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### A Critical Guide to the Second Amendment

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## A CRITICAL GUIDE TO THE SECOND AMENDMENT

GLENN HARLAN REYNOLDS[\*]

This Symposium contains a number of important articles relating to the Second Amendment to the United States Constitution. But what many casual readers may not realize is that those articles are simply the latest installments in what has become a rich and interesting literature. Although the Second Amendment was almost completely ignored by the academic community for the first two centuries of its existence, the past several years have seen an explosion of scholarship.

The reasons for that explosion are beyond the scope of this Article; they may stem in part from the increased prominence of "gun control" debates in contemporary politics, or from the natural tendency of constitutional law scholars to look for as yet unmined subjects for study. But for whatever reason, the past five years or so have undoubtedly seen more academic research concerning the Second Amendment than did the previous two hundred.

In this Article, I will summarize and criticize that scholarship. By doing so, I hope to serve two purposes. First, I hope to provide readers who are unfamiliar with the literature sufficient background to understand references to it in other articles on this issue, or simply to consider themselves "Second Amendment literate." Second, I hope both to criticize and to synthesize the literature on the Second Amendment, to suggest fruitful areas for future research, and to provide my own views on some problems that I consider particularly important. Although some aspects of Second Amendment theory have been developed with a thoroughness that would surprise those unfamiliar with the field, other aspects deserve additional study. I hope that readers of this Article will be inspired to join in the conversation.

### I. INTRODUCTION

Before addressing the body of Second Amendment scholarship, it is worth taking a moment to put it into the context of the popular debate over gun controls and the right to bear arms. Although it would be something of an oversimplification, it is probably fair to say that those who support (p.462)gun control have generally tended either to ignore the Second Amendment entirely or to adopt an interpretation that leaves it essentially without effect.[1] Those opposed to gun control, on the other hand, have naturally tended to adopt rather strong interpretations of the Second Amendment.[2] This is not surprising; we see similar phenomena with regard to other parts of the Bill of Rights. For example, it is common to find "right wing" opponents of sexual liberty taking the position that the Ninth Amendment,[3] often cited as the root of the right to privacy that is typically implicated in cases involving sexual freedom,[4] means nothing. Robert Bork, for example, has described the Ninth Amendment as an "inkblot" whose meaning cannot be deciphered,[5] and has referred to the right of privacy as a "loose canon in the law." [6] Supporters of such sexual rights, on the other hand, tend to take rather expansive views of what the Ninth Amendment protects.[7] Similarly, in the field of free speech representatives of the media seem often to believe that *everything* that affects their interests--almost down to the availability of free

parking near newspaper offices--implicates important First Amendment concerns, while those opposed to, say, sexually explicit art or flag burning tend to take a much narrower view.<sup>(p.463)</sup>

But with regard to most parts of the Bill of Rights, the ability of partisans to make extreme constitutional arguments is limited by the existence of large bodies of judicial caselaw and scholarly explication, which set the bounds for respectable discourse on the subject. In the case of the Second Amendment, at least until a few years ago, there was no such caselaw or scholarship. Today there is still very little caselaw, but there is now a great deal of scholarship.<sup>[8]</sup> So far, however, the scholarship seems to have had less impact on the public debate in this area than in many others: instead, the debate is driven mostly by what will make good sound bites and by what will further the direct-mail fundraising of organizations on both sides of the issue. That may change, and if it does it will probably be a good thing.

Perhaps surprisingly, what distinguishes the Second Amendment scholarship from that relating to other constitutional rights, such as privacy or free speech, is that there appears to be far more agreement on the general outlines of Second Amendment theory than exists in those other areas. Indeed, there is sufficient consensus on many issues that one can properly speak of a "Standard Model" in Second Amendment theory, much as physicists and cosmologists speak of a "Standard Model" in terms of the creation and evolution of the Universe.<sup>[9]</sup> In both cases, the agreement is not complete: within both Standard Models are parts that are subject to disagreement. But the overall framework for analysis, the questions regarded as being clearly resolved, and those regarded as still open, are all generally agreed upon. This is certainly the case with regard to Second Amendment scholarship. Unfortunately, despite the existence of unusually broad areas of scholarly consensus, this literature has so far had less of a disciplinary effect on public debate than might otherwise be hoped. Perhaps this Symposium, by increasing the awareness of general readers, will help to remedy that problem. I will discuss this subject at greater length below.

Of course, a Standard Model among lawyers is not the same thing as a Standard Model among physicists. For one thing, physicists can revise their theories based on new experiments and data. Lawyers lack such opportunities. The Supreme Court is the closest thing we have to a theory-testing device, but the Court does not really serve a theory-testing purpose. First, as I have suggested elsewhere, prediction of Supreme Court decisions does little to validate particular theories, given the complexities involved.<sup>[10]</sup> Second, Supreme Court decisions change in a way that physical laws do not. <sup>(p.464)</sup>It would have been perfectly proper in 1953 to argue that because the Supreme Court had not recognized the right to integrated schools, such a right did not exist, at least as a legally enforceable matter. <sup>[11]</sup> But such an argument would hardly have stated an eternal truth about the Constitution, or even (as the following year proved)<sup>[12]</sup> about the Supreme Court's view of the question. Similarly, the Supreme Court's treatment of the First Amendment until well into this century was very similar to its treatment of the Second Amendment up to this point.<sup>[13]</sup> Though we must all abide by the Supreme Court's decisions, for constitutional scholars the Supreme Court is another institution to be studied--and, frequently, critiqued--rather than a source of final answers.

At any rate, with these caveats I will discuss what can fairly be called the "Standard Model" of Second Amendment interpretation. I will also discuss those aspects of Second Amendment theory that can be characterized as outside the Standard Model. I will then make some observations of my own regarding the shortcomings of both Standard Model and non-Standard Model theories, and will close with a few comments on the way in which the public debate over the Second Amendment has been influenced (or not) by the scholarly literature on the subject.

## II. THE STANDARD MODEL

The Second Amendment reads:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.[14]

To modern readers, at least, these words are not particularly clear. What is a "militia"? What does it mean for one to be "well regulated"? What is a "right of the people"? What does it mean to "keep and bear arms"? And what sort of infringements on that right are prohibited?

Until the last decade, the scholarly literature provided little guidance on this subject. Debate on the subject took place almost exclusively in political speeches, newspaper editorials, letters to the editor, and the pages of gun (p.465)magazines.[15] Since the publication of Don Kates' seminal article in the *Michigan Law Review*,[16] followed by Sanford Levinson's *Yale Law Journal* article entitled *The Embarrassing Second Amendment*,[17] however, a scholarly debate has flourished, with literally dozens of well-researched articles, many by eminent authors, addressing the subject.[18] The purpose (p.466) of these articles is quite specifically to answer the questions set out above. A short summary of their conclusions follows.

### *A. The Individual Right to Keep and Bear Arms Under the Standard Model*

The Standard Model is rooted in two main sources: the text of the Second Amendment and its historical underpinnings. Both are interpreted to support an individual right to keep and bear arms.[19] The text's support is seen as straightforward: the language used, after all, is "right of the people," a term that appears in other parts of the Bill of Rights that are universally interpreted as protecting individual rights. Thus, any argument that the right protected is not one enforceable by individuals is undermined by the text:

[To deny that the right protected is one enforceable by individuals] the following set of propositions must be accepted: (1) when the first Congress drafted the Bill of Rights it used "right of the people" in the first amendment to denote a right of individuals (assembly); (2) then, some sixteen words later, it used the same phrase in the second amendment to denote a right belonging exclusively to the states; (3) but then, forty-six words later, the fourth amendment's "right of the people" had reverted to its normal individual right meaning; (4) "right of the people" was again used in the natural sense in the ninth amendment; and (5) finally, in the tenth amendment the first Congress specifically distinguished "the states" from "the people," although it had failed to do so in the second amendment.[20]

Thus, say Standard Model writers, the Second Amendment protects the same sort of individual right that other parts of the Bill of Rights provide. To hold otherwise, these writers argue, is to do violence to the Bill of Rights since, if one "right of the people" could be held not to apply to individuals, then so could others.[21] Furthermore, as William Van Alstyne notes, the "right" to which the Second Amendment refers is clearly the right "of the people, to keep and bear arms." [22] Thus, whatever the meaning of the (p.467) Amendment's reference to a "well-regulated militia," that reference does not modify the right recognized by the Amendment.[23]

This textual argument is also supported by reference to history. Standard Model scholars muster substantial evidence that the Framers intended the Second Amendment to

protect an individual right to arms.[24] The first piece of evidence for this proposition is that such a right was protected by the English Bill of Rights of 1689.[25] As such, it became one of the "Rights of Englishmen" around which the American Revolutionaries initially rallied.[26] Standard Model scholars also stress that the right to keep and bear arms was seen as serving two purposes. First, it allowed individuals to defend themselves from outlaws of all kinds--not only ordinary criminals, but also soldiers and government officials who exceeded their authority, for in the legal and philosophical framework of the time no distinction was made between the two.[27] Just as importantly, the presence of an armed populace was seen as a check on government tyranny and on the power of a standing army. With the citizenry armed, imposing tyranny would be far more difficult than it would be with the citizenry defenseless.

Tench Coxe made this point in a commentary on the Second Amendment.[28] Coxe explained the purpose of the Amendment this way:(p.468)

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens, the people are confirmed by the next article in their right to keep and bear *their private arms*.[29]

Similarly, Madison himself wrote that a regular army that threatened liberty would find itself opposed by "a militia amounting to near a half a million citizens with arms in their hands." [30] Madison contrasted the situation in America with that obtaining under the European governments, whom he described as "afraid to trust the people with arms," and argued that the new federal government need not be feared because Americans possessed "the advantage of being armed, which the Americans possess over the people of almost every other nation." [31]

Standard Model scholars note that these statements were echoed by similar sentiments from other Framers, all of whom seem to have been proponents of the individual ownership of firearms. Thomas Jefferson was a vigorous advocate of gun ownership because he believed that it fostered both personal and societal virtue; [32] a model constitution that he drafted for (p.469) Virginia in 1776 included a provision guaranteeing that "[n]o Freeman shall be debarred the use of arms [within his own lands]." [33] Similarly, Anti-Federalist Patrick Henry agreed, stating that "The great object is that every man be armed.... Every one who is able may have a gun." [34]

Thus, the right to keep and bear arms was considered an essential form of protection not just for home and hearth, but also against government tyranny. It can be understood as yet another of the forms of division of power that the Framers created to protect citizens' liberties. It is commonplace to note that the Framers divided power within the federal government, by apportioning it among three branches, and that the Framers divided government power in general by splitting it between the federal government and the governments of the states. But under the Standard Model approach it is fair to say that the Framers divided power yet another way, by ensuring that the citizenry possessed sufficient military power to offset that of the Federal government. Such a division makes sense in light of such other (p.470) Constitutional language as the Preamble's statement that the authority of the government comes from the people, and the similar statement in the Tenth Amendment. [35] If the federal and state governments are merely agents of the people, it is logical that the people would be reluctant to surrender a monopoly on military power to their servants, for fear that their servants might someday become their masters. [36]

This was certainly the view of commentators throughout the nineteenth century. As Justice Joseph Story wrote in his *Commentaries on the Constitution*:

The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers, and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.[37]

Influential nineteenth-century scholar Thomas Cooley made the same point:

The right of the people to bear arms in their own defence, and to form and drill military organizations in defence of the State, may not be very important in this country, but it is significant as having been reserved by the people as a possible and necessary resort for the protection of self-government against usurpation, and against any attempt on the part of those who may for the time be in possession of State authority or resources to set aside the constitution and substitute their own rule for that of the people. Should the contingency ever arise when it would be necessary for the people to make use of the arms in their hands for the protection of constitutional liberty, the proceeding, so far from being revolutionary, would be in strict accord with popular right and duty.[38]

This point is the key underpinning of the standard model's approach. The right to keep and bear arms exists in the people because it is their for their own protection. Note Cooley's distinction between the people's "own (p.471)defence" and the "defence of the state." This distinction carries with it the clear implication that "the people" and "the state" are not the same thing.

### *B. The Militia and the People*

One modern critic of the Standard Model, Dennis Henigan of the Center to Prevent Handgun Violence, dismisses this basis for the Second Amendment. Henigan describes what I call the "Standard Model" as the "insurrectionist theory" of the Second Amendment.[39] According to Henigan, it is absurd to believe that the Framers intended to include a right of revolution in the Constitution.[40] Henigan's argument suffers from a number of problems, not least of which is that in fact the Framers *did* seem to believe in just such a right. Aside from the passages quoted above, the 1794 Tennessee Constitution, which was adopted just after the adoption of the Bill of Rights and which Thomas Jefferson is said to have described as "the least imperfect and most republican of the state constitutions,"[41] contains an explicit recognition of the right--and in fact the duty--of citizens to rebel against a tyrannical government. Article I, Section 1 of the Tennessee Constitution provides:

That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of those ends they have at all times, an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper.[42]

Article I, Section 2 provides:

That government being instituted for the common benefit, the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind.[43](p.472)

One could hardly ask for a more explicit endorsement of an "insurrectionist theory" than this. Nor is Tennessee the only state whose constitution dates from the period of the Framing and contains such a provision.[44] And, of course, the Declaration of Independence states the same theory.[45] So the argument that a constitutional right of revolt was unthinkable or absurd to the Framers contradicts some rather obvious historical

evidence to the contrary. That should come as no surprise, really, when we remember that the Framers were, after all, revolutionaries themselves.

Nonetheless, there is that troubling language about the "well regulated militia." The Second Amendment *does* contain a preamble of sorts, and although there seems little enthusiasm for paying attention to the Preamble to the Constitution itself,[46] criticism of arguments in favor of a personal right to bear arms always seems to turn on that point. The argument is that because the Second Amendment opens with the words, "A well regulated Militia, being necessary to the security of a free State," it must therefore not protect a right that can be asserted by individuals. Standard Model scholars disagree. Once again, we will look first at the text, then at the historical circumstances surrounding it.

First, as William Van Alstyne points out, the "right of the people" described in the Second Amendment is "to keep and bear arms," not to belong to a militia.

Rather, the Second Amendment adheres to the guarantee of the right of the people to keep and bear arms as the predicate for the other provision to which it speaks, i.e., the provision respecting a militia, as distinct from a standing army separately subject to congressional ... control.... In relating these propositions within one amendment, moreover, it does not disparage, much less does it subordinate, "the right of the people to keep (p.473)and bear arms." To the contrary, it expressly *embraces* that right and indeed it erects the very scaffolding of a free state upon *that* guarantee. *It derives its definition of a well-regulated militia in just this way for a "free State":* The militia to be well-regulated is a militia to be drawn from just such people (i.e., people with a right to keep and bear arms) rather than from some other source (i.e., from people without rights to keep and bear arms).[47]

In other words, the right to keep and bear arms is not subordinate to the purpose of having a militia--the notion of a "well regulated militia" is subordinate to the purpose of having an armed citizenry.[48] Furthermore, Van Alstyne points out, the reference in the Second Amendment's opening clause is "an express reference to the security of a 'free state.'" It is not a reference to *the* security of THE STATE.[49] Thus, the purpose of the Second Amendment is to ensure an armed citizenry, from which can be drawn the kind of militia that is necessary to the survival of a free state.

There is other textual support as well. Significantly, Madison's own proposal for integrating the Bill of Rights into the Constitution was not to add them at the end (as they have been) but to interlineate them into the portions of the original Constitution they affected or to which they related.[50] If he had thought the Second Amendment would alter the military and/or militia provisions of the Constitution he would have interlineated it in Article I, Section 8, near or after clauses 15 and 16.[51] Instead, he planned to insert the right to arms with freedom of religion, the press and other personal rights in Section 9 following the rights against bills of attainder and ex post facto laws.[52] This too supports the notion that the Second Amendment isn't about making the state militarily strong (an odd function for one-tenth of the Bill of Rights), but about protecting the rights of people in the same fashion as those other provisions.

