THE "ASSAULT WEAPONS" BAN, THE SECOND AMENDMENT, AND THE SECURITY OF A FREE STATE

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent . . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.

L. Brandeis.[1]

INTRODUCTION

On September 13, 1994, President Clinton signed into law the Violent Crime Control and Law Enforcement Act of 1994 (Crime Law).[2] Most controversial among its provisions was a ban on the manufacture and importation of 19 semiautomatic rifles by name, approximately 175 others that fit the description of an "assault weapon," and pistol magazines with a capacity greater than ten rounds.[3] Central to the controversy is the interpretation

---

1. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

2. Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. §§ 921(a), 922.

3. *Id.* at § 110102. RESTRICTION ON MANUFACTURE, TRANSFER, AND POSSESSION OF CERTAIN SEMIAUTOMATIC ASSAULT WEAPONS.

(a) RESTRICTION.—Section 922 of title 18, United States Code, is amended by adding at the end the following new subsection:
18 U.S.C. § 922 (v)(1) It shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon.

(2) Paragraph (1) shall not apply to the possession or transfer of any semiautomatic assault weapon otherwise lawfully possessed under Federal law on the date of the enactment of this subsection . . .
18 U.S.C. § 921(a) (30) The term "semiautomatic assault weapon" means—

(A) any of the firearms, or copies or duplicates of the firearms in any caliber, known as—
- (i) Norinco, Mitchell, and Poly Technologies Avtomat Kalashnikovs (all models);
- (ii) Action Arms Israeli Military Industries UZI and Galil;
- (iii) Beretta Ar70 (SC-70);
- (iv) Colt AR-15;
- (v) Fabrique National FN/FAL, FN/LAR, and FNC;
- (vi) SWD M-10, M-11, M-11/9, and M-12;

of the Second Amendment[4] to the Constitution of the United States.

Those opposed to the ban view it as an attack on their rights and liberties, liberties they believe the Second Amendment protects.[5] Those in favor of the ban approve of it as a means of reducing violent crime involving firearms, construing the Second Amendment more narrowly, or even calling for its repeal.[6]

This article will discuss the Second Amendment, informed by its background, by the views of the men who framed it, and by historical perspectives on the right to keep and bear arms. It will apply this meaning, along with a standard of interpretation of the Second Amendment to the Crime Law's semiautomatic weapons ban in a constitutional analysis, showing that the law violates the Constitution

I. EXEGESIS OF THE SECOND AMENDMENT

> "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."[7]

(vii) Steyr AUG;
(viii) INTRATEC TEC-9, TEC-DC9 and TEC-22; and
(ix) revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12;

(B) a semiautomatic rifle that has an ability to accept a detachable magazine and has at least 2 of-
(i) a folding or telescoping stock;
(ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;
(iii) a bayonet mount;
(iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and
(v) a grenade launcher;

(C) a semiautomatic pistol that has an ability to accept a detachable magazine and has at least 2 of—
(i) an ammunition magazine that attaches to the pistole outside of the pistol grip; . . .
(iv) a manufactured weight of 50 ounces or more when the pistol is unloaded; and
(v) a semiautomatic version of an automatic firearm;. . . .

Id. A National Rifle Association/Institute for Legislative Action Fact Sheet puts the number of firearms banned, or possibly banned, under the Crime Law at greater than 182.

4. U.S. CONST. amend. II. "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."

5. *See,* Tanya Metaksa, *Help Me Stop the Rape of Liberty,* AMERICAN RIFLEMAN, Oct. 20, 1994, at 40.

6. *See,* Sam Newlund, *Let's Talk of Repealing the Second Amendment,* STAR TRIBUNE, Sep. 15, 1994, at 25A.

7. U.S. CONST. amend. II. At the outset, it should be made clear that this article

A. Historical Setting

On April 18, 1775, British General Thomas Gage dispatched Lieutenant Colonel Francis Smith to seize and destroy weapons belonging to the colonial militia at Concord, Massachusetts. Smith sent Major John Pitcairn ahead with six lighted companies. About seventy armed militiamen confronted the Major in Lexington. Who fired first remains unknown to this day, but after a volley of shots, eight Americans were dead and ten were wounded. The British pressed on to Concord and skirmished briefly with several hundred more militiamen. Both sides suffered casualties, but the real fighting had not yet begun. Soon thousands of irate militiamen hemmed in Smith's troops in Lexington and another 20,000 besieged Gage.[8] This was the "shot heard 'round the world." Ten years of British oppression and colonial resistance[9] were wood for the fire of the American Revolution—the attempt to disarm the colonists was the spark.[10] It is against this background that the Second Amendment to the United States Constitution has its clearest meaning.

After the Declaration of Independence was written, seven states enacted "bills of rights."[11] Each "bill of rights provided either for protection of the concept of a Militia or for an express right to keep and bear arms."[12] After the Revolution, these concerns occupied a significant part of the debate over the new Constitution.[13] George Mason, a participant in the revolution and

---

will not examine other grounds upon which the semiautomatic weapons ban could be found unconstitutional. Certainly the doctrine of void-for-vagueness presents itself as a clear contender. For example, there is great difficulty in distinguishing a semiautomatic "assault weapon" with a military appearance from one whose mechanism is identical, yet may not have a military appearance. Military appearance also presents a difficulty since almost all firearms have origins in, or are related to, military weapons. Neither will this article examine possible congressional overreaching in the Commerce Clause, which invalidated the Gun-Free School Zones Act of 1990 in United States v. Lopez, 115 S.Ct. 1624 (1995). The thrust of this article will be to examine the applicability of the Second Amendment as a constitutional rule of law.

8. *See generally* ALLAN R. MILLETT & PETER MASLOWSKI, FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES OF AMERICA 50-51 (1984).

9. *See generally id.* at 47-51.

10. *See* STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED 62 (1984).

11. REPORT OF THE SENATE SUBCOMM. ON THE CONSTITUTION OF THE COMM. OF THE JUDICIARY, 97TH CONG., 2d SESS., THE RIGHT TO KEEP AND BEAR ARMS 6 (Comm. Print 1982) [hereinafter SUBCOMMITTEE REPORT].

12. *Id.*

13. *See generally* DAVID EARL YOUNG, THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY IN COMMENTARIES ON LIBERTY, FREE GOVERNMENT AND AN ARMED POPULACE DURING THE FORMATION OF THE BILL OF RIGHTS (1991).

drafter of the Virginia Bill of Rights, accused the British of having plotted "to disarm the people—that was the best and most effective way to enslave them."[14] In an effort to convince Pennsylvania to ratify the Constitution that had been criticized for not limiting standing armies, Noah Webster wrote:

> Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword, because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretense, raised in the United States.[15]

Thus the Framers clearly saw the Militia made up of citizens with the right to keep and bear arms as indispensable ingredients to maintaining a free state. While the Militia and the right are intertwined for this purpose, the Militia depends on the right, but the right exists apart from the Militia. A well regulated Militia is simply the best application of that right for maintaining a free state.

B. A Well Regulated Militia . . .

To analyze the phrase "A well regulated Militia,"[16] it is necessary to define a "Militia." Since, in modern life, open carrying of weapons by citizens is a foreign, if not alarming image, a Militia is not something most Americans would recognize. The Militia tradition dates to pre-colonial England where every able-bodied male was not simply allowed, but was required to keep his own arms in public service.[17] That tradition is evident in the declaration of the General Assembly of Virginia: "The defense and safety of the commonwealth depend upon having its citizens properly armed and taught the knowledge of military duty."[18] To accomplish this, Virginia mandated that "[a]ll free males between

---

14. *See* SUBCOMMITTEE REPORT, *supra* note 11, at 7 (quoting Debates and other Proceedings of the Convention of Virginia, ... (taken in shorthand by David Robertson of Petersburg) at 271, 275 (2d ed. Richmond, 1805)).

15. *Id.* at 7 (quoting Noah Webster, "An Examination into the Leading Principles of the Federal Constitution ..." in Paul Ford, ed., Pamphlets on the Constitution of the United States, at 56 (New York, 1888)).

16. U.S. CONST. amend II.

17. Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment,* 82 MICH. L. REV. 204, 214 (1983).

18. United States v. Miller, 307 U.S. 174, 181 (1939) (quoting The General Assembly of Virginia, Oct., 1785 (12 Hening's Statutes 9, c. 1 et seq.)).

eighteen and fifty years" be "formed into companies" and provide themselves with weapons and ammunition according to their ranks.[19] A New York Statute of 1786 called for every male between sixteen and forty-five years of age to enroll in a militia company in a "Beat" where he resided, and to provide himself at his own expense a "good Musket or Firelock, a sufficient Bayonet and Belt," other accoutrements and ammunition.[20]

The Militia Act of 1792, enacted by the Second Congress, provided that "every free able-bodied white male citizen of the respective states ... of the age of eighteen years and under the age of forty-five years ... shall ... be enrolled in the militia."[21] The statute also required each member to "provide himself with a good musket or firelock, a sufficient bayonet and belt" as well as powder and other equipment.[22]

In *Presser v. Illinois*, the Supreme Court said:

> It is undoubtedly true that *all* citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining public security, and disable the people from performing their duty to the general government.[23]

In determining what the Militia is, it will also be helpful to address what it is not. Some commentators have said that the Militia has become what is now the National Guard, operated by the states.[24] At the outset, it should be conceded that the National Guard bears a resemblance to a Militia. However, the debates prior to the adoption of the Constitution clearly show they are not the same. Baron von Stuben's plan emphasized a "select militia" which would be paid for its services and receive specialized training, an organization more like the modern National

---

19. *Id.* at 181, 182.
20. *Id.* at 180, 181.
21. 1 Stat. 271. Chap. XXXIII Section 1.
22. *Id.*
23. 116 U.S. 252, 265 (1886) (emphasis added).
24. WARREN FREEDMAN, THE PRIVILEGE TO KEEP AND BEAR ARMS: THE SECOND AMENDMENT AND ITS INTERPRETATION 22 (1989).

