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RECONSIDERING THE SECOND AMENDMENT: CONSTITUTIONAL PROTECTION FOR A RIGHT OF SECURITY

*Donald L. Beschle**

INTRODUCTION

For decades, the issue of gun control has sparked heated debate. Argument has become more intense in the past few years as communities have considered various restrictions on access to or use of firearms. In a handful of cases, localities have enacted unprecedented total or near total bans on the private ownership of handguns.¹ Debate in the legislative arena has focused on the benefits sought by gun-control proponents, the likelihood of achieving such benefits from specific gun-control proposals, and the social costs of limiting the average citizen's access to firearms.² At the same time, increasing interest in the policy questions of gun control has renewed interest in the legal questions concerning the constitutional validity of firearms legislation.

The most prominent of these legal questions is the effect of the second amendment to the United States Constitution on firearms legislation. The second amendment provides: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."³ Interpretations of this provision and its effect generally have taken one of two radically-opposite positions. The dominant view, put forth with almost complete unanimity by twentieth-century courts, has focused on the first half of the provision and its reference to a "well regulated militia." The amendment, courts hold, guards only against federal attempts to disarm or

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1. *E.g.* Morton Grove, Ill., Ordinance 81-11, *reprinted in* Quilici v. Village of Morton Grove, 695 F.2d 261, 263 n.1 (7th Cir. 1982), *cert. denied*, 104 S. Ct. 194 (1983).

2. The literature on the policy questions posed by gun control legislation is extensive and, as might be expected, does not achieve a consensus for or against such proposals. Pro-gun control advocates probably most often cite G. NEWTON & F. ZIMRING, *FIREARMS AND VIOLENCE IN AMERICAN LIFE* (1969).

For a collection of arguments that gun control would be unwise, unnecessary, and ineffective, see, *e.g.*, *FIREARMS AND VIOLENCE* (D. Kates ed. 1984).

3. U.S. CONST. amend. II.

abolish organized state militias.⁴ Under this interpretation, the second amendment is irrelevant to the debate surrounding federal, state, and local gun-control proposals because such proposals seek only to restrict the individual's access to firearms and do not affect organized state militias.

While it has found almost no judicial support, academic critics of the prevalent judicial interpretation have put forth an opposing view of the second amendment. Drawing on attitudes expressed in eighteenth-century American and earlier English thought, these commentators have concluded that the "right to keep and bear arms" is constitutionally equal in strength and importance to any other provision in the Bill of Rights. Proponents of this minority viewpoint maintain that the "militia" clause never was meant as a restriction and therefore the rights guaranteed by the second amendment are guaranteed to individuals, not merely to states.⁵ Under this interpretation, the second amendment would stand as a serious barrier to the federal, state, or local enactment of much proposed firearms legislation.

It is obvious that the dominant judicial attitude toward the second amendment and the minority views of the prominent academic critics of that attitude are irreconcilable. Close examination of the issue, however, discloses that neither the majority nor the minority viewpoint is wholly adequate. The prevalent judicial view, although correct in most of its conclusions regarding the constitutionality of firearms legislation, has ignored the arguments of its critics, and in doing so has failed to provide a satisfying explanation of what the second amendment does mean. While it may be true that the provision no longer has the same practical importance today as it did when it was adopted, the courts should give a more convincing rationale for their rulings than the mere citation of past authority which itself lacked comprehensive analysis.

At the same time, the critics of the prevalent judicial attitude toward the second amendment have put forth a position at least as unsatisfying as that which they attack. The critics ignore the effect of two hundred years of history on society and on constitutional doctrine by focusing almost exclusively on eighteenth-century attitudes and arguing for their adoption in almost every detail in the twentieth century. They also fail to consider the ways in which changes in the world have altered the relationships between ends sought by the Constitution and the types of means which might be effective or necessary to achieve those

4. See *infra* notes 12-50 and accompanying text.

5. See *infra* notes 54-78 and accompanying text.

ends. The inadequacy of the critics' position becomes most obvious when they attempt to explain just what restrictions on weapons are constitutionally permissible. Even the critics tend to concede that some restrictions are constitutionally permitted at least for some sorts of weapons.⁶ However, eighteenth-century attitudes provide little assistance in the process of twentieth-century line-drawing and the proposed rules which emerge, such as the proposal that government may not restrain the ownership of any type of weapon in use in 1787, or any "lineal descendant" of such a weapon,⁷ lack any reasonable rationale and essentially are worthless. Blind adherence to every detail of the Framers' thoughts does not present an adequate analytical framework for the constitutional gun-control issue.

The flaw with both of the conflicting positions on this issue is the apparent assumption that the ultimate concern of the second amendment is with the weapons themselves. In fact, both the language of the amendment itself and the history behind it clearly indicate that the goal sought by the second amendment is the security of the people. Once it is recognized that security is the essential concern of the second amendment and that firearms or other weapons are only a means to that end, the analysis will yield more satisfactory results.

Viewing firearms as merely a means of insuring personal security rather than as ends in themselves leads to a conclusion somewhere between the prevailing judicial view that the amendment does not guarantee individual rights and the view of the critics that the private ownership of most firearms should not be prohibited. Stated simply, the second amendment should not be seen as a barrier to state and local regulation of gun ownership, including such drastic measures as a total prohibition on the private possession of firearms. On the other hand, the amendment should bar the prohibition or serious restriction by the federal government of the right to own certain weapons, which are ap-

6. See, e.g., Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983), in which one of the most prominent advocates of a strong personal right to bear arms under the second amendment contends that the constitutional protection of the provision extends only to weapons which are "(1) 'of the kind in common use' among law-abiding people today; (2) useful and appropriate not just for military purposes, but also for law enforcement and individual self-defense, and (3) lineally descended from the kinds of weaponry known to the Founders." *Id.* at 259. He also concedes that at least certain types of *registration* schemes (as opposed to confiscation or prohibition) are constitutional, even with respect to protected weapons. *Id.* at 264-66.

7. See *id.* at 259-64. On the other hand, Kates' requirements that the weapon be of the kind in common use among law-abiding people today and useful for law enforcement and self-defense purposes can be justified on grounds other than mere historicism. See *infra* note 130 and accompanying text.

propriate for self-defense or defense of the home against intruders. This intermediate position may please neither side of the gun-control debate, but it is consistent with the underlying policies behind the second amendment as they apply to the realities of twentieth-century America.⁸

I. CONTRASTING VIEWS OF THE SECOND AMENDMENT

A. *Minimizing the Amendment: The Prevailing Judicial View*

Case law involving second amendment challenges to federal and state gun-control legislation consistently has rejected those constitutional claims. Almost without exception, courts have held that the amendment is a limitation only on the federal government and therefore is irrelevant in assessing the validity of state or local legislation.⁹ Even as applied to federal action, the amendment guarantees only that the states retain the right of self-defense through the maintenance of the militia and therefore provides no individual right to keep or bear arms.¹⁰

The Supreme Court has spoken on the subject of the second amendment only four times.¹¹ In 1876, the Supreme Court in *United States v. Cruikshank*¹² reversed a criminal conviction of southern whites charged, among other things, with conspiring to deprive blacks of an alleged constitutional right to keep and bear arms.¹³ The Court based its reversal upon the conclusion that the second amendment conferred no such right upon individuals, but rather was meant only to limit the power of the federal government in its relations with the

8. The debate over gun control has been waged "at a level of propaganda more appropriate to social warfare than to democratic discourse." Bruce-Briggs, *The Great American Gun War*, THE PUB. INTEREST, Fall 1976, at 37. Even in law journals, the impression often is that constitutional conclusions are used simply to bolster the policy conclusions of the author. Compare Jackson, *Handgun Control: Constitutional and Critically Needed*, 8 N.C. CENT. L.J. 189 (1977) (favoring controls and finding them constitutional), with McClure, *Firearms and Federalism*, 7 IDAHO L. REV. 197 (1970) (opposing controls and finding them unconstitutional).

9. See *infra* notes 12-40 and accompanying text.

10. See *infra* note 14 and accompanying text.

11. *United States v. Cruikshank*, 92 U.S. 542 (1876); *Presser v. Illinois*, 116 U.S. 252 (1886); *Miller v. Texas*, 153 U.S. 535 (1894); *United States v. Miller*, 307 U.S. 174 (1939).

The first three of the four decisions occurred over ninety years ago, prior to the development of most contemporary constitutional doctrine. See 92 U.S. 542; 116 U.S. 252; 153 U.S. 535.

12. 92 U.S. 542 (1876).

13. There were thirty-two counts to the indictment, some repetitive, and only two dealt specifically with the right to bear arms. *Id.* at 544-45. Counts based upon interference with the right of assembly, the right of due process, the right of equal protection, the right to vote, and other charges all were dismissed for various reasons. *Id.* at 548-59.

states.¹⁴ The second amendment established only a collective right, exercised through the maintenance of a militia.¹⁵

Ten years later, in *Presser v. Illinois*,¹⁶ the Court upheld the defendant's conviction for violating a state law which prohibited military assemblies held without a permit. With little discussion beyond a citation to *Cruikshank*, the Court held that not only did the second amendment establish no individual right to bear arms, but that it also did not apply at all to actions of state governments.¹⁷ Similarly, in 1894 the Court in *Miller v. Texas*¹⁸ held that the amendment applied only to the federal government and consequently upheld the defendant's murder conviction despite his contention that the crime of illegally carrying a gun for which he initially had been apprehended was unconstitutional under the second amendment.¹⁹

Although these early cases still are considered good law and are cited favorably,²⁰ they must be viewed in light of the fact that they were decided prior to the twentieth-century expansion of much of the Bill of Rights to include action by the states. In *Miller v. Texas*, for example, the Court also held the fourth amendment provisions against unreasonable searches and seizures inapplicable to the states.²¹ The fourth amendment subsequently has been incorporated into the due process clause and applied to the states despite this early precedent;²²

14. *Id.* at 553.

15. *See id.*

16. 116 U.S. 252 (1886).

17. *Id.* at 265. Again, the second amendment discussion is brief. Most of the opinion deals with the defendant's contention that the statute under which he was convicted was unconstitutional either because it conflicted with federal statutes or because it impermissibly intruded on the federal interest in having all citizens armed and well-trained for possible federal military service. *Id.* at 260-69.

18. 153 U.S. 535 (1894).

