quoted the following statement of the Recorder of London, the chief legal official in London during the 18th century:

The right of his Majesty's protestant subjects to have arms for their own defense, and to use them for lawful purposes, is most clear and undeniable. ... And that this right which every protestant most unquestionable possesses individually may, and in many cases must, be exercised collectively, is likewise a point which I conceive to be most clearly
As noted above, colonial Americans took the position that they retained all rights possessed by the English. At least one of the four purposes for the right to keep and bear arms established by the English Bill of Rights—self-defense—contradicts the state's right view that the individual right to bear arms is limited to militia or collective purposes. State's right advocates ignore the evidence provided by case law and English legal officials that recognize an individual right to bear arms.

B. Development of the Right to Keep and Bear Arms in Pre-Constitution America

1. The Colonial Charters

Like the English statutes discussed above, several American colonial charters had provisions requiring citizens to keep arms. Even though established ..., the lawful purposes for which such arms may be used (besides immediate self-defense) are the suppression of violent and felonious breaches of the peace, the assistance of the civil magistrates in the execution of the laws, and the defense of the kingdom against foreign invaders. The statements and case law following promulgation of the English Bill of Rights establish a variety of purposes for the right to keep and bear arms.

59. 1 SCHWARTZ, supra note 30, at 49. For a discussion of the American colonial charters and other documents in which Americans declared that they retained all rights held by Englishmen, see supra note 46.

60. For a discussion of the state's right view, see supra notes 11-13 and accompanying text.

61. Kates, supra note 8, at 206. State's right advocates have cited the statement accompanying the provision in the English Bill of Rights as providing the only purpose for the right to keep and bear arms in England. See Rohner, supra note 8, at 59; Weatherup, supra note 10, at 974. Based on this statement, state's right advocates have concluded that the English right to keep and bear arms was limited to "collective" or "militia" purposes. Weatherup, supra note 10, at 974. Mr. Weatherup opined that "[t]here was obviously no recognition of any personal right to bear arms on the part of subjects generally." Id. He argued that "[t]here was no individual right to bear arms; the rights of subjects could be protected only by the political process and the fundamental laws of the land." Id. Most federal courts that have considered the issue have adopted the state's right view. For a discussion of federal case law interpreting the Second Amendment, see supra notes 32-39 and accompanying text.

62. See REPORT OF THE SUBCOMMITTEE, supra note 46, at 3 (concluding that these laws resulted from availability of hunting and need for defense in colonies); see also Kates, supra note 8, at 215-16 (same).

In 1623, Virginia forbade its citizens from traveling without carrying arms. REPORT OF THE SUBCOMMITTEE, supra note 46, at 3. In 1658, the state required every household to have a firearm, and in 1673, the Virginia colonial government agreed to loan money to those households that could not afford a firearm. Id. Similarly, Massachusetts required all freemen to own firearms. Id. Those who did not own a firearm could be fined. Id. Furthermore, with the British military buildup in America in the late eighteenth century, several colonies called upon their citizens to take up arms. United States v. Miller, 307 U.S. 174, 180-81 (1939) (discussing common law history of right to bear arms). In 1784, Massachusetts organized a militia in which every man was responsible for pro-
these provisions required individuals to own arms, many states continued to regulate possession of arms as was necessary to maintain public safety. Thus, while the American colonial charters provide evidence supporting an individual right to keep and bear arms, they also provide early evidence of gun control legislation.

2. The State Constitutions

After the adoption of the Declaration of Independence in 1776, several of the colonies adopted constitutions of their own. The constitutions of Massachusetts, Pennsylvania and Vermont all included provisions that guaranteed the right to bear arms. The purposes of these provisions appear to match those adopted by the English Parliament in 1689.

Pennsylvania's Constitution, adopted in 1776, provided in part:

That the people have a right to bear arms for the defence [sic] of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up;

viding his own firearm. Id. New York and Virginia followed shortly thereafter with similar laws. Id. Commentators have argued that these charters provide clear evidence that the right to keep and bear arms extends beyond the keeping of arms for use in militia service. See Kates, supra note 8, at 215. Mr. Kates suggested that some states required even those citizens not eligible for militia service to keep arms. Id. (citing The Laws and Liberties of Massachusetts 42 (M. Ferrard ed., 1929)).

In addition, many state charters declared that Americans retained all rights held by Englishmen, including the right to bear arms for personal use. For a discussion of other state charters declaring that Americans retained rights possessed by the English, see supra note 46 and accompanying text. For a discussion of the English right to keep and bear arms, see supra notes 45-61 and accompanying text. Nevertheless, some state's right advocates have argued that the drafters of the colonial charters included a right to bear arms only because they were concerned with providing for the common defense by a local militia, rather than military rule. Feller & Gotting, supra note 12, at 52-53. These commentators apparently ignore the evidence discussed above.


[The] duty to keep and bear arms was limited by the interest of colonial governments in preventing the use of firearms for harmful ends. . . . To provide against Negro insurrections, Virginia forbade Negroes from carrying arms without their masters' certificate. Pennsylvania had a similar provision by 1700, and South Carolina even required that the master keep all arms not in use safely locked up in his house.

Id. at 149 (citations omitted). Professor Levin also cited colonial laws forbidding the use of guns in an area where a person or livestock might be wounded or killed, and a Pennsylvania statute forbidding the firing of a gun in Philadelphia without a special license from the governor. Id. at 150 (citing, inter alia, Penn. Stat., ch. 245, § 4 (1721)).

64. 2 SCHWARTZ, supra note 30, at 245, 265, 342.
65. Id.
66. 1 SCHWARTZ, supra note 30, at 41 (discussing text of English Bill of Rights of 1689).
And that the military should be kept under strict subordination to, and governed by, the civil power.\(^67\)

This provision echoes three of the four established purposes supporting the right to keep and bear arms in England.\(^68\) The provision expressly provides for the right to keep and bear arms for both self-defense and the common defense.\(^69\) Furthermore, the provision also contains a clause evidencing fear of standing armies and recognizing the danger such armies present to the liberty of the people.\(^70\)

The Pennsylvania Constitution provides direct evidence that the American colonists, after declaring independence from Great Britain, continued to fear that extensive military power in the hands of government would lead to despotism.\(^71\) Both the American colonists and the


In addition, the Vermont Constitution, adopted in 1777, contains a right to bear arms provision identical to the original provision in the Pennsylvania Constitution of 1776. See Vt. Const. ch. I, art. 16.

\(^68\) For a discussion of the purposes of the English right to keep and bear arms, see supra notes 47-58 and accompanying text.

\(^69\) Pa. Const. of 1776, reprinted in 2 Schwartz, supra note 30, at 266. Commentators Feller and Gotting argue that the terms “defense of themselves and the state” is not a reference to individual self-defense. Feller & Gotting, supra note 12, at 54-55. Instead, Feller and Gotting contend that the self-defense provision guaranteed that all of the people could collectively take up arms to defend their lives. Id. They contend that “the defense of the state” provision referred to protection of the political framework and state sovereignty. Id. However, this interpretation is problematic in light of the provision that a substantial minority of the Pennsylvania legislature recommended be added to the Federal Constitution. 3 Schwartz, supra note 30, at 657. The Pennsylvania provision added hunting to the list of proper uses of arms, indicating that the use of arms extended to personal as well as collective purposes. Id. Unless the Pennsylvania legislature intended the right to keep and bear arms provision in the federal Constitution to be different in scope than the sister provision in the state constitution, it is unlikely that the Pennsylvania right to keep and bear arms was limited to collective purposes.

\(^70\) Pa. Const. of 1776, reprinted in 2 Schwartz, supra note 30, at 266.

\(^71\) Id. The concept of an armed populace protecting against despotism is inconsistent with the state’s right view. For a discussion of the view of some state’s right proponents and many federal courts that the right to keep and bear arms is limited to a state’s right to arm organized military units, see supra notes 11-13 & 32-39 and accompanying text.

The purpose of the original right to bear arms was to protect the people against military institutions under the control of the government. State’s right supporters claim that the Second Amendment provided for the arming and maintenance of such units by the state governments. While the colonists feared organized military forces under the control of the federal government, provisions barring government control of the military in three state constitutions indicate that the people also feared military units under the control of the state governments. See Mass. Const. pt. I, art. XVII, reprinted in 2 Schwartz, supra note 30, at 337; Pa. Const. of 1776, reprinted in 2 Schwartz, supra note 30, at 266; Vt. Const., ch. I, art. 16.
English Parliament countered this possibility by restricting the government's power over the military and by guaranteeing the people the right to keep and bear arms.\textsuperscript{72}

IV. The Legislative History of the Second Amendment

A. The Debates at the Constitutional Convention

At the Constitutional Convention, the Framers heatedly debated whether to include provisions giving Congress the power to regulate and call forth the militia.\textsuperscript{73} The debate centered on how to provide for adequate defense of the nation while maintaining individual liberties.\textsuperscript{74} To prevent the federal government from using the militia to usurp the liberty of the people, opponents of the militia provisions believed that the delegates should leave the power to regulate the militia with the states.\textsuperscript{75} On the other hand, George Mason and James Madison argued that the defense of the nation depended on having either uniform regulation of the militia or a standing army.\textsuperscript{76}

\textsuperscript{72} See, e.g., Mass. Const. pt. 1, art. XVII, reprinted in 2 Schwartz, supra note 30, at 337; Pa. Const. of 1776, reprinted in 2 Schwartz, supra note 30, at 266. The Massachusetts Constitution, adopted in 1789, states that "[t]he people have a right to keep and bear arms for the common defense." Mass. Const. pt.1, art. XVII, reprinted in 2 Schwartz, supra note 30, at 337. At first glance, state's right supporters would cite the Massachusetts right to bear arms provision to support their position that the right is a collective one, exercisable by the state only, and only to arm its militia. However, immediately following the sentence giving \textit{the people} the right to bear arms, the Massachusetts Constitution provides: "And as in a time 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. pt. 1, art. XVII, reprinted in 2 Schwartz, supra note 30, at 342-43. The drafters felt that the people could not trust the Massachusetts government with the power to control the military; therefore, it was unlikely that the people would depend on that government to arm the militia. It is more likely that the drafters intended the "right of the people to keep and bear arms for the common defense" to be an individual right to keep arms, but they limited the use of these arms to providing for the common defense through a system of civil defense.

\textsuperscript{73} James Madison, Journal of the Constitutional Convention 590 (E. H. Scott ed., 1893); see also U.S. Const. art. 1, § 8, cl. 16 (giving Congress 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, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress"); U.S. Const. art. 1, § 8, cl. 15 (giving Congress power to call forth militia).

\textsuperscript{74} Madison, supra note 73, at 590.

\textsuperscript{75} Id. For example, Eldridge Gerry, a representative of Massachusetts, queried: "Will any man say that liberty will be safe in the hands of eighty or an [sic] hundred men [of the national legislature] taken from the whole continent, as in the hands of two or three hundred taken from a single State?" Id.

\textsuperscript{76} Id. at 555, 590-92. George Mason believed that a balance could be struck between the interests of the states and the need for national defense. Id.
Madison eventually convinced the delegation to include a provision giving Congress the power to regulate the militia. Madison argued that having a federally regulated militia would actually be the best way to ensure that the government did not infringe upon the liberty of the people. He reasoned that without an effective militia, the government would have to form a standing army to defend the nation. Madison proposed that the Framers give the responsibility of providing for an effective militia to the federal government because he believed that the states could not sustain such a militia.

The delegates’ compromise at the Constitutional Convention rejected Madison’s proposal. Mason proposed that Congress have the power to regulate and discipline the militia, but that the power to appoint officers be left with the states. However, Oliver Ellsworth of Connecticut felt that Mason’s proposal went too far. Ellsworth proposed that the government have the power to regulate the militia only on two occasions. First, the government should regulate the militia when the militia was in actual service of the federal government. Second, the government should regulate the militia if the states failed to provide regulations on their own. Ellsworth stated that the power over the militia should not be taken from the states, “whose [significance] would pine away to nothing after such a sacrifice of power.” Furthermore, Ellsworth believed that even if the delegates recommended giving Congress this power, the states would never accept such a system of regulation.

Ellsworth was not alone. John Dickinson of Delaware contended that the states never would, nor ought to, give up their power to regulate the militia. Dickinson suggested that the bulk of the power over the militia should remain with the states. He thought the drafters should give the federal government power over only one-fourth of the militia on a rotating basis. Roger Sherman of Connecticut also agreed that the states would not give up their militia. Sherman argued that the states wanted to maintain their militia to defend against insurrections and enforce their laws.

Notably, the militia to which the delegates were referring is not akin to the National Guard of modern times. See The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution [hereinafter Virginia Debates], in 3 Elliot’s Debates on the Federal Constitution 425 (Jonathan Elliot ed., 1859) [hereinafter Elliot’s Debates]. Madison and Mason were referring to the militia as the entire body of the people. For a discussion of Mason’s view on the militia, see infra notes 100-02 and accompanying text. For further discussion of the meaning of the word militia, see Report of the Subcommittee, supra note 46, at 7; Kates, supra note 8, at 214-18; Levinson, supra note 8, at 246-47.

77. Madison, supra note 73, at 590-92.
78. Id. at 590-92.
79. Id. Madison contended that the best way to prevent a standing army was to render it unnecessary by providing in the Constitution for an “effectual provision for a good militia.” Id. at 592.
80. Id. at 590-92. Madison argued that the states had neglected their militia in the past. He felt that after consolidation of the states into a union, the states would depend even less on their own military units for safety. If this occurred, the entire nation would lack an adequate defense. Because discipline of the militia was a national concern, Madison believed that the Constitution ought to provide for federal regulation of the militia. For a discussion of the debates on the adoption of the militia clauses, see Weatherup, supra note 10, at 980-84.
regarding which body of government should regulate the militia is undoubtedly one of the main reasons the Bill of Rights included the right to keep and bear arms, and is probably the origin of the preamble, "'[a] well regulated Militia being necessary to the security of a free State.'"81 This Comment demonstrates, however, that it is unlikely that the Framers simply intended that the right to keep and bear arms would insure that an armed militia existed to provide for the common defense.82

B. The State Ratification Conventions

Thirteen states voted on ratification of the Constitution.83 Eight states recommended amendments; of those, five sought guarantees for the right to keep and bear arms.84 The most illuminating debates with regard to the right to keep and bear arms occurred at the Virginia Convention.85

81. U.S. CONST. amend. II. For a discussion of the state ratification debates and the comments of various 18th century political figures, see infra notes 83-202 and accompanying text.