Standard Model scholars cite ample historical evidence to support this reading of the text. These range from statements of the Framers concerning the makeup of the militia, such as George Mason's "Who are the militia? They consist now of the whole people,"[53] to contemporaneous legal documents, such as the Virginia Constitution of 1776, which describes "a well-regulated militia, composed of the body of the people,"[54] to historical (p.474)analysis of the colonial militia as it developed from English practice.[55] As Standard Model writers report, arms-bearing began as a duty, and continued as a right.[56] Citizens were required to possess arms suitable for militia service, and were liable to show up for inspection from time to time to prove that they possessed them and knew how to use them,

and to receive training in militia tactics. A "well regulated militia" was thus one that was well-trained and equipped; not one that was "well-regulated" in the modern sense of being subjected to numerous government prohibitions and restrictions.[57]

Thus, under the Standard Model's interpretation, the language "well regulated militia" is not a *limitation* on the right of the people to keep and bear arms, but an outgrowth of that right. As Don Kates describes matters, "[t]hus, the amendment's wording, so opaque to us, made perfect sense to the Framers: believing that a militia (composed of the entire people possessed of their individually owned arms) was necessary for the protection of a free state, they guaranteed the people's rights to possess those arms." [58] Kates concludes this passage by stating that "[a]t the very least, the Framers' understanding of 'militia' casts doubt on an interpretation that would guarantee only the state's right to arm organized military units." [59](p.475)

### *C. The Standard Model: A Summary*

The picture that emerges from this scholarship is a coherent one, consistent with both the text of the Constitution and what we know about the Framers' understanding. The purpose of the right to bear arms is twofold: to allow individuals to protect themselves and their families, and to ensure a body of armed citizenry from which a militia could be drawn, [60] whether that militia's role was to protect the nation, or to protect the people from a tyrannical government. Professor Malcolm writes:

[T]he Second Amendment was meant to accomplish two distinct goals, each perceived as crucial to the maintenance of liberty. First, it was meant to guarantee the individual's right to have arms for self-defence and self-preservation. Such an individual right was a legacy of the English Bill of Rights. This is also plain from American colonial practice, the debates over the Constitution, and state proposals for what was to become the Second Amendment....

The second and related objective concerned the militia, and it is the coupling of these two objectives that has caused the most confusion. The customary American militia necessitated an armed public, and Madison's original version of the amendment, as well as those suggested by the states, described the militia as either "composed of" or "including" the body of the people. A select militia was regarded as little better than a standing army. [61]

The mainstream scholarly interpretation of the Second Amendment--what I have been calling the Standard Model--has thus succeeded in making clear the meaning of a text that many modern readers may find unclear. This is no small accomplishment. It also provides many useful answers to questions that may occur to some readers, answers that I will summarize here.

#### 1. The National Guard

One commonplace assertion of newspaper editorialists and others who discuss the Second Amendment in the popular press is that the National Guard is the "militia" protected by that Amendment. This is clearly wrong. As mentioned above, the "militia" referred to in the Second Amendment was to be composed of the entire populace, for only such a body could serve as a check on the (p.476)government. [62] Indeed, both English and American history had led Americans to be very suspicious of "select" militias. [63] Such bodies, composed of those deemed politically reliable by authorities, had played unfortunate roles in the past, [64] and were regarded with the same suspicion as standing armies. As one scholar notes, the Framers' references to select militias were "strongly pejorative." [65]



Today's National Guard, which might more properly be thought of as "troops" than "militia" anyhow,[66] is a very select militia indeed, and can hardly be expected to substitute for the "whole body of the people." The National Guard was never designed to resist a tyrannical government. Rather, the National Guard was created in response to the perceived shortcomings of the militia as an offensive force; there were repeated incidents in which the militia refused to invade Canada, Mexico, and various other locations, or in which federal attempts to so employ the militia were held illegal.[67]

Under the current system, National Guard officers have dual status: they are both members of the State Guard and members of the federal armed (p.477)forces.[68] They are armed, paid, and trained by the federal government.[69] They can be called out at will by the federal government, and such call-outs cannot be resisted, in any meaningful fashion, by them or by their states.[70] They are subject to federal military discipline on the same basis as members of the national government's armed forces.[71] And they are required to swear an oath of loyalty to the United States government, as well as to their states.[72] As one military officer writes:

By providing for a militia in the Constitution, the Framers sought to strengthen civilian control of the military. They postulated that a militia composed of citizen-soldiers would curb any unseemly ambitions of the small standing army. Today's National Guard is often perceived as the successor to the militia, and observers still tout the Guard's role as the ultimate restraint on the professional military.

The reality, however, is much different. Today's national guard is a very different force from the colonial-era militia. With 178,000 full-time federal employees and almost all of its budget drawn from the federal government, the National Guard is, for all practical purposes, a federal force. Indeed, one commentator concluded that it is very much akin to the "standing army" against which the Founding Fathers railed.[73]

It is thus difficult to argue that the "militia" referred to in the Second Amendment is merely today's National Guard, or, for that matter, any other select governmental body.[74] As Professor Malcolm states, "[t]he argument that today's National Guardsmen, members of a select militia, would constitute the *only* persons entitled to keep and bear arms has no historical foundation." [75] At any rate, one need look no further than the statute books (p.478) to see that such an assertion is incorrect: the National Guard and the militia are distinct entities.[76] At both the federal and state levels, the "unorganized militia" is defined as essentially the entire population except for the old and the very young--with the difference that many states include women.[77] Furthermore, of course, neither the National Guard nor any institution much like it existed at the time of the framing. As Standard Model scholars point out, this makes any argument that the Second Amendment merely protects the National Guard untenable.

## 2. What Weapons are Protected?

Discussion of the right to keep and bear arms seems to lead inevitably to questions of whether the existence of such a right necessitates the right to own, for instance, a howitzer or a nuclear weapon. Writers adhering to the Standard Model, which stresses fidelity to the purposes and history of the Second Amendment, have arrived at fairly convincing answers to such questions by drawing on those sources.[78]

The right to keep and bear arms is no more absolute than, say, the right to free speech. Just as the demand "your money or your life" is not protected by the First Amendment, so the right to arms is not without limits. But the right to arms is no more undone by this fact than freedom of speech is undone by the fact that that right is not absolute either.

Mainstream scholars of the Second Amendment draw limits from the text and from the

purpose of the provision.[79] Textually, the language "keep and bear arms" is interpreted as limiting the arms protected to those (p.479)that an individual can "bear"--that is, carry.[80] This fact, together with the fact that the right is seen as one pertaining to individuals, leaves out large crew-served weapons such as howitzers, machine guns, nuclear missiles, and so on. Presumably individuals (if wealthy and eccentric enough) could "keep" such weapons, but they could not "bear" them.[81]

Because one purpose of the right is to allow individuals to form up into militia units at a moment's notice, the kinds of weapons protected are those in general military use, or those that, though designed for civilians, are substantially equivalent to those military weapons.[82] Because another purpose is the defense of the home, Standard Model writers also import common-law limitations on the right to arms, as they existed at the time of the framing.[83] Under the common law, individuals had a right to keep and bear arms, but not such arms as were inherently a menace to neighbors, or that had an unavoidable tendency to terrify the community. Thus, weapons such as machine guns, howitzers, or nuclear weapons would not be (p.480)permitted.[84] Note however that the much-vilified "assault rifle" would be protected under this interpretation--not in spite of its military character, but because of it. The "recreational and sporting uses" often cited by both sides in the contemporary gun control debate, on the other hand, are not relevant. They are cited by those who favor gun control in the hopes of not arousing the fears of hunters and target shooters, and by those who oppose gun control in the hopes of mobilizing those same groups. But they have nothing to do (directly) with the purpose of maintaining an armed citizenry. Recreation and sport, to the extent they are protected at all, are covered only penumbally; the Second Amendment is not about sport or recreation.[85]

### 3. Who Has a Right to Keep and Bear Arms?

Despite the claims of some prominent gun-lobby spokespersons, and of a vast number of radio talk show callers, the Standard Model interpretation of the Second Amendment does not guarantee a right to keep and bear arms for everyone. The right to arms always extended beyond the core membership of the militia, encompassing those (like women, seamen, clergymen, and those beyond the upper age for militia service) who could not be called out for militia duty. But Standard Model scholars tend to stress that in

classical republican political philosophy, the concept of a right to arms was inextricably and multifariously tied to that of the "virtuous citizen." Free and republican institutions were believed to be dependent on civic *virtu* which, in turn, depended upon each citizen being armed--and, therefore, fearless, self-reliant, and upright. Since possession of arms was the hallmark of a citizen's independence, the ultimate expression of civic *virtu* was his defensive use of arms against criminals, oppressive officials, and foreign enemies alike. One implication of this emphasis on the virtuous citizen is that the right to arms does not preclude laws disarming the unvirtuous (i.e. criminals) or those who, like children or the mentally unbalanced, are deemed incapable of virtue.[86]

Thus, felons, children, and the insane were excluded from the right to arms precisely as (and for the same reasons) they were excluded from the franchise--though some (women for example) who lacked the right to vote nonetheless possessed the right to arms.[87] Nonetheless, the franchise and (p.481)the right to arms were "intimately linked" in the minds of the Framers and of prior and subsequent republican thinkers.[88]

This means that the right to arms does not extend to minors, so that the "Gun Free School Zones Act" overturned in *United States v. Lopez*,[89] does not violate the Second Amendment, at least as applied to schoolchildren. Nor does the right extend to felons or the

insane.[90] Furthermore, licensing laws, background checks, and waiting periods--so long as all are reasonable and not simply covert efforts at restricting the availability of guns to those who qualify[91] --do not violate the right, arguments of overzealous gun enthusiasts to the contrary notwithstanding. After all, the "well regulated militia" of which every citizen was presumed a part included the necessity of showing up occasionally in person to prove that one possessed the necessary weapons and knew how to use them.[92] If that could be required, then it is hard to argue that citizens cannot be required to fill out a form or two.[93] Similarly, laws regulating the wearing of arms are generally regarded as acceptable under the Standard Model, although there is some (p.482)dispute on this subject.[94] The more popular view is that the term "keep" refers to owning arms that are kept in one's household; the term "bear" refers to the bearing of arms while actually taking part in militia duties.[95] Thus,

[t]he amendment's language was apparently intended to protect the possession of firearms for all legitimate purposes, but to guarantee the right to carry them outside the home only in the course of militia service. Outside that context the only carrying of firearms which the amendment appears to protect is such transportation as is implicit in the concept of a right to possess--e.g., transporting them between the purchaser or owner's premises and a shooting range, or a gun store or gunsmith and so on.[96]

In this light, whatever the asserted benefits of laws that allow citizens to carry weapons freely, the Standard Model stresses that there is no Second Amendment right to do so--though there may, of course, be Fourteenth Amendment rights not to be discriminated against in the granting of any such licenses a state may choose to permit.[97]

#### 4. Have Times Changed?

Another argument frequently heard is that the Second Amendment is militarily obsolete. The argument is that lightly-armed civilians simply cannot defend themselves against a modern army, and that as a result an armed citizenry would not serve as a remedy for, or even a deterrent against, a tyrannical government.[98] Thus, the Second Amendment should not be taken seriously, even if it is admitted that it was intended to protect an armed citizenry in precisely the fashion described in the Standard Model.(p.483)

It is hard to know what to say about this argument. First, of course, it is something of an act of faith to believe that *any* constitutional right will ultimately protect against a tyrannical government. As the interned American citizens of Japanese descent learned, the Bill of Rights provided them with little protection when it was needed.[99] And, of course, there is no guarantee that a free press will prevail over the long term either. Certainly some tyrannies have arisen in nations where press freedom existed--Weimar Germany, for example. Yet we do not generally require proof of efficacy where other Constitutional rights are concerned, so it seems a bit unfair to demand it solely in the case of the Second Amendment.

At any rate, the argument that irregulars with light arms are ineffective against modern armies--though no doubt pleasing to the self-esteem of military professionals--is not especially compelling based on the facts. As I write this article, the Red Army, which many analysts once thought capable of cutting through the armies of Western Europe like a knife through cheese, is finding itself sorely tried by the irregulars of the self-proclaimed Chechen Republic. Though most observers predict eventual victory for the Russian armed forces, some believe that the fighting will bring down the Yeltsin government, and pretty much everyone agrees that this will make the Russian authorities less likely to crack down in the same fashion again: it has just been too expensive.[100] Similarly, a recent peasant

revolt in Chiapas left the Mexican army and authorities looking rather bad.[101] In my lifetime, we have seen modern armies defeated or embarrassed by lightly armed irregulars from Vietnam, to Afghanistan, to Lebanon to Somalia. It thus seems rather believable that an armed citizenry could frustrate tyranny, or at least make would-be tyrants weigh the high costs against the dubious benefits of, say, a military coup.[102](p.484)

### 5. Is the Right Worth the Cost?

The final popular argument against a Second Amendment right to keep and bear arms is that, regardless of what the right is supposed to accomplish, it is simply too expensive. That is, with all of the violence in America, the cost of having guns readily available exceeds any benefit that an armed citizenry might provide.

My usual response to such arguments is that as a professor of constitutional law I am as sublimely indifferent to the question of whether the availability of guns leads to crime as I am to the question of whether pornography causes sexual offenses. In either case, the Constitution has spoken, and that is enough. Such consequential concerns may be relevant to, say, the question of whether to *repeal* the First or Second Amendments, but they should certainly have no role in how we interpret or apply them. I thus leave argument about these topics to criminologists and the like.[103]

At any rate, Standard Model theorists stress that if we are going to let worries about costs and benefits affect our interpretation of constitutional rights, we ought to be consistent.[104] As Professor Levinson puts it:(p.485)

If one does accept the plausibility of any of the arguments on behalf of a strong reading of the Second Amendment, but, nevertheless, rejects them in the name of social prudence and the present-day consequences produced by finicky adherence to earlier understandings, why do we not apply such consequentialist criteria to each and every part of the Bill of Rights? As Ronald Dworkin has argued, what it means to take rights seriously is that one will honor them even when there is significant social cost in doing so. If protecting freedom of speech, the rights of criminal defendants, or any other part of the Bill of Rights were always (or even most of the time) costless to the society as a whole, it would truly be impossible to understand why they would be as controversial as they are. The very fact that there are often significant costs--criminals going free, oppressed groups having to hear viciously racist speech, and so on--helps to account for the observed fact that those who view themselves as defenders of the Bill of Rights are generally antagonistic to prudential arguments. Most often, one finds them embracing versions of textual, historical, or doctrinal argument that dismiss as almost crass and vulgar any insistence that times might have changed and made too "expensive" the continued adherence to a given view ... Yet one finds that the tables are strikingly turned when the Second Amendment comes into play. Here it is "conservatives" who argue in effect that social costs are irrelevant and "liberals" who argue for a notion of the "living constitution" and "changed circumstances" that would have the practical consequence of removing any real bite from the Second Amendment.[105]

Hypocrisy, on both left and right, is the small coin of constitutional debate, at least when one leaves behind journals with footnotes and enters the realm of Op/Ed pundits and television talking heads. But the Constitution, and particularly the Bill of Rights, is not a buffet line from which we can take those items that look appetizing while leaving behind those that do not appeal. It is a package deal. Thus, arguments that disfavored rights should be balanced away while favored rights should be retained should be recognized for what they are. On the other hand, arguments that *all* of the Bill of Rights should be jettisoned when inconvenient, though intellectually honest, should also be rejected, in my opinion. The Bill of Rights does not exist to make it easy for us to do what we want. It exists to

make it hard for us to do what we shouldn't.

## 6. Failure of a Condition Precedent

There is one argument against giving present day meaning to the Second Amendment that cannot be dealt with quite so easily. That is David Williams' argument in his *The Terrifying Second Amendment*.<sup>[106]</sup> Williams neither dismisses the Standard Model nor argues that regardless of its reasoning its conclusions should be dismissed. Instead, Williams criticizes the right to keep and bear arms from *within* the Standard Model's framework.<sup>(p.486)</sup>

In short, Williams agrees that the Framers intended the militia to be universal, and that the National Guard is not the "well regulated militia" that the Second Amendment envisions.<sup>[107]</sup> Williams writes:

Those who support a states' rights view of the militia seek to identify the Amendment's militia with the National Guard. The guard, however, is a select body, only a fraction of the population....