19. *Id.* at 538. By 1894, the Court said the rule that the second amendment did not apply to the states was "well settled." *Id.*

20. *See, e.g.,* *Quilici v. Village of Morton Grove*, 695 F.2d 261, 269 (7th Cir. 1982), *cert. denied*, 104 S. Ct. 194 (1983) (citing *Presser*); *Vietnamese Fisherman's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 210 (S.D. Tex. 1982) (citing *Cruikshank*).

21. 153 U.S. at 538. Likewise, the Court in *Cruikshank* disposed of non-firearms-related constitutional claims for reasons courts today clearly would not follow. *See* 92 U.S. at 548-59. For example, the Court held that the first amendment rights of speech and assembly were not applicable to the states, *id.* at 552, and that the federal government was powerless to prohibit crimes committed within a single state that did not directly affect a federal interest clearly enumerated in the Constitution. *Id.* at 553-54. The first amendment, of course, has been applied to the states for over fifty years, *see* *Stromberg v. California*, 283 U.S. 359 (1931); *Near v. Minnesota*, 283 U.S. 679 (1931), and federal jurisdiction over "local" crimes has been greatly expanded. *See, e.g.,* *Perez v. United States*, 402 U.S. 146 (1971).

22. The substance of the fourth amendment was applied to the states in *Wolf v. Colorado*,

the failure of the second amendment to be accorded similar treatment must be explained for more substantial reasons than mere *stare decisis*.

The only twentieth-century Supreme Court case construing the second amendment is *United States v. Miller*.²³ In *Miller*, the defendant was indicted for transporting a sawed-off shotgun in interstate commerce in violation of the National Firearms Act of 1934.²⁴ The district court quashed the indictment on constitutional grounds, holding that the provisions of the Act on which the indictment was based violated the second amendment.²⁵ The Supreme Court reversed, holding that the amendment did not apply to a weapon, such as a sawed-off shotgun, which lacked a "reasonable relationship to the preservation or efficiency of a well-regulated militia."²⁶ The *Miller* Court examined the history of the amendment and concluded that its "obvious purpose" was "to assure the continuation and render possible the effectiveness" of state militias.²⁷ Even against action by the federal government, the second amendment will protect individual rights, if at all, only to the extent that they are related to the states' right to maintain their militias.²⁸

Although the Supreme Court decisions in this area are sparse, the Court's holdings are clear and lower federal courts consistently have followed the principles set forth in these cases to hold that: (a) the second amendment is not a limitation on the states and is therefore irrelevant to discussions of the constitutionality of state laws or local ordinances,²⁹ and (b) as against the federal government, the amend-

338 U.S. 25 (1949). The Court applied the more controversial exclusionary rule in *Mapp v. Ohio*, 367 U.S. 643 (1961). The only provisions of the first eight amendments that have not been applied to the states are the second amendment, the fifth amendment clause requiring a grand jury indictment in all criminal prosecutions, and the seventh amendment right to a jury trial in civil cases. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 413 (1983).

23. 307 U.S. 174 (1939).

24. National Firearms Act, ch. 757, 48 Stat. 1236-40 (current version at 26 U.S.C. §§ 5801-71 (1976 ed.)) The 1934 act, largely a response to the well-publicized "gangster era" violence of organized crime, "curtailed civilian ownership of machine guns, sawed-off shotguns, silencers, and other forms of 'gangster-type' weapons." J. WRIGHT, P. ROSSI & K. DALY, *UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICA* 245 (1983).

25. 26 F. Supp. 1002 (W.D. Ark. 1939).

26. 307 U.S. at 178. The Court's conclusion that a shotgun was not an appropriate militia weapon was based on the absence of any evidence to that effect; it was not something that could be judicially-noticed. *Id.* It has been argued that this holding leads to the inevitable conclusion that the federal government "cannot regulate the right to keep and bear arms suitable for militia use." S. HALBROOK, *THAT EVERY MAN BE ARMED* 165 (1984). At best, however, this is merely an inference with respect to a question not before the *Miller* Court.

27. 307 U.S. at 178.

28. *Id.* at 178-79.

29. See, e.g., *Morton Grove*, 695 F.2d 261; *Cases v. United States*, 131 F.2d 916 (1st Cir.

ment protects only the collective right of the state to organize and maintain a militia and does not guarantee any rights to individuals apart from that collective right.³⁰ In short, it appears that the only possible violation of the second amendment would be a federal attempt to disarm organized state militias, an action which is highly unlikely and completely irrelevant to the types of firearms regulations actually under discussion at the federal, state, or local levels. It therefore is not surprising that lower federal courts, without exception, have rejected individuals' second amendment claims. Indeed, the courts' disposition of the claims generally warrants only one paragraph, or less, of comment.³¹

*Quilici v. Village of Morton Grove*³² is a rare example of a case in which a federal court, while adhering to established second-amendment principles, did comment at some length upon the plaintiffs' constitutional claim. *Morton Grove* also is significant in that unlike most prior gun-control cases that dealt with licensing schemes or other legislative efforts to partially restrict firearms possession, it involved an ordinance which almost completely prohibited handgun ownership within the village.³³ Handgun owners in Morton Grove brought suit challenging the constitutionality of the ordinance, and both the district court³⁴ and the Court of Appeals for the Seventh Circuit³⁵ rejected their claims.

The Court of Appeals rejected plaintiffs' argument that *Presser* was no longer good law as nothing more than plaintiffs' "own opinions" and reaffirmed the principle that the second amendment does not apply to the states.³⁶ Although this rationale would be sufficient in itself to

1942), *cert. denied*, 319 U.S. 770 (1943), *reh'g denied*, 324 U.S. 889 (1945); *Engblom v. Carey*, 522 F. Supp. 57 (S.D.N.Y. 1981).

30. *See, e.g.*, *United States v. Warin*, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976); *Stevens v. United States*, 440 F.2d 144 (6th Cir. 1971); *Vietnamese Fisherman's Ass'n*, 543 F. Supp. 198 (S.D. Tex. 1982).

31. *See, e.g.*, *United States v. Johnson*, 497 F.2d 548 (4th Cir. 1974); *Eckert v. City of Philadelphia*, 477 F.2d 610 (3rd Cir.), *cert. denied*, 414 U.S. 839 (1973); *United States v. Tomlin*, 454 F.2d 176 (9th Cir. 1972).

32. 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 104 S. Ct. 194 (1983).

33. *See id.* at 263 n.1. The exceptions in the ordinance apply to police officers, prison personnel, members of the armed services, private security guards, authorized state employees, licensed gun clubs, licensed gun collectors, and owners of antique firearms.

34. *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169 (N.D. Ill. 1981), *aff'd*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 104 S. Ct. 194 (1983).

The district court's rejection of the plaintiff's second amendment claims, although based principally on binding precedent, is set forth at greater length than the usual lower federal court treatment of such claims. *Id.* at 1180-83.

35. 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 104 S. Ct. 194 (1983).

36. *Id.* at 270.

dispose of the second amendment claim, the court “[f]or the sake of completeness” commented on the scope of the amendment.³⁷ The “plain meaning” of the amendment, as well as precedent, make it “clear that the right to bear arms is inextricably connected to the preservation of a militia.”³⁸ Any private possession of arms not necessary for such militia functions, therefore, is unprotected by the Constitution.³⁹ In light of this, plaintiffs’ historical discussions of the importance of individual arms at English common law and at the time of the drafting of the Constitution were held to be irrelevant.⁴⁰

Judge Coffey, in his dissent, became the first federal judge to articulate a position contrary to the prevailing judicial view that the right to bear arms is not an individual right. While most of his opinion dealt with issues of state constitutional law,⁴¹ he went on to state that “the right to possess commonly owned arms for self-defense” is a “basic human freedom” entitled to constitutional protection.⁴² Interference with that right, at least interference as drastic as a total ban on the possession of such weapons, was in Judge Coffey’s opinion a violation of the Constitution. Interestingly enough, the dissent does not rely explicitly on the second amendment, but cites the fourth and fifth amendments and the privacy rights which emanate from those provisions.⁴³ Although the state clearly may restrict possession of firearms outside the home, an absolute ban on possession, including possession within one’s home, is an impermissible intrusion on a protected zone of privacy.⁴⁴ Judge Coffey’s dissent remains, however, the sole statement by

37. *Id.*

38. *Id.*

39. *Id.* at 269-71.

40. *Id.* at 270 n.8.

41. *Id.* at 271-78 (Coffey, J., dissenting). The state constitutional issues were whether the ordinances violated the state constitutional right to bear arms provision; whether the village exceeded its home rule powers by legislating on a matter of statewide, rather than local, concern; and whether the ordinance was preempted by statewide regulation of handguns. *Id.* at 271.

With respect to the state-created right to bear arms, the majority held that legislative history, along with the constitutional language making the right “subject to the police power,” led to the conclusion that only a total ban on all types of firearms would infringe upon the right. Since the statute did not extend to all types of firearms, it was valid. *Id.* at 265-67.

42. *Id.* at 278 (Coffey, J., dissenting).

43. *Id.* at 279-80.

44. *Id.* at 278-80.

A fundamental part of our concept of ordered liberty is the right to protect one’s home and family against dangerous intrusions subject to the criminal law. Morton Grove, acting like the omniscient and paternalistic “Big Brother” in George Orwell’s novel, “1984,” cannot, in the name of public welfare, dictate to its residents that they may not possess a handgun in the privacy of their home. To so prohibit the possession of handguns in the privacy of the home prevents a person from protecting his home and family,

a federal judge supporting an individual right to possess and own firearms. The Supreme Court's refusal to review the court of appeals' decision in *Morton Grove* leaves the orthodox judicial view of the second amendment intact.

Several state courts in the nineteenth century had decided that the second amendment established an individual right to bear arms,⁴⁵ but after the Supreme Court rejected the individual rights contention and also declined to apply the amendment to the states a majority of those courts later held that the Constitution did not create such a right.⁴⁶ A few state courts, while reaching the same conclusions as those adopted by federal courts, have gone beyond citation of precedent to justify those conclusions. In *Commonwealth v. Davis*,⁴⁷ for example, the Supreme Judicial Court of Massachusetts examined the history of the amendment and determined that it was created largely as a response to fears of a strong federal standing army. Rather than outlaw the existence of such an army, the amendment sought to assure the continued existence of strong state militias as counterweights to federal power. The second amendment therefore could not limit the states if they chose to limit the individual possession of weapons, since the amendment's purpose was to protect the states against federal encroachment.⁴⁸ This same line of reasoning led the New Jersey Supreme Court to hold, in *Burton v. Sills*,⁴⁹ that the second amendment will not be applied to the states through incorporation into the due process clause despite the twentieth-century trend toward extending Bill of Rights guarantees to state and local government action.⁵⁰

endangers law-abiding citizens and renders meaningless the Supreme Court's teaching that "a man's home is his castle."