82. It is more likely that the right to keep and bear arms was intended to provide the people with a check against the government's power over the militia. After a majority of the delegates of the Constitutional Convention approved the Constitution, it was sent to the states for ratification. For a discussion of the state ratification conventions, see infra notes 83-125 and accompanying text. One of the main topics of debate at the state conventions was whether the proposed Constitution provided the federal government with tremendous power over the militia without ensuring that the rights and liberties of the people would be protected. Madison, supra note 73, at 590-91. George Mason, who was instrumental in securing congressional regulation of the militia at the Constitutional Convention, did not sign the proposed Constitution because the delegates did not include a bill of rights. See Objections of the Hon. George Mason, One of the Delegates in the Late Continental Convention, To the proposed Federal Constitution; Assigned as His Reasons for Not Signing the Same, extracted in 1 Elliot's Debates, supra note 76, at 494. The debates between the supporters of the new Constitution and their opponents demonstrate that the people needed arms to defend against the federal government's potential abuse of its regulatory power over the armed militia. For a discussion of the Federalist Papers and the writings of the Anti-Federalists, see infra notes 143-202 and accompanying text.

83. 1 Elliot's Debates, supra note 76, at 319.

84. 5 Schwartz, supra note 30, at 983. New Hampshire, New York, North Carolina, Rhode Island and Virginia recommended including a right to keep and bear arms provision. 4 Schwartz, supra note 30, at 912; see also 1 Elliot's Debates, supra note 76, at 326-28. Furthermore, a substantial minority of the Pennsylvania delegates also recommended that the First Congress add a right to keep and bear arms provision to the federal Constitution. 3 Schwartz, supra note 30, at 658; see also Report of the Subcommittee, supra note 46, at 5. In Massachusetts, Samuel Adams unsuccessfully pushed for an amendment providing "'[t]hat the said Constitution shall never be construed to authorize Congress to infringe the just liberty of the press or the rights of conscience; or to prevent the people of the United States who are peaceable citizens from keeping their own arms.'" Report of the Subcommittee, supra note 46, at 6 (emphasis added).

85. See Virginia Debates, in 3 Elliot's Debates, supra note 76, at 68-86.
1. The Virginia Debates

The Virginia Convention was led, in large part, by James Madison and George Mason. Thus, it is not surprising that a substantial portion of the debates centered on Article I, Section 8, Clause 16 of the Constitution. Mason, who supported this provision at the Constitutional Convention, nonetheless argued that the Framers should place checks on Congress’ power over the militia. One of Mason’s proposed checks was on Congress’ power to arm the militia. Mason thought that there was a danger that this power could be interpreted as giving Congress the exclusive power to arm the militia. Congress thus could destroy the militia by refusing to invoke its Article I, Section 8 power to arm the militia. Mason believed that if the militia was neglected, and thereby disarmed, Congress would have an excuse to establish a standing army. The government could then use the standing army to strip unarmed and defenseless people of their liberty. Therefore, Mason, an Anti-Federalist, proposed that Congress amend the Constitution to give the states the express power to arm the militia if Congress failed to

86. See generally id., in 3 Elliot’s Debates, supra note 76.
87. Id., in 3 Elliot’s Debates, supra note 76, at 378-428.
88. Id., in 3 Elliot’s Debates, supra note 76, at 380.
89. Id.
90. Id.
91. Id. Mason stated:
     Should the national government wish to render the militia useless, they may neglect them, and let them perish, in order to have a pretence [sic] of establishing a standing army . . . . Once a standing army is established . . . the people lose their liberty. When against a regular and disciplined army, yeomanry are the only defense,—yeomanry, unskilled and unarmed . . . . Forty years ago, when the resolution of enslaving America was formed in Great Britain, the British Parliament was advised by an artful man, who was governor of Pennsylvania, [Sir William Keith], to disarm the people; that it was the best and most effectual way to enslave them; . . . and let them sink gradually, by totally disusing and neglecting the militia.

Id., in 3 Elliot’s Debates, supra note 76, at 379-80 (emphasis added). Note that Mason’s concerns are consistent with the position he took at the Constitutional Convention in favor of giving the Congress regulatory power over the militia. Madison, supra note 73, at 551. For a discussion of the debates at the Constitutional Convention, see supra notes 73-82 and accompanying text.

At the Constitutional Convention, James Madison also stated that a well-regulated militia was necessary to avoid forming a standing army to provide for the national defense. Madison, supra note 73, at 590-92. George Mason did not disagree with James Madison on this point. Id. Rather, Mason was concerned that Congress’ power over the militia was subject to abuse. In fact, at the Virginia Convention, Mason stated that were it not for the possibility that Congress’ power to arm the militia would be interpreted as exclusive, he would have supported Article I, Section 8, Clause 16. Virginia Debates, in 3 Elliot’s Debates, supra note 76, at 380.

92. Virginia Debates, in 3 Elliot’s Debates, supra note 76, at 380.
93. Id.
do so.94

The debates at the Virginia Convention lend some support to the state’s right view of gun control.95 State’s right proponents contend that the right to bear arms is limited to the states’ right to arm their militia.96 In fact, George Mason and Patrick Henry both suggested that the states have the express power to arm the militia in order to avoid federal disarmament.97 Some state’s right proponents, however, inter-

94. Id. James Madison believed that Congress’ power to arm the militia under Section 8 of Article I did not bar the states from arming their own militia; therefore, Mason’s concerns were unwarranted. Id., in 3 Elliot’s Debates, supra note 76, at 381. At the Constitutional Convention, Madison contended that Congress’ power to arm the militia did not extend to the actual furnishing of arms. See Madison, supra note 73, at 589. The debates at the Constitutional Convention support Madison’s position. Id. Rufus King, a representative of Massachusetts, proposed that arming the militia would produce two results. Id. First, King contended that arming the militia would mean specifying the kind, size and caliber of weapons the militia could hold. Id. Second, arming the militia would mean regulating the mode of furnishing arms; either by the militia themselves, the state governments or the national treasury. Id.

Notwithstanding Madison’s and King’s arguments, some of the Framers were skeptical of the militia provisions as drafted. Virginia Debates, in 3 Elliot’s Debates, supra note 76, at 384-93, 395-99. For example, Patrick Henry supported Mason, stating “[t]he great object is, that every man be armed.” Id., in 3 Elliot’s Debates, supra note 76, at 386. Henry proposed that no harm would be done by expressly stating in the Constitution that the Framers intended the power to arm the militia to be held concurrently by both the state and federal governments. Id., in 3 Elliot’s Debates, supra note 76, at 399. Thus, even though the legislative history of Article I, Section 8, Clause 16 supports Madison’s view that the right of Congress to arm the militia was not intended to be exclusive, many feared that it would be interpreted as being so. Id., in 3 Elliot’s Debates, supra note 76, at 384-93, 395-99.

95. For a discussion of the views of George Mason and Patrick Henry, see Virginia Debates, in 3 Elliot’s Debates, supra note 76, at 384-93, 395-99.

96. See, e.g., Feller & Gotting, supra note 12, at 60 (adopting state’s right view).

97. See Virginia Debates, in 3 Elliot’s Debates, supra note 76, at 384-93, 395-99 (discussing views of George Mason and Patrick Henry); see also Feller & Gotting, supra note 12, at 60. Feller and Gotting argue that the Second Amendment’s adoption was “clearly designed to placate Mason, Henry and others” who argued that the states should have the right to arm their militia. Id. Unlike the drafters of many other state constitutions, there is evidence that the drafters of the Virginia Constitution did not fear disarmament at the hands of the state. See 2 Schwartz, supra note 90, at 232-35. The Virginia Constitution, which was drafted primarily by George Mason, did not contain a right to keep and bear arms provision. Id. Thomas Jefferson wanted to include a constitutional provision providing that “[n]o free man shall be debarred the use of arms [within his own lands or tenements].” Id. at 245. The legislature, however, rejected Jefferson’s proposal and adopted Mason’s constitution, which did not contain a right to bear arms provision. Id. at 245. The omission of a right to keep and bear arms provision from the Virginia Constitution may indicate that, while the Virginia legislature feared federal disarmament of the people, it did not fear disarmament at the hands of the state. For a discussion of state constitutions containing a right to keep and bear arms provision, see supra notes 64-72 and accompanying text.
pret the right to keep and bear arms as being further limited to the arming of organized military forces. The Virginia debates do not support this view. Mason’s militia consisted of the entire body of the people of each state. Thus, defense by the militia meant civil defense, not defense by organized military units under the control of the state. Hence, even if the right to bear arms is limited to a state’s right, it is a state’s right to arm the people, not to arm organized military units.

Moreover, even though the debates at the Virginia Convention suggest that the right to keep and bear arms may rest with the states, the language used in the constitutional amendment that the Virginia delegation recommended suggests that the right rests with the people. The

98. See Feller & Gotting, supra note 12, at 64. Feller and Gotting argue that “the term ‘well regulated militia’ must be taken to mean the active, organized militia of each state, which today is categorized as the state National Guard.” Id. In addition to commentators, most federal courts take this position. See, e.g., Stevens v. United States, 440 F.2d 144 (6th Cir. 1971) (adopting state’s right view). For a discussion of federal case law adopting the state’s right view, see supra notes 32-39 and accompanying text.

99. For a discussion of why the Virginia debates do not support this view, see infra notes 100-05.

100. Virginia Debates, in 3 Elliot’s Debates, supra note 76, at 425. George Mason stated that “[a] worthy member has asked who are the militia, if they are not the people of this country,” and that “[t]hey consist now of the whole people.” Id. In addition, the Senate Subcommittee on the Constitution proposed that the militia referred to in the Second Amendment is “the entire populace capable of bearing arms, and not . . . any formal group such as what is today called the National Guard.” Report of the Subcommittee, supra note 46, at 7. To support this position, the Subcommittee cited the Militia Act of 1792. Id. (citing Act of May 8, 1792, ch. 33 (enacted by 2d Cong., 1st Sess.)). The Militia Act mandated that militia members own arms and keep ammunition. Id. The Act defined militia to include almost every adult male in the United States. Id.

Moreover, James Madison, who supported federal regulation of the militia, recognized that the people made up the militia. Virginia Debates, in 3 Elliot’s Debates, supra note 76, at 378. Madison stated that “[i]f insurrections should arise, or invasions should take place, the people ought unquestionably be employed to suppress and repel them, rather than a standing army.” Id. (emphasis added). In addition, the Federal Farmer, a prominent anti-federalist, also recognized the militia as consisting of the entire body of the people. See Letter from the Federal Farmer to the Republican No. III (Oct. 10, 1787) [hereinafter Federal Farmer III], in Letters From the Federal Farmer to the Republican 21 (William H. Bennett ed., 1978) [hereinafter Letters From the Federal Farmer]. For a further discussion of the Federal Farmer’s views, see infra notes 170-79 and accompanying text.

101. For a discussion of the eighteenth century meaning of the word militia, see Kates, supra note 8, at 213-17. Mr. Kates wrote: “The Founders stated what they meant by ‘militia’ on various occasions. Invariably they defined it in some phrase like ‘the whole body of the people,’ while their references to the organized-military-unit usage of militia, which they call a ‘select militia,’ were strongly pejorative.” Id. at 216. For further discussion of the eighteenth century meaning of the word militia, see Report of the Subcommittee, supra note 46, at 4-7; Levinson, supra note 8, at 646-47.

102. See Virginia Debates, in 3 Elliot’s Debates, supra note 76, at 425.

103. See id., in 3 Elliot’s Debates, supra note 76, at 659.
proposed amendment provided:

That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence [sic] of a free state; that standing armies, in times of peace, are dangerous to liberty and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.104

This amendment specifically refers to "the people" as the object of the right to bear arms.105

State's right proponents do not see this amendment as an obstacle to their interpretation of the Second Amendment.106 They argue that the word "people" used in colonial constitutions often referred to the states as opposed to individuals, and therefore, a similar definition applies within the Second Amendment.107 At least one constitutional scholar has criticized this view.108 Professor Stanford Levinson maintains that this view is inconsistent with the First, Fourth, Ninth and Tenth Amendments, all of which use the term "the people" when referring to individual rights.109

The view that the term "the people" refers to sovereign rights is also incompatible with the Supreme Court's recent ruling in United States

104. Id. (emphasis added). Stephen Halbrook argues that this provision clearly provides for an individual right to bear arms. See Halbrook, supra note 40, at 27. He points out that the three clauses of the provision are stated independently of one another. Id. He contends that the first clause is "a general protection of the individual right to have arms for any and all lawful purposes," and it is in no way dependent on the clause regarding the militia. Id.

105. Id.

106. See, e.g., Lawrence Delbert Cress, An Armed Community: The Origins and Meaning of the Right to Bear Arms, 71 J. Am. Hist. 22, 42 (1984) ("The Second Amendment, concerning the right of the people to keep and bear arms, was formed in contemplation, not of individual rights, but of the maintenance of the states' active organized militias.").

107. Id.

108. See Levinson, supra note 8, at 652-54.

109. Id.; see also U.S. Const. amend I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.") (emphasis added); U.S. Const. amend IV ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . .") (emphasis added); U.S. Const. amend IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.") (emphasis added); U.S. Const. amend. X ("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.") (emphasis added).
v. Verdugo-Urquidez. The Verdugo-Urquidez Court held that "the people" referred to in the First, Second, and Fourth Amendments, and "to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." Significantly, the Court found that the people protected by the Second Amendment are the same people protected by the First, Fourth, Ninth and Tenth Amendments.