....

The universal militia, by contrast, was the people under another name; it could not turn against the people because it was the people. As the National Guard is not universal, it cannot serve as a substitute.<sup>[108]</sup>

Unlike others who work within the Standard Model, however, Williams does not see the Second Amendment as creating an individual right to keep and bear arms in today's society.<sup>[109]</sup> He believes this for two reasons. First, gun owners are no more "universal" than the National Guard--that is, although some people in every demographic category own guns, gun owners are disproportionately white, middle-class men, especially from the South.<sup>[110]</sup> Thus, gun ownership represents not a universal classification, but merely another division within society.<sup>[111]</sup> "Such people," he writes, "may believe that their welfare is equivalent to the common good, but it is not. If we have an armed revolution, it will be in the interests of these citizens, not of the population as a whole."<sup>[112]</sup>

Second, Williams argues that the ideal of the militia was founded on notions of public service and widespread virtue that are not present today. In the absence of these "conditions precedent," the basic purpose of the Second Amendment cannot be fulfilled. I am sorry to say that there is something to this argument. One way of understanding it is to look at the other Constitutional institution most like the militia: the jury. Although the ideal and function of the jury are based on the kinds of notions of universal representation and service that also underlie the militia, no one familiar with the actual operation of the jury system thinks that it is either universal or representative. In a society that finds it hard to get citizens to show up for jury duty, it is perhaps too much to expect that they will show up for militia service.

But that is the problem with Williams' analysis: it is one of those arguments that "proves too much." If the failure of universality and publicspiritedness means that the Second Amendment's rights are now *passé*, then it is hard to see why the jury system should not go too. Yet we still take <sup>(p.487)</sup>the right of trial by jury quite seriously, even if the citizenry is not very good at meeting its obligations. And efforts to address this problem tend to revolve around ways of making citizens show up for jury duty, rather than abolishing the jury. There seems no good reason to treat militia service differently.

The same is true for universality of gun ownership. I will take as true Williams' assertion that gun-owners are disproportionately white Southern males, though in doing so I can't help recalling Humphrey Bogart's famous statement in *Casablanca* that there are some

sections of New York City that it would be safer not to invade.<sup>[113]</sup> But there is a solution to that problem, too: If gun ownership is essential to give the Second Amendment meaning, then simply require everyone to own a gun (and to go through the necessary training to use it responsibly). That isn't such a stretch, really, as it is precisely what the first Congress did to ensure just the universality that Williams considers so important. It did so by passing the Militia Act of 1792.<sup>[114]</sup> That act established a "Uniform Militia throughout the United States," consisting of every able-bodied male citizen between the ages of 18 and 45 and provided

[t]hat every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powderhorn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder, and shall appear, so armed, accoutred and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack.<sup>[115]</sup>

As this action of the first Congress illustrates, such an approach is far more consistent with the Second Amendment than simply ignoring it would be. That we have fallen away from the Framers' ideals, after all, may be more of a reflection on us than on them. Furthermore, universal militia service might even help to reestablish the kind of civic virtue that all of us wish were present today.<sup>[116]</sup> After decades of steadily increasing gun control, mandatory gun ownership might seem a bit hard to swallow, but in truth there is more historical precedent in this country for the requirement to own a gun than for a prohibition against doing so.<sup>[117]</sup><sup>(p.488)</sup>

Please note that neither I, nor any Standard Model scholar of whom I am aware, argues that individual gun ownership *should* be made mandatory. However, if the complaint is that less-than-universal gun ownership renders the Second Amendment meaningless, then this answer does tend to present itself rather forcefully. And while universal armament might be hard to accomplish, it is unlikely to be any harder than universal *disarmament*, based on the experience of gun control efforts over the last several decades. Note too that the Standard Model does not support what Don Kates correctly calls "the gun lobby's obnoxious habit of assailing all forms of regulation on Second Amendment grounds."<sup>[118]</sup> Under the Standard Model there are important limits on who may keep and bear arms, and on what kind of arms may be owned. But unlike the arguments of either the rabid pro- or antigun lobbies, the Standard Model draws its conclusions from the text, history, and structure of the Constitution in a principled way. These principles do not make Standard Model conclusions right as a matter of social policy--we remain free to decide, as we have in the past, that the Constitution is sufficiently wrong on an issue to be worth amending<sup>[119]</sup> --but they do make Standard Model conclusions formidable as a matter of constitutional law.

### III. THE STATES' RIGHT MODEL

No discussion of the Second Amendment would be complete without at least some reference to the other competing model of Second Amendment interpretation, the "states' right" or "collective right" model. In short, this alternative model provides that the Second Amendment protects not a right of individuals, but only a right of the States. Thus, the right protected is simply the right of states to have a "well regulated militia."

The most obvious flaw of this theory is the failure of its own proponents to take it seriously. As I argue at much greater length elsewhere,<sup>[120]</sup> a "states' rights" interpretation

of the Second Amendment would do far more than is generally advertised. The states' rights theory is normally brought out as part of an argument that the Second Amendment does not provide an individual right to keep and bear arms; such a right, it is argued, exists only as part of a state militia. The purpose of such militias is to maintain a military counterweight to the federal government's standing army, and the right is thus assertable only by states, not individual citizens.<sup>(p.489)</sup>

For example, gun-control activist Dennis Henigan<sup>[121]</sup> writes that "The purpose of the [Second] Amendment was to affirm the people's right to keep and bear arms *as a state militia*, against the possibility of the federal government's hostility, or apathy, toward the militia."<sup>[122]</sup> He describes his interpretation of the Second Amendment as providing "that the Second Amendment guarantees a right of the people to be armed only in service to an organized militia,"<sup>[123]</sup> and argues that James Madison interpreted the Amendment as ensuring

that the Constitution does not strip the states of their militia, while conceding that a strong, armed militia is necessary as a military counterpoint to the power of the regular standing army.... Madison saw the militia as the military instrument of state government, not simply as a collection of unorganized, privately armed citizens. Madison saw the armed citizen as important to liberty to the extent that the citizen was part of a military force organized by state governments, which possesses the people's 'confidence and affections,' and 'to which the people are attached.' This is hardly an argument for the right of people to be armed against government per se.<sup>[124]</sup>

In Henigan's view, which seems representative of the "states' rights" camp,<sup>[125]</sup> the purpose of the Second Amendment is to guarantee the <sup>(p.490)</sup>existence of state military forces that can serve as a counterweight to a standing federal army. Thus, it seems fair to say, the scope of any rights enjoyed by the states under the Second Amendment would be determined by the goal of preserving an independent military force not under direct federal control.

But the existence of such a right on the part of states would be a very big deal, going far beyond the abolition of any direct protection for individuals under the Second Amendment. If states possess a constitutional right, as against the federal government, to maintain militias (or "state armies" as former Chief Justice Burger calls them) then the Second Amendment works a *pro tanto* repeal of many of the restrictions on state military power contained in Article I, Section 10 of the Constitution. Furthermore, if states have a right to maintain their own militias, independent of federal control, then they obviously must have the right to equip those militias as they see fit. Otherwise, the "right" would be meaningless, as the federal government could, by regulating weaponry, render the counterweight ineffectual.

Since many states would balk at spending the money to buy guns for their citizens, quite a few might do what Congress did in 1792: require (or at least permit) their citizens to own military-type weapons, perhaps even including machine guns, howitzers, and the like.<sup>[126]</sup> If they did so, federal gun-control laws would necessarily be preempted, since otherwise the state right would mean nothing. So the states' rights interpretation necessarily leads to a power on the part of states to nullify federal gun control laws simply by allowing their citizens to possess weapons as part of a militia. Note again that the Congressional power to supervise the arming and training of the militia, contained in Article I, Section 10 clause 16 would have to be viewed as modified by the Second Amendment if we are to give the states' rights interpretation meaning.

One might try to avoid this problem by simply declaring that the National Guard is the "militia" that the states have a right to maintain, but this argument has two problems. First,

for reasons set out above,[\[127\]](#) it is pretty obviously not true. Second, if the National Guard *is* the militia, then it is unconstitutional under the Second Amendment because it is not sufficiently independent. After all, an institution that is to serve as a counterweight to the federal standing army can hardly fulfill that function if it is as thoroughly dominated by the federal government as the present-day National Guard is. Whatever the National Guard is, it is not a "state [\(p.491\)](#)army." It is, rather, a federally funded and controlled force with a (very) thin facade of state control.[\[128\]](#) The Supreme Court so reasoned in *Perpich v. United States*.[\[129\]](#) In *Perpich*, the Supreme Court addressed the question of what limitations are imposed on the National Guard under the militia clauses.[\[130\]](#) The question before the Court was whether state governors could prevent their National Guard units from being sent abroad for controversial training missions in Central America.[\[131\]](#) In short, the Court concluded that Congress' powers to raise armies and make war, rather than its militia powers, were implicated.[\[132\]](#) While not dispositive on the issue we are discussing--the Court did not discuss the Second Amendment at all--this case suggests that the National Guard should be viewed constitutionally as it really is--as a federal, not a state, army.

Furthermore, the states' right theory is based on a discredited (and always unsound) notion of relationships within our federal system. Under the classical view of the Constitution, authority is delegated by the people to two kinds of governments, state and federal. State governments are not creations of the federal government, nor is the federal government the creature of the states. Both exercise authority delegated to them by the true sovereigns, the people.[\[133\]](#) The real question to be asked in assessing any governmental action is whether that action is consistent with the authority delegated by the people, or whether it exceeds that authority and is thus *ultra vires*.[\[134\]](#)

But there is another view. In this view, the state governments represent the "real" governments of the people. The federal government exists as a somewhat mistrusted agent of the states, with states retaining the power to protect their people (and themselves) by checking the actions of the federal government where necessary to prevent overreaching. This seems to be the view embodied by the states' rights interpretation, in which "state armies" are set against the federal government, and in which state legislators retain the power to nullify federal firearms laws that would otherwise frustrate state prerogatives.[\[135\]](#)[\(p.492\)](#)

If applied across the board, this view would have rather dramatic consequences, going far beyond those outlined above. States' rights, and a view of state governments as interposed between the federal government and their citizens, after all, formed the core of the losing argument in *Brown v. Board of Education*[\[136\]](#) --and, for that matter, of the Civil War.[\[137\]](#) Yet if we are to decide that the Second Amendment embodies this general theory of the relations between the state and federal governments, there seems no reason to assume that the Framers had different intentions elsewhere in the same Constitution. Thus, unless we are to be entirely incoherent, we must seriously consider rethinking constitutional history all the way back to *Brown*, and indeed to *McCulloch v. Maryland*.[\[138\]](#) Yet it seems unlikely that we will be willing to go that far.

The view of states as the primary constituents of our Constitution, though it has an ancient (if not always honorable) history, is not one that enjoys great esteem or adherence today given the past circumstances of its invocation. Nor is it particularly consistent with either the language or the history of the Constitution. State's rights theorists make much of the Second Amendment's "preamble," but the Constitution's Preamble, after all, states that the Constitution was ordained and established by "We the [\(p.493\)](#)People," not "We the States."[\[139\]](#) Furthermore, the Constitution was ratified by special conventions of the people, not by state legislatures.[\[140\]](#)

These are rather important issues, but they have not been raised, much less addressed,



by the proponents of the states' rights theory. It is no accident that most of those writers are not practicing academics, but politicians and issue-oriented activists.[141] If I may mix my scientific metaphors, the states' rights theory may be analogized to "creation science," a mishmash of unconnected observations and *non sequiturs* intended to compete with the theory of evolution. "Creation science" is not really science at all, of course: it is just a propaganda tool for those of certain religious persuasions in the public-relations battle against evolutionary theory. Realizing that it takes a theory to kill a theory, they came up with one of their own. But "creation science" does not work from the bottom up, synthesizing research into a coherent approach. It works from the top down, starting with its conclusions and looking for evidence that supports them whether or not it forms a consistent whole.[142] Similarly, the states' rights interpretation of the Second Amendment, which pays little attention to text, history, or structural sense, is not really constitutional law. It is simply a slogan.

That is probably why advocates of the states' rights theory are short on specific historical evidence. As Stephen Halbrook puts it:

In recent years it has been suggested that the Second Amendment protects the "collective" right of states to maintain militias, while it does not protect the right of "the people" to keep and bear arms. If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for *no known writing surviving from the period between 1787 and 1791 states such a thesis.*[143](p.494)

Indeed, as Don Kates points out, the states' rights theory did not appear until this century, when it seemed necessary to uphold gun control laws--primarily intended to disarm black people and immigrants--against Second Amendment challenge.[144]

At a time when the mainstream white Anglo-Saxon leadership felt threatened by immigrants, gun-control laws such as New York's Sullivan Law were intended to address its fears. In the face of an unprecedented wave of immigration, largely made up of those whom Americans of Northern European descent found strange and threatening, Framing-era faith in an armed citizenry and in the sovereignty of the people failed. In fact, as James Fallows reports, many at the time felt that "[t]hose Italians and Greeks and Jews looked so different and disturbing"[145] that many were driven to adopt the nativist position that such immigrants could never become a real part of American society because "races may change their religions, their form of government, and their languages, but underneath they may continue the PHYSICAL, MENTAL, and MORAL CAPACITIES and INCAPACITIES which determine the REAL CHARACTER of their RELIGION, GOVERNMENT, and LITERATURE." [146] According to Fallows, this concern led to an increased interest in tests and licensing for the professions as a means of keeping immigrants out.[147] It also led to an increased interest in licensing firearms.

As David Kopel writes:

New York State passed the 1911 Sullivan Law to license handguns while the *New York Tribune* complained about pistols found "chiefly in the pockets of ignorant and quarrelsome immigrants of law-breaking propensities" and condemned "the practice of going armed ... among citizens of foreign birth." The *New York Times* noted the affinity of "low-browed foreigners" for handguns. Even before the Sullivan Law, the New York City police had been canceling pistol permits in the Italian sections of the city.... In the first three years of the Sullivan Law, 70 percent of those arrested had Italian surnames.[148]

Nor was New York the only state to follow this approach; in fact, it was widespread wherever "out" groups frightened the establishment. In the West, it was Chinese and

Japanese immigrants[149] who frightened the establishment into enacting restrictive gun laws; in the South it was (p.495)Americans of African descent.[150] Indeed, one Florida judge went so far as to write about Florida's weapons law that:

I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in the turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. *The statute was never intended to be applied to the white population and in practice has never been so applied.*[151]

Not surprisingly, an effort to disarm citizens deemed undesirable, inferior, or not sufficiently submissive is hardly consistent with the Second Amendment's notions of popular sovereignty, fearless, self-reliant citizens, and an individual right to bear arms. Thus, such actions were justified by the invocation of a new theory. Instead of placing the right to keep and bear arms in individuals--which necessarily would include members of groups whom many in the establishment did not trust--the argument was that the Second Amendment placed the right to arms in the very state governments that were then busy disarming "undesirable" groups. This "states' rights" argument thus served the same purpose as most "states' rights" arguments--to protect a racially discriminatory power structure from constitutional scrutiny.

Advocates of the states' rights argument do not confront this issue. But the recent and rather unadmirable provenance of the states' rights theory suggests why that theory's advocates spend little time on the historical record: it's bad salesmanship. It is also why they make no effort to explain the contradictions and constitutional absurdities that would result from efforts to take the state's rights approach seriously. The states' rights argument was never meant to be taken seriously; it was always simply a justification for statutes aimed at disarming untrustworthy segments of the populace.

Of course, nowadays many believe that the entire populace, not simply some racially- or nationally-defined segment of it, is untrustworthy where weapons are concerned. This may or may not be true. However, such a (p.496)view is certainly inconsistent with that embodied in the Second Amendment. If that view is to receive legal effect, it must be in spite of the Second Amendment, not because of it.

#### IV. THE CASES

Although there is not much caselaw regarding the right to keep and bear arms, there is some. What is fascinating is that it has been embraced by both sides in the gun control debate. On examination, however, it appears to support the Standard Model's views to the extent that it has much to say at all.