Id. at 280.

45. *E.g.*, *Nunn v. State*, 1 Ga. 243 (1846). Apparently the only successful state court second amendment claim in the twentieth century was *In re Brickey*, 8 Idaho 597, 70 P. 609 (1902).

46. *See, e.g.*, *Harris v. State*, 83 Nev. 404, 432 P.2d 929 (1967); *Application of Cassidy*, 268 A.D. 282, 51 N.Y.S.2d 202 (1944), *aff'd*, 296 N.Y. 926, 73 N.E.2d 41 (1947); *Photos v. City of Toledo*, 19 Misc. 147, 250 N.E.2d 916 (1969).

47. 343 N.E.2d 847, 369 Mass. 886 (1976).

48. [The second amendment] was adopted to quiet the fears of those who thought that the Congressional powers under article I, § 8, clauses 15 and 16, with regard to the State militias might have the effect of enervating or destroying those forces. The amendment is to be read as an assurance that the national government shall not so reduce the militias.

Id. at 850 (footnote omitted).

49. 53 N.J. 86, 248 A.2d 521 (1968).

50. The court stated:

The plaintiffs venture the prediction that, notwithstanding all of the foregoing, the Supreme Court will hereafter "extend the restrictions of the Second Amendment to all

In contrast to the federal courts' unanimous rejection of individual-rights claims, however, an occasional state court opinion would indicate, at least in dicta, that some types of firearms restrictions, such as a total ban on the individual possession of weapons, might be extreme enough to violate the second amendment.⁵¹ Regardless, the state courts' analysis of the issue has added little to the principles enunciated by the federal courts.

State courts also have rejected most claims that legislation restricting the possession of firearms violates state constitutional provisions,⁵² although an occasional state court has held that a state constitution provides guarantees against interference with individual gun ownership.⁵³ But while state constitutions may be important in determining the validity of state and local firearms regulations, they are of little or no relevance in determining the scope of the federal guarantee.

Case law, at least for the last century, has been nearly unanimous in holding that the purpose of the initial clause of the second amendment is to protect the right of states to organize and maintain their militias. It follows logically that the amendment does not apply to the states and therefore has no effect on state or local firearms restrictions, and that the amendment restricts the federal government only insofar as the federal government attempts to interfere with the organizing and arming of state militias. Since the current controversy over gun-control legislation concerns only restrictions on individuals and not on state militias, the second amendment is inapplicable to these restrictions under the currently-accepted doctrine.

B. Maximizing the Amendment: The Critical Commentators' Views

Although case law offers almost no support for the effective use of the second amendment to protect an individual right to possess firearms, several commentators have sharply criticized the judicial view.

of the States" as it has done with some other amendments in the Bill of Rights. Enough has been said to differentiate the second amendment from those which protect individual rights and, as such, have been carried over into the fourteenth amendment.

248 A.2d at 528.

51. *E.g.*, *State v. Dawson*, 272 N.C. 535, 159 S.E.2d 1 (1968). While upholding a conviction for breaking and entering, the court noted that the constitution assumed the existence of a right to possess weapons for use in self-defense. 159 S.E.2d at 11.

52. Dowlut & Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. L. REV. 177, 186-91 (1982). This article contains the most extensive collection and discussion of cases analyzing various state constitutional provisions securing a right to bear arms.

53. *See, e.g.*, *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980); *Schubert v. DeBard*, 398 N.E.2d 1339 (Ind. App. 1980).

These critics rely primarily on history, both of the time of the drafting of the Constitution and of earlier English common law, to support their argument that the Framers recognized and valued the right of the individual to bear arms and meant to preserve the right through the second amendment. While the courts view the second amendment as irrelevant to the modern-day balance between individual rights and government power, their critics find the provision absolutely essential to the constitutional scheme.

Commentators have traced the debate about armed citizens as far back as ancient Greece. In their view, the dispute arises from the conflict between the "libertarian" position which favors the wide ownership of weapons and the "authoritarian" position which centralizes the means of force in government institutions to keep the people "helpless and obedient."⁵⁴ For example, Aristotle criticized the exclusive possession of arms by a class of professional soldiers as leading inevitably to the dominance of that class over unarmed citizens.⁵⁵ He believed that all citizens should possess and bear arms as a check on the tyranny which threatens the community from within and without.⁵⁶ In contrast, the more authoritarian Plato suggested that individuals may possess arms only with the permission of the state,⁵⁷ although he did favor mandatory military training for all citizens.⁵⁸

The commentators contend that Cicero's promotion of the right of self-defense and the right of the people to protect the Roman republic

54. S. HALBROOK, *THAT EVERY MAN BE ARMED* 8-14 (1984). This book contains an extensive historical treatment of the subject, with the author concluding that the second amendment does create an individual right to bear arms. Some other works reach the same conclusion. *See, e.g.,* Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983). However, other writers do not agree that there is such an individual right. *See, e.g.,* Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961 (1975); Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U.L. REV. 53 (1966).

55. *See* HALBROOK, *supra* note 54, at 11-14. Halbrook quotes from two of Aristotle's works, *Politics* and *The Athenian Constitution*. Of course, not everyone would agree with the characterization of Aristotle as a spokesman for libertarianism. Karl Popper classifies Aristotle, along with Plato, as among the enemies of the open society. *See* M. HAMBURGER, *MORALS AND LAW: THE GROWTH OF ARISTOTLE'S LEGAL THEORY* xi (1970). It does seem clear, however, that Aristotle at least was less authoritarian than Plato and more influential on Enlightenment thinkers and constitutionalists. *Id.*

56. HALBROOK, *supra* note 54, at 13.

57. *Id.* at 10-11.

58. *Id.* at 10-11. Halbrook draws from two of Plato's works, *Republic* and *Laws*. Few scholars would challenge the characterization of Plato's thought as authoritarian. "It is true that in [Plato's concept of the state] there are rights, just as there are duties, but they can hardly be said to belong in any particular sense to individuals. They are inherent rather in the services or functions that individuals perform." G. SABINE, *A HISTORY OF POLITICAL THEORY* 55 (1961).

against tyranny required that the people possess arms.⁵⁹ Later thinkers, including Machiavelli, Algernon Sydney, and John Locke preferred the wide dispersion of arms instead of limiting them to a standing army as the best means of protecting against foreign invasion and domestic tyranny and assisting the right of self-defense.⁶⁰ The work of these philosophers was far more influential on the Framers of the Constitution than that of opponents of popular rule, such as Jean Bodin, who would prohibit members of the non-ruling class from possessing or bearing arms.⁶¹

English common law prior to the American Revolution generally recognized not only a right but a duty of citizens to maintain arms. With England having no standing army until late in the seventeenth century and no regular police force until the nineteenth century, all able-bodied males were expected to be available for both military and temporary police duties. They also were expected to provide their own weapons for these tasks.⁶² Significantly, exceptions to this combined right and duty to bear arms were made for persons viewed as potential opponents of the state, such as those remaining Catholic after the English Protestant Reformation. Catholics could keep weapons appropriate only for self-defense, and even these could be taken away in times of civil strife.⁶³ Similarly, Charles II, insecure after the restoration of monarchy following the rule of Oliver Cromwell, proclaimed new restrictions on the private manufacture and possession of arms.⁶⁴ This led to the provision in the English Bill of Rights of 1689: "That the Subjects which are Protestants may have Arms for their Defenses suitable to their Conditions, and as allowed by Law."⁶⁵

59. See *id.* at 15-17. Halbrook cites to two volumes of Cicero, *Murder Trials* and *Selected Political Speeches*.

60. *Id.* at 7, 20-32. To one only superficially familiar with the history of political philosophy, the citation of Machiavelli, author of *The Prince* which is an amoral presentation of how to exercise royal power most effectively, may seem strange. But Machiavelli's other works, particularly *Discourses on the First Ten Books of Titus Livius*, seem to indicate that *The Prince* was meant at most as a practical guide to conducting the type of government then prevalent in Italy, and that Machiavelli's "genuine enthusiasm" was for popular government. See SABINE, *supra* note 58, at 338-52. Such divergent thinkers as Thomas Hobbes and the republican constitutionalist James Harrington admired various parts of Machiavelli's works. *Id.*

61. HALBROOK, *supra* note 54, at 24-26. For a brief outline of the thought of this influential defender of the absolute authority of the sovereign, see SABINE, *supra* note 58, at 399-414.

62. Malcolm, *supra* note 54, at 290-92.

63. *Id.* at 293.

64. *Id.* at 295-302. In Malcolm's estimation, it was these efforts by Charles II which shifted the thinking of Englishmen from regarding the keeping of arms as essentially a duty to essentially a right. *Id.* at 294-95.

65. *Id.* at 305-07.

The critical commentators see evidence in this common law history that supports the essential link between freedom and the individual possession of arms. The denial of the right to bear arms to those individuals perceived as a threat to the state was itself a sign of second-class citizenship. The commentators also point to the English Bill of Rights as evidence that the English and eighteenth-century Americans considered the right to bear arms to be recognized by positive law and not merely as a normative view of philosophers.⁶⁶ However, the qualifying phrases of the Bill of Rights provision make it clear that any recognition of an individual right to bear arms was not absolute. Although mere possession of standard weapons never was made a criminal offense,⁶⁷ subsequent statutes restricted the use of firearms and prohibited some devices that were seen as having no legitimate uses. At the same time, it is not entirely clear that Parliament could not have criminalized such possession if it so desired. The Bill of Rights clearly prohibited disarming the public through royal fiat, but the final clause of the arms provision is ambiguous about whether Parliament could do so.⁶⁸

The Framers of the United States Constitution clearly were familiar with the thought of political philosophers from Aristotle to Locke,⁶⁹ and had a background in English political and legal history. In addition, it was an army of self-armed militiamen that defeated the suppos-

66. See HALBROOK, *supra* note 54, at 43-48.

67. In 1689, Parliament enacted "An act for the better securing the government by disarming papists and reputed papists," 1 W. & M., ch. 15 (1689), prohibiting Catholics from keeping arms except those necessary for self-defense. In 1692, Parliament enacted "An act for the more easie discovery and conviction of such as shall destroy the game of this kingdom," 4 & 5 W. & M., ch. 23 (1692), which limited the types of weapons which could be kept by those unqualified to hunt. See Malcolm, *supra* note 54, at 308-09.