Each of these amendments refer to individual rights.

Furthermore, the Verdugo-Urquidez Court emphasized that the terms "the people" and "persons" mean two different things in the Constitution. The Court indicated that the term "person" is used when describing rights guaranteed to all individuals physically located in the United States, while the term "the people" is used when describing rights guaranteed only to those individuals legally residing in the United States. The Court held that individuals must have sufficient ties to the national community to benefit from the rights guaranteed to "the people."

2. The Debates of the Remaining States

The remaining state ratification debates regarding Congress' power to regulate the militia and the right to keep and bear arms were not as well recorded as the Virginia debates. Nonetheless, the known recommendations of these states further weaken the state's right argument. Every state recommending a right to keep and bear arms provision suggested that the Constitution give "the people" that right.


11. Id. at 265.

12. Id. This Supreme Court ruling is extremely problematic for those state's right advocates who claim that the term "the people" does not mean the same thing in the Second Amendment as it does in the other amendments discussed by the Verdugo Court. See, e.g., Maynard Holbrook Jackson, Jr., Handgun Control: Constitutional and Critically Needed, 8 N.C. CENT. L.J. 189, 192 (1977). Jackson contends that the term "the people" as used in the Second Amendment applies only to the people who are part of the state militia, and presumably he is referring to the organized state militia. Id.

13. For the text of these amendments, see supra note 109.

14. Verdugo, 494 U.S. at 265. As previously indicated, Professor Cress argues that the term "person" is used in the Constitution to refer to individual rights and the term "the people" is used to refer to state's rights. Cress, supra note 106, at 31.

15. Verdugo, 494 U.S. at 265.

16. Id. For further discussion of the meaning of the term "the people" in the Constitution, see Kates, supra note 8, at 218.

17. See generally 1 ELLIOT'S DEBATES, supra note 76 (recording all state ratification debates).

18. 4 SCHWARTZ, supra note 30, at 968. North Carolina recommended an amendment with the same wording as the one recommended by Virginia. Id.
more, the amendments recommended by New Hampshire and a minority of the Pennsylvania delegates firmly establish that the Framers did not intend the right to keep and bear arms simply to protect military usage of arms. 119 New Hampshire recommended that the Constitution be amended to expressly provide that “Congress shall never disarm any citizen, unless such as are or have been in actual rebellion.” 120 Use of the word “citizen” in the New Hampshire amendment connotes an individual right. 121

The Pennsylvania minority delegates’ amendment irrefutably extended the right to keep and bear arms to individuals. 122 The amendment provided that the purpose of this right was:

That the people have a right to bear arms for the defence [sic] of themselves and their own State, . . . or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals . . . .123

addition, New York and Rhode Island suggested amendments that read “the people have a right to keep and bear arms; that a well-regulated militia, including the body of the people capable of bearing arms, is the proper, natural and safe defence [sic] of a free state.” 1 Elliot’s Debates, supra note 76, at 328, 335 (emphasis added).

119. See 1 Elliot’s Debates, supra note 76, at 326 (listing New Hampshire amendment); 3 Schwartz, supra note 30, at 65 (discussing Pennsylvania amendment).

120. 1 Elliot’s Debates, supra note 76, at 326 (emphasis added).

121. Id. Furthermore, it is doubtful that the New Hampshire amendment’s right to keep and bear arms provision is limited to “militia purposes.” Id. An amendment providing for freedom of religion and conscience separated the right to keep arms provision from an amendment concerning standing armies. Id. at 326; see also Halbrook, supra note 40, at 27. Halbrook stated that “[t]he New Hampshire and Pennsylvania proposals for the right to keep and bear arms were viewed as among ‘those amendments which particularly concern several personal rights and liberties.’” Id. (citing A Foreign Spectator, Remarks on the Amendments, No. XI, Federal Gazette, Nov. 28, 1788).

122. See 3 Schwartz, supra note 30, at 65. Although only a minority of the Pennsylvania delegates adopted the amendment, the views of this minority greatly influenced the adoption of the Bill of Rights. See A Pennsylvania III, Pa. Gazette, Feb. 20, 1788 [hereinafter Pennsylvania III], reprinted in 2 Documentary History of the Constitution 1774 (John P. Kaminski & Gaspare J. Saladino eds., microform supp. 1984) [hereinafter Documentary History]. Toench Coxe, an influential senator and a federalist, opined that the views of the Pennsylvania minority represented “the ground of opposition to the Constitution throughout the union.” Id.

123. 3 Schwartz, supra note 30, at 658. State’s right advocates contend that although the recommendations of the Pennsylvania minority had an impact on the ratification conventions of the other states, “the salient feature” of these recommended amendments was that they guaranteed the states the right to arm their militia should Congress fail to do so. See Feller & Gotting, supra note 12, at 58. Feller and Gotting, however, completely ignore the provision that grants individuals the right to keep and bear arms. Id.

Furthermore, Professor Rohner, also a state’s right advocate, states that although the colonists were concerned with personal protection and provision of
Thus, this amendment would have provided the people with an individual right to bear arms for a variety of purposes. 124

The debates of the state ratification conventions do not conclusively establish the intent of the Framers of the Bill of Rights with respect to the right to keep and bear arms. The debates, however, did inform the First Congress' consideration of the Second Amendment. 125

C. Adoption of the Second Amendment by the First Congress

In all, the states suggested to the First Congress 210 amendments containing 100 different substantive provisions. 126 James Madison recommended fourteen of these, including a provision guaranteeing the right to keep and bear arms, for adoption by the House of Representatives. 127 The recorded debates of the First Congress do not reveal the explicit reason for including the right to keep and bear arms in the Bill of Rights. 128 James Madison, however, did discuss the general reasons

food, "there is no persuasive indication that these considerations influenced Congress or the various state ratifying conventions in adopting the second amendment." Rohner, supra note 8, at 57. Professor Rohner fails to reconcile this proposition with Toench Cox's contention that the views of the Pennsylvania minority represented the basis throughout the union for opposing the Constitution. Pennsylvanian III, reprinted in 2 Documentary History, supra note 122, at 1774.

124. PA. CONST. OF 1776, reprinted in 2 Schwartz, supra note 30, at 266. Interestingly, however, the Pennsylvania minority did not suggest an unlimited right to bear arms. Id. The government could enact laws prohibiting criminals from carrying firearms. Id. The amendment also permitted regulation of arms as was necessary for the public safety. Id. These are the exact objectives of the Brady Bill. Biskupic, supra note 2, at 604. Hence, while the Pennsylvania amendment presents strong evidence against the state's right view, the amendment supports the goal most state's right advocates seek to achieve—effective gun control.

125. See, e.g., REPORT OF THE SUBCOMMITTEE, supra note 46, at 6; Pennsylvanian III, reprinted in 2 Documentary History, supra note 122, at 1774 (citing representative view of Pennsylvania minority). In its report, the Senate Subcommittee on the Constitution stated:

When the first Congress convened for the purpose of drafting a Bill of Rights, it delegated the task to James Madison. Madison did not write upon a blank tablet. Instead he obtained a pamphlet listing the State proposals for a Bill of Rights and sought to produce a briefer version incorporating all the vital proposals of these. His purpose was to incorporate, not distinguish by technical changes, proposals such as that of the Pennsylvania minority, Sam Adams and the New Hampshire delegates.


126. 5 Schwartz, supra note 30, at 983.

127. Id. The right to keep and bear arms provision initially read: "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person." Id. at 1026.

128. Id. at 1026-27. The debates regarding Madison's suggested amend-
underlying the adoption of the Bill of Rights.\textsuperscript{129}

Madison, who was an adamant supporter of the Constitution and the formation of a federal government, felt that those who opposed the Constitution feared that the federal government would use its constitutional powers to strip the people of their individual liberties.\textsuperscript{130} Madison believed that the Framers could address these concerns by including in the Constitution certain basic safeguards of the rights of the people.\textsuperscript{131} Madison opined that, if Congress could provide these safeguards without damaging the Constitution, Congress should adopt them.\textsuperscript{132}

The Framers may have considered the right to keep and bear arms the most essential of all of these safeguards. The Framers sought to balance the fear of despotism and abuse of a government-controlled military with the belief that a well regulated militia was necessary for the defense of a free state.\textsuperscript{133} The Framers decided that Congress needed

\begin{itemize}
  \item \textsuperscript{129} Id. at 1024-25.
  \item \textsuperscript{130} Id. at 1024. Madison stated: I believe that the great mass of the people who opposed [the Constitution] disliked it because it did not contain effectual provisions against encroachment on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power; nor ought we to consider them safe, while a great number of our fellow-citizens think these securities necessary. \textit{Id.} at 1025.
  \item \textsuperscript{131} Id. at 1024-25. Madison argued: "It will be a desirable thing to extinguish from the bosom of every member of the community, any apprehensions that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled." \textit{Id.} at 1024. Madison's statements show that he believed the people had grown accustomed to certain fundamental rights, and feared that those rights were in jeopardy at the hands of the new government. \textit{Id.} at 1024-25. As a result, Madison believed that the people wanted these rights expressed in the Constitution. \textit{Id.} Madison contended that "[the drafters] ought not to disregard [the people's] inclination, but, on principles of amity and moderation, conform to their wishes and expressly declare the great rights of mankind secured under [the] constitution." \textit{Id.}
  \item \textsuperscript{132} Id. at 1024-25. Madison stated: I do conceive that the constitution may be amended; that is to say, if all power is subject to abuse, that then it is possible the abuse of the powers of the General Government may be guarded against in a more secure manner than is now done, while no one advantage arising from the exercise of that power shall be damaged or endangered by it. We have in this way something to gain, and if we proceed with caution, nothing to lose. \textit{Id.} at 1025.
  \item \textsuperscript{133} See id. The colonial charters and state constitutions, as well as the Constitutional Convention, Virginia debates and the amendments recommended by the various states, clearly demonstrate that the Framers feared federal control of the militia. For a discussion of these charters, constitutions,
to have the power to regulate the militia, and that the people had to be
given a safeguard against potential abuse of this power.134 Accordingly,
the Framers may have included the first phrase of the Second Amend-
ment, "[a] well regulated Militia being necessary to the security of a free
State," to show why the second phrase, "the right of the people to keep
and bear Arms, shall not be infringed" was necessary.135

The state's right view is inconsistent with the theory that the Second
Amendment was adopted to safeguard against the government's abuse
of its power to regulate the military.136 State's right advocates contend
that the right to bear arms extends only to the arming of organized mili-
tary forces.137 As indicated above, however, the Framers intended the
Second Amendment to protect the people from just these types of
forces.

State's right proponents also contend that the right to keep and
bear arms was included in the Second Amendment in order to provide

debates and amendments, see supra notes 62-125 and accompanying text. An
analysis of The Federalist Papers and the writings of the Anti-Federalists also illus-
trates that the Framers felt that the easiest way for the federal government to
suppress the people would be to control an organized military. For a discussion
of the debates between the Federalists and the Anti-Federalists, see infra notes
143-202 and accompanying text.

134. See, e.g., Virginia Debates, in 3 Elliot's Debates, supra note 76, at 380
(discussing George Mason's position on why people should have right to keep
and bear arms).

135. U.S. Const. amend. II. This was not the final wording of the Second
Amendment that the House of Representatives adopted. See 5 Schwartz, supra
note 30, at 1107, 1127. The House adopted an amendment which read: "A well
regulated militia, composed of the body of the people, being the best security of
a free state, the right of the people to keep and bear arms shall not be infringed;
but no person religiously scrupulous shall be compelled to bear arms." Id. at
1107. The changes in the language were made by the Senate; however, most of
the Senate debates were not recorded. Id. at 1145. Yet, Mr. Schwartz reports
that other than removing the language regarding conscientious objectors, the
Senate merely performed the function of "tightening up the language" and
"striking out surplus wording and provisions." Id.

136. The First Congress could probably have provided for defense against
a standing federal army by giving the states the power to arm local militia units
under each state's control. The debates between the Federalists and the Anti-
Federalists, however, demonstrate that the Framers feared all organized military
units, not just those under the control of the federal government. See, e.g., Fed-
eral Farmer III, in Letters From the Federal Farmer, supra note 100, at 21 (dis-
cussing Federal Farmer's view on dangers presented by all forms of organized
military units). For further discussion of these debates, see infra notes 152-202
and accompanying text. In addition, the fear of organized military units under
the control of the states is also evidenced by the fact that three state constitutions
forbade state governmental control of the military. See Mass. Const. pt. 1, art.
XVII., reprinted in 2 Schwartz, supra note 30, at 337; Pa. Const. of 1776, re-
printed in 2 Schwartz, supra note 30, at 266; Vt. Const., ch. I, art. 16.

137. See Feller & Gotting, supra note 12, at 64; Rohner, supra note 8, at 53-
55.
for the common defense. The limited recorded debates of the United States Senate, however, indicate that Congress was not concerned with losing an adequate defense if the militia was disarmed. Indeed, the first Senate rejected a proposal that it insert the words “for the common defense” after the phrase “right of the people to keep and bear arms.” The Framers were confident that the federal government would provide for the common defense, whether it be through regulation of the militia or by establishment of a standing army. However, because the Framers were unsure exactly how this defense would be insured, they provided the people with the right to keep and bear arms as a check against abuses of Congress’ power over the military.

138. See Feller & Gotting, supra note 12, at 64; Rohner, supra note 8, at 53-55.

139. HARDY, supra note 47, at 76. Rather, the people were concerned that Congress would purposely fail to arm the militia in order to have a reason to establish a standing army, which would then provide for the national defense. See Virginia Debates, in 3 ELLIOTT’S DEBATES, supra note 76, at 379-80 (discussing view of George Mason and Patrick Henry that Congress might fail to arm militia so that Congress would have reason to establish standing army).