##### *A. The Supreme Court Cases*

The Supreme Court has not often considered the Second Amendment. In several nineteenth-century cases, the Court refused to enforce the right to keep and bear arms against states because of its then-applicable doctrine, as announced in *Barron v. Baltimore* [152] and the *Slaughter-House Cases*,[153] that neither the Bill of Rights nor the Fourteenth Amendment's Privileges and Immunities guarantee was directly enforceable against the states.

In *United States v. Cruikshank*,[154] the Supreme Court held that the Second

Amendment's right to keep and bear arms, along with the First Amendment's right of assembly, could not be enforced against the states.<sup>[155]</sup> A case involving claims brought by the United States against members of the Ku Klux Klan who were charged, *inter alia*, with violating black citizens' rights of assembly and to bear arms, *Cruikshank* is still cited for the proposition that the Second Amendment does not apply against the states, and the Supreme Court has not overturned that holding, not having heard a Second Amendment case since 1939. Still, this appears to be a rather slender reed--certainly *Cruikshank's* holding that the First Amendment is inapplicable to the states is long gone, and no one would argue to the contrary today. *Cruikshank* is also sometimes cited for the proposition that the right to arms is a preexisting natural right that is somehow not really part of the Constitution at all, based on the following language:

The right ... is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent on that instrument for its existence. The second amendment guarantees (p.497)that it shall not be infringed, but this, as has been seen, means that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government.<sup>[156]</sup>

It is hard to make too much of this, for two reasons. First, the Court had just finished saying the same thing about the First Amendment:

The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference.<sup>[157]</sup>

Thus, relying on *Cruikshank* for the proposition that the Second Amendment applies only against Congress requires either an acceptance that the First Amendment is also inapplicable against the states, or a convincing explanation of why our understanding of the First Amendment should be updated, while our treatment of the Second Amendment should remain in the pre-incorporation era. Nor is it possible to do much with the argument that the right to keep and bear arms "is not a right granted by the Constitution," nor is "in any manner dependent on that instrument for its existence." After all, the Court said much the same thing about the First Amendment: that right "was not created by the amendment; neither was its continuance guaranteed." Yet no one has been arguing that this language means that somehow the First Amendment does not create an enforceable right.

In fact, the argument that the Court's language about rights predating the Constitution somehow makes them unenforceable runs into more recent trouble than that. In *Griswold v. Connecticut*,<sup>[158]</sup> the case in which the Supreme Court struck down Connecticut's law against contraception as violative of the right of privacy, the Court referred to the right of privacy in similar terms: "We deal with a right of privacy older than the Bill of Rights--older than our political parties, older than our school system."<sup>[159]</sup> Yet no one would argue that Justice Douglas was not referring to a right that was enforceable by individuals against the states. Quite the contrary, even though the right that Douglas was describing was the product of penumbral reasoning, and was not specifically protected by the Bill of Rights, which the right to keep and bear arms, of course, is.<sup>[160]</sup> At any rate, if the fact that the Court calls a right "older than the Constitution" (p.498)means that it is unenforceable by individuals against state governments, nearly all of the Court's sexual liberty jurisprudence stemming from *Griswold*<sup>[161]</sup> would have to go. That seems rather drastic, and certainly counterintuitive.

Similar arguments can be made with regard to the later cases of *Presser v. Illinois* <sup>[162]</sup> and *Miller v. Texas*.<sup>[163]</sup> Decided in an era when incorporation of the Bill of Rights

against the states was not the law, they are of dubious authority today when it has become the rule. At the very least, there should be some principled reason why the doctrine of incorporation should not apply to the Second Amendment, when it is routinely applied to other rights that these cases also held not applicable against the states. Such caselaw may justify a very cautious Court of Appeals' refusal to stick its neck out in advance of Supreme Court action,[\[164\]](#) but can hardly stand for the proposition that the Second Amendment should never be regarded as enforceable against the states. These cases, after all, are not exactly spring chickens. All predate *Plessy v. Ferguson*[\[165\]](#) and in fact could be viewed as part of the build-up to *Plessy*, since the end result was disarmed blacks who could look for protection only to the very state governments that were turning against and disenfranchising them.[\[166\]](#)(p.499)

Still, even accepting the argument that the Second Amendment is applicable only against the federal government, we are left with the question of what it covers and who can invoke it. Unfortunately, there is really only one Supreme Court case offering much guidance on that subject. That case is *United States v. Miller*,[\[167\]](#) a 1939 case that offers only a modicum of help.

In brief, *Miller* involved a challenge to the National Firearms Act of 1934, which sharply limited private ownership of such gangster-associated weapons as sawed-off shotguns and submachineguns.[\[168\]](#) The defendants were indicted for possession of a sawed-off shotgun in violation of the Act, and challenged that indictment in District Court on Second Amendment grounds.[\[169\]](#) They won in the District Court and the case went to the Supreme Court on only one question: whether it was proper to take judicial notice of whether a sawed-off shotgun was a "militia weapon" and hence protected by the Second Amendment, or whether such a finding required evidentiary proceedings.[\[170\]](#)

The Supreme Court reversed, holding that evidentiary hearings were required.[\[171\]](#) In a somewhat confusing opinion the Court reviewed the history of the militia and its character of being made up of the "all males physically capable of acting in concert for the common defense.... And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[\[172\]](#) It thus held that

In the absence of any evidence tending to show that possession or use of "a shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Aymette v. State*, 2 Humphreys (Tenn.) 154, 158.[\[173\]](#)

As a result, the Court remanded the case to the district court for further fact-finding proceedings.[\[174\]](#)(p.500)

*Miller*, being addressed to a rather limited issue, thus doesn't answer a lot of our questions. But there are some important lessons to be learned nonetheless. First, *Miller* cannot plausibly be read to support the "states' rights" position: if the Second Amendment protected only a right of states to have militias, not enforceable by individuals--as "states' right" theorists claim--then factfinding would not have been necessary. Instead, the court would have had to ask only one question: "Is Mr. Miller a state?" And, if the answer was no (as, of course, it was) the case would then have been dismissed for lack of standing.

But the case was *not* dismissed for lack of standing.[\[175\]](#) Instead, the Court appears to have taken Mr. Miller's claim seriously, but concluded that it called for the kind of factfinding normally done in a District Court, and for that reason sent the case back for

further proceedings. Since the Court took Mr. Miller's claim seriously, we can conclude that the Court believed that the Second Amendment protects *some* sort of individual right to keep and bear arms, even if the precise nature of that right is unclear. Beyond that, it is risky to draw any additional conclusions: the opinion is simply not very clear.[176]

### *B. Some Tennessee Observations*

While *Miller* is not very clear, the opinion does draw its language from the important Tennessee case of *Aymette v. State*,[177] which held that the kinds of weapons protected are those that are "part of the ordinary military equipment." [178] Thus, at the risk of seeming provincial, I wish to explore some of the Tennessee caselaw on the subject. I claim two grounds beyond geography for doing so. First, the Supreme Court's citation of *Aymette*, [179] and its use of the same language, suggests that the Court felt that the rights protected by the Second Amendment were coterminous with those protected under the similar provision in the Tennessee Constitution.[180] This must be true, since *Aymette* quite clearly concerns only the right to keep and bear arms under the Tennessee Constitution.[181] Second, the Tennessee cases (p.501) are generally regarded as among the most important state cases on the right to bear arms: *Aymette* and its successor *Andrews v. State*[182] are, for example, among the very few state cases included in Robert Cottrol's very helpful three volume collection *Gun Control and the Constitution*. [183]

Article I, Section 26 of the Tennessee Constitution provides: "That the citizens of this State have a right to keep and bear arms for their common defense; but the legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." [184] In commonsensical fashion, the courts of Tennessee have interpreted this to mean pretty much exactly what it says.[185] In so doing, they have addressed some issues that remain mostly theoretical in the context of the Second Amendment to the federal Constitution.

In *Aymette*, the defendant--like those Rambo wannabes who are responsible for the term "gun nut" today--claimed that the Tennessee provision

gives to every man the right to arm himself in any manner he may choose, however unusual or dangerous the weapons he may employ, and, thus armed, to appear wherever he may think proper, without molestation or hindrance, and that any law regulating his social conduct, by restraining the use of any weapon or regulating the manner in which it shall be carried, is beyond the legislative competency to enact, and is void.[186]

In answering the question of whether this was what the right to keep and bear arms protected, the Court said:

[E]very free white man may keep and bear arms. But to keep and bear arms for what? ... The object, then, for which the right of keeping and bearing arms is secured is the defence of the public. The free white men may keep arms to protect the public liberty, to keep in awe those who are in power, and to maintain the supremacy of the laws and the constitution.... (p.502)As the object for which the right to keep and bear arms is secured is of a general and public nature, to be exercised by the people in a body, for their common defence, so the arms the right to keep which is secured are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment. If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights by those in authority. They need not, for such a purpose, the use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin.... The right to keep and bear them is not, therefore, secured by the constitution.[187]

From this language, it is easy to see why the *Miller* Court quoted *Aymette* on the question of how a sawed-off shotgun should be treated. It is also important to note that the very same passage supports an individual, rather than a state, right: "every free white man may keep and bear arms."[\[188\]](#) Furthermore, the same passage also provides a stated purpose--"to keep in awe those who are in power"--that sounds an awful lot like the Standard Model that Dennis Henigan derides as a mere "insurrectionist theory."[\[189\]](#)

The other major Tennessee case, *Andrews v. State*[\[190\]](#) addresses some other questions of current interest. *Andrews* involved defendants who were charged with violation of a statute forbidding "any person to publicly or privately carry a dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver."[\[191\]](#) They argued that the prosecution violated their rights under both the Second Amendment to the United States Constitution and under the right to keep and bear arms clause of the Tennessee Constitution.[\[192\]](#) The Court, in those pre-incorporation days, dismissed the Second Amendment claim with a reference to *Barron v. Baltimore*.[\[193\]](#)

It was the second question that raised real issues. The Attorney General of Tennessee argued that the right to keep and bear arms was a mere "political right" that existed for the benefit of the state and, hence, could be regulated at pleasure by the state.[\[194\]](#) The Court, however, did not agree.[\(p.503\)](#)

In short, the Tennessee Supreme Court examined many of the same historical sources relied upon by Standard Model scholars, and arrived at the same conclusions. It distinguished between the "keeping" of arms, which involved private possession, and the "bearing" of arms, which had to do with militia service.[\[195\]](#) The Court observed:

*Bearing* arms for the common defense may well be held to be a political right, or for the protection and maintenance of such rights, intended to be guaranteed; but the right to *keep* them, with all that is implied fairly as an incident to this right, is a private individual right, guaranteed to the citizen, not the soldier.[\[196\]](#)

The court concluded that citizens have the right to keep military-type weapons,[\[197\]](#) and to engage in the necessary practice, repair, and transportation of such weapons, even in the absence of any specific militia connection.[\[198\]](#) The Court specifically noted that the militia was by then already a nearly defunct organization, preserved in the state and federal constitutions [\(p.504\)](#)and in the statute books but otherwise of no practical consequence.[\[199\]](#) The Court held, however, that this did not affect the substance of the constitutional rights.[\[200\]](#) It upheld the statute as it applied to non-military weapons, but held that as applied to repeating pistols, which the Court said were military weapons, the statute was unconstitutional.[\[201\]](#) This case remains the leading case in Tennessee today, and its principles continue to control.[\[202\]](#)

### C. *Lessons from the Cases*

From these cases, then, we can learn the following: that the right to keep and bear arms is an individual right, not a states' right; that it consists of the right of law-abiding adult citizens to keep weapons that are of the "ordinary military equipment," or similar civilian arms, and to engage in the associated practice, maintenance, transport, etc.; that this does not create an unlimited right to *wear* such weapons; and that the desuetude of the militia as an organized social institution does not affect the right.[\[203\]](#) These are precisely the conclusions of the Standard Model scholars.[\[204\]](#)

In light of both the Federal and the Tennessee cases, then, it seems clear that the Standard Model enjoys substantial support. This should come as no great surprise, given

that the Standard Model represents an effort to deal faithfully with a rather large body of generally consistent historical and textual material.[205] There may still be uncertainties in terms of translating the Standard Model's conclusions into answers to concrete legal questions (for example, does the Standard Model mean that hunting rifles receive less protection than "assault weapons" because the latter are better suited to militia service?) but the basic framework is there.

There is, however, one major ground for criticism left. That criticism is my own, and has to do with the ultimate purpose behind the right to keep and bear arms: protection against a tyrannical government.

## V. YOU SAY YOU WANT A REVOLUTION?

The Standard Model stresses the role of an armed populace as a protection against a tyrannical government. And, as Professors Cottrol and Diamond point out, on a purely practical level it may make more sense for individuals to arm (p.505) against their own government than to arm against potential invaders.[206] Cottrol and Diamond quote Assistant Secretary of State for Human Rights John Shattuck to the effect that "[i]n the twentieth century the number of people killed by their own governments under authoritarian regimes is *four times* the number killed in all this century's wars combined." [207] They thus argue:

We have, in the twentieth century, seen the rise of monstrous states capable of deprivations of liberty far in excess of anything that the English Whigs who authored the Declaration of Rights of 1689--or their American successors in 1791--could have envisioned.... That, in the light of the history of the twentieth century, those we rely on for serious constitutional and political commentary have failed to examine the issues of whether the state *should* have a monopoly of force and whether an armed population might still play an important role in deterring governmental excesses bespeaks a dangerous intellectual cowardice, a self-imposed limit on political and constitutional discourse that causes us largely to ignore one of the most critical questions of our time.[208]

I have no argument with this point. And if SS liquidation units, or their modern-day American equivalent, ever show up at our doors we will not need much in the way of constitutional theory to tell us what to do.

But one can grant that prevention of genocide and mass murder--or at least rendering it vastly more difficult and costly for their perpetrators--is a good reason for a right to keep and bear arms without believing that it is the *only* reason. Nor does the Standard Model suggest that prevention of such horrors is the primary reason for the Second Amendment. Indeed, the very fact that our century's many government-sponsored killing sprees are far beyond what the Framers might have imagined suggests that the right to keep and bear arms exists not simply to deal with such worst-case scenarios, but also to deal with lesser instances of tyranny. After all, compared with the monster regimes of our century, the British government against which our predecessors revolted was rather nice, really. Nonetheless, the Framers found ample reason for revolt.

Yet Standard Model scholars have paid almost no attention to the question of when such a revolt would be justified.[209] One can understand why those who are working in what, to much of the academic community, is already a somewhat suspect field are a bit reluctant to take this additional step, but the question is an important one. If we have the right to keep and bear arms in no small part so that, in the last resort, we can rise up and overthrow a tyrannical government, then one important aspect of the right would seem to be some basis (p.506) for agreeing on whether the government is tyrannical or not. Granted, there

might be easy cases, like a military *coup d'etat* or a President who suddenly tried to assume dictatorial powers, but tyranny doesn't only happen that way. Hitler, after all, was elected fair and square in the beginning, yet pretty much everyone would agree that he was the archetypical dictator against whom revolt would be justified.

This is a question that is of more than just academic importance. Already, there are news reports that large numbers of Americans--as many as 300,000 according to some estimates--have organized themselves into militia companies whose stated purpose is to resist a tyrannical government. These groups are inspired by a mixture of anger over recent gun-control laws and law enforcement activities, and exaggerated fears that the federal government intends to abandon the Constitution and establish a "new world order" government.[210] And although there is every reason to believe that the vast majority of "militia movement" members are law-abiding citizens, some on the movement's fringes are talking openly about armed rebellion.[211]

Many of these individuals are very familiar with the Second Amendment, and with Standard Model scholarship, but most are sadly lacking in understanding about what the Framers would have considered a tyrannical government. As I have said elsewhere, revolting against taxation without representation is not the same as revolting against taxation, period.[212] But without a proper grounding in this subject, there are twin risks. One is that some citizens will think it is time to revolt when it is not, thus exposing the nation to enormous turmoil, loss of life, and economic damage where it is not justified--and perhaps creating a backlash against the right to keep and bear arms. The other (perhaps less likely in light of that streak of anarchy that seems part of our American culture) is that many citizens will not think that it is time to revolt when it is. Assuming that a would be Hitler (or his probably very different-looking American equivalent) were then gathering power, the consequences of such a failure could be even worse than the consequences of an unjustified rebellion. And, worst of all, the former could precede the latter, given the way in which such things often work. Unsuccessful revolts are often used as an excuse for the kind of "temporary" repression that breeds dictatorship.[213] So educating people about not only the right to keep and (p.507) bear arms, but the circumstances in which the underlying reason for that right might emerge, could be essential.