Guard than like a Militia.[25] Richard Henry Lee, Virginia delegate to the Continental Congress, argued in his "Letters from the Federal Farmer to the Republican" that such a select militia would "answer all the purposes of an army," and leave the rest of the population defenseless. He held that "to preserve liberty, it is essential that the whole body of the people always possess arms and be taught alike, especially when young, how to use them."[26] Since Lee sat in the Senate that approved the Bill of Rights, it is difficult to imagine that he meant the Second Amendment to protect the select militias he perceived as such a threat to liberty.[27]

Neither can it be argued that a standing army obviates the need for a Militia—that was the very thing a Militia was intended to counterpose.[28] From the state Militia Acts,[29] it appears that

---

25. *See, e.g.*, United States v. Miller, 307 U.S. 174, 179 (1939) (quoting ADAM SMITH, WEALTH OF NATIONS, Book V. Ch.1, where he discusses the Militia as follows: "Men of republican principles have been jealous of a standing army as dangerous to liberty .... In a militia, the character of the labourer, artificer, or tradesman, predominates over that of the soldier: in a standing army, that of the soldier predominates over every other character; and in this distinction seems to consist the essential difference between those two different species of military force.") This description of a Militia bears resemblance to the modern day National Guard, where citizens of every trade and profession become "weekend warriors." But the similarity ends with two important differences: the Militia members own and keep their own weapons (*see infra* note 30), while the government keeps and furnishes those of the Guard (*see infra* note 113); and, the Militia receives no pay for its services, while Guardsmen receive pay and other benefits. *Cf.* MILLET, *supra* note 8, at 313.

26. SUBCOMMITTEE REPORT, *supra* note 11, at 6-7.

27. *Id.* at 7. In 1958, Congress adopted 10 U.S.C. § 311 which defined the composition and classes of the United States Militia:

> (a) The militia of the United States consists of all able-bodied males at least 17 years of age and ... under 45 ... who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are commissioned officers of the National Guard.
> (b) The classes of the militia are-
> (1) the organized militia, which consists of the National Guard and the Naval Militia; and
> (2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.

Id.

The "unorganized" Militia appears to be the same Militia that was defined in the Uniform Militia Act of 1792, with the exception of the race distinctions. 1 Stat. 271. And since Congress has defined the organized Militia as the National Guard, Freedman would be hard-pressed to say the Militia of the Second Amendment and the National Guard are the same thing. *See* FREEDMAN, *supra* note 24, at 22.

28. *See* SUBCOMMITTEE REPORT, *supra* note 11 and accompanying text. For further evidence that the Framers did not intend to create the National Guard by adopting the Second Amendment, consider one Pennsylvania delegate who argued, "Congress may give

the States were to regulate the Militias within their borders, subject to the uniformity required by the federal Act.[30] The federal and state Militias were to consist of every able-bodied male citizen within a certain age range who were required to keep weapons fit for service in a Militia, that is, military type weapons.[31] The Militia Acts did not exclude use of these weapons for hunting, home defense, or personal protection—these weapons were the property of the individual.[32] Nor were they required to be locked up in an armory, where the citizen could not get to them.[33] If the weapons were the private property of individuals, the state had no right to lock them up for its exclusive service.

The adverb "well" modifies the adjective "regulated," which modifies the word "Militia."[34] Warren Freedman, former Counsel and Assistant Secretary for Bristol Meyers Company, and scholar, advocates the view that the Second Amendment protects the states' right to keep National Guards. He argues that advocates of the right to keep and bear arms interpret the word "militia" to be "unorganized militia;" that the populace at large, or at least members capable of bearing arms had the right to do so to check any and all government excesses.[35] He suggests that the thrust

---

us a select militia which will, in fact, be a standing army—or Congress, afraid of the general militia, may say there will be no militia at all. When a select militia is formed, the people in general may be disarmed." *Id.* at 6. It is noteworthy that opponents of the individual right to bear arms make their argument on the very ground the Framers intended to foreclose. This bears directly on the issue of semiautomatic, military-type weapons. Given the distrust of standing armies, and the Militia's role as a counterweight, it follows logically that the Militia of the "people in general" was free to keep and bear military weapons.

29. *See, e.g.*, United States v. Miller, 307 U.S. 174, 180-82 (1939), citing requirements in Militia Acts of the 1780s from Massachusetts, New York, and Virginia.

30. *See* The Uniform Militia Act of 1792. 1 Stat. 271. Chap. XXXIII Sec. 1.

> That every citizen so enrolled ... shall ... provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accoutred and provided, when called out to exercise, or into service ....

Id. These specifications clearly demonstrate a military use for the arms involved. Thus the weapons of a Militia must be suited to military use.

31. *Id. See also Miller*, 307 U.S. at 180-82, *supra* note 29.

32. *Id.*

33. *Id.*

34. U.S. CONST. amend. II.

35. FREEDMAN, *supra* note 24, at 21. This characterization seems to imply that

of the Second Amendment was to guard against federal attempts to disarm or abolish *organized* state Militias.[36] There is nothing to argue with in that statement, but there is something to add; it fails to take into account the very foundation upon which a Militia is well regulated and organized: a citizenry whose right to keep and bear arms is not infringed. Surely the most poorly regulated, or "unregulated" Militia, is the one without guns and ammunition suitable for a Militia. This amounts to no Militia at all.

Thus the Militia is composed of "all citizens capable of bearing arms,"[37] generally males in a particular age group.[38] But the Second Amendment's mention of a Militia was never to be construed to deny individuals the right to keep and bear arms at the caprice of Congress or a court. Such an interpretation flies in the face of the whole purpose of the Amendment, that "great object ... that every man be armed.... Everyone who is able may have a gun,"[39] with at least one purpose being to prevent tyranny enforced by a standing army.[40]

The question arises, "Have you seen your Militia lately?"[41] It is true that the Militia has been neglected over the history of

---

advocates of an individual right claim some sort of "right to revolution," or to use force capriciously. But consider Webster's point that an armed citizenry actually could keep the sovereign from enforcing unjust laws by the sword. *See supra* note 15. While some Americans might prefer to endure tyranny rather than resist, that was clearly not the sentiment of the Framers as evidenced both by history and the Second Amendment. In short, to write off the true purpose of the Amendment with a glib mischaracterization merely sets up a straw man argument barely worth the trouble of knocking down. Furthermore, Congress' own definition of an "unorganized" Militia more closely resembles that defined by the Militia Act of 1792. *See supra* note 27 and accompanying text. Members of that "unorganized" Militia were required to furnish their own arms. With this in mind, it makes no sense to say that the Second Amendment was intended only to keep the federal government from abolishing organized state Militias—the National Guards—since there were none. And the notion that it should protect National Guard type Militias does not stand up in light of the debate surrounding the adoption of the Amendment, with the specific rejection of select Militias. *See supra* note 28 and accompanying text.

36. FREEDMAN, *supra* note 24, at 22.

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

38. *See, e.g., supra* notes 19, 21 & 27.

39. SUBCOMMITTEE REPORT, *supra* note 11, at IV (quoting Patrick Henry, in the Virginia Convention on the ratification of the Constitution.) Consider also the words of George Mason: "I ask, sir, what is the militia? It is the *whole people*, except for a few public officials." WAYNE LAPIERRE, GUNS, CRIME AND FREEDOM 8 (1994) (quoting Jonathan Elliot, *The Debates in the Several States Conventions on the Adoption of the Federal Constitution, III*, 425-426 (1836-45)) (emphasis added).

40. *See supra* note 15.

41. *Cf.* Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the*

this country. That it has not been well regulated, however, cannot lead to the conclusion that the right to bear arms is invalid, or that the Militia is obsolete. There is no support for the notion that the validity of a "right of the people" depends on whether government neglects its own duty, in this case, "[t]o provide for organizing, arming, and disciplining, the Militia."[42] The Militia composed of every able-bodied citizen is, furthermore, something the Constitution says is necessary to the security of a free state.

C. *Being Necessary to the Security of a Free State . . .*

The idea that an armed citizenry is an essential ingredient of a free state has an ancient tradition. Aristotle saw it as central to political equality: "The whole constitutional set-up is intended to be neither democracy nor oligarchy but mid-way between the two—what is sometimes called 'polity,' *the members of which are those who bear arms.*"[43] In contrast, a tyranny needed a professional standing army to maintain itself.[44] Tyranny derived from the oligarchy's mistrust of the people, which it kept too poor and preoccupied with war, taxes and public works to afford weapons, or have time to rebel.[45] A further benefit an armed citizenry

---

Twentieth Century: Have You Seen Your Militia Lately?, 15 U. DAYTON L. REV. 5 (1989) (advocating a collective, states' right interpretation of the Second Amendment).

In the days following the bombing of the federal building in Oklahoma City, media attention focused on possible links with citizen militia groups not sanctioned by their state governments. A link has yet to be found. Alan Bock, *Weekend Warriors*, NATIONAL REVIEW, May 29, 1995 at 39. The legality of such groups, considered in the light of the freedom of association with the right to keep and bear arms, is beyond the scope of this article. It would seem, however, that the Framers envisioned something different:

> When James Madison and his colleagues drafted the Bill of Rights they . . . firmly believed in two distinct principles: (1) Individuals had the right to possess arms to defend themselves and their property; and (2) states retained the right to maintain militias composed of these individually armed citizens . . . Clearly, these men believed that the perpetuation of a republican spirit and character in their society depended upon the freeman's possession of arms as well as his ability and willingness to defend both himself and his society.