140. See HARDY, supra note 47, at 76 (discussing Senate’s debates on Second Amendment). State’s right advocates have argued that the Senate removed the phrase “for the common defense” because it was redundant. Jackson, supra note 112, at 193. Specifically, Mr. Jackson contends that the phrase “a well regulated militia being necessary for the security of a free state” already limited the purpose of the Second Amendment to providing for the common defense. Id. The rationale underlying the Bill of Rights, however, indicates that Congress did not include the first phrase of the Second Amendment to provide for the common defense. This phrase was probably intended to show that the reason the people needed the right to keep and bear arms was to defend against potential abuse of the militia by the federal government. Moreover, Article I, Section 8, Clauses 15 and 16 of the Constitution already gave Congress the power to regulate and call forth the militia to provide for the common defense. U.S. CONST. art. 1, § 8, cls. 15, 16. Thus, it was not necessary to grant this same power in the Second Amendment.

141. See HARDY, supra note 47, at 76 (discussing Senate debates on Second Amendment).

142. This is not to say that protection against military encroachment on the liberties of the people was the only reason for adopting the Second Amendment. The common law development of the right to bear arms and the amendments recommended by the various states suggest that the right extended to self-defense, hunting, enforcement of the local laws and other purposes. For a discussion of the development of the right to keep and bear arms, see supra notes 45-72 and accompanying text. In addition, Madison’s placement of the right to bear arms in the original draft of the Bill of Rights suggests that it was not merely a response to Article I, Section 8, Clause 16. HARDY, supra note 46, at 72. Originally, Madison would have inserted the Bill of Rights to amend specific provisions of the Constitution rather than appending the Bill of Rights as a list at the end of the document. Id. Madison, however, did not intend to use the right to keep and bear arms to amend Article I, Section 8, Clause 16. Id. Instead, he would have placed the right to keep and bear arms in Article I, Section 9, along with freedom of speech and religion, rights which are indisputably individual by nature, and which have been recognized as the most fundamental of all
V. Views of the Major Political Figures Who Influenced the Adoption of the Constitution

The Constitutional Convention of 1787 was followed by a heated debate between many of the major political figures of the late eighteenth century.\(^\text{143}\) On one side of the debate were the Federalists, who strongly supported adoption of the Constitution as it was drafted in Philadelphia during the summer of 1787.\(^\text{144}\) On the other side of the debate were the Anti-Federalists, who felt that the Constitution did not sufficiently protect the autonomy of the states and individual rights.\(^\text{145}\)

The most prominent record of the views of the Federalists are the essays of James Madison, Alexander Hamilton, and John Jay, which constitute The Federalist Papers.\(^\text{146}\) The Letters From the Federal Farmer To the Republican are one of the most commonly cited sources of the Anti-Federalist views.\(^\text{147}\)

After the American Revolution, American citizens were skeptical of rights. \(\text{Id.}\) see also Konisberg v. State Bar, 366 U.S. 36 (1961) (holding infringement on freedom of speech deserves strict scrutiny). By placing the right to bear arms in Article I, Section 9, Madison intended it to be an individual right. Also, Madison did not append the right to keep and bear arms language to the militia clauses of the Constitution. \(\text{Id.}\) This indicates that Madison did not feel that military encroachment on the liberty of the people was the only reason the right was necessary. \(\text{Id.}\) For further discussion of Madison’s original placement of the right to keep and bear arms, see Kates, supra note 8, at 223.

\(^\text{143}\) See generally The Federalist (Clinton Rossiter ed., 1961); Letters From the Federal Farmer, supra note 100.

\(^\text{144}\) See generally The Federalist, supra note 143.

\(^\text{145}\) See generally Letters From the Federal Farmer, supra note 100.

\(^\text{146}\) See generally The Federalist, supra note 143.

\(^\text{147}\) The Federal Farmer’s letters were written between October 1787 and January 1788 as part of an effort to secure amendments to the Constitution. See Letters From the Federal Farmer, supra note 100, at xiii. For many years the letters have been attributed to Richard Henry Lee. \(\text{Id.}\) at xiv. Lee was a representative of Virginia at the Constitutional Convention, a Senator in the First Congress, and a strong supporter of a bill of individual rights. \(\text{Id.}\) However, in recent times, some commentators have questioned this attribution. See generally Gordon S. Wood, The Authorship of the Letters from the Federal Farmer, 31 Wm. & Mary Q. 299 (1974) (discussing identity of author of Letters from Federal Farmer); see also Letters From the Federal Farmer, supra note 100, at xiv.

Regardless of the actual authorship of the letters, commentators agree that the letters express many of the same views as Lee and are recognized as a formidable counterpart to The Federalist. \(\text{Id.}\) at xv, xxxiii-xxxv. Alexander Hamilton himself referred to the Federal Farmer as a formidable opponent. \(\text{Id.}\) at xxxv. Furthermore, the letters were widely advertised during the ratification conventions and “had a substantial impact on the ratification debates and actually supplied many of the arguments put forth by other opponents of the Constitution.” \(\text{Id.}\) at xxxv (citing Jackson Turner Main, The Anti-Federalists (1961)). Indeed, the letters “became a sort of textbook for opposition to the Constitution as The Federalist became for the supporters of the document.” \(\text{Id.}\) at xxxvi (citing The Anti-Federalist Papers (Morton Borden ed., 1965)). For a further discussion of the debate over authorship of the letters, see \(\text{Id.}\) at xiv-xx.
placing their new-found liberty in the hands of a central government.\textsuperscript{148} They feared that the new federal government would absorb all the powers of government, usurping the states' role as a protector of individual rights.\textsuperscript{149} Before the states would accept the new Constitution, the Federalists had to convince the people that their liberty was not in danger.\textsuperscript{150} The Federalists focused on the fact that the central government could not tyrannize an armed populace.\textsuperscript{151}

\textbf{A. The People Have the Right to Bear Arms}

In \textit{The Federalist Number 46}, James Madison addressed concern over the division of power between the federal government and the states.\textsuperscript{152} Madison contended that the federal government would not threaten the existence of the states because both governments are subject to common constituents.\textsuperscript{153} Madison opined that the people were the supreme

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  \item \textsuperscript{148} \textit{Pennsylvania III}, reprinted in 2 \textit{Documentary History}, supra note 122, at 1774.
  \item \textsuperscript{149} Toench Coxe, a Federalist from Pennsylvania, wrote in the \textit{Pennsylvania Gazette} on February 20, 1788 that the Pennsylvania minority dissented because they felt the powers vested in Congress would “absorb and annihilate” the powers of the several states. \textit{Id.}
  \item During the debate over the adoption of the Constitution, Coxe wrote under two pen names, “A Pennsylvanian” and “A Freeman.” 15 \textit{Documentary History}, supra note 122, at 453-54. For a discussion of the position of the Pennsylvania minority, see supra notes 122-24 and accompanying text.
  \item \textsuperscript{150} See \textit{The Federalist} No. 46, supra note 143, at 294-300 (James Madison).
  \item \textsuperscript{151} \textit{Id.}
  \item \textsuperscript{152} \textit{Id.}
  \item \textsuperscript{153} \textit{Id.} Madison stated that:
  
  [The people] must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other.

  \textit{Id.}
  \item Alexander Hamilton also contended that the representative system would provide the people with a check on the powers of the federal government. \textit{The Federalist} No. 28, supra note 143, at 180 (Alexander Hamilton). Hamilton, addressing the concerns of those who feared the establishment of standing armies, stated:
  
  [I]t is a full answer to those who require a more peremptory provision against military establishments in time of peace to say that the whole power of the proposed government is to be in the hands of the representatives of the people. This is the essential, and, after all, the only efficacious security for the rights and privileges of the people which is attainable in a civil society.

  \textit{Id.}
  \item In addition to Madison and Hamilton, Toench Coxe, writing as “A Freeman” in February 1788, also proposed that the people provide a check on the federal government because the federal representatives are accountable to the people. \textit{See A Freeman III}, \textit{PA. Gazette}, Feb. 6, 1788 [hereinafter Freeman III], reprinted in 16 \textit{The Documentary History of the Ratification of the Consti-
authority over both. Madison further reasoned that any fear of the federal government usurping the power of the states was unreasonable because the people would have closer ties to the state governments than to the federal government. Madison argued that the only conceivable way the federal government would be able to suppress the people would be by accumulating a military force.

Madison also proposed, however, that even if the federal government formed a standing army “fully equal to the resources of the country . . . [and] entirely at the devotion of the federal government . . . the State governments with the people on their side would be able to repel the danger.” The federal army would only be made up of a portion of the citizenry able to bear arms. This army would be up against “a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by [state] governments possessing their affections and confidence.” Madison believed that the people could repel a federal army by taking up arms. Because there was no right to keep and bear arms in the Constitution as originally

TUTION 50-51 (John P. Kaminski & Gaspare J. Saladino eds., 1986) [hereinafter Documentary History of the Ratification].

154. THE FEDERALIST No. 46, supra note 143, at 294 (James Madison).

155. Id. at 295. Madison went on to argue that the only way the federal government could win the favor of the people would be to earn it through effective administration. Id. He proposed that if the federal government won the people’s favor in that way, the government deserved such favor. Id. Furthermore, Madison argued that the members of the federal government would be naturally biased toward the states, as the members themselves would be representatives from the various states. Id. at 296-97. According to Madison, if the federal government attempted to encroach upon the powers of the states, the states would easily defeat the encroachment. Id. at 297. He stated that “should an unwarrantable measure of the federal government be unpopular in particular States . . . the means of opposition to it are powerful and at hand.” Id. He argued that the federal government, composed of “[a] few representatives of the people would be opposed to the people themselves; or rather one set of representatives would be contending against thirteen sets of representatives, with the whole body of their common constituents on the side of the latter.” Id. at 298 (emphasis added).

156. Id. at 298.

157. Id. at 299 (emphasis added).

158. Id. According to Madison’s estimates, such an army could not exceed one hundredth-part of the total number of citizens or one twenty-fifth of those capable of bearing arms. Id. Madison predicted that this group could not exceed twenty five or thirty thousand men. Id.

159. Id. (emphasis added). Alexander Hamilton agreed that the people would be able to repel federal abuse of power. THE FEDERALIST No. 28, supra note 143, at 180 (Alexander Hamilton). Hamilton stated that “[i]f the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government.” Id.

160. THE FEDERALIST No. 46, supra note 143, at 299 (James Madison).
drafted, Madison must have assumed an inherent right to do so.\footnote{161 Later, at the First Congress, Madison supported amendments to the Constitution guaranteeing individual rights. 5 SCHWARTZ, supra note 30, at 1025. However, Madison’s support was conditional upon the amendments not threatening the powers of the federal government. \textit{Id}.}

Madison’s argument is not necessarily based on an assumption that the people have an inherent right to keep private arms. Madison could have been assuming that the states have a right to arm their organized militia. The theme of \textit{The Federalist Number 46}, the continuation of state sovereignty, supports this theory.\footnote{162 \textit{See generally The Federalist No. 46, supra note 143, at 294-300 (James Madison). For a discussion of the central themes of \textit{The Federalist No. 46}, see supra notes 152-61 and accompanying text.}

Furthermore, Alexander Hamilton’s argument in \textit{The Federalist Number 29}, that a “select [state] militia” would best serve the interests of both the federal government and the people, also supports the view that the Framers assumed the states had a right to arm their organized militia.\footnote{163 The Federalist No. 29, supra note 143, at 184-85 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton felt that it would be impossible to properly regulate the entire population. \textit{Id}. Therefore, the new government needed a select militia for the national defense. \textit{Id}. Hamilton stated: To oblige the great body of the yeomanry and of the other classes of the citizens to be under arms for the purpose of going through military exercises and evolutions, as often as might be necessary to acquire the degree of perfection which would entitle them to the character of a well-regulated militia, would be a real grievance to the people and a serious public inconvenience and loss. \textit{Id}. at 184.} In addition to providing for the national defense, Hamilton opined that such a force would protect the liberties of the people, should Congress form a standing army.\footnote{164 \textit{Id}. at 185. Hamilton contended that [a select corps] 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 own rights and those of their fellow-citizens. \textit{Id}.}

\footnote{165 \textit{See The Federalist No. 46, supra note 143, at 299 (James Madison).}
\footnote{166 \textit{Id}.}
\footnote{167 \textit{Id}. (emphasis added).}
to the select state-run militia Hamilton favored.\textsuperscript{168}

In addition, \textit{The Federalist Papers} were intended to placate the fears of those who opposed the Constitution—a body that feared select groups of militia as much as they feared standing armies.\textsuperscript{169} For example, in his Third Letter to the Republican, the Federal Farmer made it clear that those opposing the Constitution were concerned about federal control of the military.\textsuperscript{170} The Federal Farmer expressed two specific concerns.\textsuperscript{171} First, he feared the development of a standing federal army.\textsuperscript{172} Second, he feared that Congress would use its power over taxes and the militia to amass a select force.\textsuperscript{173} Consequently, the Federal Farmer contended that it was essential that the yeomanry of the country have a proper check on the powers of Congress to collect taxes and raise armies.\textsuperscript{174} The Federal Farmer outlined constitutional

\textsuperscript{168.} \textit{Id.} In addition to these statements in \textit{The Federalist No. 46}, one commentator argued that \textit{The Federalist No. 10} and \textit{The Federalist No. 14} show that Madison believed that the states would not properly safeguard the people's liberty. Levinson, supra note 8, at 651-52. Professor Levinson cited to Madison’s proposition that the states would not likely preserve liberty because the states could “easily fall under the sway of a local dominant faction.” \textit{Id.} at 652. Considering this proposition, it is unlikely that Madison was arguing that the right to keep and bear arms, which protected the liberty of the people, rested with the states.