At the moment, the risk of a misguided revolt still seems fairly remote, but that is the time to take appropriate steps. Standard Model scholars need to develop this aspect of their theories. Theories, even theories of constitutional law professors, have consequences. Indeed, the growth of the militia movement is itself an unintended consequence of antigun arguments that the Second Amendment only protects the right to belong to a militia--for that movement has its roots in individuals who organized their militias in response to just this argument.

Now is not the place for me to address such issues at any more length; this "brief" survey of the field is already too long. But I would suggest that a place to start should be with the original organic document of our nation, the Declaration of Independence. The principles laid out there, and its registry of complaints against King George III, represent a good starting point for discussion of what constitutes a legitimate revolution, as opposed to a mere "rebellion" or "insurrection." And, although modern-day government-bashers would probably disagree, a careful reading of that document will make clear how different our government is from the one that the Framers revolted against. At the core of most of the Declaration's complaints is lack of political participation by the colonists. Our modern society, despite its ills, does not suffer from a lack of political participation; arguably, it suffers from too much.[214] But whether they now like it or not, the government that we have today is the government that most Americans at least thought they wanted. And it is one that they can change, without a revolution, if that is what they really want.



## VI. CONCLUSION

In the preceding pages, I have tried to lay out the two main schools of thought regarding the Second Amendment's right to keep and bear arms. As readers will recognize by now, I believe that the mainstream view that I have called the Standard Model has the better of the debate. But that is only half true.

Standard Model scholars dominate the academic literature on the Second Amendment almost completely. But their views are much less represented in the more popular media, where the "states' rights" view seems still to be dominant. (p.508) Perhaps this reflects the notorious "liberal bias" of the media, though frankly I doubt that. Instead, I am afraid that it has to do with a central failing of American academia: the strong tendency of academics to talk to one another rather than to outsiders. In some fields, this is inevitable, simply because no one else is interested. But that cannot be the case where the subject is one as controversial and contested as the right to keep and bear arms. Instead, I think that it has to do with the reluctance of legal academics to "go public" with their views.

That is understandable. Scientist Stephen Jay Gould writes in the foreword to one of his "pop" books on evolutionary theory that "[i]n France, they call this genre *vulgarisation*--but the implications are entirely positive.... In America, for reasons that I do not understand (and that are truly perverse), such writing for non-scientists lies immured in deprecations." [215] I think that a similar dynamic exists in the field of constitutional law as well. In the field of science, widespread popular ignorance is a very bad thing, given the many ways in which scientific knowledge is important to our society. But in the field of constitutional law, widespread popular ignorance is even worse, because Americans are not simply affected by constitutional law, as even the most unscientific are affected by science. Americans have *responsibilities* under the Constitution, and they can hardly be expected to discharge them if they remain ignorant on the subject.

As long as Americans *do* remain ignorant, they are likely to fall victim to a "Gresham's Law" of constitutional discussion, in which the bad arguments drive out the good. Or, worse yet, they are likely to succumb to the same kind of promises of painless redemption that are mainstays of the diet and fitness industries. In both cases, the outcome is likely to be bad.

Legal academics cannot force Americans to learn, but we can at least do our best to see that they have the opportunity, by taking our knowledge public. This doesn't mean freely opining on just any subject: in fact, I would like to see a world in which legal academics are consulted by talking-head shows only on subjects about which they have published scholarly articles. [216] But it does mean talking about our work to people who aren't law professors or law students.

If the Standard Model scholars had done more of this over the past few years, the public debate would be very different. Perhaps this issue of the *Tennessee Law Review* will circulate widely enough to start the process of educating the public at large about the interesting work being done in this field. If it does, we will all be better off.

## ADDENDUM

I completed this Article several months before the Oklahoma City bombing and the subsequent focusing of attention on the Second Amendment debate and (p.509) the "militia movement" groups. [217] While those events do not really affect the analysis contained in this Article, the public debate has raised a number of questions that I wish to address briefly here. [218] Fortunately, the editors of the *Tennessee Law Review* have been kind enough to allow me to append the following.

As has been shown above, the National Guard is pretty clearly not the "militia" to which the Framers referred. As a result, militia groups argue that *they* are the militia that the Constitution describes. But they are wrong, too. Although the militia was a body that was, in a way, external to the state in the sense of being an institution of the people, the expectation was that the state, not private groups, would provide the foundation upon which the structure of the militia would be erected. As David Williams puts it, "Republicans did not intend to leave the universality of the militia to the chance decision of every citizen to arm herself. The state was supposed to erect the necessary scaffolding on which the militia could build itself, to muster the militia, and oblige every citizen to own a gun." [219]

This is difficult for many modern Americans, with more European-influenced ideas of the state, to appreciate. But perhaps the best analogy would be to the institution of the jury. The jury was intended not just as a protection for individuals, but far more importantly as a check against overweening state power, since it could always refuse to convict in cases of political prosecution. The jury was intended to reflect the community, and to function in many ways independent of state direction. But the state provides the structure within which the jury operates; no one can get together with eleven friends and simply declare that the resulting group makes up a constitutional jury. Similarly, although First Amendment associational rights may provide some protection for individuals who band together and call themselves a "militia," they do not thereby become the well regulated militia that the Second Amendment describes. Of course, as discussed above, neither can a select government-controlled body constitute that militia, any more than such a body could constitute a jury. One could not, for example, designate twelve members of the Los Angeles Police Department as the "jury" to hear police brutality lawsuits and by so doing comply with the Seventh Amendment's right of trial by jury in civil actions--nor is it easy to imagine anyone who would think that such an approach made sense. The same is true of (p.510)the militia: not just any armed body is capable of doing the militia's constitutional job. Rather, it must be representative of--in fact, it must *be*--the community.

Militia groups are even farther off base when they make arguments based on the right of revolt. There is little question that the Framers believed that citizens had the right to revolt against a tyrannical government; after all, they had done so themselves. And, as I have mentioned earlier, Framing-era state constitutions explicitly enshrine such a right as well. [220] Nor is there much room to doubt that an important purpose of the Second Amendment was to make such a revolt possible, in the last extremity. But the militia movement--or at least those fringe elements talking about armed revolt--has it seriously wrong if they think that today's circumstances justify a revolt.

There are two reasons for this. The first is that the primary way in which the militia was intended to serve as a bulwark against oppression was passive. Since, at the time of the framing, the primary means of executing the law or quelling insurrection was by calling out the militia, a simple refusal on the part of the militia to perform its duties would be enough to frustrate tyranny pretty thoroughly. Obviously, this does not apply to private groups without state sanction, since they would not be called out as groups to enforce the law anyway. Second, and more importantly, today's theorists of revolt pay insufficient attention to the Framers' thoughts on the subject. A good short description follows:

This right of resistance is the second general result of entrusting force to the militia. It is the *only* purpose of the Second Amendment explicitly mentioned during its discussion in Congress....

Republicans were aware of the danger implicit in vouchsafing this right of resistance in the citizenry and sensitive to the charge that they were inciting violence. They developed a number of limits on the right: It must be a product of the "body" of the people, i.e., the great majority acting by consensus; it must be a course of last resort; its inspiration must be

a commitment to the common good; and its object must be a true tyrant, committed to large-scale abuse, not merely randomly unjust or sinful in private life. An uprising that failed to meet these criteria was considered an illegitimate rebellion, rather than an act of true republican resistance.[\[221\]](#)

Thus, there can be no claim--despite what some militia theorists, and some militia critics, maintain--that the Second Amendment guarantees a right for any individual to declare war against the federal government whenever he or she thinks the government is unjust. Quite the contrary. It should also be obvious that those talking armed revolt today do not meet any part of the test set out above.

There are two important points to be taken from the preceding. First, constitutional theory *matters*, and not just to professors of constitutional law. The proper understanding of the Second Amendment, as embodied in its history and [\(p.511\)](#)explained in the academic literature, has taken quite a beating at the hands of both pro- and anti-gun advocates, with unfortunate consequences that we see today. The Second Amendment creates an individual right to arms; the "militia" language neither expands nor contracts that right.[\[222\]](#) In light of the Framers' understanding, this makes sense: the armed citizenry was the body from which the well regulated militia was to be drawn, but the right of revolt could not be exercised by individual citizens or small groups, only by the people as a whole.

Unfortunately, some gun-control proponents have promulgated the notion that the Second Amendment protects only a militia; many pro-gun activists have responded by forming militias in the hopes that doing so would somehow expand their constitutional rights. This, coupled with misunderstanding of the purpose of the Second Amendment on the part of both groups, has produced a situation that may still prove dangerous. And that is the second lesson: Be careful what you advocate in terms of constitutional principles, because people may listen to you.

My final observation has less to do with constitutional law than with good manners as applied to constitutional law. It has been my experience, as a constitutional scholar who has written on Second Amendment issues, that I have gotten a much greater response from members of the non-academic community regarding those topics than when I have written on, say, the Commerce Clause.[\[223\]](#) It has also been my experience that although a few of the individuals who have contacted me could fairly be classified as "nuts," the vast majority have been intelligent, well-read, and polite. Many of them have been far more knowledgeable about the Second Amendment, its history, its caselaw, and its academic treatment than are most professors of constitutional law.

Nonetheless, in popular media discussions of the subject, and in casual conversation among academics and journalists, such individuals are routinely written off quite unfairly as either nuts or dupes of the National Rifle Association. I will not belabor this point, as it has been addressed admirably by Doug Laycock in his *Vicious Stereotypes in Polite Society*.[\[224\]](#) But I do want to stress that such stereotyping of individuals based on their views is itself a form of polarizing "hate speech," just as much as attacks based on racial prejudice or paranoid distrust of [\(p.512\)](#)the government. In fact, such stereotyping and marginalization themselves promote paranoia and conspiracy theories. After all, many may believe that a system that ignores or trivializes their views--even when those views are in fact well-founded--is unlikely to have their best interests at heart, or even to be truly democratic.

I fear that the bad habit of trivializing and disdainful popular opinion regarding the Constitution--particularly when that opinion comes disproportionately from rural working-class white males--represents an unfortunate legacy of the Civil Rights struggle. The academic and government elites were right then, and their more populist critics were wrong. But being right once is not the same as being right always. That is easy to forget, of course, as there are few pleasures more insidiously addictive than the belief in one's own moral and

intellectual superiority. But it remains true nonetheless. And when, as so many commentators today argue, the elites seem to have captured a disproportionate share of political and economic power,<sup>[225]</sup> treating the Constitution, too, as a preserve of the elite is likely to produce great resentment, and to produce a dangerous loss of legitimacy. I fear that it has done both.

Interestingly, the adoption of Standard Model jurisprudence by the Supreme Court might do a great deal to ease the distrust and polarization that I have mentioned, and even to make sensible gun controls easier. So far, the barriers to gun control have been political, not constitutional. Those opposing gun control have been motivated in no small part by the fear that each measure represents a step toward confiscation. If adopted, the Standard Model approach would go a long way toward easing those fears, by protecting an individual right to arms. But because the Standard Model approach permits many reasonable limits on gun ownership and gun wearing, most genuine gun control efforts--those not aimed at confiscation--would pass muster. Furthermore, because the Standard Model approach is visibly rooted in the text, purposes and history of the Constitution, it is likely to be regarded as constitutionally legitimate. Though the importance of this last point has been underestimated in recent years, it is no small thing.

With the growing division in American society along lines of class, race, education, and age, and with the approach of a millennium (something that, if history is any guide, tends to encourage the growth of odd beliefs and political movements) what we need is more discussion and better manners, not efforts to cut off discussion using bad manners. And if our system of government is to retain the loyalty of its citizens, it must pay far more attention to questions of legitimacy than it has in recent years. I hope that this edition of the *Tennessee Law Review*, and my own small contribution to it, will play a role in promoting both, and I invite readers to take up the challenge and do the same.

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[1] See discussion *infra* Part III.

[2] See discussion *infra* Part II.

[3] 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." *Id.* See THE RIGHTS RETAINED BY THE PEOPLE (Randy E. Barnett ed., 1991); Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 Cornell L. Rev. 1 (1988); Charles Black, *On Reading and Using the Ninth Amendment*, in POWER AND POLICY IN QUEST OF LAW 187 (Myres McDougal & W. Michael Reisman eds., 1985); Symposium on Interpreting the Ninth Amendment, 64 CHI.-KENT L. REV. 37 (1989). For an interesting article tying the Ninth Amendment to the right to keep and bear arms see Nicholas Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992).

[4] See, e.g., *Roe v. Wade* 410 U.S. 113, 153 (1973) (holding most state law restrictions on abortions in the first two trimesters unconstitutional); *Griswold v. Connecticut*, 381 U.S. 479 484-85 (1965) (holding that right to privacy invalidates laws restricting contraceptive access for married couples).

[5] *The Bork Disinformers*, WALL ST. J., Oct. 5, 1987, at 22.

[6] See ROBERT H. BORK, THE TEMPTING OF AMERICA 97 (1990). For a rather critical assessment of Bork's approach to the *Griswold* case in particular and the right of privacy in general, see Glenn H. Reynolds, *Sex, Lies and Jurisprudence: Robert Bork, Griswold, and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045 (1990). See also Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333 (1992) (criticizing Bork and other "right wing" constitutional theorists for inconsistency in interpretive technique).

[7] See, e.g., LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 110-11 (1991) (arguing that under the Ninth Amendment the right to engage in "unconventional sexual behavior" is

"required by the Constitution").

[8] See *infra* note 18.

[9] See, e.g., U.S. Cong. House of Representatives, *Hearings on High Energy Physics*, Comm. on Science, Science Subcomm., January 26, 1995, available: LEXIS-NEXIS Library, CURNWS file (testimony of Dr. Frank S. Merrit, University of Chicago, Enrico Fermi Institute) (describing "Standard Model"). For a more popularly-oriented treatment see *Circles of the Mind*, THE ECONOMIST, May 1, 1993, at 90.

[10] See Glenn H. Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110 (1991).

[11] Indeed, the Court had rejected such a right in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[12] See *Brown v. Board of Education*, 347 U.S. 483 493 (1954) (holding the right to integrated schools constitutionally protected).

[13] William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, DUKE L.J. 1236, 1254-55 (1994) ("Indeed, one may fairly declare, [the Second Amendment] is at least as well anchored in the Constitution ... as were the essential claims with respect to the First Amendment's protection of freedom of speech as first advanced on the Supreme Court by Holmes and Brandeis, seventy years ago.").

[14] U.S. CONST. amend. II.

[15] Sanford Levinson's *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989), is so titled because of the contrast between the extensive discussion of the Second Amendment in the popular press and its near-complete marginalization by the academy up to that point. Levinson notes:

To grasp the difference, one might simply begin by noting that it is not at all unusual for the Second Amendment to show up in letters to the editors of newspapers and magazines. That judges and academic lawyers, including the ones who write casebooks, ignore it is most certainly not evidence for the proposition that no one cares about it.

*Id.* at 641 (footnote omitted). Levinson explains this gap by reference to cultural and political differences between the great mass of Americans and those who dominate elite discussion of legal issues:

I cannot help but suspect that the best explanation for the absence of the Second Amendment from the legal consciousness of the elite bar, including that component found in the legal academy, is derived from a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even "winning," interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation.

*Id.* at 642 (footnote omitted).

[16] Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983) [hereinafter Kates, *Original Meaning*].

[17] Levinson, *supra* note 15.