In addition to these subsequent statutes, the language in the Bill of Rights provision can be interpreted to include prior existing statutes as exceptions to the right. *Id.* at 308. In light of all this, it is not surprising that Joseph Story called the English right to bear arms "more nominal than real." 2 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1898 (3d ed. 1858). This is not something of which Story approved, however, as he described the right to keep and bear arms 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 . . . enable the people to resist and triumph over them." *Id.* at § 1897. There is strong evidence that Story viewed the right to bear arms as a collective right. He deplored "the growing indifference to any system of militia discipline" and stated: "How it is practicable to keep the people duly armed without some form of organization, it is difficult to see." *Id.*

68. The applicable provision in the English Bill of Rights provides "That the subjects which are protestants may have arms for their defense suitable their conditions, *and as allowed by law.*" An Act Declaring the Rights and Liberties of the Subject, 1 W. & M., Sess. 2, c.2 (1689) (emphasis added).

69. See HALBROOK, *supra* note 54, at 7-9.

edly stronger British standing army to secure American independence. The fact that the Founders initially restricted the establishment of a national standing army⁷⁰ indicates a mistrust of all standing armies, even one that their new federal government might create.⁷¹ A local militia would protect against the domestic usurpation of power by rulers, as well as protect against foreign invasion.⁷² It seems clear that the Framers envisioned a right of the people to bear arms to oppose an oppressive government, although the constitutional debates do not address whether such a right should exist for other purposes, such as self-defense or hunting.

With this history in mind, the critical commentators have concluded that the second amendment right to bear arms is an individual right that is not linked inextricably to the maintenance of an organized militia.⁷³ The right to rebel against an oppressive government cannot be realized through government-controlled military forces; the individual right to bear arms remains the key to liberty just as in the late eighteenth century. The importance of this right to rebel, combined with the important common law right of self-defense, leads the critics to conclude that the right to possess arms, like other provisions of the Bill of Rights, should be applied to the states.⁷⁴ Case law to the contrary is criticized as outdated, ripe for overruling, or simply incorrect.⁷⁵

While these commentators are clear in their rejection of the prevalent judicial view that the second amendment provides only a collective right and is not applicable against the states, they are less clear in defining the precise scope of the individual right to bear arms which they advocate. Those who address this point at all tend to agree that the right should not be considered absolute and recognize that at least

70. Congress could maintain no standing army of its own without the consent of nine of the thirteen states under the Articles of Confederation, but every state was required to "[k]eep up a well regulated and disciplined militia." Weatherup, *supra* note 54, at 980. Also see George Mason's draft of the Virginia state bill of rights, America's first, which stated that "standing armies, in time of peace, should be avoided, as dangerous to liberty." Rohner, *supra* note 42, at 56.

71. HALBROOK, *supra* note 54, at 58-72.

72. See STORY, *supra* note 67, at § 1897. Story notes that "The militia is the natural defense of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers." *Id.* He also quotes Tacitus with approval: "Is there any escape from a large standing army, but in a well disciplined militia?" *Id.* at § 1897 n.2.

73. See, e.g., HALBROOK, *supra* note 54, at 194-97; Kates, *supra* note 6, at 267-73; Hardy & Stampoly, *Of Arms and the Law*, 51 CHI.-KENT L. REV. 62, 78-79 (1974).

74. However, some commentators would interpret the amendment to minimize federal power, but would not apply it to the states. See Levine & Saxe, *The Second Amendment: The Right to Bear Arms*, 7 HOUS. L. REV. 1 (1969).

75. See, e.g., HALBROOK, *supra* note 54, at 155-92.

some restrictions on some types of weapons would be permissible.⁷⁶ However, they have difficulty articulating a convincing rationale for limiting the right so that it remains consistent with their own characterization of its historic purposes. One possible theory is that the right to possess arms extends only to those arms appropriate for opposing an oppressive government. But this interpretation seemingly would exclude nothing short of nuclear weapons.⁷⁷ Another approach would be to limit the guarantee to weapons similar to those used in the eighteenth century.⁷⁸ However, this approach excludes many weapons which would be of obvious benefit in exercising the "right of revolution." While the critics have chastised the courts for refusing to incorporate historical evidence into their second-amendment analysis, they have been equally myopic in their own approach. The commentators have failed to delve below the surface of eighteenth-century thought to find an explanation that would preserve the essence of the Framers' motivations but still be consistent with current social conditions. Proper second-amendment analysis requires consideration of both the Framers' intent and the realities of the twentieth century.

II. IDENTIFYING THE CORE CONCERNS BEHIND THE SECOND AMENDMENT

With respect to the second amendment, it would be difficult to imagine more sharply divergent positions than those taken by the courts and the critical commentators. The commentators, relying on their views of history and of the Framers' intent, claim that an unbro-

76. There tend to be two types of suggested limitations on the scope of the amendment. The first type would find unconstitutional only the most restrictive types of regulation, such as confiscation or the outright prohibition of weapons. Therefore, restrictions such as licensing gun owners and registering firearms would be permissible. See, e.g., Note, *The Right to Keep and Bear Arms: A Necessary Constitutional Guarantee or an Outmoded Provision of the Bill of Rights*, 31 ALB. L. REV. 74, 86-87 (1967).

The other type of limitation is more concerned with defining the types of weapons protected by the amendment. Some commentators would define the protected class as those included in the Framers' meaning of the term "firearms," i.e. generally rifles, handguns, and shotguns. See McClure, *supra* note 8, at 211. Others suggest that firearms useful for organized military conflict comprise the protected category. See Note, *The Right to Bear Arms and Handgun Prohibition: A Fundamental Rights Analysis*, 14 N.C. CENT. L.J. 296, at 310 (1983) (this category would not include handguns).

77. Even this may be an overly conservative statement, at least in the view of some actual or potential revolutionaries. Che Guevara was quoted as saying in 1962, "We must proceed along the path of liberation, even if that costs millions of atomic victims." D. ZIEGLER, *WAR, PEACE, AND INTERNATIONAL POLITICS* 263 (1984).

78. The most elaborate enunciation of this type is that of Kates, *supra* note 6, at 258-64.

ken line of federal cases and the overwhelming majority of state court decisions are simply wrong. Judges, relying instead on this clear body of precedent, dismiss the historical arguments of the commentators as irrelevant.⁷⁹ These positions are not necessarily irreconcilable and it is possible to reach a conclusion combining valid arguments from both sides.

Mere citation of precedent, particularly nineteenth-century precedent, is a rather unconvincing way of deciding claims made under the Bill of Rights. A holding that the second amendment is basically different than other Bill of Rights' provisions should be supported by a more satisfactory rationale than *stare decisis*. Yet the failure of courts to venture beyond precedent does not mean that a satisfying distinction is nonexistent; the second amendment is genuinely different from most Bill of Rights' provisions. At the same time, few, if any, provisions of the Constitution are interpreted by focusing solely on eighteenth century thought and applying it, in every detail, to twentieth-century problems. The commentators' failure to recognize and deal seriously with the ways in which twentieth-century America differs from eighteenth-century America makes the maximalist position on the second amendment appear shallow. This is not to say that the concerns of the Framers are to be disregarded; their basic concerns must be the starting point of constitutional analysis, and any acceptable rule of constitutional law must be consistent with those concerns.

An explanation of how the rights found in the second amendment differ from rights such as those of religious belief and expression protected by the first amendment requires a brief discussion of the nature and definition of a "right." While the word often is used to denote a legal entitlement which could be taken away through normal government procedures, a constitutional right is something more. A constitutional right can be altered through the extraordinary process of amendment but it cannot be taken away through the normal majoritarian procedures of the legislative system. In this sense, it is closer to a "right" in the strongest sense of the word; that is, something belonging to the individual which, without his consent, cannot be taken away.⁸⁰ In

79. See *supra*, notes 12-50, and accompanying text.

80. Not everyone would recognize this type of a right; some would subordinate individual human rights to the overall welfare of the community. E.H. Bradley's statement is an example of this extreme view: "The rights of the individual today are not worth serious criticism. . . . The welfare of the community is the end and is the ultimate standard. And over its members the right of its moral organism is absolute," quoted in Pennock, *Rights, Natural Rights and Human Rights—A General View*, in *HUMAN RIGHTS* 1,4 (J. Pennock & J. Chapman eds. 1981). But jurisprudence in recent years has seen strong defenses of the existence of strong individual rights.

a nation committed to democracy, there must be justification for the frustration of majoritarianism implicit in the recognition of a strong right. Justification for the recognition of individual rights is based ultimately upon the contention that certain freedoms or entitlements are essential to human existence, or at least to an existence granting human beings the dignity they deserve.⁸¹

With this in mind, it would seem that rights can be divided into two categories. First, there are rights which might be described as primary. These rights require no further elaboration or explanation beyond their mere enunciation to justify their existence. It is obvious that such rights, which would include the right to be free from arbitrary deprivations of life, liberty or property, the right to have and express one's own beliefs, religious and otherwise, and the right to be free from torture or cruel and unusual punishments, are fundamental to human dignity. While considerable disagreement may exist over the precise scope of such rights, and the means necessary to implement them, no significant controversy exists as to their existence in some basic, unadorned form. To a person who shares basic Western political and philosophical values even a request to explain why such rights are recognized will seem strange.⁸²

The right to possess firearms is not this type of right. It is by no means evident that a life without access to firearms is lacking in some fundamental way. Nations which share a basic commitment to Western values vary widely in their attitudes toward private ownership of firearms,⁸³ as do Americans.⁸⁴ The differences of opinion are different

Probably the most widely quoted recent definition of this strong type of right is Ronald Dworkin's: "If someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so." R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 269 (1977).

81. See the various viewpoints collected in *HUMAN RIGHTS*, *supra* note 80. See also, Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. GAOR at 1, U.N. Sales No. E.73.XIV.2 (1948).

82. In other cultures the existence of such rights are doubtful, or at least defined quite differently. See Pollis & Schwab, *Human Rights: A Western Construct with Limited Applicability*, in *HUMAN RIGHTS* 1, 13 (A. Pollis & P. Schwab eds. 1979); M. STACKHOUSE, *CREEDS, SOCIETY AND HUMAN RIGHTS: A STUDY IN THREE CULTURES* (1984).