\textsuperscript{169.} \textit{See, e.g., Federal Farmer III, in Letters From the Federal Farmer, supra note 100, at 13-24 (reflecting Federal Farmer's fear of select militias). For a discussion of the Anti-Federalists' views on select militias, see infra notes 171-79.}

\textsuperscript{170.} \textit{See Federal Farmer III, in Letters From the Federal Farmer, supra note 100, at 13-24. The Federal Farmer wrote that the powers vested in the federal government by the Constitution, as it was originally proposed, including the power to lay and collect taxes, form the militia, make bankruptcy laws and raise armies and navies “comprehend all the essential powers in the community, and those which will be left to the states will be of no great importance.” \textit{Id.} at 18-19.}

\textsuperscript{171.} \textit{Id.} at 19-21.

\textsuperscript{172.} \textit{Id.}

\textsuperscript{173.} \textit{Id.} The Federal Farmer noted that, although the proposed Constitution limited Congress' power to appropriate funds for the maintenance of a standing army to two years, Congress' power to raise such an army was unlimited. \textit{Id}. Once Congress formed a standing army, the Federal Farmer felt that the army would have no trouble convincing the Congress to appropriate monies every two years to support it. \textit{Id.} He stated that “it is very evident to me, that we shall have a large standing army as soon as the monies to support them can be possibly found.” \textit{Id.} The Federal Farmer's concerns regarding Congress' use of its power to regulate the militia to accumulate a select force were not unfounded. \textit{The Federalist No. 28, supra note 153, at 185 (Alexander Hamilton).} Hamilton argued that if the militia were to provide for defense of the country, a select corps would have to be formed, as it would be impossible to properly regulate the entire body of the people. \textit{Id.}

\textsuperscript{174.} \textit{Federal Farmer III, in Letters From the Federal Farmer, supra note 100, at 21. In this regard, the Federal Farmer acknowledged the Federalist argument that an armed populace could defend itself. \textit{Id.} He proposed:}

\textit{It is true, the yeomanry . . . possess the lands, the weight of property, possess arms, and are too strong a body of men to be openly offended—}
amendments necessary to avoid federal abuse of the military power in his Eighteenth Letter to the Republican.\textsuperscript{175} He proposed that Congress amend the Constitution to ensure that all men capable of bearing arms be given the right to do so and that the Constitution prohibit the establishment of any form of select militia or "distinct bodies of military men."\textsuperscript{176}

These two letters from the Federal Farmer show that opponents to the Constitution feared Congress’ ability to place the citizens under martial law, whether it was by means of a standing army or by means of a select militia.\textsuperscript{177} The opponents felt that the only way to defend the

and, therefore, it is urged, they will take care of themselves, that men who shall govern will not dare pay any disrespect to their opinions.

\textit{Id.} (emphasis added). However, the Federal Farmer did not believe that the people’s ability to possess arms was enough to negate Congress’ power to build armies and lay taxes. He stated:

It is easily perceived, that if [the people] have not their proper negative . . . on the passage of laws relative to taxes and armies, they may in twenty or thirty years be by means imperceptible to them, totally deprived of that boasted weight and strength: This may be done in a great measure by [C]ongress, if disposed to do it, \textit{by modelling the militia. Should one fifth or one eighth part of the men capable of bearing arms be made a select militia, as has been proposed, and those the young and ardent part of the community, possessed of but little or no property, and all the others put upon a plan that will render them of no importance, \textit{the farmer will answer all the purposes of an army, while the latter will be defenceless}} [sic].

\textit{Id.}, in LETTERS FROM THE FEDERAL FARMER, \textit{supra} note 100, at 21-22 (emphasis added). Furthermore, the Federal Farmer argued that the mere power to elect representatives to the federal legislature was not enough to provide a check on Congress. \textit{Id.} He believed that it would be nearly impossible for thirty or forty thousand people to find one man who possessed similar views to themselves. \textit{Id.}

\textsuperscript{175} \textit{Letter from the Federal Farmer to the Republican No. XVIII} (Jan. 25, 1788) [hereinafter \textit{Federal Farmer XVIII}], in LETTERS FROM THE FEDERAL FARMER, \textit{supra} note 100, at 122-32.

\textsuperscript{176} \textit{Id.}, in LETTERS FROM THE FEDERAL FARMER, \textit{supra} note 100, at 124.

The Federal Farmer argued that a militia,

not much unlike regular troops, will ever produce an inattention to the general militia; and the consequences has ever been, and always must be, that the substantial men, having families and property, will generally be without arms, without knowing the use of them, and defenceless [sic]; whereas, \textit{to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them.}

\textit{Id.}

\textsuperscript{177} \textit{See, e.g.}, Federal Farmer III, in LETTERS FROM THE FEDERAL FARMER, \textit{supra} note 100, at 20-22 (discussing Federal Farmer’s views on government’s power to model militia); Federal Farmer XVIII, \textit{supra} note 175, in LETTERS FROM THE FEDERAL FARMER, \textit{supra} note 100, at 124 (outlining Federal Farmer’s proposed constitutional amendments). The Senate Subcommittee on the Constitution cited the Federal Farmer’s letters in support of its conclusion that

\textit{[t]he suspicion of select militia units expressed in these passages is a clear indication that the framers of the Constitution did not seek to guarantee a State right to maintain formed groups similar to the Na-
people's liberty was to arm the entire population. Furthermore, the only way to guarantee the right to keep and bear arms was to make it an express right in the Constitution.

Because the Bill of Rights was adopted to appease the concerns of doubters such as the Federal Farmer, it is unlikely that the First Congress would adopt provisions for arming the very type of military force that these doubters feared the most. Thus, state's right advocates are left with the argument that even if the right to keep and bear arms applies to the people as a whole, a state has the prerogative to exercise this right on the people's behalf. This argument, while finding little support in the writings of either the Federalists or the Anti-Federalists, is consistent with the arguments of some state's right proponents. These

REPORT OF THE SUBCOMMITTEE, supra note 46, at 5. The Subcommittee also quoted an unnamed delegate at the Pennsylvania Convention as stating, "Congress may give us a select militia which will, in fact, be a standing army—or Congress, afraid of a general militia, may say there will be no militia at all. When a select militia is formed, the people in general may be disarmed." Id. at 4.

In addition, in his journal of the debates at the Constitutional Convention, James Madison noted that the delegates expressed similar sentiments at the Convention. MADISON, supra note 73, at 557. Madison wrote that Oliver Ellsworth, a representative of Connecticut, "considered the idea of a select militia as impracticable; and if it were not, it would be followed by ruinous declension of the great body of the militia." Id.

178. Federal Farmer XVIII, supra note 175, in LETTERS FROM THE FEDERAL FARMER, supra note 100, at 122-24. For a discussion of the Federal Farmer's suggested amendments, see supra notes 175-76 and accompanying text.


180. See 5 SCHWARTZ, supra note 30, at 1024-25. At the debates of the First Congress, Madison opined that the Representatives should amend the Constitution to include rights that opponents of the Constitution felt were in danger. Id. One individual rights commentator, Steven Halbrook, has contended that "[s]ince these same prominent anti-federalists were among the most vocal in calling for a guarantee recognizing the individual right to have arms, it is inconceivable that they would not have objected to what became the [S]econd [A]mendment had anyone understood it not to protect personal rights." Halbrook, supra note 40, at 36-37. In addition, the Senate Subcommittee on the Constitution stated: "Lee, in particular, [who] sat in the Senate which approved the Bill of Rights . . . would hardly have meant the [S]econd [A]mendment to apply only to the select militias he so feared and disliked." REPORT OF THE SUBCOMMITTEE, supra note 46, at 5. The Subcommittee assumed that Richard Henry Lee authored the letters of the Federal Farmer. See id.

Notwithstanding the evidence that the Framers feared select militias as much as standing armies, state's right advocates have cited Hamilton's arguments, in The Federalist No. 29, as definitive proof that the militia the Second Amendment refers to is select militia. See Feller & Gotting, supra note 12, at 64 (discussing Hamilton's arguments on formation of select militia). For a discussion of Hamilton's view that select militia would provide the best defense of the nation, see supra note 163 and accompanying text.

181. See, e.g., Kates, supra note 8, at 212; THE FEDERALIST NO. 46, supra note
state's rights proponents contend that while the right to keep and bear arms was intended to protect against tyranny, it is nonetheless a state's right to arm the militia.\textsuperscript{182}

B. \textit{The People Have the Right to Supply Their Own Arms}

In \textit{The Federalist Number 46}, Madison never referred to the states as the source of the arms held by "near half a million citizens."\textsuperscript{183} In fact, Madison referred to the people as the source of arms and to the states only as the means by which the armed population would organize to defend themselves.\textsuperscript{184} In comparing America with the European kingdoms, Madison stated:

\textit{Besides the advantage of being armed}, which the Americans possess over the people of almost every other nation, the existence of subordinate [state] governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.\textsuperscript{185}

In this passage, Madison specifically noted that the states' function with regard to the militia was the appointment of officers.\textsuperscript{186} He did not say

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143, at 299 (James Madison) (discussing Madison's view of state's role with respect to militia). For a discussion of who would supply the people with arms, see infra notes 184-96 and accompanying text.

182. Kates, supra note 8, at 212.

183. \textit{The Federalist No. 46}, supra note 143, at 299 (James Madison) (emphasis added).

184. \textit{Id.}

185. \textit{Id.} (emphasis added). Madison distinguished the American federal government from the kingdoms of Europe by noting that the American government trusted its people with arms, while the European governments did not. \textit{Id.} He reasoned that as long as the people were armed, they could defend themselves against any military force organized by the government. \textit{Id.} at 299-300. Furthermore, Madison proposed that if oppressed people of Europe had the same rights to bear arms as Americans, the Europeans could have freed themselves from despotism. \textit{Id.} In addition, Madison contended that the possession of arms coupled with the organizational benefits of state governments would ensure "that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it." \textit{Id.} at 300.

In addition, Noah Webster, a Federalist from Pennsylvania, also recognized an inherent right to keep and bear arms in the American people. See Report of the Subcommittee, supra note 46, at 5. Like Madison, Webster felt that the right to bear arms distinguished Americans from the oppressed citizens of Europe. \textit{Id.} Webster stated:

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

186. \textit{The Federalist No. 46}, supra note 143, at 299 (James Madison).
that the states would arm the militia.\textsuperscript{187} Madison identified two reasons why the people would be able to repel a standing federal army.\textsuperscript{188} First, the people were armed, and second, they were organized by the states.\textsuperscript{189}

\textsuperscript{187} Id. Maynard Holbrook Jackson, a state's right commentator, argues that these passages illustrate Madison's view that the states would protect the people from "a too powerful federal government." Jackson, supra note 112, at 194. When examining Madison's language regarding the impact of local governments on the overthrow of European tyrannies, Jackson concludes that Madison was referring to the local governments as the source of arms. Id. Jackson, however, ignores the fact that Madison twice stated that "[b]esides the advantage of being armed," local governments act as an additional barrier "against the enterprises of ambition." The Federalist No. 46, supra note 143, at 299 (James Madison). Also, in his discussion of the continuation of state sovereignty, Madison never referred to the local governments as the source of the peoples' arms.

Moreover, Toench Coxe, writing as "A Freeman," provided further evidence that the right to keep and bear arms was not intended to be a right of the states. See A Freeman II, Pa. Gazette [hereinafter Freeman II], Jan. 30, 1788, reprinted in 15 Documentary History of the Ratification, supra note 153, at 508-11. In Freeman II, Coxe listed fourteen categories of state powers. Id. Within these categories, he listed the specific powers of the states. Id. However, nowhere did he list the power to arm the militia or the people. Id. Among the states' powers with regard to the militia, Coxe listed the appointment of officers and training of the militia, but not arming it. Id.

\textsuperscript{188} The Federalist No. 46, supra note 143, at 299 (James Madison).

\textsuperscript{189} Id. This should not be confused with the state's right argument that the Second Amendment guarantees states the right to arm organized military forces. See, e.g., Rohner, supra note 8, at 65 (stating that Second Amendment only applies to organized military forces). Madison's writings suggest that the states' role in protecting the people from tyranny was to organize a force that was already armed. The Federalist No. 46, supra note 143, at 299 (James Madison). For a discussion of Madison's view on the state's role of organizing the militia, see supra notes 184-89 and accompanying text.

Even Alexander Hamilton, who favored using a select militia for both the national defense and to protect the liberty of the people, believed that people who were not members of the select militia had a right to keep and bear arms. See The Federalist No. 29, supra note 143, at 184-85 (Alexander Hamilton) (discussing Hamilton's view of select militia); The Federalist No. 28, supra note 143, at 180 (Alexander Hamilton) (examining Hamilton's view that there was individual right to keep and bear arms). Hamilton argued that the organizational benefits provided by the states were essential to the defense of liberty. Id. Hamilton explained that without such benefit, "[t]he citizens must rush tumultuously to arms, without concert, without system, without resource; except in their courage and despair." Id. Hamilton was presenting a scenario in which the states controlled the militia instead of the federal government, and the states abused their power. Id. In such a scenario, the people would be left without the organizational benefits of the state. Id. If the federal government abused that same power, however, the people could turn to the states for organization. Id. at 181. Hamilton assumed that even if the states controlled the militia and abused their power, the people could still "rush tumultuously to arms." Id. at 180. Thus, despite favoring a select militia, Hamilton believed that the people as a whole had a right to arms that was independent of the states. Id. For a discussion of Hamilton's views on select militia, see supra notes 163-64 and accompanying text.
The essays of Toench Coxe, a Federalist Senator from Pennsylvania, provide further support for the proposition that the Federalists felt that the right to bear arms was inherent in the people. Coxe felt that a main source of opposition to the proposed Constitution was Congress’ power over both the purse and the sword—taxes and the militia. Coxe felt that the state legislatures had an adequate check over the federal government’s power of the purse because the states chose the senators whose vote was necessary to take any commercial act. Coxe also stated that the power of the sword rested in the people and not the federal government.