[18] See, e.g., Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1205-11, 1261-62 (1992); Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1164 (1991) [hereinafter Amar, *Constitution*]; Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991) [hereinafter Cottrol & Diamond, *Afro-Americanist Reconsideration*]; Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the "Right to Bear Arms,"* 49 LAW & CONTEMP. PROBS. 151 (1986); Kates, *Original Meaning*, *supra* note 16; Don B. Kates Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143 (1986) [hereinafter Kates, *Dialogue*]; Don B. Kates Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87 (1992) [hereinafter Kates, *Self Protection*]; Levinson, *supra* note 15; Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125 (1986); Van Alstyne, *supra* note 13; Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995 (1995) [hereinafter Cottrol & Diamond, *Fifth Auxiliary Right*] (reviewing JOYCE L. MALCOLM, *THE ORIGINS OF AN ANGLO AMERICAN RIGHT* (1994)); F. Smith Fussner, *That Every Man Be Armed: The Evolution of a Constitutional Right*, 3 CONST. COMMENTARY 582 (1986) (book review); Joyce L. Malcolm, *That Every Man Be Armed: The Evolution of A Constitutional Right*, 54 GEO. WASH. L. REV. 452 (1986) (book review); see also James G. Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 328 (1990); Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257 (1991); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

[19] According to a brief filed by the group Academics for the Second Amendment, "[o]f 41 law review articles published since 1980 which offer substantial discussion of the Amendment," all but four take the individual rights position. Amicus Curiae Brief of Academics for the Second Amendment at 7 n.4, *United States v. Lopez*, 114 S. Ct. 2097 (1994) (93-1260) [hereinafter *Lopez* Brief].

[20] Kates, *Original Meaning*, *supra* note 16, at 218.

[21] *Id.*; see also Van Alstyne, *supra* note 13, at 1237-38.

[22] Van Alstyne, *supra* note 13, at 1242. Or as Professors Cottrol & Diamond put it:

To begin with, the first clause, discussing the well-regulated militia, seems to be the dependent clause. According to this reading, a well-regulated militia depends on the right of the people to keep

and bear arms. The language does not support the opposite reading, that the right of the people to keep and bear arms depends on the maintenance or preservation of a well-regulated militia. It should also be noted that the Amendment has two parts: (1) an observation, or perhaps a cautionary note ("A well regulated Militia, being necessary to the security of a free State") and (2) a command or legal requirement ("the right of the people to keep and bear Arms, shall not be infringed"). The plain language of the first clause appears to impose no legal requirement or restriction on the federal government. Only the second clause indicates a right that the government cannot infringe.

Cottrol & Diamond, *Fifth Auxiliary Right*, *supra* note [18](#), at [1002](#).

[\[23\]](#) *Id.*

[\[24\]](#) See JOYCE L. MALCOLM, TO KEEP AND BEAR ARMS 119 (1994).

[\[25\]](#) "That the subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by law." English Bill of Rights of 1689, *quoted in* MALCOLM, *supra* note [24](#), at 119.

[\[26\]](#) MALCOLM, *supra* note [24](#), at 135-64. See also STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS 1-17 (1989) (describing uproar over British efforts to disarm the citizens of Boston, and portrayal of these efforts as a violation of the rights of Englishmen); Joyce L. Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. [285](#) (1983). The right to bear arms was also considered one of the traditional rights of Englishmen by William Blackstone. 1 William Blackstone, Commentaries, \*129, \*144 (placing right to bear arms alongside right of petition and access to courts of law, as essential to the vindication of other rights such as liberty and property).

[\[27\]](#) See Kates, *Self-Protection*, *supra* note [18](#), at [99](#).

[\[28\]](#) See Kates, *Original Meaning*, *supra* note [16](#), at [224](#) (citing A Pennsylvanian (Tench Coxe), *Remarks on the First Part of the Amendments to the Federal Constitution*, PHILA. FED. GAZETTE, June 18, 1789 at 2).

[\[29\]](#) A Pennsylvanian (Tench Coxe), *Remarks on the First Part of the Amendments to the Federal Constitution*, PHILA. FED. GAZETTE, June 18, 1789, at 2, *quoted in* Kates, *Original Meaning*, *supra* note [16](#), at [224 n.81](#). James Madison approved of Coxe's construction of the Second Amendment in a letter to Coxe dated June 24, 1789. 12 Papers of James Madison 257 (R. Rutland & C. Hobson eds., 1977), *quoted in* Kates, *Original Meaning*, *supra* note [16](#), at [224 n.81](#).

[\[30\]](#) THE FEDERALIST No. 46, at 299 (James Madison) (Willmore Kendall & George W. Carey eds., 1966). This language is quoted in most Standard Model articles. See, e.g., HALBROOK, *supra* note [26](#), at 100 (quoting Noah Webster); Cottrol & Diamond, *Afro-Americanist Reconsideration*, *supra* note [18](#), at [330](#). Noah Webster's pro-Constitution pamphlet states:

Before a standing army can rule, the people must be disarmed; as they are in almost every Kingdom of 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 pretence, raised in the United States.

HALBROOK, *supra* note [26](#), at 100 (quoting NOAH WEBSTER, AN EXAMINATION OF THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 43 (Philadelphia, Prichard & Hall, 1787)); Kates, *Original Meaning*, *supra* note [16](#), at [228 n.100](#).

[\[31\]](#) Madison, *supra* note [30](#), at 299.

[\[32\]](#) Jefferson is often quoted for a letter that he wrote to a nephew suggesting that proficiency with firearms builds character:

As to the species of exercise, I advise the gun. While this gives a moderate exercise to the body, it gives boldness, enterprise, and independence to the mind. Games played with the ball, and others of that nature, are too violent for the body, and stamp no character on the mind. Let your gun, therefore, be the constant companion of your walks.

1 THE JEFFERSON CYCLOPEDIA 318 (John P. Foley ed., Russell & Russell 1967) (1900).

It is worth noting that such views are not merely aesthetic, but expressly political. The "boldness, enterprise, and independence" to which Jefferson refers are characteristics viewed by the Framers as essential to citizenship in a republic. For more on this link between armsbearing and civic virtue, see Akhil R. Amar, *The Central Meaning of Republican Government*, 65 U. COLO. L. REV. 749, 771-72 (1994) (discussing linkage between armsbearing and full citizenship in American thought from framing to present); Amar, *Constitution*, *supra* note [18](#), at [1163-73](#). Cf. Jean Bethke Elstain, *Citizenship and Armed Civic Virtue: Some Critical Questions on the Commitment to Public Life*, in COMMUNITY IN AMERICA 47 (Charles Reynolds & Ralph Norman eds. 1988). In short, the theory is that

[t]he right of arms is one of the first to be taken away by tyrants, not only for the physical security despotism gains in monopolizing armed power in the hands of the state, but also for its moral effects. The tyrant disarms his citizens in order to degrade them; he knows that being unarmed "palsies the hand and brutalizes the mind: an habitual disuse of physical forces totally destroys the moral; and men lose at once the power of protecting themselves and of discerning the cause of their oppression." Thus, when Machiavelli said that "to be disarmed is to be contemptible," he meant not simply to be

held in contempt, but to deserve it; by disarming men tyrants render them at once brutish and pusillanimous.

Kates, *Self Protection*, *supra* note [18](#), at [95](#) (quoting JOEL BARLOW, ADVICE TO THE PRIVILEGED ORDERS IN THE SEVERAL STATES OF EUROPE RESULTING FROM THE NECESSITY AND PROPRIETY OF A GENERAL REVOLUTION IN THE PRINCIPLE OF GOVERNMENT 45 (Cornell Univ. Press 1956) (1792) (citation omitted).

[\[33\]](#) 1 THE JEFFERSONIAN CYCLOPEDIA, *supra* note [32](#), at 51 (alteration in original).

[\[34\]](#) Patrick Henry, Virginia Debates on the Adoption of the Federal Constitution, in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 386 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co. 1836) [hereinafter ELLIOT'S DEBATES].

[\[35\]](#) U.S. CONST. pmbl.; *id.* amend. X.

[\[36\]](#) See Levinson, *supra* note [15](#), at [651](#). Levinson discusses "the implication that might be drawn from the Second, Ninth and Tenth Amendments: the citizenry itself can be viewed as an important third component of republican governance insofar as it stands ready to defend republican liberty against the depredations of the other two structures."

[\[37\]](#) 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1897 (Melville M. Bigelow ed., 5th ed., Boston, Little, Brown & Co. 1891). Interestingly, this passage from Story--which dates from its original publication in 1833--was quoted by the Tennessee Supreme Court in a case upholding the right to keep and bear arms under the Tennessee Constitution. *Andrews v. State*, 50 Tenn. 141, 157, 3 Heisk. [165](#), [183](#) (1871); see also Glenn H. Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. [647](#) (1994).

[\[38\]](#) Thomas M. Cooley, *The Abnegation of Self-Government*, THE PRINCETON REV., July-Dec. 1883, at 209, 213-14, *quoted in* Levinson, *supra* note [15](#), at [649 n.64](#).

[\[39\]](#) Dennis Henigan, *Arms, Anarchy, and the Second Amendment*, 26 VAL. L. REV. [107](#) (1991).

As explained below [the standard model] amounts to the startling assertion of a generalized constitutional right of all citizens to engage in armed insurrection against their government. This "insurrectionist theory" of the Second Amendment, in the judgment of this writer, represents a profoundly dangerous doctrine of unrestrained individual rights which, if adopted by the courts, would threaten the rule of law itself.

*Id.* at [110](#).

[\[40\]](#) *Id.*

[\[41\]](#) Lewis L. Laska, *A Legal and Constitutional History of Tennessee, 1772-1972*, 6 MEM. ST. L. REV. 563, 582-83 (1976) (quoting J.G.M. RAMSEY, THE ANNALS OF TENNESSEE TO THE END OF THE EIGHTEENTH CENTURY 657 (Kingsport Press 1926) (1853)). Laska points out, however, that Ramsey did not identify the source for his quotation. *Id.* at 583 n.90.

[\[42\]](#) TENN. CONST. art. I § 1.

[\[43\]](#) TENN. CONST. art. I § 2.

[\[44\]](#) Compare NEW HAMPSHIRE CONST. art. I § 10, with TENN. CONST. art. I § 2.

[\[45\]](#) THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.--That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed,--that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

*Id.*; see also Dan Himmelfarb, *The Constitutional Relevance of the Second Sentence of the Declaration of Independence*, 100 YALE L.J. 169 (1990).

[\[46\]](#) Robert Bork, for example, characterizes the language of the Preamble as "entirely hortatory and not judicially enforceable." BORK, *supra* note [6](#), at 35. Nor has anyone else tried to do much with the Preamble. It would be interesting to see what would become of existing constitutional law if the Supreme Court gave the Preamble to the Constitution as much interpretive weight as critics of the Standard Model give the opening clause of the Second Amendment. That, however, is a topic for another article.

[\[47\]](#) Van Alstyne, *supra* note [13](#), at [1243-44](#).

[\[48\]](#) *Id.*; see also Cottrol & Diamond, *Fifth Auxiliary Right*, *supra* note [18](#).

[\[49\]](#) Van Alstyne, *supra* note [13](#), at [1244](#).

[\[50\]](#) See Kates, *Original Meaning*, *supra* note [16](#), at [223](#).

[\[51\]](#) *Id.*

[\[52\]](#) *Id.*

[\[53\]](#) George Mason, Virginia Debates on the Adoption of the Federal Constitution, in 3 ELLIOT'S DEBATES, *supra* note [34](#), at 425.

[54] VA. CONST. OF 1776, art. I § 13.

[55] See, e.g., MALCOLM, *supra* note 24, at 143:

Pinning down intellectual influence is always difficult, yet when the reliance upon Blackstone is added to other evidence it seems clear that English attitudes and practices toward the use of weapons shaped American attitudes and practices. Americans were more consistent, however. Practice and profession did not diverge in America as they did in England. Professional armies had no "permanent and perpetual" role in America until 1763. Rather, the settlers' jealousy of their personal right to have weapons was magnified by what one historian characterized as their "almost panic fear" of a standing army, a legacy handed down from generation to generation by forbears "who, if they were Southern Cavaliers recalled Cromwell and his major-generals, and if they were New Englanders the attempts of the Stuarts to raise regular armies and govern through their sanction."

*Id.* (quoting KATHARINE CHORLEY, *ARMIES AND THE ART OF REVOLUTION* 216 (1973)).

[56] See, e.g., Kates, *Original Meaning*, *supra* note 16, at 215-17.

[57] Kates describes it this way:

[T]he different colonies imposed a duty to keep arms and to muster occasionally for drill upon virtually every able-bodied white man between the age of majority and a designated cut-off age. Moreover, the duty to keep arms applied to *every* household, not just to those containing persons subject to militia service....

In short, one purpose of the Founders having been to guarantee the arms of the militia, they accomplished that purpose by guaranteeing the arms of the individuals who made up the militia. In this respect it would never have occurred to the Founders to differentiate between the arms of the two groups in the context of the amendment's language. The personally owned arms of the individual were the arms of the militia.

*Id.* at 215, 217 (footnotes omitted).

[58] *Id.* at 217-18.

[59] *Id.* at 218; see also Cottrol & Diamond, *Fifth Auxiliary Right*, *supra* note 20, at 1012. "Beset by internal and external threats, early American settlements had very active militias. Settlements made considerable efforts to ensure the migration of white men capable of bearing arms. The survival of colonies, particularly in their early stages, rested on virtually universal militia participation." *Id.* (footnotes omitted).

Cottrol and Diamond go on to note that "virtually universal" included even citizens who were formally ineligible for militia service. "In most colonies, militia membership was restricted to white men. As a practical matter, every colony had free blacks, and occasionally slaves, who would participate in the colony's defense when it was under attack." *Id.* at 1012 n.74.

[60] See MALCOLM, *supra* note 24, at 162-63.

[61] *Id.* (footnotes omitted).

[62] See *supra* notes 40-44 and accompanying text.

[63] See, e.g., Cottrol & Diamond, *Fifth Auxiliary Right*, *supra* note 18, at 1009.

[64] As Professors Cottrol and Diamond report:

Charles II approached the business of disarming potential subversives with caution. One of the tools used to perform this task was the establishment of a select militia, volunteer units given intensive military training. Such units were valuable because they received training superior to the often haphazard drill of the militia at large. They could also be selected for their political reliability. Charles II, suspicious of the English tradition of the armed population, used this select militia to disarm those considered "politically unreliable," a category that continued to expand under his reign.

*Id.*

[65] Kates, *Original Meaning*, *supra* note 16, at 216.

[66] Compare MALCOLM, *supra* note 24, at 4 ("The militia was first and foremost a defensive force and could not be taken out of the realm. Members were even reluctant to leave their own counties.") with *id.* at 23 ("With the commonwealth threatened by internal insurrections and foreign invasions [after the English Civil War] the new rulers had ample excuse to maintain a large standing army.... and the country that had always depended upon an impromptu militia found itself supporting a standing army respected and feared throughout Europe."). See also THE FEDERALIST No. 8, *supra* note 30, at 67-68 (Alexander Hamilton); Nos. 19, 20, at 131, 135 (James Madison & Alexander Hamilton) (using the word "troops" to refer to members of a professional standing army, as opposed to the militia, which is made up of citizen-soldiers).

[67] See, e.g., 29 Op. Atty. Gen. 322 (1912). In fact, when the Army wanted to use militia units to chase Mexican bandits south of the border, Attorney General Wickersham opined that the Constitution prohibited the use of militia units outside American borders. *Id.* For a litany of complaints about the militia's unsuitability in providing the kind of "global reach" needed by a nascent superpower, see Frederick B. Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 189 (1940).

[68] 10 U.S.C. § 311 (Supp. 1988).

[69] 10 U.S.C. § 101(10)(c) (Supp. 1988).



[70] 10 U.S.C. § 332 (1988); *see also* discussion of *Perpich*, *infra text* accompanying notes [129-32](#).

[71] 10 U.S.C. § 802(a)(3) (Supp. 1994).