LAPIERRE, *supra* note 39, at 15 (quoting Robert Shalhope, *The Ideological Origins of the Second Amendment*, 69 JOURNAL OF AMERICAN HISTORY 599 (1982)). Militias maintained by state governments, composed of individually armed citizens, represent the ideal cooperation between the government and the governed. Citizens become partners with the government in maintaining a free society, and neither need fear the other.

42. U.S. CONST. art. I, § 8, cl. 16.

43. HALBROOK, *supra* note 10, at 11 (quoting ARISTOTLE, POLITICS at 71) (emphasis original). Halbrook cites Aristotle's criticism of Plato's oligarchic constitution for disarming the populace.

44. *Id.* at 12.

45. *Id.*

provides is defense of the nation when the ruler's standing army is conquered or destroyed, something an unarmed populace could never do.[46]

The word "state" in the Second Amendment has a peculiar modifier—the adjective "free." The necessity of a Militia did not exist for just any kind of state; a Militia, composed of armed and free citizens, would actually threaten the security of a tyrannical slave state or a police state.[47] What the Framers clearly intended to preserve through the Second Amendment was a *free* state. Classical thinkers saw tyranny resulting as freedom led to prosperity, which led to decadence, and finally weakness.[48] Nicolo Machiavelli saw the Militia as the cure for this cycle by maintaining public spirit and self-reliance in the citizenry.[49] And as for the fears of "unorganized" militias, he contended:

> [I]t is certain that no subjects or citizens, when legally armed and kept in due order by their masters, ever did the least mischief to any state ... Rome remained free for four hundred years and Sparta eight hundred years, although their citizens were armed all that time; but many other states that have

---

46. It is worth noting that France, a country with a history of disarming its citizens, has been invaded twice this century, and has required foreign assistance to expel invading armies on both occasions. *See generally* MILLETT, *supra* note 8, at 328-58, 430-67.

> They (the french peasants) grow crooked, and become feeble, not able to fight nor to defend the realm; nor do they have weapons, nor the money to buy them weapons withal .... Wherefore the French king hath not men of his own realm to defend it ... by which cause the said king is compelled to make his armies and retinues for the defense of his land of strangers ... or else his enemies might overrun him .... If the realm of England, which is an isle, and therefore not likely to get aid of other realms, were ruled under such a law ... it would be a prey to all other nations that would conquer, rob, or devour it ....

SIR JOHN FORTESCUE, THE GOVERNANCE OF ENGLAND: THE DIFFERENCE BETWEEN AN ABSOLUTE AND A LIMITED MONARCHY 114-115 (Rev. ed.1885) (1476), quoted in DAVID T. HARDY, ORIGINS AND DEVELOPMENTS OF THE SECOND AMENDMENT 22 (1986). Switzerland, on the other hand, has almost universal ownership of firearms and has managed to remain neutral through two world wars fought around its borders, and has remained free for seven hundred years. LAPIERRE, *supra* note 39, at 170-71.

47. HALBROOK, *supra* note 10, at 12 (quoting ARISTOTLE, POLITICS at 248.) ("It is by use of the light infantry in civil wars that the masses get the better of the rich; their mobility and light equipment give them an advantage over cavalry and the heavy-armed.").

48. David Hardy, *The Unalienable Right to Self-Defense and the Second Amendment*, 8 JOURNAL OF CHRISTIAN JURISPRUDENCE 87, 90 (1990). *See also* HARDY, *supra* note 46, at 11, for the proposition that the right to keep and bear arms is ancient and inalienable, predating all other rights enumerated in the Bill of Rights.

49. *Id.*

> been disarmed have lost their liberties in less than forty years.[50]

That armed citizenry, or Militia, had the effect of maintaining the security and freedom of the state in at least three ways. It protected the people from tyranny enforced by a standing army, from invading armies, and perhaps most importantly, from internal decay by maintaining civic virtue.[51] This is relevant to the Second Amendment because Machiavelli's concept of armed citizens traveled through English thought to the Framers.[52]

The Supreme Court has recognized that the difference between freedom and slavery exists in the right to keep and bear arms. In *Dred Scott v. Sanford*,[53] the Court enumerated several rights that would belong to blacks if the Court gave them recognition as citizens.[54] Those rights included freedom to travel from state to state, freedom of speech and assembly, and freedom "to keep and carry arms wherever they went."[55] According to the Court's reasoning, this right was as essential to citizenship in the United States as any other of the most fundamental rights now taken for granted.[56] The freedom to keep and bear arms is arguably more central to liberty than the rights of free speech and assembly, and freedom of the press.[57] Supreme Court Justice Joseph Story claimed that "[t]he right of citizens to keep and

---

50. HALBROOK *supra* note 10, at 22 (quoting N. MACHIAVELLI, THE PRINCE AND THE DISCOURSES 44-46 (Mod. Library ed. 1950) (1513); N. MACHIAVELLI, THE ART OF WAR 30-31 (E. Farnsworth trans., rev. ed. 1965) (1521), cited in Hardy, supra note 48 at 90.). This is especially remarkable since Machiavelli sought to *strengthen* the Ruler. *See generally* N. MACHIAVELLI, THE PRINCE, (trans. Luigi Ricci 1935) (Mentor Books, 1952).

51. Wendy Brown argues that the keeping and bearing of arms is a vestige of republicanism better left in the past; that republicanism presupposes a virtuous populace; that gun ownership results in rape of women and murder of urban black men. Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 YALE L.J. 661, 665 (1989). Most urban black males, however, are killed by each other. WILLIAM OLIVER, THE VIOLENT SOCIAL WORLD OF BLACK MEN 1-2 (1994). And women are better off armed when facing rapists. GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 126 (1991). The classical point of view expressed by Machiavelli suggests, on the contrary, that a well regulated Militia would be the very thing that would help to maintain a virtuous populace through self-reliance and civic spirit.

52. HALBROOK, *supra* note 10, at 8 (citing J. POCOCK, THE MACHIAVELLIAN MOMENT 528 (1975), and POCOCK, BETWEEN MACHIAVELLI AND HUME, EDWARD GIBBON AND THE DECLINE AND FALL OF THE ROMAN EMPIRE (Bowersock et al. eds, 1977)).

53. 60 U.S. (19 How.) 393 (1856).

54. *Id.* at 417.

55. *Id.*

56. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (freedom of expression); Shapiro v. Thompson, 394 U.S. 618 (1969) (right of interstate migration).

57. U.S. CONST. amend. I.

bear arms has justly been considered, as the palladium of the liberties of the republic."[58] While the pen is mightier than the sword, it is not in a one-on-one with a tyrant's storm trooper or an attacking criminal.

It is true that the high rate of crime involving guns is a threat to the security of the nation. It is imperative, however, to separate the crime from the means used to commit it. Telephones, boats, airplanes, cars, and the mail system are used every day to commit all manner of crimes. There is clearly no logic to banning these. Like any other instrument, firearms have uses both good and evil. One good use is self-defense.[59] Furthermore, the possibility that a victim might have a weapon serves as a deterrent to criminals.[60] General ownership of firearms

---

58. III JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, § 1890 (1833)(Fred B. Rothman & Co., 1991).

> The importance of this article will scarcely be doubted by any persons, who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments 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. The right [is] the palladium of the liberties of the republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How it is practicable to keep the *people* duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine *all* the protection intended by this clause of our national bill of rights.

Id. (emphasis added).

59. *Cf.* KLECK, *supra* note 51, at 111-12. "Although shootings of criminals represent a small fraction of defensive uses of guns, Americans nevertheless shoot criminals with a [remarkable] frequency ...." But, "the gun was fired in less than half of the defensive uses; the rest of the times the gun was merely displayed or referred to, in order to frighten away the criminal." *Id.* at 111.

Kleck, it should be noted, does not fit the stereotypical profile of an NRA spokesman. He is a liberal Democrat, an opponent of the death penalty, and a member of the American Civil Liberties Union and Amnesty International, but not of the NRA. Don B. Kates, *Shot Down*, NATIONAL REVIEW, Mar. 6, 1995 at 49, 50-51.

60. Indeed, in ... surveys prison denizens expressed support for handgun

among citizens also protects lives and property from criminals, as well as from potential tyrants. Thus it is ill-advised to advocate the banning of any instrument simply because it might be misused. With those inclined to obey the rules helplessly disarmed, and with gun control laws that can never prevent lawbreakers from getting weapons, the law of unintended consequences may make the cure worse than the illness.[61]

There is also compelling evidence that armed citizens deter crime. In March of 1982, Kennesaw, Georgia passed a law *requiring* firearm ownership of every head of household.[62] The crime rate there was negligible, but actually decreased after the law was passed.[63] The most recent homicide was committed in 1989, not with a gun but a knife.[64] The most recent gun homicide was in 1986, involving two drunk out-of-towners who were daring each other to shoot. One accepted the challenge.[65]

There is also evidence that a victim of violence who uses armed resistance is almost always better off than one who sub-

---

> prohibition on precisely the same grounds which lead many honest citizens to oppose it, that it would make life safer and easier for the criminal by disarming his victims without affecting his own ability to attack them. Typical of prisoner comments, according to criminologist Ernest van den Haag of New York University, was: "Ban guns; I'd love it. I'm an armed robber."

Carol Ruth Silver and Don B. Kates, Jr.,Self-Defense, Handgun Ownership, and the Independence of Women in a Violent, Sexist Society *in* RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT 151 (Don B. Kates, Jr., ed., 1979).

61. Consider the words of Cesare Beccaria, the eighteenth century Italian criminologist:

> False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are of such a nature. They disarm those only who are neither inclined nor determined to commit crimes.... Such laws make things worse for the assaulted and better for the assailants. They serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man.