In addition, in A Pennsylvanian III Coxe stated:

The power of the sword, say the minority of Pennsylvania, is in the hands of Congress. My friends and countrymen, it is not so, for THE POWERS OF THE SWORD ARE IN THE HANDS OF THE YEOMANRY OF AMERICA FROM SIXTEEN TO SIXTY. The militia of these free Commonwealhaths, entitled and accustomed to their arms, when compared with any possible army, must be tremendous and irresistible. Who are these militia? are they not ourselves.[sic]

Coxe also wrote, “I do not hesitate to affirm, that the unlimited power of the sword is not in the hands of either the foederal [sic] or state governments, but, where I trust in God it will ever remain, in the hands of the people.” Importantly, Coxe asserted that the power of the sword rests in neither the federal nor the state governments.

In sum, the political correspondence relating to the adoption of the

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190. See generally Pennsylvanian III, reprinted in 2 Documentary History, supra note 122 (examining Coxe’s view that because people have individual right to keep and bear arms, they could thwart select military force).

191. Id., reprinted in 2 Documentary History, supra note 122, at 1776-80. In his Third Letter to the Republican, the Federal Farmer also voiced his objections to the powers vested in the federal government. Federal Farmer III, in Letters From the Federal Farmer, supra note 100, at 18-22. The Federal Farmer found the power to regulate the militia objectionable in itself, and particularly objectionable when joined with the power to lay and collect taxes. Id., in Letters From the Federal Farmer, supra note 100, at 20-21.


193. Id., reprinted in 2 Documentary History, supra note 122, at 1778-79.

194. Id.

195. Id., reprinted in 2 Documentary History, supra note 122, at 1780. Coxe believed that because the Constitution did not take away the right to keep and bear arms, the people necessarily retained that right. Id., reprinted in 2 Documentary History, supra note 122, at 1779. He stated: “Congress ha[s] no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birth-right of an American. What clause in the state or federal constitutions hath given away that important right.” Id.

196. Id., reprinted in 2 Documentary History, supra note 122, at 1779.
Constitution supports an individual right to keep and bear arms.197 The Federalists based their argument in favor of ratification of the Constitution on three principles. First, the people would select their representatives and, therefore, the federal government would be directly accountable to the people.198 Second, the people would have the right to keep and bear arms.199 Third, the states would organize an armed populace to repel any army the federal government might form.200 The letters of the Federal Farmer suggest that opponents to the original draft of the Constitution did not disagree that, if these contentions were true, the people would be able to check the power of the federal government.201 The letters of the Federal Farmer also suggest, however, the feeling that Congress needed to express certain rights in the Constitution to ensure a realization of the principles on which the Federalists based their argument.202

VI. A PROPOSED CONSTITUTIONAL ANALYSIS OF FEDERAL GUN CONTROL LEGISLATION

The common law history of the right to keep and bear arms, the

197. For a discussion of the political correspondence accompanying the adoption of the Second Amendment by the First Congress, see supra notes 142-96 and accompanying text.
198. For a discussion of the Federalist view on the representative system, see supra notes 153-55 and accompanying text.
199. For a discussion of the Federalist view on the right to keep and bear arms, see supra notes 159-68 and accompanying text.
200. For a discussion of the Federalist view on the role of the states with regard to the militia, see supra notes 183-89 and accompanying text.
201. For a discussion of the letters of the Federal Farmer, see supra notes 170-79 and accompanying text. See also Levinson, supra note 8, at 649.
202. See Letter from the Federal Farmer to the Republican No. XVI (Jan. 20, 1788), in LETTERS FROM THE FEDERAL FARMER, supra note 100, at 105. In his Sixteenth Letter to the Republican, the Federal Farmer addressed the need for a bill of individual rights to offset the powers of the federal government. Id. The Federal Farmer countered the Federalists' argument that if specific rights were enumerated, those not listed would be foregone. Id. He suggested adoption of a clause stating that all rights not expressly given up by the people were reserved. Id. In addition, he proposed that the Constitution be "express and explicit about [the people's] essential rights, and not be forced to claim them on the precarious and unascertained tenure of inferences and general principles, knowing that in any controversy between [the people] and their rulers, concerning those rights, disputes may be endless and nothing certain." Id., in LETTERS FROM THE FEDERAL FARMER, supra note 100, at 107.

Moreover, one individual right commentator has noted that those who debated the adoption of the Bill of Rights did not dispute Toench Coxe's analysis that the right to keep and bear arms was a private right. Halbrook, supra note 40, at 30. Halbrook stated: "The only dispute was over whether a bill of rights was even necessary to protect such fundamental rights." Id. In addition, another individual rights commentator has opined that "both Federalists and Anti-Federalists accepted an individual right to arms." Kates, supra note 8, at 223. Mr. Kates contends that the only debate was over how best to guarantee the right to keep and bear arms. Id.
legislative history of the Second Amendment and the debates between the Federalists and Anti-Federalists show that the Framers of the Constitution intended the right to keep and bear arms to be an individual right.\textsuperscript{203} Thus, a court should employ modern principals of constitutional review, as established by the Supreme Court, to determine whether the Second Amendment applies to federal gun control legislation.\textsuperscript{204} The Supreme Court originally established the principles of rational basis and strict scrutiny review in the early twentieth century.\textsuperscript{205}

Nonetheless, legislation restricting the right to keep and bear arms has not been subject to review under these principles for three reasons. First, some courts have dismissed challenges to state gun control legislation based on the view that the Second Amendment does not apply to state legislation.\textsuperscript{206} Second, in United States v. Miller, a 1939 challenge to

\textsuperscript{203} For a discussion of the history of the Second Amendment, see supr

\textsuperscript{204} See Laurence H. Tribe, American Constitutional Law 779 (2d ed. 1988).

\textsuperscript{205} Since the early twentieth century, the Supreme Court has established two approaches to constitutional review of state and federal legislation. John E. Nowak et al., Constitutional Law 351 (3d ed. 1986). First, when legislation regulates all persons, and only involves matters of economic and social welfare, the Court will defer to the legislature and uphold the legislation, as long as the legislation is rationally related to some legitimate government interest. See Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 83 (1978) (holding that economic regulations are accorded presumption of constitutionality); United States v. Carolene Prods. Co., 304 U.S. 144, 152 & n.4 (1938) ("The existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not . . . unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."). However, if the legislation relates to the exercise of a "fundamental right," the Court gives less deference to the legislature and independently scrutinizes the legislation to determine whether it improperly restricts that fundamental right. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (holding right to vote is fundamental); Loving v. Virginia, 388 U.S. 1, 12 (1967) (finding right to marry is basic civil right deserving of strict scrutiny); United States v. Guest, 383 U.S. 745, 757 (1966) (holding right to interstate travel occupies position fundamental to concept of our federal union); see also Nowak et al., supra, at 351 (discussing Supreme Court’s review of government infringements on fundamental rights). If the law restricts a fundamental right, the Court will uphold the law only if it is necessary to promote a compelling or overriding government interest. See, e.g., American Party of Tex. v. White, 415 U.S. 767, 776-83 & n.14 (1974) (upholding requirement that new political parties or candidates demonstrate public support to get on ballot because it furthered compelling state interest in preventing elections from becoming unmanageable); see also Nowak et al., supra, at 351.

federal gun control legislation, the Supreme Court avoided constitutional analysis of federal limitations on the possession of firearms.\textsuperscript{207} The Court limited its discussion to the permissible scope of federal regulation of individual possession of firearms that are not within the ambit of the Second Amendment.\textsuperscript{208} Third, lower federal courts have closed the door on constitutional scrutiny of individual possession of firearms by concluding, based on a misinterpretation of Miller, that there is no individual right to keep and bear arms.\textsuperscript{209}

As was demonstrated in the preceding sections, the Framers of the Constitution intended to vest the right to keep and bear arms in individuals and not the states.\textsuperscript{210} Therefore, lower courts have erred in straying from the portion of the Miller opinion recognizing an individual right to keep and bear arms.\textsuperscript{211} The Miller Court relied on the legislative history of the Second Amendment in interpreting the Amendment’s scope.\textsuperscript{212} Miller held that the Framers only intended the Second Amendment to ensure the maintenance of a well-regulated militia as

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\textsuperscript{208} Id. at 178. The Miller Court held that the Second Amendment only protects possession of those weapons with “some reasonable relationship to the preservation or efficiency of a well regulated militia.” Id. The Court stated that the weapon prohibited by the federal statute at issue, a sawed-off shotgun, did not fall within that description. Id. For further discussion of Miller, see supra notes 8 & 22-30 and accompanying text.

\textsuperscript{209} See, e.g., Stevens v. United States, 440 F.2d 144 (6th Cir. 1971) (holding that Second Amendment only guarantees state’s right to arm organized militia). For a discussion of federal case law on the Second Amendment, see supra notes 32-39 and accompanying text. The Miller Court defined “militia” as the entire male population. Miller, 307 U.S. at 178. The Court stated that the militia was to be armed by the civilian population itself. Id. Notwithstanding this holding, federal courts have concluded that Miller limited the right to keep and bear arms to a state’s right. See, e.g., Stevens, 440 F.2d at 144 (interpreting Second Amendment as protecting states’ right to arm militia).

\textsuperscript{210} See, e.g., Pennsylvania III, reprinted in 2 Documentary History, supra note 122, at 1778-79 (reporting Toench Coxe’s statement that right to keep and bear arms is individual right). For a discussion of the Framers’ intent regarding the right to keep and bear arms, see supra notes 45-202 and accompanying text.

\textsuperscript{211} Miller, 307 U.S. at 178. For a discussion of cases misinterpreting the Miller opinion, see supra notes 32-39 and accompanying text.

\textsuperscript{212} Miller, 307 U.S. at 177.
provided for in Article I, Section 8, Clause 16 of the Constitution.\textsuperscript{213} Thus, the Miller Court stated that the Second Amendment only protected the right to keep and bear arms having "some reasonable relationship to the preservation . . . of a well regulated militia."\textsuperscript{214} However, if the Miller holding were followed to its logical conclusion, and each individual were allowed to keep and bear the types of arms used by the modern military, the result would be terrifying. Taken to this extreme, for example, each individual would have the right to keep and bear nuclear weapons.\textsuperscript{215}

The courts have avoided this result by interpreting Miller as only protecting the state's right to keep and bear arms, and not the individual's right to keep modern day weapons.\textsuperscript{216} As a result, the scope of constitutional limitation on the federal government's power to limit the right of individuals to keep and bear arms has never been analyzed under modern principles of constitutional review. The purpose of this section is to develop a constitutional analysis of federal gun control legislation, such as the proposed Brady Bill, assuming an individual right to bear arms.

A constitutional analysis of federal or state legislation must begin by determining whether there exists a right entitled to constitutional protection.\textsuperscript{217} Next, one must examine the types of considerations that might warrant governmental restriction of that right.\textsuperscript{218} If there are considerations warranting restriction of a constitutional right, one must determine whether a court should apply strict scrutiny to governmental actions that appear to infringe upon that right.\textsuperscript{219} Under modern constitutional principles, courts will give active protection to rights considered fundamental to individual liberties as reflected by history and by interpretation of the Constitution by the Supreme Court.\textsuperscript{220} The Supreme Court has found only a limited group of fundamental rights.

\textsuperscript{213} Id. Under the Court's holding, in order for possession of a weapon to be protected under the Second Amendment, a weapon must be "part of the ordinary military equipment or . . . contribute to the common defense." Id. at 178. The Court limited the purpose of the militia to providing for the national defense. Id.

\textsuperscript{214} Id. at 178.

\textsuperscript{215} For a discussion of federal case law recognizing the undesirable results of Miller, see supra notes 32-39 and accompanying text. See also Levinson, supra note 8, at 654-55.

\textsuperscript{216} See, e.g., Stevens v. United States, 440 F.2d 144, 144 (6th Cir. 1971).

\textsuperscript{217} Tribe, supra note 204, at 779.

\textsuperscript{218} Id.

\textsuperscript{219} Id. at 780.

\textsuperscript{220} Nowak et al., supra note 205, at 465. In their treatise, authors Nowak, Rotunda and Young contend that "the Court has continually sought to enforce those natural law rights which the justices believed were essential in American society." Id. at 361.
For example, the Court has held that the right to marry, vote and the right to interstate travel are fundamental rights. The Court has reasoned that these rights are so essential to the individual liberties in our society that they justify strict review of the acts of other branches of government that infringe upon them. Thus, the Court will uphold a law that restricts fundamental rights only if the law is necessary to promote a compelling or overriding governmental interest.

In conducting a constitutional analysis of the Second Amendment, the first step is to determine the scope of the right that it guarantees, and whether the Court would consider that right to be fundamental. As was discussed in the preceding sections, the Framers of the Second Amendment articulated two essential purposes for the right to keep and bear arms. First, by providing for an armed citizenry, the Framers felt that they could avoid the necessity of forming a standing army to defend the nation. Second, if Congress were to form a select military force, whether a select militia or a standing army, the people as a whole would have a means of defense against that force in the event that the federal government attempted to use the national military force against the people. The Framers considered both of these purposes essential.

221. Zablocki v. Redhail, 434 U.S. 374, 383-88 (1978) (declaring marriage is fundamental right and striking down statute forbidding marriage by persons who did not comply with court order for child support); Loving v. Virginia, 388 U.S. 1, 9 (1967) (finding that marriage is fundamental right and racial classifications relating to marriage are prohibited unless state meets "heavy burden of justification").

222. Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (holding that right to vote is fundamental).

223. United States v. Guest, 383 U.S. 745, 757 (1966) (holding that right to interstate travel occupies position "fundamental to the concept of our Federal Union").

224. NOWAK ET AL., supra note 205, at 465.

225. Id. at 351. Compare Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (holding state law imposing burdensome requirements on new political parties to get candidates on election ballot violated Equal Protection Clause of Fourteenth Amendment because it impaired freedom of association of affected parties and was not justified by compelling state interest) with American Party of Tex. v. White, 415 U.S. 767, 776-83 & n.14 (1974) (upholding requirement that new political parties or candidates demonstrate public support to get on ballot because it furthered compelling state interest in preventing elections from becoming unmanageable).