[72] *See* 32 U.S.C. § 304 (Supp. 1988); 10 U.S.C. § 3261 (Supp. 1994) (setting out oath of National Guardsmen and requiring that members of the Guard take the oath).

[73] Col. Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 384-85 (1994) (quoting William S. Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 MIL. L. REV. 1, 2 (1992)).

[74] Note also the following:

Nowadays, it is quite common to speak loosely of the National Guard as "the state militia," but 200 years ago, any band of paid, semiprofessional part-time volunteers, like today's Guard, would have been called "a *select corps*" or "*select militia*"--and viewed in many quarters as little better than a standing army. In 1789, when used without any qualifying adjective, "the militia" referred to all Citizens capable of bearing arms.... [So] "the militia" is identical to "the people."

Amar, *Constitution*, *supra* note [18](#), at [1166](#).

[75] MALCOLM, *supra* note [24](#), at 163.

[76] 10 U.S.C. § 101(4)(a) (1988).

[77] *See, e.g.*, 10 U.S.C. § 311 (1994) (classifying the able-bodied male population aged 17-45 and female members of the National Guard as the unorganized militia of the United States). The state rule is similar, except that many states include all women. *See, e.g.*, ALA. CODE § 31-2-2 to -5 (1975); ARIZ. CONST. art. XVI, § 1; ARK. CODE ANN. § 1261-101(b); CAL. MIL. & VET. CODE § 122 (West 1988) (Note that § 554 says male or female.); CONN. GEN. STAT. § 27-2 (1990); GA. CODE ANN. § 38-2-3(d) (1982 & Supp. 1994); IDAHO CODE § 46-102 (1977) (Note that § 46-105 (Supp. 1994) authorizes women to serve.); IND. CODE ANN. § 10-2-3-1 (Burns 1992); IOWA CONST. art. VI, § 1 (amended 1868); KAN. STAT. ANN. § 48-904(e) (1983) (Unorganized militia includes both men and women.); KY. CONST. § 219; MINN. STAT. ANN. § 190.06 (West 1992); MISS. CODE ANN. § 33-5-1 (1990); N.M. STAT. ANN. § 20-2-2 (Michie 1978); N.M. CONST. art. XVIII, § 1; N.Y. MIL. LAW § 2 (McKinney 1990); N.D. CONST. art. II, § 16; OHIO CONST. art. IX, § 1 (1994) (authorizes "all citizens to serve"); OR. REV. STAT. § 396.105 (1994); R.I. GEN. LAWS § 30-1-2 (1994) (Note that § 30-1-3 authorizes enlistment of females.); S.C. CONST. art. 13, § 1 (amended 1975); S.D. CODIFIED LAWS § 33-2-2 (1994); S.D. CONST. art. XV, § 1; TENN. CODE ANN. § 58-1-104(d) (1989); UTAH CONST. art. XV, § 1; WYO. STAT. § 19-2-102 (1977); WYO. CONST. art. 17, § 1 (1994).

[78] *See, e.g.*, Van Alstyne, *supra* note [13](#), at [1254](#).

[79] *E.g., id.*

[80] *Id.*

[81] This is not quite as silly as it sounds. Switzerland, for example, permits individual possession of weapons that are much more highly restricted in the United States, including howitzers, anti-aircraft guns, and anti-tank weapons. *See* DAVID KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES* 283 (1991). ("The army sells to arms 'collectors' (usually former soldiers) a variety of machine guns, as well as anti-tank weapons, howitzers, anti-aircraft guns, and cannons."); *id.* at 292 (stating that Switzerland allows ownership of "howitzers, anti-aircraft guns, and other military weapons by anyone who can meet the simple requirements for a license"); *id.* at 295 ("[T]he Swiss are powerfully armed, with everything from handguns to anti-aircraft missiles, and legal controls range from nonexistent to mild.") Kopel points out, however, that the absence of "howitzer crime"--and the low rate of violent crime in Switzerland in general--have more to do with cultural factors than with the ready availability of firearms. *Id.* at 292-94.

[82] *See, e.g.*, *Aymette v. State*, 21 Tenn. 152, 156-57, 2 Hum. [154](#), [158-59](#) (1840):

As the object for which the right to keep and bear arms is secured is of general and public nature, to be exercised by the people in a body, for their common defence, so the arms the right to keep which is secured are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment.

*Id.* at 156, 2 Hum. at [158](#). Although the Tennessee Supreme Court in *Aymette* was construing the right to keep and bear arms under the Tennessee Constitution, this language was quoted by the United States Supreme Court in *United States v. Miller*, 307 U.S. [174](#), [178](#) (1939), a case addressing the Second Amendment. Note that this language distinguishes between "the object for which the right to keep and bear arms is secured" and the right itself. *Aymette*, 21 Tenn. at 156, 2 Hum. at [158](#) (emphasis added). This is entirely consistent with the Standard Model analysis.

[83] David E. Vandercoy, *The History of the Second Amendment*, 28 VAL. U. L. REV. [1007](#) (1994); Stephen P. Halbrook, *Rationing Firearms Purchases and the Right To Keep Arms: Reflections on the Bills of Rights of Virginia, West Virginia, and the United States*, 96 W. VA. L. REV. 1 (1993).

[84] Kates, *Original Meaning*, *supra* note [16](#), at [259](#). For a discussion of textual and logical limitations implied by the original right view, see Halbrook, *supra* note [18](#); Kates, *Dialogue*, *supra* note [18](#), at [146-48](#).

[85] *See* Thomas M. Moncure, *The Second Amendment Ain't About Hunting*, 34 How. L.J. 589 (1991).

[86] Kates, *Dialogue*, *supra* note 18, at 146.

[87] Kates, *Original Meaning*, *supra* note 16, at 215-16.

[88] Amar, *Constitution*, *supra* note 18, at 1164 n.152.

[89] 2 F.3d 1342, 1367-68 (5th Cir. 1993), *aff'd* 115 S. Ct. 1624 (1995).

[90] Kates, *Original Meaning*, *supra* note 16, at 266.

Felons simply did not fall within the benefits of the common law right to possess arms. That law punished felons with automatic forfeiture of all goods, usually accompanied by death.... Nor does it seem that the Founders considered felons within the common law right to arms or intended to confer any such right on them. All the ratifying convention proposals which most explicitly detailed the recommended right-to-arms amendment excluded criminals and the violent.

*Id.* Given the rather promiscuous designation of felonies nowadays, one might imagine an argument to the contrary in the case of minor nonviolent felonies, crimes that would have been misdemeanors (or perhaps not even crimes at all) under the common law. However, I am aware of no Standard Model scholar who has made such an argument.

[91] For a First Amendment analog, see *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (striking down gross receipts tax on newspapers as a covert effort at prior restraint).

[92] Kates, *Dialogue*, *supra* note 18, at 148.

[93] Kates, *Original Meaning*, *supra* note 16, at 265.

[I]t has been argued that registration and permissive licensing cannot sustain scrutiny under the amendment.... By destroying the anonymity of gun ownership, licensing or registration laws would make it possible for a despot to follow up his coup by confiscating all firearms.

Whatever the abstract cogency of this argument, the concept of anonymity or privacy in gun ownership profoundly departs from the conditions under which the Founders envisioned the amendment operating. Under the militia laws (first colonial, then state and eventually federal), every household, and/or male reaching the age of majority, was required to maintain at least one firearm in good condition. To prove compliance these firearms had to be submitted for inspection periodically.

*Id.*

[94] Compare Kates, *Original Meaning*, *supra* note 16, at 267, with Halbrook, *supra* note 18, at 160-62.

Note that the Tennessee Constitution makes the same distinction between "keeping" and "bearing" and that Tennessee courts--even before the right-to-arms provision of the Tennessee Constitution was amended to make it explicit--held that the legislature retained the right to regulate the "wearing" of arms. See *State v. Aymette*, 21 Tenn. 152, 156-57, 2 Hum. 154, 158-59 (1840), at 21 Tenn. 156-57, 2 Hum. 158-59 (distinguishing between "keeping," "bearing," and "carrying" of arms); see generally Reynolds, *supra* note 37, at 661-65 (discussing this distinction). Once again I emphasize the United States Supreme Court's reliance on *Aymette* in *United States v. Miller*, 307 U.S. 174, 178 (1939), as evidence that this is a point relevant to the United States Constitution and not simply the Tennessee Constitution. *Id.*

[95] Kates, *Original Meaning*, *supra* note 16, at 267.

[96] *Id.*

[97] *Id.*

[98] See, e.g., Col. Charles J. Dunlap, Jr., USAF, *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643 (1995)

[99] See, e.g., *Korematsu v. United States*, 323 U.S. 214, 219 (1944) (upholding military order excluding Americans of Japanese origin from the West Coast). See also *Hirabayashi v. United States*, 320 U.S. 81, 102 (1943) (upholding earlier curfew applying to American citizens of Japanese descent).

[100] See generally Jonathan Clarke, *Chechnya is Caution for Bosnia Hawks*, MEMPHIS COMM. APP., Jan. 29, 1995, at 4B; David Filipov, *Troops in Chechnya Watch Their Backs*, S.F. CHRON., Feb. 1, 1995, at A10; Fred Haitt, *Truth of Chechen War Derails Russian Propaganda Machine*, WASH. POST, Jan. 29, 1995, at A24; Steve LeVinge, *Bombs Rouse Chechen Town to Enlist; Night Raid Hits Hospital, Schools and Homes; Angry Survivors Form Militia at Dawn*, WASH. POST, Jan. 25, 1995, at A20; Steve LeVinge, *Russians Alienate Potential Allies as They Try to Pacify Chechnya; Villagers Turn Against Moscow After Repulsing Tank Column*, WASH. POST, Feb. 1, 1995, at A15.

[101] See Dianne Solis, *Bishop Is Mediating Tense Negotiations Between Rebels, Mexican Government*, WALL ST. J., Feb. 22, 1994, at A14; Dianne Solis, *Mexican Dissidents Gather in Chiapas As Rebel Leader Aims to Build Support*, WALL ST. J., Aug. 5, 1994, at A6.

[102] As Sanford Levinson writes, "It is simply silly to respond that small arms are irrelevant against nuclear-armed states: Witness contemporary Northern Ireland and the territories occupied by Israel, where the sophisticated weaponry of Great Britain and Israel have proved almost totally beside the point." Levinson, *supra* note 15, at 657. Levinson is joined in this view by military expert Col. Harry Summers. According to Summers, even after the demise of the militia system and the rise of the National Guard, there remains a role for an armed citizenry as a check on potential tyrants.

The militia may be out of date in the 1990s; the need for "the security of a free state" is not.

No matter how much those committed to gun control do not want to hear it, the Lithuanian example once again makes clear that "the right of the people to keep and bear arms" is an integral part of that security.

Col. Harry G. Summers, Jr., *Lithuania Strengthens Case for Gun Ownership*, DET. FREE PRESS, Mar. 29, 1990, at 17A. See also Kates, *Original Meaning*, *supra* note 16, at 270:

The argument that an armed citizenry cannot hope to overthrow a modern military machine flies directly in the face of the history of partisan guerilla and civil wars in the twentieth century. To make this argument (which is invariably supported, if at all, by reference only to the *American* military experience in *non*-revolutionary struggles like the two World Wars), one must make indulge in the assumption that a handgun-armed citizenry will eschew guerilla tactics in favor of throwing themselves headlong under the tracks of advancing tanks. Far from proving invincible, in the vast majority of cases in this century in which they have confronted popular insurgencies, modern armies have been unable to suppress the insurgents.

*Id.* (footnote omitted).

[103] For more on the turgid do-guns-cause-crime debate see GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* (1991); FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE CITIZENS' GUIDE TO GUN CONTROL* (1987). I also recommend David Kopel's excellent cross-cultural study of guns, crime, and gun control in countries around the world. KOPEL, *supra* note 81. Kopel's exhaustive research explodes many of the cross-cultural myths often employed by both sides in the debate over guns and crime.

[104] Levinson, *supra* note 15, at 657-58.

[105] *Id.*

[106] Williams, *supra* note 18.

[107] *Id.* at 589.

[108] *Id.*

[109] *Id.* at 590.

[110] *Id.* at 590-91.

[111] *Id.* at 590-94.

[112] *Id.* at 591.

[113] CASABLANCA (Metro-Goldwyn-Mayer 1942).

[114] Militia Act, Ch. 33, 1 Stat. 271-74 (1792).

[115] *Id.* at 271.

[116] David Kopel certainly suggests that the universal military service of the Swiss has such an effect, though he also doubts that it would be as successful here. KOPEL, *supra* note 81, at 278-302.

[117] See generally KOPEL, *supra* note 81, at 303-373 (describing history of firearms ownership and regulation in United States from colonial times to the present era).

[118] Levinson, *supra* note 15, at 656 (quoting Don B. Kates, Jr., *Minimalist Interpretation of the Second Amendment 2* (draft Sept. 29, 1986) (unpublished manuscript on file with author)).

[119] See, e.g., U.S. CONST. amend. XXI (repealing Prohibition).

[120] Glenn H. Reynolds & Don B. Kates, Jr., *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995).

[121] Henigan is identified as the Director of the Legal Action Project at the Center to Prevent Handgun Violence in Washington, D.C.

[122] Henigan, *supra* note 39, at 119.

[123] *Id.* at 120.

[124] *Id.* at 121.

[125] Henigan is author of two law review articles that adopt this approach. See *supra* note 39; Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen the Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989). Former Chief Justice Warren Burger has also made this argument, although not in a scholarly publication. See Press Conference Concerning Introduction of the Public Health and Safety Act of 1992, June 26, 1992, available: LEXIS-NEXIS Library, ARCNWS file.

[O]ne of the frauds--and I use that term advisedly--on the American people has been the campaign to mislead the public about the Second Amendment. The Second Amendment doesn't guarantee the right to have firearms at all... [The Framers] wanted the Bill of rights to make sure that there was no standing army in this country, but that there would be state armies. Every state during the revolution had its own army. There was no national army.

*Id.* (emphasis added).

Laurence Tribe adopts a similar interpretation, although his treatment of the subject is rather casual. According to Tribe, the Second Amendment "most plausibly may be read to preserve a power of the state militias against abolition by the federal government, not the asserted right of individuals to possess all manner of lethal weapons." TRIBE & DORF, *supra* note 7, at 11. This statement is based on less than one paragraph of analysis, and wholly fails to explore the textual, historical, and structural implications of such a position. It

appears appropriately enough in a chapter entitled "How Not to Read the Constitution." *Id.*

[126] See *supra* [section II.C.2](#). Note that the restrictions on weaponry derived by the Standard Model would not apply under a states' rights formulation. Linguistically, the notion of a state "bearing" a howitzer is no sillier than the notion of a state "bearing" anything else. Historically, the common law never recognized restrictions on the kind of weaponry a government force might possess. See Reynolds & Kates, *supra* note [120](#).

[127] See *supra* [section II.C.1](#).

[128] See *supra* note [73](#) and accompanying [text](#).

[129] 496 U.S. [334](#) (1990)

[130] *Id.* at [336-37](#).

[131] *Id.* at [338](#).

[132] *Id.* at [350-51](#).

[133] See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402 (1819). For a more extensive discussion of sovereignty and federalism issues, see Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

[134] See, e.g., *McCulloch*, 17 U.S. (4 Wheat.) at 420 (noting that under the Constitution "the powers of [the federal] government are limited and that its limits are not to be transcended").

[135] See KLECK, *supra* note [103](#), at 34. This view seems inconsistent with the view of relations between state and federal governments generally held by those favoring gun control (who are usually, though not always, liberals). As Sanford Levinson has noted, the debate over the Second Amendment creates a peculiar inversion, with conservatives taking on the approach of liberals and *vice versa*. See Levinson, *supra* note [15](#), at [643-44](#). Kleck notes:

When the issue is gun control, liberals and conservatives switch places. Many liberals support gun laws that confer broad power on government to regulate individual behavior, especially in private places ... whereas conservatives oppose them. Some liberals dismiss the Second Amendment to the Constitution as an outmoded historical curiosity ... whereas conservatives defend a view of this amendment that is every bit as broad as the American Civil Liberties Union's ... view of the First Amendment.