KLECK, *supra* note 51, at 145. (alterations in original).

62. Luther M. Boggs, Jr., *Gun Town U.S.A., Revisited,* NATIONAL REVIEW, Aug. 15, 1994 at 26.

63. *Id.*

64. *Id.*

65. *Id.* See also *infra,* notes 177-79 and accompanying text, for a comparison of Kennesaw's crime rate with that of Washington, D.C., where all civilian firearm ownership is banned.

mits.[66] It follows that a better way to deal with crime would be to arm the law-abiding and disarm criminals.[67] Upwards of 20,000 gun laws have yet to disarm criminals.[68] And since they will never be disarmed without massive confiscations and a *de facto* repeal of the Fourth Amendment,[69] the law-abiding certainly should not be.

While crime is a threat to the security of the nation, the government must act circumspectly when its methods of dealing with the problem touch upon a fundamental liberty. When a liberty is sacrificed for safety, that safety cannot be long enjoyed.

Along with crime, there are other threats to freedom. During the civil rights movement of the 1960s, blacks and civil rights workers were frequently threatened, attacked, and murdered. All the while the federal government was powerless to intervene and the local police were sympathetic to the attackers.[70] The main deterrence was that the victims possessed arms and made the risk of an attack too costly.[71] These episodes illustrate the validity and necessity of citizens being armed, of that balance of power that constitutes the only restraint against evil men, especially when the police are sympathetic to them, or employ them. In a free state, citizens must be free to defend themselves

---

66. KLECK, *supra* note 51, at 124.

> Robbery and assault victims who used a gun to resist were less likely to be attacked or to suffer an injury than those who used any other methods of self- protection or those who did not resist at all. Only 17.4% of gun resisters in robberies, and 12.1% in assaults, were injured.

Id.

Of those who attempted to resist robberies without violence or by evasion, 34.9% were injured; 25.5% of assault victims in that category were also injured. *Id.* at 149, table 4.4.

67. See *id.* at 144, where Kleck contends that his "evidence raises the radical possibility that a world in which no one had guns would actually be less safe than one in which nonagressors had guns and aggressors did not." While this is not necessarily achievable, he holds it up as a way to clarify what the "goals of a rational gun control policy should be." Contrast this with the assault weapons ban that applies uniformly to aggressors and nonagressors alike. Kleck writes, "In view of this ... evidence, [a] 'blunderbuss' policy would facilitate victimization because legal restrictions would almost certainly be evaded more by aggressors than nonaggressors, causing a shift in gun distribution that favored the former over the latter." *Id.* at 145.

68. *Cf.* Kates, *supra* note 17, at 207 n.11.

69. U.S. CONST. amend IV. *See also* David T. Hardy and Kenneth L. Chotner, The Potential for Civil Liberties Violations in the Enforcement of Handgun Prohibition *in* RESTRICTING HANDGUNS, *supra* note 60, at 195, and LAPIERRE, *supra* note 39, at 177-78.

70. *See* John R. Salter, Jr., and Don B. Kates, Jr., The Necessity of Access to Firearms by Dissenters and Minorities Whom Government is Unwilling or Unable to Protect in RESTRICTING HANDGUNS, *supra* note 60, at 188, 192.

71. *Id.* at 186.

and not merely dependent upon,[72] or at the mercy of, the police. Police officers, while they carry out a necessary and admirable service, do not have a monopoly on righteousness. Certainly they should not be entitled to a monopoly on the use of force.

The Framers saw the Militia as necessary to the security of a free state. The logic and language of the Second Amendment require that the Militia be well regulated. As a bare minimum to being well regulated, the people must not have their right to keep and bear arms infringed.

D. The Right of the People . . .

There is a strong tradition that the right to keep and bear arms is a Natural Right.[73] According to Blackstone, "The absolute rights of man ... are usually summed up ... [as] the natural liberty of mankind. This natural liberty ... [is] a right inherent in us by birth, and one of the gifts of God to man at his creation ...."[74] If a right is a gift from God, it does not depend on government for its existence, only for its protection.[75]

Aristotle observed that man in creation was not at a natural disadvantage to other creatures by being "barefoot, unclothed, and void of any weapon of force,"[76] while other creatures had their offensive or defensive weaponry built-in. Man had many means of defense available:

> Take the hand: this is as good as a talon, or a claw, or a horn, or again, a spear or a sword, or any other weapon or tool: it can be all of these, because it can seize and hold them all. And Nature has admirably contrived the actual shape of the hand so as to fit in with this arrangement.[77]

---

72. In South v. Maryland, 59 U.S. (18 How.) 396 (1856), the Supreme Court held that local law enforcement had no duty to protect individuals from injury by a mob. *See also* Bowers v. DeVito, 686 F.2d 616 (1982) (no civil right to be protected by state against being murdered by criminals or madmen); Riss v. City of New York, 22 N.Y. 2d 579 (1968) (court cannot proclaim new general duty of protection. Keating, J., dissenting, noted that plaintiff was not carrying any weapon of defense in conformity with law and was thus required to rely on the city for protection which denied all responsibility to her. *Id.* at 584); Warren v. District of Columbia, 444 A.2d 1 (1981) (women who were repeatedly gang raped, beaten and forced to perform sexual acts had no cause of action against city for negligence of police officers. "[A] government and its agents are under no general duty to provide ... police protection, to any particular individual citizen." *Id.* at 3.)

73. *See* Hardy, *supra* note 48, at 87 (1990).

74. I WILLIAM BLACKSTONE, COMMENTARIES *121 (1765).

75. *See id.* at *120.

76. HALBROOK, *supra* note 10, at 14 (quoting ARISTOTLE, PARTS OF ANIMALS 373 (A. Peck trans., 1961).

77. *Id.*

And certainly the ownership and use of weapons does not violate any Judeo-Christian tenet, only their misuse does. Jesus Christ said, "[H]e that hath no sword, let him sell his garment and buy one."[78] But when Peter unnecessarily attacked the servant of the High Priest, Jesus warned that "all they who take the sword shall perish with the sword."[79]

Blackstone saw the right to bear arms as one of five "auxiliary subordinate rights of the subject [i.e., individual], which serve principally ... to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property."[80] In his treatise on the Rights of Persons, Blackstone wrote:

> So long as these remain inviolate, the subject is perfectly free; for every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed .... And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next to the right of petitioning the king and parliament for redress of grievances; and lastly to the right of having and using arms for self-preservation and defense.[81]

This notion of individual, Natural Rights is central to American government. The Declaration of Independence held to be a self-evident truth that all men were "endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men."[82] The right to keep and bear arms being a Natural Right, that right is not granted by government. It is granted by God[83] to preserve life, liberty and property. The Second Amendment does not *grant* to the people that right. It secures it from government intrusion.[84]

---

78. *Luke* 22:36.

79. *Matthew* 26:52.

80. BLACKSTONE, *supra* note 74, at *136. *See also* HALBROOK , *supra* note 10, at 54.

81. BLACKSTONE, *supra* note 74, at *140.

82. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). *See also* Hardy, *supra* note 48, at 87.

83. *Cf. id. Cf.* BLACKSTONE, *supra* note 74, at *125 (certain rights are inherent in persons; they are not granted by governments).

84. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 288 (1990) (Brennan, J., dissenting)."[T]he Framers of the Bill of Rights did not purport to 'create' rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing." *Id.*

United States v. Cruikshank[85] is often cited by proponents of firearm bans as holding that the Second Amendment does not protect the right to bear arms. But the Supreme Court said:

> [The right to bear arms] is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this ... means no more than that it shall not be infringed by Congress. [It] has no other effect than to restrict the powers of the national government ....[86]

The Constitution being the supreme law of the land, there can be only one Power higher than it is. The Second Amendment was intended specifically to keep the *federal* government from infringing the Natural Right to bear arms. The states were not subject to this provision under the Bill of Rights.[87]

The facts of *Cruikshank* involved charges against whites for conspiring to violate the civil rights of a group of blacks in a lynching. The right to keep and bear arms was one of those civil rights.[88] One specific issue in this case was whether the Second Amendment applied to state officials who would violate the right

---

85. 92 U.S. 542 (1875).

86. *Id.* at 553.

87. Under modern substantive due process standards the Second Amendment should easily be incorporated into the Fourteenth Amendment and apply to the states. In Palko v. Connecticut, 302 U.S. 319 (1937), Justice Cardozo held that the test of whether a Bill of Rights provision was "fundamental," and therefore applied to the states, depended on whether it was of "the very essence of a scheme of ordered liberty" and one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Id.* at 328.

The Second Amendment easily meets this test. As mentioned above, the Framers of the Constitution sought to establish a particular kind of nation—a free one. They declared a well regulated Militia necessary to the security of a free state. There can be no clearer declaration of the "essence of ordered liberty"—the security of a free state—than the necessity of the Militia in the Second Amendment. Justice Joseph Story called the Second Amendment the "palladium of the liberties of the republic." *See supra* note 58. If that right is the safeguard of all other liberties, it cannot but be fundamental.

In addition, consider the language of *Presser* that "the states cannot, even [apart from the Second Amendment] prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource ...." *See supra* note 22. Thus whether the incorporation theory is adopted with regard to the Second Amendment or not, states cannot prohibit the people from keeping and bearing arms. This makes sense since the Constitution gives Congress power to "provide for calling forth the Militia ...." U.S. CONST. art. I, § 8, cl. 15. There must be a Militia to call up. Finally, the Supreme Court has repeatedly said that the first eight amendments of the Bill of Rights secure "fundamental" rights which are "personal," or individual. Grosjean v. American Press Co., 297 U.S. 233, 243 (1936); Twining v. New Jersey, 211 U.S. 78, 98-99 (1908).