226. TRIBE, supra note 204, at 779.

227. For a discussion of the purposes of the right to keep and bear arms, see supra notes 45-202 and accompanying text.

228. See Virginia Debates, reprinted in 3 ELLIOTT'S DEBATES, supra note 76, at 425. For a discussion of the Framers' fear of standing armies and the use of the militia to avoid the formation of standing armies, see supra notes 62-202 and accompanying text.

229. See, e.g., Federal Farmer XVIII, supra note 175, reprinted in LETTERS FROM THE FEDERAL FARMER, supra note 100, at 124. 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. Id.
to the preservation of the people's liberty. Today, the United States has both a standing army and a select militia. Thus, the first purpose of the Second Amendment has failed. However, the Amendment's second purpose, that the people should be able to take up arms to defend themselves against abuse of the federal army and the National Guard, is still valid.

Because the second purpose of the Amendment is valid and deserves review, the next issue is whether the right to keep and bear arms should be considered a fundamental right. The previous sections demonstrated that there is no doubt that the Framers considered the right of the people to keep and bear arms to be among the most fundamental of all rights when the Second Amendment was adopted. This right was the people's last line of defense against attempts by the government to deprive them of their liberty. However, individual rights

a discussion of the militia's role in protecting against a standing army, see supra notes 88-94 & 152-82 and accompanying text.

230. Professor Rohner suggested that because the militia referred to in the Second Amendment no longer exists, the Second Amendment is obsolete. Rohner, supra note 8, at 72. This view, however, fails to recognize the second overriding purpose of the right to keep and bear arms—defending the people against abuse by a federal army.

231. See, e.g., Federal Farmer XVIII, supra note 175, reprinted in Letters From the Federal Farmer, supra note 100, at 124 (warning that people needed to be armed to protect themselves against select body of militia). Commentators have disagreed on the issue of whether the right to bear arms as a means of defending against tyranny is a valid idea in modern society. Professor Levin contended that the Framers intended the right to keep and bear arms to maintain a military balance between the government and the people. Levin, supra note 63, at 166. He noted, however, that the possibility of maintaining this military balance had "become smaller as society has become more complex and warfare more destructive." Id. Therefore, he argued, the right to bear arms has become "more futile, meaningless, and dangerous." Id. at 167.

On the other hand, another commentator implied that an unarmed population presents an invitation for oppressive government conduct. Levinson, supra note 8, at 656. Professor Levinson noted that "[t]he American political tradition is, for good or ill, based in large measure on a healthy mistrust of the state." Id. He cited the suppression of Chinese students in Tiananmen Square as a recent example of a tyrannical government trampling the rights of an unarmed population. Id. at 656-57. Professor Levinson also pointed out that the citizens of Northern Ireland have successfully used small arms against the sophisticated military weaponry of Great Britain. Id. at 657. Professor Levinson contended that, while times and weapons have changed since the Framers adopted the Second Amendment, there are still instances when an armed population is necessary to ward off government aggression. Id. He explained that this need can be satisfied without giving individuals the right to keep and bear the same type of sophisticated weaponry used by the military. Id. For these reasons, Professor Levinson asserted that the Second Amendment should not be dismissed summarily. Id.

232. Nowak et al., supra note 205, at 465.

233. See, e.g., The Federalist No. 46, supra note 150, at 295 (James Madison) (stating that government could not deprive armed populace of its liberty).

234. Id.
today have more protection. The Supreme Court has taken an active role in ensuring the continuing vitality of individual rights. In addition, groups such as the American Civil Liberties Union exist solely to protect the liberty of the people. Americans are much further removed from despotism than they were in 1776, and, as a result, the second purpose of the Second Amendment arguably may be obsolete.

Nonetheless, just as James Madison and George Mason could never have comprehended Americans living in harmony with a standing army and a select militia, it is impossible for us to predict how long that harmony will last. One could thus argue that because of the unknown dangers of a standing army, a compelling governmental purpose must justify any measure that restricts the right to keep and bear arms.

If the Supreme Court adopts this latter view, the next step in determining the permissible scope of federal gun control legislation is to ascertain the interest of the government in enacting legislation, such as the Brady Bill, that infringes upon the fundamental right to keep and bear arms. The overriding purpose of the Brady Bill is to decrease the incidents of violent crime involving the use of firearms. One must determine whether decreasing incidents of violent crime furthers a compelling government interest such that the means used to serve the interest will survive strict scrutiny.

235. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (holding right to vote is fundamental); Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding right to marry is basic civil right deserving of strict scrutiny); United States v. Guest, 383 U.S. 745, 757 (1966) (holding right to interstate travel occupies position fundamental to concept of federal union); see also NOWAK ET AL., supra note 205, at 351 (discussing Supreme Court's protection of fundamental rights). If the law restricts a fundamental right, the Court will uphold it only if it is necessary to promote a compelling or overriding government interest. See, e.g., American Party of Tex. v. White, 415 U.S. 767, 776-83 & n.14 (1974) (upholding requirement that new political parties or candidates demonstrate public support to get on ballot because it furthered compelling state interest in preventing elections from becoming unmanageable).

236. NOWAK ET AL., supra note 205, at 465. One may argue that the determination of whether a right is fundamental should not depend on the likelihood that its exercise will be necessary to preserve liberty. See id. at 966 (contending that fundamental rights are those that are essential in American society). Rather, the fundamental nature of a right should depend on the importance of its exercise to individual liberty if and when it becomes necessary to exercise that right. See id. Specifically, while the safeguards of individual liberty have consistently increased since the adoption of the Second Amendment, the right to keep and bear arms probably remains the only effective means of warding off governmental abuse of military power. Therefore, legislation that restricts the Second Amendment right to bear arms should be subject to strict scrutiny. For a discussion of Professor Levinson's view on the continuing validity of the Second Amendment as a means of warding off military aggression, see supra note 231.

237. TRIBE, supra note 204, at 779.

238. Biskupic, supra note 2, at 604. For a discussion of the purposes of the Brady Bill, see supra notes 6-7 and accompanying text.

239. See NOWAK ET AL., supra note 205, at 465.
A. Prevention of Violent Crimes Involving Firearms Furthers a Compelling Governmental Interest

The number of murders committed by criminals with guns jumped from 5,015 in 1965 to 10,379 in 1972.\textsuperscript{240} In 1990, 20,045 murders were committed in the United States; 12,847 with firearms.\textsuperscript{241} In addition to homicides, twenty-three percent of all aggravated assaults committed in 1990 were committed with firearms.\textsuperscript{242} These statistics demonstrate that the federal government can protect health and human life by enacting legislation aimed at limiting the volume of violent crime committed with firearms. In addition, the Supreme Court has held that the protection of health and human life are compelling government interests.\textsuperscript{243} This Comment now turns to an examination of whether the government can enact legislation restricting the right to keep arms without violating the Second Amendment.

B. Strict Scrutiny of Federal Gun Control Legislation

Of the rights guaranteed by the Bill of Rights, two are written without qualification: the First Amendment freedom of speech and the Second Amendment right to keep and bear arms.\textsuperscript{244} Despite the literal lack

\textsuperscript{240} Weatherup, \textit{supra} note 10, at 961 (citing BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, \textit{STATISTICAL ABSTRACT OF THE UNITED STATES}: 1974, at 151 (95th ed. 1974)). Mr. Weatherup also noted that in New York City in 1973, there were only 28,000 lawfully possessed handguns. \textit{Id.} The Treasury Department estimated that over 1,300,000 were possessed illegally. \textit{Id.} (citing Michael T. Kaufman, \textit{Illegal Market in Pistols Found Here}, N. Y. TIMES, Dec. 2, 1973, \S 1, at 1, col. 5.

241. Federal Bureau of Investigation, U.S. DEP'T OF JUSTICE, \textit{Crime in the United States, in Uniform Crime Reports: 1990}, at 12 (1991) [hereinafter Uniform Crime Reports]. From 1986 through 1989 there were an average of 18,536 murders committed per year; of these, an average of 11,180 per year were committed with firearms. \textit{Id.}

242. \textit{Id.}, \textit{in Uniform Crime Reports, supra} note 241, at 24. This reflects a 14% increase from the number of aggravated assaults committed with firearms in 1989. \textit{Id.}


244. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." (emphasis added)); U.S. CONST. amend. II ("the right of the people to keep and bear Arms, shall not be infringed" (emphasis added)). Compare the right to free speech and the right to keep and bear arms with the other rights guaranteed by the First Amendment and the Constitution. The government is barred only from "prohibiting the free exercise [of religion]." U.S. CONST. amend. I. On its face the First Amendment leaves room for the regulation of religious exercise. \textit{Id.} Moreover, the First Amendment only gives the people the right to assemble "peaceably." \textit{Id.} The Third Amend-
of qualification, however, the rights guaranteed by these amendments may still be subject to some regulatory measures. In *Konigsberg v. State Bar*, Justice Harlan stated:

> At the outset we reject the view that freedom of speech and association . . . , as protected by the First and Fourteenth Amendments, are "absolutes," not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment.

Justice Harlan proposed that when "constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved." This same balancing test should

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245. *See* Konigsberg *v.* State Bar, 366 U.S. 36 (1961) (holding that inquiries about bar applicant’s membership in Communist Party were constitutional).


247. *Id.* at 49 (citation omitted). Justice Harlan noted two instances in which “freedom of speech is narrower than an unlimited license to talk.” *Id.* at 50. First, “certain forms of speech, or speech in certain contexts,” are outside the scope of the First Amendment. *Id.* Second, statutes that are not intended to control the content of speech, but incidentally limit its “unfettered exercise,” are not within the scope of the First Amendment’s prohibition when they “are justified by subordinating valid governmental interests.” *Id.* at 50-51.

248. *Id.* at 51. Justice Black dissented, arguing that “the First Amendment’s unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the ‘balancing’ that was to be done in this field.” *Id.* at 61 (Black, J., dissenting). A majority of the Court, however, adopted Justice Harlan’s balancing test. *Id.* at 50-51.

The Supreme Court has qualified *Konigsberg*’s holding that bar examiners may inquire into an applicant’s membership in political organizations. *See* Baird *v.* State Bar of Ariz., 401 U.S. 1, 8 (1971) (holding that views and beliefs are immune from bar association inquiries); *In re Stolar*, 401 U.S. 23, 27-28 (1971) (holding that requiring that bar applicants answer questions regarding memberships in various clubs and organizations is unconstitutional under First Amendment). Nonetheless, the Court continues to balance First Amendment protection against governmental interests in regulation. *See, e.g.*, New York State Club Ass’n, Inc. *v.* City of New York, 487 U.S. 1, 12-13 (1988) (finding state’s interest in eradicating discrimination outweighs minimal impact of law forbid-
also apply to governmental infringement on the right to keep and bear arms.

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

The Brady Bill would impose a seven-day waiting period on potential handgun purchasers. The apparent purpose of the bill is to identify felons at the point of sale. A large percentage of violent crimes are committed with firearms, and a large number of violent crime offenders have prior felony records. By decreasing the number of felons with firearms, the government hopes to decrease the number of firearms used in violent crimes. Because preventing convicted felons from acquiring firearms helps prevent gun violence and diminishes crime, the government’s purpose is legitimate.

Discriminatory membership policies on First Amendment rights; Carey v. Brown, 447 U.S. 455, 464-67 (1980) (weighing interests in protecting privacy in home and providing special protection for labor protesters against First and Fourteenth Amendment rights of other protesters); Police Dep’t v. Mosley, 408 U.S. 92, 99-100 (1972) (considering law infringing exercise of First and Fourteenth Amendment rights in light of state interests in preventing disruptions at schools). For further discussion of the Konigsberg case, see Nowak et al., supra note 205, at 838-40.

249. For a discussion of the government’s compelling interest in decreasing criminal activity involving firearms, see supra notes 240-43 and accompanying text.

250. For a discussion of the people’s fundamental right to keep and bear arms, see supra notes 226-36 and accompanying text.


252. Id. (requiring criminal background check of handgun purchaser before purchase is allowed). The Brady Bill does not itself prohibit the possession of firearms. Id. Felons are prohibited from possessing firearms under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 922(g)(1) (1988). The Brady Bill merely allows gun vendors an opportunity to identify felons and thus avoid selling them guns. H.R. 277, 103d Cong., 1st Sess. § 2(a)(1)(A). For further discussion of the Brady Bill, see supra notes 1-7 and accompanying text.

253. See Crime in the United States, in Uniform Crime Reports, supra note 241, at 12. For a discussion of the connection between the use of firearms and violent crimes, see supra notes 240-43 and accompanying text. In 1979, Justice Department estimates showed that one-third of all violent offenders had prior convictions for a violent offense. Bureau of Justice Statistics, U.S. Dep’t of Justice, Report to the Nation on Crime and Justice 103 (2d ed. 1988). Moreover, of the persons released from state prisons in 1983, approximately 77% had been arrested in the past, or were re-arrested after release, for commission of a violent offense. Information Please Almanac, Atlas and Yearbook 827 (44th ed. 1991). In 1988, among all persons arrested for murder in the 75 largest counties in the United States, 49% had prior convictions. Bureau of Justice Statistics, U.S. Dep’t of Justice, Source Book of Criminal Justice Statistics 440 (1990). Twenty-nine percent of these convictions were for felonies. Id. Of those arrested for assault in the same counties, 46% had prior convictions—31% for felonies. Id. Finally, among all of those arrested for Committing violent offenses in those counties, 50% had prior records—34% for felonies. Id.
from obtaining firearms directly furthers the goal of decreasing the number of violent crimes committed with firearms, the Brady Bill appears to be within the scope of the government's legitimate purpose for firearm regulation.  