*Id.* This is just another such case. although a states' rights approach to constitutional affairs generally tends to be identified with reactionary causes, it is here identified with the "progressive" cause of gun control. Meanwhile, as Kleck notes, anti-gun control forces wax eloquent, in this context, about the importance of individual rights and the dangers of overbearing law enforcement officials--complaints conspicuous by their absence in the context of, say the drug war. The political right, however, has pretty much given up on states' right arguments as a loser, and the left clings to them only in this one instance, which seems more a case of constitutional wishful thinking than serious analysis.

[136] 347 U.S. 483 (1954).

[137] See generally DON E. FEHRENBACHER, CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVE-HOLDING SOUTH 47 (1989) (describing John Calhoun's theories of state government power to nullify federal legislation). See also John C. Calhoun, *A Disquisition on Government and a Discourse on the Constitution and Government of the United States*, in 1 THE WORKS OF JOHN C. CALHOUN 1, 168-81 (Richard K. Cralle ed., 1851).

[138] For more on this topic, see Reynolds & Kates, *supra* note [120](#).

[139] U.S. CONST. pmbl.

[140] See U.S. CONST. art. VII (calling for ratification by "Conventions of nine States"). For a general history of the ratification process, see DANIEL FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 175-218 (1990).

[141] According to the brief filed by Academics for the Second Amendment in *United States v. Lopez*, "[o]f 41 law review articles published since 1980 which offer substantial discussion of the Amendment, just four take the state's right-only position. Their quality does not exceed their quantity: Three of the four articles were written by employees of anti-gun lobbying groups, the fourth by a politician." *Lopez* Brief, *supra* note [19](#), at 6.

[142] See, e.g., JOHN L. CASTI, PARADIGMS LOST: IMAGES OF MAN IN THE MIRROR OF SCIENCE 124-25 (1989) ("[C]reation 'science' joins the long list of other perverse modern 'sciences,' such as 'fashion science,' 'dairy science,' and 'educational science,' all of which can be conveniently subsumed under the heading 'nonscientific science.'... All the hallmarks of pseudoscience ... show up in glorious detail.").

[143] STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 83 (1984), *quoted in* Van Alstyne, *supra* note [13](#), at [1243 n.19](#) (emphasis added by Van Alstyne).

[144] Kates, *Original Meaning*, *supra* note [16](#), at [244-45](#).

[145] JAMES FALLOWS, MORE LIKE US: MAKING AMERICA GREAT AGAIN 142 (1989).

[146] *Id.* at 143. The language quoted comes from SUSAN S. FORBES & PETER LEMOS, A HISTORY OF THE AMERICAN LANGUAGE POLICY 116 (1981). Fallows does not cite its original source, but attributes it to

"immigration specialists" of the early 20th century.

[147] FALLOWS, *supra* note 145, at 131-151.

[148] KOPEL, *supra* note 81, at 342-43.

[149] *Id.*

[150] See Cottrol & Diamond, *Afro-Americanist Reconsideration*, *supra* note 18, at 342-49.

[151] *Watson v. Stone*, 4 So.2d 700, 703 (Fla. 1924) (Buford, J., concurring specially) (emphasis added). This case is quoted in Cottrol & Diamond, *Afro-Americanist Reconsideration*, *supra* note 18, at 355, along with a number of other cases making the same point. In particular, it is worth noting another opinion quoted in that work, in which a dissenting judge noted that "the race issue has extremely intensified a decisive purpose to entirely disarm the negro, and this policy is evident upon reading the opinions." *State v. Nieto*, 130 N.E. 663, 669 (Ohio 1920) (Wannamaker, J., dissenting).

[152] 32 U.S. 180 (1833) (Bill of Rights guarantees not applicable against states).

[153] 83 U.S. 36, 78 (1872) (holding that the Fourteenth Amendment's Privileges and Immunities clause is enforceable against the states).

[154] 92 U.S. 542 (1875) (holding that the duty to protect the right of the people peaceably to assemble for lawful purposes and the right to bear arms rests solely with the states).

[155] *Id.* at 553.

[156] *Id.*

[157] *Id.* at 552.

[158] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[159] *Id.* at 486.

[160] I do not mean to suggest that Douglas' methodology was wrong. Indeed, I believe that "penumbral reasoning" is more widely used, by judges of all political persuasions, than is often recognized. See generally Reynolds, *supra* note 6.

[161] See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (extending *Griswold* right of privacy to overturn laws against sales of contraceptives to unmarried adults); *Roe v. Wade*, 410 U.S. 113, 164-66 (1973) (holding most state law restrictions on abortion within the first two trimesters unconstitutional based on right of privacy).

[162] 116 U.S. 252, 265 (1886) (holding that the Second Amendment is a limitation only against the federal government).

[163] 153 U.S. 535, 538 (1894) ("[I]t is well-settled that the restrictions of the [second and fourth] amendments operate only on the Federal power and have no reference whatever to proceedings in state courts.").

[164] See, e.g., *Fresno Rifle and Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723, 730-31 (9th Cir. 1992) ("[I]t is for the Supreme Court, not us, to revisit the reach of the Second Amendment.... Until such time as *Cruikshank* and *Presser* are overturned, the Second Amendment limits only federal action, and we affirm the district court's decision 'that the Second Amendment stays the hand of the National Government only.'").

[165] 163 U.S. 537 (1896).

[166] Professors Cottrol and Diamond so argue:

The *Cruikshank* decision, which dealt a serious blow to Congress' ability to enforce the Fourteenth Amendment, was part of a larger campaign of the Court to ignore the original purpose of the Fourteenth Amendment.... The doctrine in *Cruikshank*, that blacks would have to look to state government for protection against criminal conspiracies, gave the green light to private forces, often with the assistance of state and local governments, that sought to subjugate the former slaves and their descendants. Private violence was instrumental in driving blacks from the ranks of voters. It helped force many blacks into peonage, a virtual return to slavery, and was used to force many blacks into a state of ritualized subservience.

Cottrol & Diamond, *Afro-Americanist Reconsideration*, *supra* note 18, at 347-48.

[167] 307 U.S. 174 (1939).

[168] National Firearms Act, 48 Stat. 1236 (1934).

[169] *Miller*, 307, U.S. at 175-76.

[170] *Id.* at 176-77.

[171] *Id.* at 183.

[172] *Id.* at 178-79.

[173] *Id.* at 178 (quoting *Aymette v. State*, 21 Tenn. 152, 156, 2 Hum. 154, 158 (1840)).

[174] *Id.* at 183.

[175] *Id.* at 177.

[176] It is, however, relatively short, and I encourage readers to look it up and go through it themselves. Since *Miller* is invoked (often wrongly) by partisans on both sides of the popular gun debate, anyone seriously interested in the subject should be familiar with its text. Having done so, readers will probably be amazed at the scope of the claims made about *Miller* by "pop" commentators on both sides of the issue.

[177] 21 Tenn. 152, 2 Hum. 158 (1840).

[178] *Id.* at 156, 2 Hum. at 158.

[179] United States v. Miller, 307 U.S. 174, 178 (1939).

[180] TENN. CONST. art. I, § 26.

[181] The *Aymette* opinion itself, however, states that the Tennessee provision was adopted "in the same view" as was the Second Amendment. *Aymette*, 21 Tenn. at 155, 2 Hum. at 157.

[182] 50 Tenn. 141, 3 Heisk. 165 (1871).

[183] ROBERT COTTROL, GUN CONTROL AND THE CONSTITUTION: THE COURTS, CONGRESS, AND THE SECOND AMENDMENT (1993).

[184] TENN. CONST. art. I, § 26. Note that there is no mention of militia here--the subject of the militia is addressed elsewhere, in Article I, § 24, which provides:

That the sure and certain defense of a free people, is a well regulated militia; and, as standing armies in time of peace are dangerous to freedom, they ought to be avoided as far as the circumstances and safety of the community will admit; and that in all cases the military shall be kept in strict subordination to the civil authority.

TENN. CONST. art. I § 24. Thus, the "dual purpose" language of the Second Amendment-- focusing on *both* the importance of a militia as a counterweight to a standing army, *and* the right of the people to be armed--is in the Tennessee Constitution separated into distinct provisions, though both purposes are preserved.

[185] *See, e.g.,* *Andrews v. State*, 50 Tenn. 141, 3 Heisk. 165 (1871); *Aymette v. State*, 21 Tenn. 152, 2 Hum. 154 (1840).

[186] 21 Tenn. at 153, 2 Hum. at 156.

[187] *Id.* at 156-57, 2 Hum. at 158-59.

[188] *Id.* at 156, 2 Hum. at 158. The language limiting the right to whites was added in 1834, when tensions over slavery were high, and removed in 1870. For more on this subject see Reynolds, *supra* note 37, at 658-660.

[189] *See supra* note 39 and accompanying text.

[190] 50 Tenn. 141, 3 Heisk. 165 (1871).

[191] Act of June 11, 1870, ch. 13. *See Andrews*, 50 Tenn. at 146, 3 Heisk. at 171.

[192] *Andrews*, 50 Tenn. at 143, 3 Heisk. at 167.

[193] 32 U.S. 180 (1833). For the Tennessee Court's discussion of this issue see *Andrews*, 50 Tenn. at 147-50, 3 Heisk. at 172-75.

[194] *Andrews*, 50 Tenn. at 156, 3 Heisk. at 182. According to David Kopel, Tennessee has the dubious distinction of having been the first to pass a law aimed at disarming Negroes that was drafted in neutral terms. Not coincidentally, it also appears to have been the first place where the "collective right" or "states' right" argument was used. As always, the argument was a sham.

Even in the states where white supremacy was back in control for good, laws to disarm Negroes now had to be cloaked in neutral, nonracial terms. Tennessee took the lead in 1870 with creative draftsmanship. The legislature barred the sale of any handguns except the "Army and Navy model." The ex-confederate soldiers already had their high-quality "Army and Navy" guns. But cash-poor freedmen could barely afford lower-cost, simpler firearms not of the "Army and Navy" quality.

KOPEL, *supra* note 81, at 336.

[195] *Andrews*, 50 Tenn. at 156, 3 Heisk. at 182.

[196] *Id.* (emphasis added).

[197] *Id.* at 154, 3 Heisk. at 179. These were defined, in essentially the same terms as *Aymette*, as those weapons actually used by the military, including "the rifle of all descriptions, the shot gun, the musket, and repeater, and that under the Constitution the right to keep such arms, can not be infringed or forbidden by the Legislature." *Id.* at 154, 3 Heisk. at 179; *see also Aymette*, 21 Tenn. at 159, 2 Hum. at 160-61.

[198] *Andrews*, 50 Tenn. at 153, 3 Heisk. at 178-89.

The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose, a man would have the right to carry them to and from his home, and no one could claim that the Legislature had a right to punish him for it, without violating this clause of the Constitution.

But farther than this, it must be held, that the right to keep arms involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace; that in such use, he shall not use them for violation of the rights of others, or the paramount rights of the community of which he makes a part.

*Id.*

[199] *Id.* at 158, 3 Heisk. at 184.

[200] *Id.* at 158-59, 3 Heisk. at 184.

[201] *Id.* at 160, 3 Heisk. at 187.

[202] *See, e.g.,* LEWIS L. LASKA, *THE TENNESSEE STATE CONSTITUTION: A REFERENCE GUIDE* 57-58 (1990); 25 Tenn. Jur. *Weapons* §4 (1985).

[203] *See* United States v. Miller, 307 U.S. 174 (1939); Miller v. Texas, 153 U.S. 535 (1894); Presser v. Illinois, 116 U.S. 252 (1886); United States v. Cruikshank, 92 U.S. 542 (1875); Andrews v. State, 50 Tenn. 141 [ed. 3 Heisk. 165] (1871); Aymette v. State, 21 Tenn. 152 [ed: 2 Hum. 154] (1840).

[204] *See supra* Part II.

[205] *Id.*

[206] Cottrol & Diamond, *Fifth Auxiliary Right*, *supra* note 18, at 1025 n.141.

[207] *Id.*

[208] *Id.* at 1025-26.

[209] *See supra* Part II. Neither, I should note, have states' right advocates, but such an oversight is less surprising in their case. *See supra* Part III. *But see infra* text accompanying note 221 (describing requirements for legitimate revolution under Framers' theory).

[210] *See, e.g.,* Louis Sahagun, *A Wave of Distrust in the West*, L.A. TIMES, Feb. 3, 1995, at 13; Christopher J. Farley, *Patriot Games*, TIME, Dec. 19, 1994, at 48.

[211] *Id.*

[212] *See* Glenn H. Reynolds, *Up in Arms About a Revolting Movement*, CHIC. TRIB., Jan. 30, 1995, at 13. I should stress that the "revolting movement" pun was not my idea; it was inserted by the editors. My title was "Militia Movement Has It Half-Right," which I think is a more accurate description of the problem.

[213] *See* KOPEL, *supra* note 81, at 317. Although as David Kopel points out, this was not the response to the Whiskey Rebellion. Instead, the local militia was called out, and it quickly put down the rebellion. Nor were the inhabitants disarmed as a result.

The decisions of the framers of the constitution and of President Washington today seem predictable, but they ran against the dominant course of world history. A weak federal government, faced with armed rebellion against its authority, responded by creating a government structure that presumed the whole citizen population would individually own weapons of war, and would be trained in their use.

*Id.* at 320.

One wonders whether our present day leaders would live up to such a standard. George Washingtons seem to be in short supply these days.

[214] *See* JONATHAN RAUCH, *DEMOSCLEROSIS: THE SILENT KILLER OF AMERICAN GOVERNMENT* (1994). This is a basic argument of Rauch's book. For different reasons, I agree with his basic point. *See* Glenn Harlan Reynolds, *Is Democracy Like Sex?* (forthcoming 1995 in the *Vanderbilt Law Review*).

[215] STEPHEN JAY GOULD, *BULLY FOR BRONTOSAURUS* 11 (1991).

[216] *See* Reynolds & Kates, *supra* note 120.

[217] *See, e.g.,* *The Right to Bear Arms*, U.S. NEWS & WORLD REPORT, May 22, 1995, at 29; Bartholomew Sullivan, *Militias, Supremacists Populate Mid-South*, MEMPHIS COMM. APPEAL, Apr. 29, 1995, at 1A. For a critical overview of the post-Oklahoma City media coverage of these issues see Mack Tanner, *Extreme Prejudice: How the Media Misrepresent the Militia Movement*, REASON, July 1995, at 42.

[218] Some of these issues are addressed at more length in a prepared statement that I submitted to the House Judiciary Committee's subcommittee on Crime. Glenn H. Reynolds, Letter to Dan Bryant, House Judiciary Committee Staff, May 1, 1995 (on file with author; to be published by the Committee).

[219] Williams, *supra* note 18, at 593.

[220] *See supra* notes 42-44.

[221] Williams, *supra* note 18, at 582 (footnote omitted).

[222] As William Van Alstyne of Duke University Law School notes, the right described in the Second Amendment is the right to keep and bear arms, not the right to belong to a militia. "Rather, the Second Amendment adheres to the guarantee of the right of the people to keep and bear arms as a predicate for the other provision to which it speaks, i.e., the provision respecting a militia..." Van Alstyne, *supra* note 13, at 1243 (1994). *See also* Cottrol & Diamond, *Fifth Auxiliary Right*, *supra* note 18, at 1002 (1994) ("The plain language of the first clause appears to impose no legal requirement or restriction on the federal government. Only the second clause indicates a right that the government cannot infringe.").

[223] Based on casual conversation, this appears to be the experience of other Second Amendment scholars as well.

[224] Douglas Laycock, *Vicious Stereotypes in Polite Society*, 8 CONSTITUTIONAL COMMENTARY 395 (1991). *See also* Don B. Kates, Jr., *Bigotry, Symbolism and Ideology in the Battle over Gun Control*, 1992 PUB. INT. L. REV. 31.

[225] *See generally* Michael Lind, *To Have and Have Not: Notes on the Progress of the American Class War*, HARPER'S, June 1995, at 35.