88. 92 U.S. 542 (1875).

to bear arms of other citizens. The Court said, no, holding that it only applied to Congress.[89]

The Georgia Supreme Court has held the Second Amendment applicable to that state.[90] In 1837, the state legislature totally banned the sale of pistols and other weapons.[91] The court declared the statute unconstitutional under the Second Amendment to the federal constitution.[92] It held that the Bill of Rights protected natural rights which were as capable of infringement by states as by the federal government.[93]

Some courts and commentators have asserted that the right to keep and bear arms is a collective right rather than an individual one.[94] Freedman argues that "'a well regulated militia' clearly negates any individual right to keep and bear arms."[95] He cites the Kansas Supreme Court in *Salina v. Blaksly*, a 1905 decision. The court looked to the Kansas Bill of Rights which provides that, "the people have the right to bear arms for their defense and security." The court construed that phrase as only referring "to the people as a collective body."[96] Yet Freedman acknowledges that the term "people" includes individuals, but not "infants, idiots, lunatics and felons."[97] Of course, he cites no one who says it does include members of those groups. He can only mean that the "people" have the right, that individuals are "people," but that individuals do not have the right. This syllogism is like saying all men are mortal, Socrates was a man, but Socrates was *not* mortal.

It would be absurd for a state to say that the people had a mere collective right, and thus individuals could be disarmed at the state's will. If all individuals could be disarmed, there clearly being nothing to prevent it in the collective view, then that

---

89. *Id.* at 553.

90. SUBCOMMITTEE REPORT, *supra* note 11, at 12 (quoting Nunn v. State, 1 Ga. 243, 251 (1846)).

91. *Id.*

92. *Id.*

93. *Id.*

94. FREEDMAN, *supra* note 24, at 20.

95. *Id.* at 22.

96. *Id.* (quoting Salina v. Blaksly, 83 P. 619 (1905)). Freedman also contends that "people" means "states" in the Second Amendment to reinforce his collective view. *Id.* at 26. This runs directly counter to the seminal interpretation of those terms in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316,403-404 (1819), where Chief Justice Marshall declared that the Constitution arose from the people and *not* the states. There is no way to argue that "people" equals "state" without offending simple logic and grammar.

97. FREEDMAN, *supra* note 24, at 26.

collective right is empty. Without individuals, there is no collective.[98]

The illogic in this interpretation becomes especially clear in light of the language of other Bill of Rights guarantees. The First Amendment guarantees the "right of the *people* peaceably to assemble;"[99] and the Fourth Amendment the "right of the *people* to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."[100] Few, if any, would seriously argue that these were *collective* rights.

The historical background also contradicts the collective right view. In the debates over the Second Amendment, the phrase "for the common defense" was specifically rejected as part of the provision.[101]

In *United States v. Verdugo-Urquidez*,[102] Chief Justice Rehnquist, in dicta, considered the phrase "the people" to have been "a term of art employed in select parts of the Constitution."[103] He said that, although his "textual exegesis [was] by no means conclusive, it suggest[ed] that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments . . . refers to a class of persons who are part of a national community . . . ."[104] The use of the phrase "class of persons" in *Verdugo-Urquidez* separates those who are protected from those who are not—"aliens outside of United States territory."[105] It therefore includes as a minimum "persons who are part of a national community," in other words, individual American citizens and resident aliens.[106]

---

98. Thus the collective right theory means that citizens only have the right to arms when called by their government to suppress insurrection, repel invasion, etc. This is a conscript army, called at the sovereign's pleasure. And the notion that one may be *compelled* to exercise a right speaks for itself. Otherwise there exists a duty to keep arms, something Freedman would not hold. Also, this interpretation, cast as saying the right to keep and bear arms applies only to a Militia, not to every citizen, willfully ignores that the Militia *is* every citizen. *See supra* at note 17 and accompanying text. See also the SUBCOMMITTEE REPORT, supra note 11, at IV, quoting Richard Henry Lee, that "[t]o preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them." Lee was a member of the first Senate, which passed the Bill of Rights. *Id.*

99. U.S. CONST. amend. I (emphasis added).

100. U.S. CONST. amend. IV (emphasis added).

101. SUBCOMMITTEE REPORT, *supra* note 11, at 9.

102. 494 U.S. 259 (1990).

103. *Id.* at 265.

104. *Id.*

105. *Id.* at 266.

106. *See id.* at 265 (Fourth Amendment protects people of the United States against arbitrary actions of their own government). *See id.* at 271 (aliens receive constitutional protections once they are in the United States territory and develop substantial connections).

The collective right theory finds its support in construing the Second Amendment right as existing only in relation to a government controlled, owned and operated Militia—namely, the National Guard.[107] It does this by tying the right solely to the Militia Clause, and narrowly defining the Militia.[108] This is a construction of destruction, making the Amendment a dead letter. In the first place, neither the federal government nor the states need the permission of the Second Amendment to keep armed troops. Congress already has power from the Constitution to "raise and support Armies."[109] And "[n]o state shall, without the Consent of Congress ... keep Troops, or Ships of War in time of Peace."[110] Such an interpretation gives the Second Amendment the effect of conferring on Congress constitutional power it already has, while encouraging the states to violate a separate provision.[111] The National Guard is indeed "Troops ... in time of peace."[112] But they are kept with permission from Congress,[113] not the Second Amendment. Conversely, if the Second Amendment allowed states to keep troops, there would be no reason for the "No Troops" clause, for the states would not need permission from Congress for something the Constitution authorized. The collective interpretation puts these three provisions at irreconcilable odds with one another.

Another absurdity results within the Amendment itself if the collective right construction is applied, for then it would have

---

107. *See* Ehrman and Henigan, *supra* note 41, at 6, 39-40. *See also* FREEDMAN, *supra* note 24 and accompanying text. The Reserves of the Army, Navy and Air Force could conceivably fit into such an interpretation on the federal level. *Cf.* MILLET, *supra* note 8, at 262.

108. *See* Ehrman and Henigan, *supra* note 41, at 6, 39-40.

109. U.S. CONST. art. I, § 8, cl. 12.

110. *Id.* § 10, cl. 3.

111. *Id.*

112. Consider that the 184th Bomb Group of the Kansas Air National Guard at McConnell AFB, Kansas, now maintains B-1B strategic bombers. *Bombers in the Guard*, AIR FORCE MAGAZINE, Oct. 1994 at 32. If that is the "Militia," it has indeed come a long way.

113. *See* 10 U.S.C § 311. *See also* United States v. Hale, 978 F.2d 1016, 1019 (8th Cir. 1992) (citing Ehrman and Henigan that the Dick Act of 1903 created the modern national guard structure); Perpich v. Department of Defense, 496 U.S. 334, 351 (1990) ("The Federal Government provides virtually all of the funding, the materiel, and the leadership for the State Guard units."). See also United States v. Miller, 307 U.S. 174 (1939), stating, "[t]he Militia which the States were expected to maintain and train is *set in contrast with* Troops which they were forbidden to keep wihtout the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion." *Id.* at 178, 179. (emphasis added).

to say, "[a] well regulated Militia being necessary ... the right of the *Militia* to keep and bear arms shall not be infringed."[114] But the Amendment recognizes the right in the people, *all* of whom are the Militia—those same people of the First, Fourth, Ninth and Tenth Amendments.[115] This construction yields no more than a right in the people to enlist or be drafted into a federal or state military unit, something less like a right and more like a duty. It fails in light of the rest of the Constitution that already provides for that duty.

Thus the notion that the Second Amendment right to keep and bear arms is a collective right is erroneous. It has no foundation in history nor the intent of the framers;[116] nor is it supported by grammar and logic;[117] nor does the most current Supreme Court explication of its language lend it credence;[118] and it does not make sense in light of the rest of the Constitution. It is little more than specious reasoning and wishful thinking.

E. To Keep and Bear Arms . . .

To "keep" means to have or maintain at one's disposal;[119] to "bear" has a meaning similar to that of "keep," but involves the idea of carrying (cup bearer, torchbearer, standard-bearer).[120] "Arms" signifies a means of offense or defense.[121] Thus it seems that the words mean what they say; that there is a right to keep and bear a means of offense and defense; that a man may keep and carry a weapon to defend himself or to injure or kill another.

---

114. *But see* U.S. CONST. amend. II. *See also Verdugo-Urquidez* 494 U.S. 259, 286 (1990) (Brennan, J., dissenting). "[T]he term 'the people' is better understood as a rhetorical counterpoint to 'the Government,' such that rights that were reserved to 'the people' were to protect all those [people] subject to 'the Government.'" *Id.* To say that the Second Amendment protects only state owned and operated National Guards (or federal Reserve units) is to erase all the lines between government and the governed. It contorts the Second Amendment, and other provisions of the Bill of Rights, into rights of the state or federal government. Even the most cursory glance at the Ninth and Tenth Amendments makes this fallacy apparent. U.S. CONST. amends. IX, X.

115. U.S. CONST. amends. I, IV, IX, X. *See also Verdugo-Urquidez,* 494 U.S. at 265 (1990).

116. *See also* SUBCOMMITTEE REPORT, *supra* note 11, at 7 (quoting Patrick Henry that "[t]he great object is that every man be armed" and "everyone who is able may have a gun").

117. *See supra* note 23 and accompanying text. To say that "people" excludes individuals is illogical.

118. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

119. WEBSTER'S NEW COLLEGIATE DICTIONARY 625, 626 (G. & C. Merriam Co. 1980).

120. *Id.* at 96.

121. *Id.* at 60.

The circumstances under which such use is legal depend upon the criminal law, a subject not at issue here.