254. Constitutional analysis of the Brady Bill, however, cannot end with the Second Amendment. The Brady Bill, when combined with the prohibition of felon ownership of firearms under the Omnibus Crime Control and Safe Streets Act of 1968, treats convicted felons differently than law-abiding citizens. See H.R. 277, 103d Cong., 1st Sess. (1993). Therefore, a court may also scrutinize the Brady Bill under the equal protection component of the Fifth Amendment. While the Equal Protection Clause appears only in the Fourteenth Amendment, and not the Fifth Amendment, the Supreme Court has held that the Fifth Amendment's Due Process Clause applies equal protection standards to the federal government. See Davis v. Passman, 442 U.S. 228, 234-35 (1979) (holding gender classifications denying equal protection are actionable under Fifth Amendment).

Generally, the government may enact laws that treat similarly situated people differently as long as the disparate treatment is reasonably related to a legitimate governmental interest. See United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-76 (1980) (holding Court will not invalidate social and economic legislation on equal protection grounds unless it has no rational relationship to governmental objective); McGowan v. Maryland, 366 U.S. 420, 425 (1961) (finding that Equal Protection Clause is only offended if classification rests on grounds "wholly irrelevant" to achievement of state's objective). Furthermore, the Court will apply strict scrutiny only if the class of individuals treated adversely is a suspect class, or if the right that is deprived is a fundamental right. Compare Loving v. Virginia, 388 U.S. 1, 9 (1967) (prohibiting racial classifications unless "heavy burden of justification" met) with Korematsu v. United States, 329 U.S. 214, 216 (1944) (compelling interest can justify racial classification). See Nowak et al., supra note 205, at 852 (discussing Supreme Court's application of strict scrutiny test).

For example, in Zablocki v. Redhail, the Supreme Court applied the Equal Protection Clause to a case involving a fundamental right. Zablocki v. Redhail, 434 U.S. 374, 383-88 (1978). The Zablocki Court considered a law forbidding marriage by those persons not in compliance with a court order to support their children. Id. The Court declared the law invalid under the Equal Protection Clause even though the law did not apply to a suspect classification because the law treated people unequally with respect to the fundamental right to marry. Id.

This author proposes that felons are not a suspect class deserving of heightened constitutional protection. The Court has determined that classifications based on mental retardation, poverty and age are not suspect. See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985) (holding mental retardation is not suspect classification); Harris v. McRae, 448 U.S. 297, 323 (1980) (finding poverty standing alone is not suspect classification); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976) (holding age is not suspect classification). The Court is not likely to hold that one's status as a convicted felon is suspect, while classifications based on mental retardation, poverty and age are not. Moreover, the Court has outlined the indicia of suspect classes: 1) the class is determined by immutable characteristics; 2) there is a history of discrimination against that class; and 3) the class is politically powerless. Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974). The class of felons fails to meet the first criterion on this list. One becomes a convicted felon due to actions of his or her own accord; it is not an immutable characteristic.

However, although felons are not a suspect class, the Court may accord strict scrutiny to legislation restricting a felon's right to possess firearms because the Court may find that the right to keep and bear arms is a fundamental right.
Constitutional analysis of the proposed legislation does not end here. In order to pass constitutional muster, the government must utilize the least restrictive burden on the legitimate possession of firearms in accomplishing its goal.\textsuperscript{255} The Brady Bill very likely meets this standard. The current version of the bill would require law-abiding citizens to wait only seven days before obtaining possession of a handgun, a minimal burden on the right to bear arms.\textsuperscript{256} Furthermore, the Brady Bill is keenly crafted to achieve its purpose. The bill requires the police to check the background of potential handgun purchasers during the waiting period.\textsuperscript{257} This requirement is probably the most direct and effective means of preventing felons from purchasing firearms.\textsuperscript{258} In sum, the Brady Bill would impose only minimal burdens on the right of law-abiding citizens to keep and bear arms while directly furthering a compelling state interest.\textsuperscript{259}

A more interesting analysis results from the proposed ban on as-

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The Court will examine carefully the connection between the possession of firearms by convicted felons and death and injury resulting from violent crime. For a discussion of the balance between the government's compelling interest in protecting the health and safety of its citizens, and an individual's fundamental right to bear arms, see \textit{supra} notes 203-43 and accompanying text. For a discussion of the right to keep and bear arms as a fundamental right, see \textit{supra} notes 226-36 and accompanying text.

\textsuperscript{255} Shelton \textit{v.} Tucker, 364 U.S. 479, 488 (1960) (noting that when government establishes compelling interest in restricting constitutional right, "that [interest] cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."). In \textit{Shelton}, the Supreme Court held that legislation restricting a constitutional right cannot be so broad that it interferes unnecessarily with that right. \textit{Id.}; see also Lovell \textit{v.} Griffin, 303 U.S. 444, 451 (1983) (invalidating statute prohibiting all distribution of literature without license because statute went beyond means necessary to meet government objectives). These cases concerned challenges under the First Amendment. However, because the Second Amendment also guarantees a fundamental right, the Court should apply this same standard to Second Amendment challenges to gun control legislation.

\textsuperscript{256} H.R. 277, 103d Cong., 1st Sess. § 2(a)(1)(A)(ii).

\textsuperscript{257} \textit{Id.}

\textsuperscript{258} House Bill 3371 contained a provision requiring state to replace the five-day waiting period with an instantaneous background check once the technology for such instantaneous checks became available. H.R. 3371, 102d Cong., 1st Sess. (1991). However, a more recent version of the bill does not contain such a provision. See H.R. 277, 103d Cong., 1st Sess. (1993).

\textsuperscript{259} Notably, the initial House version of the bill, would be less likely to pass constitutional scrutiny. The initial House bill did not require a background check. Biskupic, \textit{Brady Compromise}, \textit{supra} note 4, at 1757. Therefore, the current version of the bill would probably be more effective than the House bill at actually preventing felons from obtaining firearms. By ignoring this potential avenue for decreasing the burden on law-abiding citizens' right to bear arms, the initial House bill did not use the least burdensome methods to achieve the government's goal.
assault weapons contained in a recent version of the Senate bill.260 Under the previously proposed ban, all assault weapons would be outlawed in all circumstances.261 While the same balancing test applies here as for the waiting period, the assault weapon ban imposes a much heavier burden on individual rights. The only burden the Brady Bill would place on Second Amendment rights is a seven-day waiting period to purchase a handgun.262 By contrast, the assault weapon ban would deprive law-abiding citizens of the right to possess an entire class of firearms.263 Therefore, in order to analyze the assault weapon legislation, one must determine if the government can completely deny the people possession of an entire class of firearms.

Banning private possession of sophisticated military weaponry, such as nuclear weapons, can easily be justified by the government's compelling interest in maintaining political stability and national security, thus protecting all of the individual liberties that the Constitution guarantees.264 One could argue, however, that individual possession of assault weapons does not pose a threat to the national security. The military could easily suppress a few radical groups who owned assault weapons. By contrast, assault weapons would create a tremendous advantage for an oppressed population if the military became the aggressor. Thus, when balancing the government's interest in maintaining political stability and the people's Second Amendment rights, individual rights must prevail when dealing with assault weapon legislation. The government must have a compelling interest other than avoiding violent insurrections to justify an absolute ban on assault weapons.265

260. Biskupic, Senate Bill, supra note 4, at 2102. For a discussion of the Senate's 1991 crime control bill, which includes a ban on nine classifications of assault weapons, see supra note 4. A state ban on assault weapons was recently challenged in federal court on Second Amendment grounds in Fresno Rifle & Pistol Club v. Van de Kamp, 746 F. Supp. 1415 (E.D. Cal. 1990). The Fresno court upheld the law. Id. In reaching its conclusion, the court relied on the continued adherence of federal courts to the view that the Second Amendment does not apply to the states. Id. at 1417-19.

261. See Biskupic, Senate Bill, supra note 4, at 2102.


263. Biskupic, Senate Bill, supra note 4, at 2130.

264. Under the Second Amendment, individuals have the right to keep and bear arms to defend themselves against the organized military should the government abuse its power to regulate that military. Thus, one could argue that the Second Amendment guarantees possession of almost any weapon because almost any weapon would reasonably contribute to this purpose. However, private possession of tactical weaponry such as nuclear missiles and war planes could enable any radical group to threaten our government and, therefore, our liberty. Thus, a court would probably find that the government has a compelling interest in maintaining its political structure and defending against violent rebellion by radical groups. Without such security, all individual liberties would be meaningless. Therefore, the government can bar individual possession of weapons that pose an imminent threat to the national security, notwithstanding the impact on Second Amendment rights.

265. See NOWAK ET AL., supra note 205, at 351.
On the other hand, assault weapons are often used and are particularly destructive in the commission of violent crimes.\(^{266}\) Thus, the government’s interest in limiting the use of assault weapons is even more compelling than its interest limiting the use of more conventional weapons. In addition, banning assault weapons would not completely deprive the people of an effective means of defending against military abuse.\(^ {267}\) One commentator has pointed out that the people of Northern Ireland have made extremely effective use of small arms against the sophisticated weaponry of Great Britain.\(^ {268}\) Thus, depriving the people of the possession of assault weapons may be justified by the government’s interest in controlling the use of assault weapons to commit violent crimes. One may also contend that a ban on such weapons would decrease the people’s ability to resist military oppression to such a degree that a ban is not justified by the government’s interests. Which of these views is “constitutionally correct” depends on one’s opinion as to the types of arms that are necessary to repel military aggression.

It is unclear what result the Supreme Court would reach with respect to legislation such as the Senate’s proposed ban of assault weapons. The Second Amendment, however, does not ban all governmental regulation of firearms. Therefore, as long as the Brady Bill or other gun control legislation meets the standards of modern constitutional review, the Supreme Court should uphold the law.

VII. Conclusion

Federal courts have avoided constitutional review of gun control legislation by adopting the fiction that the Second Amendment only grants to the states the right to arm their militias.\(^ {269}\) A historical analysis of the debates surrounding the adoption of the Second Amendment,

\(^{266}\) L. Stanley Chauvin, Jr., Time to Assault Weapons, A.B.A.J., May 1990, at 8, 8. Mr. Chauvin reports that “an assault gun is twenty times more likely to be used in crime than a conventional firearm.” Id.; see also Judith Bonderman & Dennis A. Hennigan, Paying the Bill For Violence, NAT’L J., Jan. 28, 1991, 13, 13-14 (reporting Cox Newspapers survey showing that assault weapons are 20 times more likely than conventional firearms to be used in criminal activity; 25 times more likely to be used in drug crimes). Mr. Chauvin states that in recent years, the use of assault weapons in crime has increased by 78%. Chauvin, supra, at 8. The National Law Journal recently reported a 1989 incident in which five children were killed and 29 wounded when a gunman armed with an assault rifle opened fire at a playground. Bonderman & Hennigan, supra, at 13. The reason assault weapons are more popular with criminals is that they have features such as a large ammunition capacity, rapid fire capability, and ease of concealment. Id. at 14.

\(^{267}\) See Levinson, supra note 8, at 656-57 (citing people’s use of small arms and other weapons in Northern Ireland and territories occupied by Israel).

\(^{268}\) Id.

\(^{269}\) See, e.g., Stevens v. United States, 440 F.2d 144 (6th. Cir. 1971) (holding that there is no individual right to keep and bear arms). For a discussion of these federal court decisions, see supra notes 92-99 and accompanying text.
however, proves that the Framers of the Constitution intended the Second Amendment to grant an individual right to keep and bear arms.\textsuperscript{270} The intended purposes of Second Amendment right to keep and bear arms are twofold.\textsuperscript{271} First, an armed population could provide for civil defense of the nation, thus avoiding the necessity of a standing army.\textsuperscript{272} Second, the people in possession of arms could defend themselves against oppression by an organized military, if one were ever formed.\textsuperscript{273}

The first purpose for the Second Amendment is now moot because the United States maintains an organized military to defend the nation. The second purpose still retains its vitality as a last line of defense against military oppression; it is not, however, necessarily a blanket guarantee to possess all types of weapons. Today, the Second Amendment simply ensures that any attempt of the federal government to regulate the possession of firearms will be subject to strict constitutional scrutiny.\textsuperscript{274}

Under modern principals of constitutional review, legislation that serves the government's compelling interest in protecting human life will be upheld as long as that interest outweighs the legislation's impact on Second Amendment rights, and the means chosen to further the government's interest are narrowly tailored to further that interest.\textsuperscript{275} Using this balancing test one can argue that the government's interest in preventing violent crimes involving firearms is so compelling that the government can regulate the possession of all firearms, except to the extent that such regulation would leave the people completely defenseless against the military. This approach leaves ample room for legislation requiring waiting periods and criminal background checks before a handgun can be purchased, legislation regulating the possession of firearms by felons, and legislation banning possession of all firearms that would pose a threat to the national security.

The Supreme Court should take the next opportunity that arises to

\textsuperscript{270} For a discussion of the debates surrounding the adoption of the Second Amendment, see supra notes 83-202 and accompanying text.

\textsuperscript{271} For a discussion of the purposes of the Second Amendment, see supra notes 83-202 and accompanying text.

\textsuperscript{272} For a discussion of the role of the armed population, see supra notes 101-02 & 170-76 and accompanying text.

\textsuperscript{273} For a discussion of using the armed populace to avoid formation of a standing army, see supra notes 183-202 and accompanying text.

\textsuperscript{274} Because the only fundamental purpose for the right to keep and bear arms today is to guarantee the people a means of defense against military oppression, the government is free to regulate all other uses of firearms so long as the regulation is rationally related to a legitimate government purpose. For a discussion of the government's interest in regulating the possession of firearms, see supra notes 240-43 and accompanying text. Therefore, there is no constitutional obstacle to legislation regulating the use of arms for purposes such as hunting and self-defense.

\textsuperscript{275} For a proposed constitutional analysis of the Second Amendment right to bear arms, see supra notes 203-68 and accompanying text.
reverse the long line of cases denying any individual right to keep and bear arms. As soon as this is done, a line of case law should develop that will set the parameters for permissible gun control regulation, as has been the case with all other fundamental rights guaranteed by the Constitution. Such parameters must be based in strict scrutiny jurisprudence, and not in the judicial fiction of the absence of an individual right to keep and bear arms that has little support in the history of the Second Amendment.

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