83. See, e.g., Greenwood & Magaddino, *Comparative Cross-Cultural Statistics*, in *RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT* 31 (D. Kates ed. 1979), and Hardy & Chotiner, *The Potential for Civil Liberties Violations in the Enforcement of Handgun Prohibition*, in *RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT* 194 (D. Kates ed. 1974).

84. The latest Gallup Poll figures indicate that Americans favor handgun registration by a margin of 56 percent to 40 percent. *Handgun Signup Favored, Even By Owners*, Chicago Sun-Times, May 26, 1985, at 24. For contrasting non-scholarly opinions on the issue, see Gresham, *Guns and Hunting: Fact vs. Fantasy*, in *THE ISSUE OF GUN CONTROL* (T. Draper ed. 1981) and

from dissention about the first amendment, for example. While wide disagreement might be expected on the particular application of the religion clauses, very little disagreement would be expressed to the unadorned statement that individuals should have the right to freely practice their religion. There is substantial disagreement with respect to the unadorned assertion that individuals should have the right to own firearms.⁸⁵

The right to possess firearms also differs from the typical right recognized in the Bill of Rights in that it involves an object. Primary rights tend to be concerned with intangible attributes such as belief, privacy, and expression. The right to possess a thing is obviously different. In addition, the basic orientation of the Bill of Rights toward property is not to protect its ownership in absolute terms, but to require that if government acts to take property away, it must provide the owner with just compensation, and provide due process.⁸⁶ It can be argued that the right to possess certain types of objects is primary and is necessary for proper human existence. But if a list of such objects were to be drawn, it seems clear that things such as food and shelter would rank ahead of firearms.⁸⁷ Yet the anomaly remains: government may take away a citizen's home, respecting due process and with just compensation, but the second amendment at first glance would not allow government to take away the citizen's firearms. The right of firearms possession, in short, is substantially different from primary rights recognized by the Constitution.

To say that a right is not primary is not to say, however, that it does not exist. Other rights, which might be labelled "secondary" or "derivative," do exist and are recognized by the Constitution. Such secondary or derivative rights are not self-evidently necessary to preserve human dignity, but exist because of the conviction that they are essential to the preservation of primary rights. Such secondary rights do require explanation as to their connection with primary rights, and the extent of the connection may change over time.

The most obvious example of a secondary or derivative right in the

Corbett, *Living Without Handguns*, in *THE ISSUE OF GUN CONTROL* (T. Draper ed. 1981).

85. See *supra* note 84, and accompanying text.

86. U.S. CONST. amend. V and XIV, § 1.

87. STACKHOUSE, *supra* note 82, discusses attitudes of different cultures toward these "positive" rights, i.e., rights to have something as opposed simply to being free of government interference in one's life ("negative" rights). The U.N. Declaration of Human Rights, *supra* note 81, includes a number of positive rights, among them the right to an adequate standard of living, the right to education, the right to work, and the right to rest and leisure. It is not surprising that the right to own firearms is not accorded equal importance.

Bill of Rights is the right of state sovereignty provided by the tenth amendment.⁸⁸ It is not self-evident that strong, autonomous local units of government are essential to preserve human dignity. Many of the Framers believed that small units of government were more representative and respecting of human rights, and the protection of "states' rights" is meant not as an end in itself, but as a means of bringing about respect for the underlying, primary individual rights. History has demonstrated that smaller units of government are not invariably more protective of human rights, and often the federal government has had to assert its power and limit state power in order to protect individuals from mistreatment by these supposedly more sensitive government units.⁸⁹

Situations will arise where an extension of a derivative right may in fact interfere with the primary rights which the derivative right was established to protect. Broad expansion of the concept of states' rights, for example, can serve to hinder individual rights. In such a situation it is necessary to rethink, and possibly redefine, the scope of the secondary right to assure that it is fulfilling its intended function. It is inappropriate to sacrifice the primary right to preserve the derivative right.

With regard to the tenth amendment, recent case law illustrates this principle quite well. In the 1976 case of *National League of Cities v. Usery*,⁹⁰ the Supreme Court attempted to define an area of state sovereign immunity without carefully thinking through the underlying values which the tenth amendment was meant to secure. Instead, the Court treated the amendment, with its guarantee of state sovereignty as an end in itself.⁹¹ A decade of case law after *National League of Cities* proved that it was quite impossible to define rationally the scope of state sovereignty and the scope of the tenth amendment when it was approached on such terms.⁹² Finally, in the recent case of *Garcia v.*

88. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

89. Federal control has been asserted by assuring equal protection of the laws, through judicial decisions and through much legislation, such as the Civil Rights Act of 1964, 42 U.S.C. § 1971 (1976 ed.).

90. 426 U.S. 833 (1976).

91. *Id.* at 842-43.

92. In a series of decisions, the Supreme Court consistently has narrowed the scope of state sovereignty without ever providing a satisfactory definition of the concept. See *Equal Employment Opportunity Comm'n v. Wyoming*, 460 U.S. 226 (1983); *Jefferson County Pharmaceutical Ass'n Inc. v. Abbott Laboratories*, 460 U.S. 150 (1983); *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982); *United Transp. Union v. Long Island R.R.*, 455 U.S. 678 (1982); and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). Lower courts had even more difficulty in applying the Supreme Court's tests. See, e.g., *Williams v. Eastside Mental*

San Antonio Metropolitan Transit Authority,⁹³ the Court changed direction and overruled *National League of Cities*. In doing so, the Court identified the core concern of the tenth amendment as preserving governmental structures, including those at the state and local level, through which the states' citizens might participate effectively in the process of government.⁹⁴ This process, in turn, will assure proper respect for local concerns in federal legislation. Having identified this as the primary right underlying the derivative concept of "states' rights," courts now can interpret and apply the tenth amendment to protect the underlying right and at the same time refrain from extending the derivative right in a way which actually might frustrate realization of the primary right. Unthinking devotion to "states' rights" can interfere with individual rights, the protection of which is the justification for recognizing a "right" possessed by a state in the first place.

Similarly, the second amendment requires careful analysis of its nature as a means to an end or group of ends. It is evident that possession of arms is not valued as an end in itself. This is made clear not only by the differences between the right to bear arms and other Bill of Rights guarantees discussed above, but also by the evidence marshalled by both sides in the current second amendment debate. Case law, as discussed, places great emphasis on the militia clause of the amendment. This is justified since it provides an explanation of the ultimate purpose of the amendment. However, it is not the words "A well regulated Militia" but the following "being necessary to the security of a free state" which are most significant. Just as the right to bear arms is necessary for a reason, so a well-regulated militia also is necessary, not as an end in itself, but to assure the fundamental right contained in the second amendment: security.

The historical sources cited by the critical commentators also make it clear that security is the primary goal behind the second amendment. The commentators have produced much evidence of the importance of arms to the Framers, but it is clear that arms are important as a means, not an end. There are several types of "security" that historical sources indicate were important to the Framers: (a) security

Health Center, Inc., 669 F.2d 671 (11th Cir. 1982) *cert. denied*, 459 U.S. 976 (1982) (operating a mental health center is not a protected state function); *Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979) (operating a municipal airport is a protected state function); *United States v. Best*, 573 F.2d 1095 (9th Cir. 1978) (licensing drivers is a protected state function); *Friends of the Earth v. Carey*, 552 F.2d 25 (2d Cir. 1977), *cert. denied*, 434 U.S. 902 (1977) (regulating traffic on public roads is not a protected state function).

93. 105 S. Ct. 1005 (1985).

94. *Id.* at 1016-18.

against foreign invasion;⁹⁵ (b) security against tyranny by the federal government;⁹⁶ (c) security against oppression by state or local government,⁹⁷ and (d) security of the individual against crime.⁹⁸ Both sides of the second amendment debate should agree that these rights of security are the true concerns behind the provision and that militias and individually-owned firearms merely are means of securing those rights.⁹⁹

Once the right of security, consisting of these several subparts, is recognized to be the principal concern of the second amendment, it is possible to analyze the constitutionality of firearms restrictions in a manner which does not ignore the true purposes of the Framers or the realities of the twentieth century. The central inquiry in each case must be whether the proposed restriction poses a substantial threat to any

95. HALBROOK, *supra* note 54, quotes from both sides of the ratification debate. Federalist Tench Coxe wrote: "The militia of these free commonwealths, entitled and accustomed to their arms, when compared with any possible army, must be *tremendous and irresistible*." *Id.* at 68, quoting from the Pennsylvania Gazette, Feb. 20, 1788. A prominent anti-federalist pamphleteer asked: "Had we a standing army when the British invaded our peaceful shores? . . . And which of you, my fellow citizens, is afraid of any invasion from foreign powers that our brave militia would not be able immediately to repel." *Id.* at 70, quoting from the Pennsylvania Herald, Oct. 17, 1787. See also STORY, *supra* note 67, at § 1897 ("The militia is the natural defence [sic] of a free country against sudden foreign invasions . . .").

96. Again, evidence comes from both sides of the ratification debate. Federalist Noah Webster wrote: "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" HALBROOK, *supra* note 54, at 68, quoting from a pamphlet written by N. Webster. On the anti-federalist side, similar sentiments were expressed: "The government is only just and perfectly free . . . where there is also a dernier [last] resort, or real power left in the community to defend themselves against any attack on their liberties." *Id.* at 72, quoting from an anti-federalist tract.

97. Jefferson wrote, with respect to Shay's Rebellion: "The late rebellion, in Massachusetts has given more alarm than I think it should have done . . . No country should be . . . long without one." Letter from Thomas Jefferson to James Madison (Dec. 20, 1787) in VA. COMM. ON CONSTITUTIONAL GOV'T, WE THE STATES 231-32 (1964), in recognition that state governments might also be oppressive and justify armed resistance.

98. See Kates, *supra* note 6, at 233-34. The fact that the political rebel is a criminal within the legal system against which he rebels indicates that weapons are to be valued both for their utility in bringing about (legitimate?) revolutions and suppressing (illegitimate?) revolutions. See STORY, *supra* note 67, at § 1897: "The militia is the natural defence [sic] of a free country against . . . domestic insurrections, and domestic usurpations of power by rulers."