The question then becomes: "Which 'arms' do the people have a right to keep and bear under the Second Amendment?" Since the Amendment recognizes the need for a well regulated Militia, it must protect at the very least the right of the people to keep and bear arms related to use in a Militia. In discerning this standard, it seems elementary that the means should be adequate to the threat. Spears should not be pitted against automatic rifles. The Constitution grants to Congress the power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[122] It further authorizes Congress "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States."[123] While it is true that muskets and flintlocks were the modern weapons of the Framers, it does not follow that those weapons alone receive protection from the Second Amendment. Since the Militia was to be employed for these military purposes, it must be armed with military style weapons. The idea that the Second Amendment requires sending the Militia with flintlocks to meet an invading enemy with AK-47s speaks for itself.

Militia weapons must also meet the threat of domestic tyranny, one of the other aspects of maintaining a free state. In discussing the way to maintain a democratic society, Aristotle called for a "light-armed infantry and service in ships .... And so in practice, wherever these form a large proportion of the population, the oligarchs, if there is a struggle, fight at a disadvantage."[124] He also said, "[i]t is by the use of light infantry in civil wars that the masses get the better of the rich; their mobility and light equipment give them an advantage over cavalry and the heavy-armed."[125] The primary weapons of a modern light infantry are rifles—semiautomatic and automatic—and handguns.[126] Since these would be the primary weapons of an attacking

122. U.S. CONST. art. I, § 8, cl. 15.

123. *Id.* at cl. 16.

124. HALBROOK, *supra* note 10, at 12 (quoting ARISTOTLE, POLITICS at 248).

125. *Id.* at 248.

126. *See generally Edward C. Ezell, Small Arms Today: Latest Reports on the World's Weapons and Ammunition* (1988); IAN V. HOGG & JOHN WEEKS, MILITARY SMALL ARMS OF THE 20TH CENTURY: A COMPREHENSIVE ILLUSTRATED ENCYCLOEPAEDIA OF THE WORLD'S SMALL CALIBRE FIREARMS (1991).

ground force,[127] the Militia's weapons must be proportionate in defense. And since a domestic tyrant would have similar weapons at his disposal in his standing army, these weapons should belong to members of the Militia.

F. Shall Not be Infringed.

The word "infringe" means to defeat or frustrate, to trespass or encroach upon in a way that violates law or the rights of another.[128] To encroach carries with it the idea of entering by "gradual steps or by stealth into the possession or rights of another."[129] While it is clear that infringement would involve an outright assault on, and disregard of, individual rights, its specific meaning embraces the smaller, more subtle incursions as well. The use of the word "shall" puts this phrase in the imperative mood. The phrase is then a commandment, a "Thou shalt not" spoken to the federal government.

In *Nunn v. State*,[130] the Georgia Supreme Court responded to a legislative ban on the sale of pistols with just such a view, giving a thorough definition of the word "infringe." It held that the Second Amendment guaranteed:

> the right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not merely such as are used by the militia, shall not be *infringed, curtailed, or broken in on, in the slightest degree*; and all this for the important end to be attained: the rearing up and qualifying of a well regulated militia, so vitally necessary to the security of a free state.[131]

In summary, the Second Amendment stands for the proposition that (a) a well regulated Militia, composed of all citizens

---

127. One conceivable argument against the individual right to bear arms related to a Militia is that the Framers could not have anticipated the weapons begotten by modern science such as nuclear warheads. Thus a Militia would be ineffective against the force of a modern military, such as that of the United States. *Cf.* FREEDMAN, *supra* note 24, at 48, 49. The clear answer to this is that the most basic military doctrine is that no war is won until the ground is occupied. With an estimated 40 million gun owning households in America, compared with a current active duty military of less than 1.4 million, it is difficult to say that such a military could overpower the entire population without obliterating the countryside. Undoubtedly nuclear weapons would do the job, but then there would be nothing left to rule over.

128. WEBSTER'S NEW COLLEGIATE DICTIONARY 587 (1980).

129. *Id.* at 372.

130. 1 Ga. 243 (1846).

131. SUBCOMMITTEE REPORT, *supra* note 11, at 12, *quoting Nunn*, 1 Ga. at 251 (emphasis added).

capable of bearing arms, is (b) necessary to maintaining the security of a free state; and therefore, (c) the fundamental, natural right of the people, that is, individual persons who are part of a national community, to keep and carry arms related to use in a Militia, shall not be infringed, curtailed, or broken in upon in the slightest degree. When Congress passed the ban on semiautomatic firearms, it infringed the right of the people to keep and bear arms, and did so more than just slightly. The ban directly disarms the people of the very class of weapons that would most suit a modern Militia—weapons that would meet the purposes of the Second Amendment to deter tyranny of the sovereign, repel invasions, and suppress insurrections. Because Congress violated the Constitution, federal courts should overturn the weapons ban in the Crime Law when confronted with an actual case or controversy.

II. ANALYSIS.

A. Standard of Interpretation.

In *United States v. Miller*,[132] the Supreme Court set forth a standard for interpreting the Second Amendment. There the defendants had been charged for transporting a "12-gauge Stevens shotgun having a barrel less than 18 inches in length ... in interstate commerce [and], not having registered [it]" in violation of the National Firearms Act of 1934.[133] The district court had held that the registration requirement for transferring such a weapon violated the Second Amendment. The Supreme Court reversed on direct appeal, saying:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has *some reasonable relationship to the preservation or efficiency of a well regulated militia*, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is *any part of the ordinary military equipment* or that *its use could contribute to the common defense.*[134]

132. 307 U.S. 174 (1939).
133. *Id.* at 175.
134. *Id.* at 178 (emphasis added).

The standard may be expressed as follows:

> The Second Amendment guarantees the right of the people to keep and bear arms reasonably related to the preservation or efficiency of a well regulated Militia. The weapons of the Militia are ordinary military weapons that could reasonably contribute to both personal defense[135] and the common defense.

This standard has the strength of maintaining the spirit and letter of the Second Amendment, recognizing the proper application of the right to keep and bear arms. It also recognizes a legitimate governmental interest in maintaining security. Critical to understanding the application of the Second Amendment is to understand its purpose. As was mentioned earlier, one purpose is to guard against tyranny enforced by a standing army.[136] The Militia should not be limited to muskets and bows when the regular military has fully automatic light infantry weapons, not to mention heavy artillery, Cruise missiles, F-117A Stealth Fighters, and A-10 attack jets. It should be clear that these are not militia-type weaponry—they are not "ordinary military equipment." Neither could all but a handful of citizens afford to buy jet fighters and cruise missiles, much less maintain and operate them. But Aristotle's model of a Militia, armed as a light infantry, still applies today as a force capable of resisting a regular military.[137] Thus the weapons of the modern Militia should be those used by a light infantry.[138] This means weapons that indi-

---

135. While the *Presser* Court obviously did not use this language of "personal defense," it logically fits in with the language of "common defense," especially in light of the question at issue—the legitimacy of a shotgun, not high technology weaponry. The terms are not mutually exclusive, since a rifle suitable for defending an individual is also suitable for the common defense. See also *supra* note 41, citing Shalhope, that republican spirit "depended upon the freeman's possession of arms as well as his ability and willingness to defend both himself and his society." But some weapons suitable for the common defense would *not* be suitable for personal defense, for example B-1B nuclear bombers. The Second Amendment does not guarantee the right to keep a B-1B in one's garage.

136. *See supra* note 12 and accompanying text.

137. It is worth noting that well armed, though small, populations have successfully turned back superpowers. The Mujahadeen in Afghanistan turned back the Soviet military, albeit with some help from American Stinger missiles; North Vietnam was able to turn back American Forces, with Soviet weaponry; and the American Colonies defeated the British Empire, with a little help from the French.

138. The Militia Act of 1792 enacted "[t]hat out of the militia enrolled ... there shall be formed for each battalion at least one company of grenadiers, light infantry or riflemen." 1 Stat. 271, 272 Sec. 4. Since the main part of the Militia was to function as a light infantry, it should have the weapons of a light infantry.

viduals can carry alone and use for the common defense,[139] or for personal defense. Notably, the *Miller* Court did not say that keeping and using the shotgun had no "reasonable relationship to the preservation or efficiency of a well regulated militia," only that there was no evidence tending to show it, and it was not subject to judicial notice.[140]

With semiautomatic rifles and handguns, however, there is abundant evidence, both in the United States and all over the world, that these weapons are reasonably related to the preservation and efficiency of Militias.[141] The Colt AR-15, for example, is a semiautomatic version of the United States' military M-16, the enlistee's duty weapon in regular, reserve, and guard components. The Beretta M-9 is the military's service pistol.[142] The AR-15 was banned by name in the Crime Law;[143] the Beretta's magazine capacity was reduced to ten rounds,[144] a number that seriously reduces the effectiveness of the relatively small caliber 9 mm handgun.[145] In all, the ban affected at least 182 rifles,[146] many of which have been or are now in use in military organizations all around the world;[147] and the magazine limit affected thousands of handguns and handgun accessories,[148] weapons in use or similar to those in use, in military and police organizations all around the world.[149] The Crime Law's ban and magazine limits thus infringe on the right of the people to keep weapons reason-

---

139. In criticism one might argue that this rule would allow citizens to carry shoulder-launched Surface-to-Air Missiles, since an individual could carry one. Shoulder launched SAMs are not "ordinary" and the cost would also be prohibitive for most citizens. Neither do they serve any personal defense purpose in any but the strangest of situations. In short, shoulder-launched SAMs are not protected by the Second Amendment, since they serve no realistic personal defense purpose. One would be much better off with a revolver in facing a barbarian horde.

140. United States v. Miller, 307 U.S. 174, 178 (1939).

141. KLECK, *supra* note 51, at 70. "Most firearms, no matter what their current uses, derive directly or indirectly from firearms originally designed for the military . . . ."

142. Jim Wilson, *M9 Beretta: Ten Years of Combat,* GUNS AND AMMO, Mar. 1995, at 45.

143. Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. §§ 922, 921(a)(30)(A)(iv).

144. *Id.* at § 921(a)(30)(C).

145. *Cf.* Jim Wilson, *10-Shot Combat Shooting Tactics,* GUNS AND AMMO, Feb. 1995 at 66.

146. *See supra* note 3.

147. See generally MILITARY SMALL ARMS OF THE 20TH CENTURY, *supra* note 126, and compare with the list mentioned at note 3 plus the 19 rifles banned by name. Such a comparison shows clearly that these or similar makes are, or have been, in use in militaries all over the world in this century.

148. Dick Metcalf, *On Target,* HANDGUNNING, Nov./Dec. 1994, at 10.

149. *Id.*

ably, even necessarily, related to the preservation and efficiency of the Militia.

B. Judicial Review.

Marbury v. Madison[150] announced the Supreme Court's authority to rule on the constitutionality of congressional acts. In *McCulloch v. Maryland*,[151] Chief Justice Marshall expounded the "necessary and proper" clause saying:

> We admit ... that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion ... to perform the high duties assigned to it .... Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.[152]

Chief Justice Marshall went on to add:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.[153]

The semiautomatic weapons ban fails Marshall's test on two counts. First, the power of Congress to ban weapons it dislikes runs directly into a constitutional prohibition—the Second Amendment. In *Cruikshank*, the precise holding was that "the second amendment declares ... that [the right to bear arms] shall not be infringed by Congress. This ... has no other effect than to restrict the powers of national government ...."[154]

When Congress passed the weapons ban, it exceeded its power and infringed the right of the people to keep and bear arms. The ban prohibits the manufacture, sale, and purchase of

---

150. 5 U.S. (1 Cranch) 137 (1803).
151. 17 U.S. (4 Wheat.) 316 (1819).
152. *Id.* at 421.
153. *Id.* at 423.
154. 92 U.S. 542, 553 (1875).

the targeted weapons made after the signing of the law,[155] making it illegal to replace worn out weapons with newer ones, and limiting the number available to new purchasers. These weapons are more than rationally related to use in a Militia. Indeed, they, and similar weapons, have been, and still are, in use in Militias and military units all over the world.[156] Since Congress has deprived the American people of the right to keep and bear arms related to service in a Militia that are made after September 1994, it has infringed the right guaranteed by the Second Amendment.

C. Construction.

The Second Amendment makes its guarantee explicit. That the right is fundamental is clear from the fact that it is in the Bill of Rights. It is not a collective right or a state right, but an individual right.[157] It is a general rule of construction that rights in favor of the citizen are construed liberally, as indeed every other right enumerated in the Constitution has been, and several that are not explicit. If the freedom to use contraceptives without state interference is inherent in a fundamental right of privacy that can be discerned through "penumbras" and "emanations;"[158] if the right to privacy reaches to protect a woman who wants an abortion, even though neither abortion nor privacy is mentioned anywhere in the Constitution;[159] if First Amendment freedom of political speech extends to one who steals an American flag and burns it in protest,[160] then there can be no rational way of denying individual Americans the right to keep and bear arms reasonably related to the preservation and efficiency of a Militia, when the guarantee is spelled out in black and white.

---

155. *See* Violent Crime Control and Law Enforcement Act of 1994 18 U.S.C. § 922(a):

> (v)(1) It shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon.
>
> (2) Paragraph (1) shall not apply to the possession or transfer of any semiautomatic assault weapon otherwise lawfully possessed under Federal law on the date of the enactment of this subsection.

156. *See generally Edward C. Ezell, Small Arms Today: Latest Reports on the World's Weapons and Ammunition* (1988), and IAN V. HOGG & JOHN WEEKS, MILITARY SMALL ARMS OF THE 20TH CENTURY: A COMPREHENSIVE ILLUSTRATED ENCYCLOEPAEDIA OF THE WORLD'S SMALL CALIBRE FIREARMS (1991).

157. *See supra* notes 80-118 and accompanying text.

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

159. Roe v. Wade, 410 U.S. 113 (1973).

160. Texas v. Johnson, 491 U.S. 397 (1989).

Since the right to keep and bear arms is a fundamental right, that right deserves the broadest construction. And any legislative act that infringes it must be closely scrutinized.

D. Strict Scrutiny.

When governmental action infringes upon a fundamental right, courts have traditionally subjected that action to strict scrutiny. To withstand judicial review, the action must be necessary to achieve a compelling government objective, and there must have been no less restrictive means available.[161]

The Crime Law infringes upon the right of law abiding citizens to keep an entire class of weapons that are reasonably, even necessarily, related to service in a Militia by making purchase of weapons made or imported after September 1994 a federal crime.[162] The government's interest is to control crime because of its impact on interstate commerce. Even laying aside the federal government's lack of general police power and conceding for argument's sake that it has a compelling interest in reducing crime,[163] the banning of an entire class of weapons cannot be shown to be necessary to accomplishing it.

In the first place, semiautomatic rifles are used in a minuscule proportion of violent crimes—in less than one half of one percent.[164] While news media and politicians commonly refer to "assault rifles"[165] as the "weapon of choice" of drug dealers and youth gangs, there is no hard evidence to support the claim,

---

161. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §11.7 (4th ed. 1991). "[The] fundamental rights analysis is simply ... the modern recognition of the natural law concepts first espoused by Justice Chase in Calder v. Bull." (Calder v. Bull 3 U.S. 386 (1798).

162. Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C § 922(a)(v)(1, 2).

163. It should be considered how compelling is Congress' interest in controlling crime. The Constitution gives to Congress no power to regulate for the general welfare (i.e. police powers), it may only tax and spend for it. Under federalism, police powers are reserved to the states. U.S. CONST. amend. X. Even granting the broad reading the Supreme Court has given to Congress' power under the Commerce Clause, the constitutional prohibition in the Second Amendment must work to limit it. Otherwise, it is a dead letter.

164. *See* LAPIERRE *supra* note 39 at 56. *See also infra* notes 164-175 and accompanying text.

165. KLECK, *supra* note 51 at 70. ("According to official Department of Defense definitions, as well as usage in standard firearms reference works, an assault rifle ... is ... capable of firing both fully automatically and semiautomatically ...."). *Id.* This definition differs greatly from the journalistic usage which has come to mean weapons capable of semiautomatic fire with a military appearance.

either for these groups or for criminals in general.[166] Samples of guns seized from criminals represent a small fraction[167] that fit the description of "assault weapons."[168] Homicides likewise involve these weapons in small numbers.[169] One reason is that assault rifles are *less* lethal than ordinary civilian hunting rifles.[170] This is so for two reasons. First, assault rifles use smaller, pointed bullets, as opposed to the more lethal hollow points frequently used in hunting rifles.[171] Second, the 1899 Hague Peace Conference banned hollow points for military use.[172] The result is both humanitarian and strategic, since wounding an enemy rather than killing him requires more drain on the enemy's resources.[173]

In sum, criminals rarely use the kind of rifles banned in the Crime Law because they prefer more concealable handguns.[174] And the pistols that fit the definition of assault weapons are no more lethal than other pistols or revolvers.[175] Because banning weapons reasonably related to use by a Militia is not necessarily related to stopping crime, the assault weapons ban should be overturned.

Furthermore, there is strong evidence that publicized, general civilian firearm ownership actually reduces crime.[176] The

---

166. *Id.* at 73.

167. *Id.* This was less than 3% (assault rifles only) in Los Angeles in 1988; 0.5% (assault type long guns) in New York City; 8% (assault weapons) in Oakland; less than 3% (semiautomatic rifles, including sporting ones) in Chicago: and 0% in Washington, D.C.

168. *Id.* at 70. Kleck says this term has been used to encompass semiautomatic pistols, a few shotguns and assault rifles.

169. *Id.* Of 217 homicides in Dade County, Florida in 1989, 1.4% involved assault weapons. In Massachusetts, excluding Boston, from 1984-1988, there were 559 criminal homicides, of which 5, or 0.9% involved assault rifles and 1.7% of gun homicides. "With the exception of the Oakland data, available evidence indicates that [assault weapons] constituted no more than 3% of crime guns in the nation's biggest cities .... Even a spokesman for Handgun Control Incorporated, a major proponent of the assault weapons ban, conceded that they 'play a small role in overall violent crime' (emphasizing, however that they could become a problem in the future)(New York Times 4-7-89, p. A15)."

170. KLECK, *supra* note 51 at 77.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. KLECK, *supra* note 51, at 134. "From October 1966 to March 1967 the Orlando Police Department trained more than 2500 women to use guns. Organized in response to demands from citizens worried about a sharp increase in rape, this was an unusually large and highly publicized program .... An ... analysis of Orlando crime trends showed that the rape rate decreased by 88% in 1967, compared to 1966 .... [T]he only other crime to show a substantial drop was burglary."

Atlanta, Georgia, suburb of Kennesaw passed a city ordinance requiring every head of household to own at least one firearm.[177] That city has a negligible crime rate.[178] Contrast Kennesaw with Washington, D.C., where civilians may not buy or carry a handgun, nor keep any gun loaded or assembled in a home for self-defense.[179] That city has one of the highest homicide rates in the nation.[180] As such, the banning of firearms will actually have the effect of aggravating the problem it was ostensibly designed to solve.