99. Kates cites authority to demonstrate the Founders' love of guns in themselves. The most notable is effusive praise of the gun by Jefferson: "it gives boldness, enterprise and independence to the mind Let your gun therefore be the constant companion of your walks." Kates, *supra* note 6, at 229, quoting from THE JEFFERSON CYCLOPEDIA 51 (Foley ed. 1967). But clearly, arms are in the Constitution because of their instrumental qualities in assuring the ends discussed *supra*, and not because they were, along with such non-constitutionally protected objects as the violin and hot air balloons, among Jefferson's favorite things. See F. BRODIE, THOMAS JEFFERSON: AN INTIMATE HISTORY 58, 255 (1974). Jefferson, incidentally, hated dogs, and suggested that they all be exterminated. *Id.* at 22. Does this suggest yet another reason he would urge that a gun be a constant companion on one's walks?

part of the right of security. To some extent, firearms will be necessary to assure security, and to that extent the second amendment will protect them. But when government action, although clearly interfering with the unlimited freedom of the individual to possess weapons, does so in a way which does not interfere with the underlying right of security, such action is constitutional. To hold otherwise would be to sacrifice ends to means.

III. APPLYING THE SECOND AMENDMENT AS A GUARANTEE OF A RIGHT OF SECURITY

By focusing on the right of security rather than firearms as the primary concern of the second amendment, it is possible to decide what types of limitations on the possession and use of firearms may create constitutional problems. Four types of security: security against foreign invasion, federal oppression, state oppression, and crime will be examined. The possible existence of a constitutional interest in preserving the right to own firearms for some reason apart from security, such as commercial or subsistence hunting must also be considered.

Several general types of firearms legislation must be examined in relation to each of the rights of security. Some restrictions, such as those restricting the carrying of a concealed weapon¹⁰⁰ or requiring gun dealers to be licensed,¹⁰¹ are generally accepted both as to their constitutionality and their wisdom and do not require extensive analysis.¹⁰² The types of restrictions which do merit careful examination fall into the following four categories: (1) registration requirements calling for the maintenance of records of the sale and ownership of weapons;¹⁰³ (2) "permissive" licensing of gun owners; that is, licensing guns under standards which a large majority of those who wish to own firearms easily satisfy;¹⁰⁴ (3) "restrictive" licensing of gun owners, that is, licensing limited to a small number of applicants who can demonstrate

100. *E.g.*, MICH. COMP. LAWS § 28.426 (1981).

101. *E.g.*, CONN. GEN. STAT. ANN. § 29-28 (1975).

102. Kates, for example, has little difficulty in conceding the constitutionality of such restrictions while maintaining that more severe restrictions would be invalid. *See Kates, supra* note 6, at 264-67. For a survey of existing firearms regulation *see* WRIGHT, ROSSI & DALY, *supra* note 25, at 243-72.

103. *E.g.*, 18 U.S.C. § 923 (1976) which requires firearms dealers, among other things to "maintain . . . records of importation, production, shipment, receipt, sale, or other dispositions, of firearms"

104. *E.g.*, MASS. ANN. LAWS ch. 140, § 129B (Michie/Law. Co-op. 1981) which calls for the issuance of firearms identification cards to all those who apply with the exception of certain well-defined and uncontroversial groups, *e.g.*, recent convicts, drug addicts, etc.

some special need for firearms;¹⁰⁶ and (4) outright prohibitions on the possession of either all firearms or certain types of firearms.¹⁰⁶ Since federal, state or local governments might enact these restrictions, each type of restriction must be evaluated at every level.

It will be noted that throughout the following discussion the classic second amendment controversy over the nature of the right guaranteed by the amendment as either individual or collective is largely absent. This is due to the fact that by redefining the purpose behind the amendment as security rather than firearms, the two views are not antithetical, but are rather closely linked. The security sought by the amendment is that of a "free state." On its surface, this objective is collective; it seems to be a "state's right." Yet the adjective "free" obviously indicates that the security of the state is called for only insofar as it assures the security of the people. In other words, the collective exercise of the right is one way to assure preservation of the individual right to security. It may be chosen by the people as the preferred method of assuring the right, as will be discussed below, but ultimately the collective right exists not for its own sake but to assure the existence of the individual right insofar as it is necessary.¹⁰⁷

A. Security Against Foreign Invasion

There is much evidence that the Framers of the Constitution considered a citizen militia to be the best defense against threats of foreign invasion.¹⁰⁸ This is unsurprising in light of the fact that it was such a force which won independence by defeating Great Britain's standing army. Not only was a citizen militia thought of as effective, it was considered far less dangerous to civil liberties than the maintenance of a strong standing army.¹⁰⁹

105. The classic example is New York's "Sullivan Law," N.Y. PENAL LAW §§ 265.00 to 265.40 (making it illegal to possess a firearm) and § 400 (creating licensing procedure for those who wish to legally possess firearms, despite provisions of § 265) (McKinney 1979).

106. E.g., Ordinance No. 81-11 of the Village of Morton Grove, Ill., at issue in *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 104 S. Ct. 194 (1983), discussed *supra* notes 32-44, and accompanying text. See also, Ordinance of Mar. 19, 1982 of the City of Chicago, Ill., amending the Municipal Code of the City of Chicago ch. 11.1-3(c) to prohibit any handgun registration after Apr. 10, 1982, at issue and upheld against constitutional attack in *Skar v. Byrne*, 556 F. Supp. 736 (N.D. Ill. 1983), *aff'd*, 727 F.2d 633 (7th Cir. 1984).

107. Just as the "state's rights" of the tenth amendment exist only as necessary means to the protection of underlying individual rights. See *supra* notes 90-94, and accompanying text. See also Beschle, *Defining the Scope of State Sovereignty Under the Tenth Amendment: A Structural Approach*, 34 DEPAUL L. REV. 163 (1984).

108. See *supra* note 95, and accompanying text.

109. It is against sound policy for a free people to keep up large military establish-

The Constitution does not prohibit the existence of a standing army. On the contrary, several constitutional provisions seem to assume that one will exist. While argument will continue over the political issues of its proper size and composition, most people would agree that a standing army is necessary in the twentieth century to assure security against foreign invasion. This does not lead to the conclusion that individual arms are irrelevant to protect the same interest. Some commentators have contended that the last line of defense against a foreign invader would be individual, perhaps guerrilla, resistance.¹¹⁰

The question is not whether individual arms are essential to protect against foreign invasion. The constitutional question is whether a legislative decision that arms are not essential (or even valuable) for such a purpose will be respected. In other words, is a decision to rely exclusively on organized military forces to guard against foreign invasion constitutionally suspect? If the political process delegates protection of this aspect of the right of security to the military, the decision is the product of sincere conviction that this type of decision best assures such security. No one involved in the process has any interest in weakening the community's security against invasion. Generally, decisions reached by the political process are constitutionally suspect when they result in deprivation of the rights of an individual or a minority in order to give benefits to the majority. When the interests of all are implicated equally in a decision, the results of the political process are not suspect.¹¹¹

The right of security against foreign invasion must be secured through means chosen by the political process. A decision to rely entirely on organized armies, based on the rationale that the marginal effect of individual arms against foreign invasion would be offset totally by the anticipated benefits to the other rights of security, particularly the right to security against crimes committed with privately-owned

ments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. STORY, *supra* note 67, at § 1897. See also HALBROOK, *supra* note 54, at 69-72; and Rohner, *supra* note 54, at 56-57.

110. See, e.g., Hardy, *The Second Amendment as a Restraint on State and Federal Firearm Restrictions*, in *RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT* 171, 183-85 (D. Kates ed. 1979).

111. Where a "decision is equally in or against the antecedent whole interest of each person," rather than allowing a majority to assign harms to a minority while assuming no risk of harm themselves, strong ground exist for allocating the decision to the political process. R. DWOR-KIN, *A MATTER OF PRINCIPLE* 87 (1985).

weapons, seems completely justified.

There is no reason to believe that a significant number of those involved in the political process are opposed to providing effective protection against foreign invasion. Therefore a decision to rely entirely on standing armies and organized state militias for such protection seems rational and it appears that any legislative decision to restrict or even prohibit individual firearms ownership will pose no serious threat to the right of security against foreign invasion.

B. Security Against Oppression by the Federal Government

Even as they sought to create an effective national government, the Framers clearly were concerned with the dangers of excessive federal power.¹¹² The Bill of Rights is largely the legacy of the anti-federalist opponents of the Constitution and their fears concerning the potential power of the new national government.¹¹³ There is considerable evidence to support the contention that the second amendment primarily was concerned with assuring the existence of an effective counterweight to potential federal oppression.¹¹⁴ In discussing the right of security against foreign invasion, there was no need to distinguish between state and federal legislation. Neither level of government would have any interest in failing to adequately provide such security. But in analyzing the right of security against federal oppression, there is a necessary distinction between state or local legislation limiting firearms possession and similar federal legislation.

When state or local legislators limit firearms possession through legislation which is the product of their own representative political processes, the decision poses no threat to the right of security against federal oppression. A decision at the state level to limit arms to the organized militia, or to disarm, simply may indicate the state's conclusion that individual firearms ownership is now irrelevant to protection against federal oppression. History makes it clear that the Constitution provides the defense against such oppression through the courts and the participation of the states in federal legislative processes.¹¹⁵ Federal ac-

112. See A. HAMILTON, J. MADISON & J. JAY, *THE FEDERALIST* (1901 ed.), especially nos. XXVI, XXVII, and XXVIII: "The Idea of Restraining the Legislative Authority in Regard to the Common Defense Considered."

113. See generally, Storing, *What the Anti-Federalists Were For*, in 1 *THE COMPLETE ANTI-FEDERALIST* (H. Storing ed. 1981).

114. See *supra* note 80 and accompanying text.

115. This is true of other derivative rights provisions, such as the tenth amendment. See *supra* notes 88-94 and accompanying text.

tion requires more serious examination. It seems clear that the second amendment prohibits federal attempts to disarm the states' organized militias. It follows that a state's decision that armed individual citizens are important as part of the overall militia system to protect against possible federal oppression should be respected. Most states have adopted some form of a right to bear arms as a part of their state constitution.¹¹⁶ While the language of these guarantees varies significantly from state to state, it seems clear that through these provisions some states have attempted to ensure individual, as well as collective, rights of firearms possession. When a state has made this decision, the argument against of federal interference is strong.

History, however, complicates the analysis and cannot be ignored. The Framers of the Constitution clearly believed in a right of revolution and acted on that belief by rebelling against England.¹¹⁷ Yet the system they established, as any system of positive law must, disallowed such a right. Basic change can be brought about through the process of constitutional amendment and Article V of the Constitution can be seen as an attempt to tame and institutionalize the right of revolution.¹¹⁸ Violent revolution was rejected, if not by the terms of the Constitution itself, then certainly by subsequent history, particularly that of the Civil War. The federal government properly may resist violent revolution. In light of this, what is left of the second amendment as a provision assuring security against federal oppression? Does it really assure the right to maintain private arms sufficient to rebel against the federal government?

The amendment was meant to assure security against federal oppression. Historically, the structure of the federal government has been the most effective means to this end. The states and their people contribute to the federal lawmaking process and can check its abuses,¹¹⁹ while the courts provide a further check on constitutional violations. Beyond these checks, orthodox second amendment doctrine protects organized state militias. Would private firearms ownership add anything significant to the balance of federal and local power? History and logic indicate that it would not.

116. See Dowlut & Knoop, *supra* note 52, at 177.

117. See Reid, *The Irrelevance of the Declaration*, in *LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW* 46, 52-54 (H. Hartog ed. 1981) asserting that this was a belief in a legal, not simply a moral right.

118. Which would add strength to the argument that the amendment process is political and not subject to judicial review. See *Coleman v. Miller*, 307 U.S. 433, 454 (1939).

119. See *Garcia v. San Antonio Metropolitan Transit Auth.*, 105 S. Ct. 1005 (1985).

Post-eighteenth century history, particularly that of the Civil War, indicates that the federal government may prevent the possession and stockpiling of weapons which pose a threat to its existence. Any contrary conclusion would lead to the bizarre spectacle of a government engaged in an arms race with its own citizens, one which the government, no doubt, would win. Even advocates of a strong individual right to bear arms, while basing their arguments on the right to oppose federal tyranny, implicitly seem to undercut their own position and indicate its artificiality by conceding that some types of arms may be restricted by law.¹²⁰ If one takes seriously the contention that private arms should stand as a credible threat in case of federal tyranny, then it follows that the people must be allowed to have those arms necessary to offset the considerable military capability of the federal government. Today this would include such things as machine-guns, flamethrowers, light artillery and much more. No one seriously would contend that the federal government cannot regulate these weapons. Arguing for a strong second amendment in the interest of providing a credible threat to federal military power while at the same time conceding that the amendment extends only to rifles, handguns, and shotguns (the general types of weapons in use in the late eighteenth century) is self-contradictory. The right asserted is obviously insufficient to satisfy the asserted need for the right.

History and logic do not permit one to take the right of armed revolution as a serious proposition of positive constitutional law. Only the legal revolutions provided by the political process are recognized by the Constitution. Constitutional processes, rather than firearms, are the true safeguard against infringements of the right of security against federal oppression. Even if we do take the right of armed revolution seriously, the existence of organized state militias will satisfy this interest. If there is a legitimate second amendment concern with protecting individual firearms ownership, it exists elsewhere.

C. *Security Against Oppression by State Government*

The Framers of the Constitution were concerned primarily with possible threats to liberty posed by the federal government, but subsequent history has shown that state and local governments have interfered with individual rights at least as often as the national govern-

120. See, e.g., Kates, *supra* note 6, at 261: "[T]he amendment does not protect the possession of fully automated weapons, grenades, rocket launchers, flame throwers, artillery pieces, tanks, nuclear devices, and so on," despite their "military utility."

ment. Furthermore, the post-Civil War constitutional amendments led to the application of much of the Bill of Rights to the states. Should the second amendment be read to endorse the position that firearms are an important means of assuring individual security against state oppression, and should the amendment join those other provisions which limit state action?

On the surface, it is plausible that individually-owned firearms serve as a deterrent to state-approved deprivations of individual rights. When the state acts through its police to deprive individuals of rights, firearms might be considered useful, if not essential, to protect those rights. Proponents of strong individual rights under the second amendment have argued, for example, that firearms would have been useful to southern Blacks during the century following the Civil War. Southern legislatures of the the post-Reconstruction era, however, enacted laws that kept Blacks unarmed.¹²¹

A closer inquiry reveals a more complex picture. Just as the Constitution provides structures which have proven to be more effective than individual firearms in limiting possible federal oppression, it also contains similar safeguards to protect against systematic state abuses. Federal courts, federal troops, and federal legislation pursuant to the fourteenth amendment have been effective in this regard in a more lasting and profound way than privately-owned firearms could have been. The constitutional defects in the post-Reconstruction statutes adopted by the southern legislatures included the inequality of treatment between races, and the unrepresentative political process by which legislation was enacted. Clearly, legislation that disarmed only Blacks or that was enforced solely against minority groups should have been declared unconstitutional, but not because of the second amendment. Rather, such statutes clearly violate the fourteenth amendment and its guarantee of equal protection of the laws.¹²²

The fourteenth amendment provides an individual with the right to security against oppressive state government. The possession of firearms has become irrelevant to the individual's right against oppressive government, state or federal, because effective legal and political means have developed in the latter half of the twentieth century to insure protection of the individual's rights.¹²³ Thus, when the federal government

121. See, e.g., Kates, *Toward a History of Handgun Prohibition in the United States*, in *RESTRICTING HANDGUNS* *supra* note 110, at 12-15.

122. The Supreme Court's error in *Cruikshank*, see *supra* notes 8-10, was not in its analysis of the second amendment, but rather in its failure to apply effectively the equal protection clause.

123. Equal protection as a basic principle or "model" running through constitutional litiga-

is willing to ensure minority and individual rights against state oppression, and when state political processes function properly, a state decision which determines that individually-owned firearms are irrelevant to the individual's right against government oppression is rational and should be considered constitutional. Such a legislative decision will be subject to review by federal as well as state courts to assure that its implementation does not violate the equal protection clause or any other constitutional provision.

Likewise, a federal decision that prohibits the possession of firearms does not abridge the right to security against oppressive state government. If the people, acting through their elected federal representatives, decide that individual firearm possession is unnecessary, then in light of the existence of other means of protection available, their decision poses no substantial threat to the individual's right of security against state government oppression pursuant to the second amendment.

D. Security Against Crime

The analysis of the right of security against foreign invasion and oppression by federal or state government, although establishing the marginal value (if any) of individual arms, still has provided no convincing rationale to support firearms restriction consistent with the basic concerns of the second amendment. Even if privately-owned weapons add almost nothing to the ability of the people to resist threats of government oppression, they still would not detract from these aspects of the right of security. Individual firearms ownership could be thought of as a positive contribution to the right of security.

However, such a conclusion cannot stand after analysis of the right of security against crime. Although most of the scholarly critiques of current second amendment doctrine primarily discuss the value of privately-owned firearms in opposing government oppression, these commentators also have identified security against lawless individuals, unconnected with government, as one of the interests the amendment seeks to protect.¹²⁴ This facet of the concerns which underlie the second amendment may be seen as an outgrowth of the common law right of self-defense; while firearms will not be always necessary for self-defense, in certain instances firearms will make effective self-defense

tion is largely a post-World War II phenomenon. See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW 991-1135 (1978).

124. See *supra* note 98, and accompanying text.

much more likely.

Clearly, defense against crime is the most important security-related interest in the minds of persons who own firearms today, and of those who are advocates in the political arena of a strong legal right to ownership of firearms.¹²⁵ Unlike the right to armed revolt against the federal or state governments, it is not clear that history has mooted the importance of the right to armed defense against crime. Thus, any analysis of the second amendment should take this facet of the right of security seriously.

A critical analysis must not adopt the position that legislation which restricts firearms is invalid without considering the historical developments of the last two hundred years. In the eighteenth century, permanent armed police forces were nonexistent; well into the nineteenth century, such forces were rudimentary and unlikely to inspire sufficient confidence for people to entrust those forces with the responsibility of defending the community against crime.¹²⁶ The twentieth century has seen the development of much more professional and effective police forces. In addition, plausible evidence supports the contention that free access to firearms actually contributes to the insecurity of the individual against the threat of various forms of violence.¹²⁷

These historical developments confront the people with a choice. If citizens believe that the absence of controls on firearms makes them less secure, they can maintain the right of the individual to possess arms freely only by sacrificing some of their security against crime in the interest of preserving what was intended to be only a means to that end. Or, by limiting access to firearms, they can adjust the means in the interest of better achieving the end. The latter choice seems more consistent with the view of the Constitution as a document concerned with unchanging, fundamental rights to be maintained regardless of the social setting caused by historical change. To require strict adherence to a particular firearms policy when evidence proves that the policy destroys security which is the fundamental goal of the amendment, would be historical formalism of the worst kind.¹²⁸

125. When asked to identify the most important reason they owned a gun, 21 percent of all gun owners and 45 percent of handgun owners cited self-defense at home or work. Another three percent of gun owners and eight percent of handgun owners needed weapons for law enforcement or security work. The rest cited hunting or collecting, which are unrelated to security. WRIGHT, ROSSI & DALY, *supra* note 24, at 96.

126. See Malcolm, *supra* note 54, at 290-91. .

127. See generally, NEWTON & ZIMRING, *supra* note 2, at 61-68.

128. In critiquing those who advocate strict adherence to the "Framers' intent" in constitutional interpretation, Dworkin discusses the difference between "abstract" intentions, the broad

This is not to say that the empirical conclusions of people who would ban firearms are necessarily correct. It is to assert, however, that a rational legislature representing the views of its people could come to such a conclusion. Such a conclusion would seem entirely free of any taint from improper motives since it is inconceivable that a legislature intentionally would vote to decrease the security of its citizens, especially in a way that would not save any substantial sums of money.¹²⁹ State and local legislation restricting the private ownership of firearms is a rational and constitutionally permissible attempt to maximize the fundamental concern underlying the second amendment, the security of the people.

Federal legislation may present more substantial problems with respect to the right of security against crime. The federal government has not attempted to provide local police functions. Consequently, state and local government provide the only forum for people to choose collectively the best way to protect themselves against crime. The people of each state, it would seem, are entitled to their own choice regarding the desirability of privately owned firearms. Just as the people of a state may opt against individual firearms ownership, so might another state reach the opposite conclusion. Federal interference with such a decision would seem improper.

Deference to state and local decisions that private firearms ownership contributes to security against crime need not invalidate all federal firearms legislation. Security against crime, even if it requires individually-owned firearms, does not require that those firearms be unregistered. Nor does security against crime dictate that owners of firearms need not be licensed, as long as the licensing scheme is permissive and allows ownership except for persons such as convicted felons whom the state has deprived of that right. Only when federal legislation interferes substantially with state choices about who may own firearms, either through a system of restrictive licensing or through outright prohibition of private ownership, will that federal legislation interfere with the allocation of decision-making authority which the second amendment envisions.

ends sought by a legislator, and "concrete" intentions, the specific routes chosen by the legislator to achieve the broad ends. Where implementing both the abstract and concrete intentions is impossible because they conflict, one must be seen as dominant. DWORKIN, *supra* note 111, at 48-51. In this case, it appears that the second amendment provides, in its language, both an abstract intent (preservation of the people's security) and concrete intentions (militias and private firearms ownership). When these intentions conflict, security should be seen as the dominant concern.

129. See *supra* note 111.

An examination of the type of firearm in question is also necessary. Firearms appropriate for use by individuals to protect themselves or their homes against crime should not be subject to federal prohibition, but weapons that lack a relationship to assuring security against crime should be. This approach will allow the federal prohibition of weapons such as machine-guns and flamethrowers that almost everyone would concede may be prohibited. In addition, the rationale for these exceptions will be better than some commentators' almost metaphysical attempts to classify weapons as within or outside of second amendment protection based on whether the weapon is one which was valued in the 1780's or is a "lineal descendant" of such a weapon.¹³⁰

E. Possible Interests in Firearms Apart From Security

It seems clear that the Framers' primary purpose for the second amendment was the security of the people. But it may be appropriate to mention other reasons for private ownership of firearms that the commentators have put forward. Although a substantial percentage of people who own firearms do so to provide security against crime, most American gun owners do not own them primarily for security.¹³¹ The most common reason cited for the ownership of firearms is hunting.¹³² Other non-security reasons that substantial numbers of gun owners give include target shooting, gun collecting, and because the owner "just likes to have one."¹³³ However harmless or even beneficial these latter three interests may be, it seems clear that none of them rise to the level of a constitutional right. The same is true of recreational hunting.¹³⁴

A small number of hunters, however, make their living by that activity and another relatively small group of gun owners require weapons for use in other occupations.¹³⁵ Government attempts to interfere with lawful occupations which require weapons do create constitutional problems. However, those problems flow more from other constitutional provisions, particularly the due process clause, than from the second

130. See Kates, *supra* note 6, at 258-61.

131. WRIGHT, ROSSI & DALY, *supra* note 24, at 96.

132. *Id.* Fifty-four percent of gun owners list hunting as the most important reason for their ownership of guns. Among handgun owners, however, self-defense at home and work is the most commonly-cited reason.

133. *Id.*

134. See Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371 (1978).

135. Three percent of all gun owners, and eight percent of handgun owners, own them primarily for use in a law enforcement or security job. WRIGHT, ROSSI & DALY, *supra* note 24, at 96.

amendment.¹³⁶ These problems should not serve as serious impediments to the main thrust of most firearms legislation. They will prevent only the outright prohibition of ownership by those who demonstrate a job-related need for firearms, an exception which almost certainly will present no particular controversy.¹³⁷ These considerations should be kept in mind, but they are of only minimal importance in analyzing the proper interpretation of the second amendment.

IV. FURTHER IMPLICATIONS OF RECOGNIZING THE SECOND AMENDMENT AS PROVIDING A RIGHT OF SECURITY

Recognizing a right of personal security as the core of the second amendment may have implications far beyond its contribution to understanding the amendment itself. A most interesting implication would appear in constitutional matters involving criminal law and procedure. The concept of a right of security may provide a justification for the use of "balancing tests" in this field.

Although the term "right" can be used in a weak sense to describe an entitlement which exists only because it is recognized by statutory or decisional law and therefore can be taken away through normal democratic lawmaking procedures, it is more commonly and usefully used to denote something greater. Used in its strong sense, the term "right" describes something that people have by virtue of their citizenship or humanity and that a majority vote cannot take simply because the majority has decided that such a deprivation would further the common good.¹³⁸ If a right is to be denied or limited, it must be in the interest of preserving another right of equal or greater importance.

Adopting this framework and recognizing that the concept of a constitutional right generally uses the term "right" in its strong sense, it is difficult to understand the frequent use of balancing tests that weigh criminal defendants' fourth, fifth, sixth, or seventh amendment rights against the perceived social benefits gained by efficient functioning of the criminal justice system. If, in fact, rights never are defeated by mere democratic interests, the balance must always be struck in favor of the individual right. Yet this clearly is not the case in areas such as the fourth amendment, where use of the term "unreasonable"

136. See *TRIBE*, *supra* note 123, at 948-53.

137. The stringent gun control ordinance of Morton Grove, Ill., for example, contains exceptions for "peace officers," "keepers of prisons," members of the armed forces, watchmen and security guards employed "for the protection of persons . . . and property . . ." and authorized state agents and investigators. 695 F.2d at 264.

138. See *supra* note 80.

to denote what is forbidden seems to invite balancing,¹³⁹ and also where the language seems much more absolute, as in the fifth amendment guarantee against self-incrimination.¹⁴⁰

One example is the classic "fair trial-free press" issue. When the media seeks to publicize details of a crime it may prejudice a defendant's right to a fair trial. There is an obvious way to preserve both the first amendment rights of the press and the due process rights of the defendant. The press would be allowed to publish and, if necessary, the defendant would be set free. But courts¹⁴¹ and most commentators¹⁴² do not take this approach. Rather, they opt for trimming back one of the competing rights in order to allow the court system to do its job.¹⁴³

If rights are limited, the restriction should be in deference to another right. Yet there is no explicit right of the public to a well-functioning system of criminal prosecution apparent in the Constitution. However, if the second amendment confers upon citizens the basic right to personal security, not just the right to firearms, and also confers the derivative right to establish appropriate government structures to obtain that security, it is possible to balance this right against that of the defendant. In this case, the right is balanced against another right rather than balanced against a majoritarian interest. This is not to say that such balancing always or even usually should result in automatic deference to the right of security, but it does provide a justifiable explanation for using a balancing test when dealing with a criminal defendant's constitutional right. In essence, the second amendment right of security is also an individual right, albeit one that requires collective action to protect it. The full impact of recognizing a right of security as a constitutional right is significant and requires more consideration.

As long as the second amendment is viewed as ultimately concerned with firearms, in all likelihood it will continue to be treated as a

139. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

140. "No person . . . shall be compelled in any criminal case to be a witness against himself. . ." U.S. CONST. amend. V.

141. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (no absolute barriers to publication of pretrial publicity, but injunction might be justified under some circumstances pursuant to a balancing test).

142. See, e.g., Stanga, *Judicial Protection of the Criminal Defendant Against Adverse Press Coverage*, 13 WM. & MARY L. REV. 1, 22 (1971); Comment, *Gagging the Press in Criminal Trials*, 10 HARV. C.R.-C.L. L. REV. 608 (1975).

143. But occasionally an approach rejecting any balancing and urging absolute protection of both rights is suggested. See, e.g., Wright, *Fair Trial—Free Press*, 38 F.R.D. 435 (1965). And Justice Brennan, concurring in *Nebraska Press Ass'n*, urged a rule of absolute protection of the press from prior restraints. 427 U.S. at 585-604 (Brennan, J., concurring).

largely meaningless anachronism. Criticism of current doctrine, which itself arises from the same assumptions about the ultimate concern of the provision, will continue to be ineffective in light of the realities of the twentieth century. Only by abandoning the focus on firearms themselves and shifting attention to the true ends of the second amendment—personal security—will proper understanding of the second amendment develop so that it becomes a useful tool in maintaining the fundamental structure of rights and powers set forth in the Constitution.

IV. SUMMARY AND CONCLUSION

An examination of the second amendment concerns of the Framers of the second amendment indicates that firearms were not intended to be ends in themselves, but rather means by which citizens would assure themselves of a right of security. This right has a number of aspects: security against foreign invasion, security against government oppression at the federal and state levels, and security against criminal acts of other individuals. It seems clear that at least some of the Framers thought that individual ownership of weapons was essential to secure these ends. In light of historical developments that seriously alter the relationship between the means of firearms and the end of personal security, however, the ends sought by the second amendment should take precedence.

The traditional view that the second amendment does not apply to the states is justified. When a state legislature, acting through proper representative procedures, decides to limit or even to prohibit the individual possession of firearms, it attempts to maximize the citizens' right to security against invasion, government oppression and crime, not to interfere with it. In light of the fact that individual firearms play almost no role today in providing security against foreign invasion and government oppression, and the fact that a plausible argument exists that banning firearms will have the overall effect of increasing the people's security against crime, state firearms legislation is consistent with the concerns underlying the second amendment. This is true regardless of the type of legislation involved, from registration to outright prohibition.

The traditional view that the second amendment limits federal legislation only to the extent that legislation seeks to disarm organized state militias should be modified. The amendment envisions that state and local communities are the basic units for deciding the most appropriate way to preserve the right of security. Constitutional provisions

safeguard against government oppression and provide for national security so that private firearms are not necessary. However, the question of the efficacy of private firearms as a means of providing security against crime remains unsettled. States are likely to differ on this question not only as a result of differing political philosophies, but also due to real differences in the social conditions of the states and the resulting likelihood that free access to weapons either will increase or reduce the security of the individual citizen against crime. Courts should respect state decisions on this matter, as long as those decisions are consistent with the mandate of the second amendment.

This does not mean that the federal government may do nothing at all related to firearms, however. Registration of firearms or permissive licensing of firearms owners will not interfere with the ability of those citizens to provide for their security against crime, and therefore will not interfere with any state's decision to permit private firearms ownership. Likewise, even restrictive licensing or outright prohibition will pose no constitutional problem when limited to weapons that are inappropriate for self-defense. But the second amendment should bar any federal attempt to prohibit ownership of weapons appropriate for self-defense to persons the states permit to own such weapons. To this extent, the second amendment should protect individuals, as well as state militias, from federal interference.

The second amendment is not the sole constitutional provision governing the validity of firearms legislation. Such legislation also must conform to other constitutional provisions, including the equal protection and due process clauses. State and local legislation, of course, must conform with state constitutional guarantees. Keeping in mind that the basic purpose of the second amendment is to assure citizens a right of security against several types of threats, it is possible to delineate the scope and effect of the amendment to avoid disregarding and belittling the provision.