This situation bears out on the international level as well. Switzerland requires every male citizen to keep a fully automatic firearm and ammunition in his home.[181] Switzerland had exactly the same homicide rate in 1988 as England and Wales where the population is almost completely disarmed, a small 1.1 per 100,000.[182] Mexico, however, has the third highest homicide rate in the world, double that of the United States, which has 9 per 100,000.[183] In Mexico restrictions make it almost impossible to own a firearm legally.[184] England, however, has higher burglary and robbery rates than does the United States.[185] These numbers show that restrictions on firearms do not reduce crime. Conversely, wide *and* legal availability of firearms does not increase crime, but actually reduces it. When hands, feet, knives, and baseball bats are much more often used in violent crimes, it makes little sense to say that banning a class of firearms is somehow *necessary*.

As a less restrictive means, Congress could have appropriated money to states to deal with crime as they saw fit. Indeed, more logically Congress should have issued weapons to law-

---

177. To show disapproval for the handgun ban passed in Morton Grove, Ill., Kennesaw passed a city ordinance *requiring* heads of household to keep at least one firearm in their homes. While the law provided a conscientious objector exemption and a small fine of $50, it was never enforced. But within seven months after the law was passed, there were only five residential burglaries reported to police, compared to 45 in the previous year, or a drop of 89%. This drop far exceeded the overall decrease in Georgia of 10.4%, and the national decrease of 7.1% for cities under 10,000 population. *Id* at 136.

178. *Id.*

179. Don B. Kates, Jr., *Shot Down*, NATIONAL REVIEW, Mar. 6, 1995, at 49, 52.

180. *Id.*

181. LAPIERRE, *supra* note 39, at 171, 174.

182. *Id.* at 174 (citing *International Crime Rates*, U.S. Bureau of Justice Statistics (1988)).

183. *Id.* at 172 (citing the 1990 *Demographic Yearbook* published by the United Nations)

184. *Id.*

185. *Id.* at 174.

abiding civilians and paid to train them how to use them. The evidence supports this as a much more effective way to reduce crime than simply banning weapons and in so doing disarming the law-abiding.[186]

E. The Categorical Approach: The Second Amendment as a Flat Prohibition.

In *Employment Division, Department of Human Resources of Oregon v. Smith*,[187] the Supreme Court announced an approach to government actions that affect fundamental rights. This categorical approach[188] stands as a principled rule for vindicating both individual rights and government action, offering more precision and certainty than balancing individual rights against government interests. While the approach has been applied specifically to First Amendment questions, it also pertains to other fundamental rights.[189] And the right to keep and bear arms is no less *fundamental* than those the First Amendment protects.[190] The rule applied to the Second Amendment would be stated thus:

> An otherwise valid, neutral and generally applicable law that incidentally burdens the right to keep and bear arms is constitutional.[191] But a law that directly regulates the right to keep and bear arms is unconstitutional, even if the burden

---

186. *See* KLECK, *supra* note 51, at 144, 145.

187. 494 U.S. 872 (1990).

188. For a thorough exposition of the categorical approach in the context of Free Exercise, see Comment, Smith's *Free-Exercise "Hybrids" Rooted in Non-Free-Exercise Soil*, 6 REGENT U. L. REV. 201 (1995).

189. *See* Planned Parenthood v. Casey, 112 S.Ct. 2791, 2878 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (citations omitted). The appropriateness of treating the Second Amendment with the same respect as the First Amendment is evident in the structure of the Bill of Rights. While every other provision essentially limits government action, these two limit government action *and* affirmatively guarantee rights the people may exercise actively. For example, the Fourth, Fifth, Sixth, Seventh and Eighth Amendments control how the government may deal with people when they come in contact with the judicial system. U.S. CONST. amends. IV, V, VI, VII, VIII. The Third Amendment requires the government to leave people alone by not quartering soldiers in their houses in peace time. U.S. CONST. amend. III. Keeping and bearing arms, however, is an active exercise, not a passive right, just as religious conduct, speech, press activities, and peaceable assembly to petition the government are.

190. *See supra* notes 55-57 and accompanying text.

191. *Cf.* Smith, 494 U.S. 872, 879-80 (1990) (otherwise valid, neutral and generally applicable laws that burden free exercise of religion are constitutional).

> is slight. Such a law is presumptively invalid,[192] since fundamental rights "are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."[193]

An otherwise valid law is one that does not suffer from vagueness, overbreadth, or any other defect that makes it impossible to enforce fairly, even if the conduct it regulates is not protected.[194] A neutral law is one that does not target the exercise of a fundamental right, but may have an "incidental effect" on the right.[195] "The defect of a lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target" the keeping and bearing of arms of a particular group of people for discriminatory treatment.[196] If a law targeting a fundamental right is found not generally applicable, it can be valid only to prevent grave and immediate danger to lawful government interests.[197]

Under this analysis, government action that incidentally or obliquely touches the right to keep and bear arms does not violate the Constitution. Such valid regulations might include prohibiting the sale of defective weapons, prohibiting carrying them into government facilities[198] such as court rooms or military bases, requiring criminal background checks for purchasers of weapons, and perhaps prescribing the manner of carrying weapons in public. Such laws do not target the right directly. Unconstitutional regulations are those that would directly regulate the right to keep and bear arms. This would include weapons bans, reducing magazine capacities, waiting periods, and any other

---

192. *Cf.* R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S.Ct 2538, 2549 (1992) (First Amendment prevents government from proscribing speech, expressive conduct because of disapproval of ideas expressed, making content-based regulations against hate speech presumptively invalid). It follows that laws banning weapons simply because Congress disapproves of them, not because of any danger of immediate breach of the peace, are also presumptively invalid.

193. Board of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

194. *See* NOWAK & ROTUNDA, *supra* note 161, at §§ 16.8 and 16.9.

195. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S.Ct. 2217, 2242 (1993) (Souter, J., concurring in part and concurring in the judgment).

196. *Cf. id.* at 2239 (Scalia, J., concurring in part and concurring in the judgment) (state may not target particular religious practice for discriminatory treatment, though otherwise valid, general and neutral laws affecting the same conduct incidentally would be constitutional).

197. *See Barnette*, 319 U.S. at 639 (1943).

198. A government clearly has power to control the conduct of those who enter its facilities and property.

arbitrary state action that somehow infringed that right, such as purchase permits given at the discretion of state officials.[199] Any direct burden, however slight, is presumed invalid without a showing that it prevents grave and immediate danger to lawful state interests.[200]

Certain neutral laws, however, may impose a heavy burden on the right to keep and bear arms, yet be held constitutional under this analysis. For example, Congress could pass a trade sanction, banning imports from all communist and authoritarian countries. Weapons and ammunition made in China and the former Soviet Union would be banned, but the action still constitutional, simply because the action did not target the right to keep and bear arms. This would be a substantial burden if, for example, there were no American manufacturers. On the other hand, laws that directly burden the right, even as slightly as a twenty-four-hour waiting period for firearm purchases, are presumptively invalid. This is so simply because they target the right.

The semiautomatic weapons ban fails under this analysis on several counts. A strong case could be made for the ban being void for vagueness or overbreadth on the sheer difficulty of understanding it, and on its chilling effect upon those who would exercise the right.[201] Nevertheless, the Crime Law is not neutral since its object is to deprive the people of the right to keep and bear a specific class of arms—semiautomatic weapons related to use in a Militia—both by banning certain rifles and reducing the effectiveness of semiautomatic handguns. These are weapons the people have a right to keep for the common defense and defense of themselves. Lack of neutrality is further evident in the Crime Law's exempting hundreds of hunting rifles from the ban by name.[202] Even more, it left untouched those weapons that are most frequently used in violent crimes such as small caliber handguns,[203] not to mention knives, clubs, hands, and feet.

---

199. *Cf.* Planned Parenthood v. Casey, 112 S.Ct. 2791, 2878 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (striking down a Pennsylvania 24-hour waiting period for abortions).

200. *See Barnette*, 319 U.S. at 639 (1943).

201. The Crime Law's weapons ban reads more like a detailed regulation than a law. See *supra* note 3 for a small morsel of the ban, and note 7.

202. Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C § 922, § 110106, APPENDIX A TO SECTION 922 OF TITLE 18.

203. *Cf.* LAPIERRE, *supra* note 39, at 58 (citing the U.S. Treasury Department's Bureau of Alchohol, Tobacco and Firearms in *USA Today*, Dec. 29, 1993).

The semiautomatic weapons ban also fails on general applicability. The people discriminated against are those who would keep and bear arms related to use in a Militia, either for self-defense or for the common defense. At the same time, those who want only to use weapons for hunting are left alone for now. The semiautomatic weapons ban and magazine limits place a direct burden on the right to keep and bear arms related to use in a Militia, by making it impossible ever to replace them with new ones, thus diminishing their effectiveness and availability. And since there is no showing that the law prevents grave and immediate danger to interests the United States may lawfully protect, it is invalid. On the contrary, the law restricts a right fundamental to the preservation of a well regulated Militia composed of every able-bodied citizen. And that Militia, the Constitution says, is necessary to the security of a free nation.[204]

This approach is preferable to the balancing approach because it construes the Second Amendment as an "explicit textual source of constitutional protection" from government action,[205] and does not merely weigh governmental interests against individual rights. In view of the general prohibition in the Second Amendment, even if assault weapons could be shown to be significant factors in crime affecting commerce, the Second Amendment would not allow them to be banned. The rationale is simple: To disregard the First, Fourth, Fifth, Sixth, and Eighth Amendments[206] would remove huge obstacles to the government's prevention and prosecution of crime. But the Bill of Rights was written with other interests in mind, specifically, "the security of individual liberty."[207] The Second Amendment deserves no less protection, and certainly no narrower construction, than any other provision in the Bill of Rights.

Any balancing of the benefit of an armed population, against the risk that some may abuse weapons, was already done in the Bill of Rights by the Framers. This is evident in that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond

---

204. U.S. Const. Amend. II.

205. *Cf.* Graham v. Connor, 490 U.S. 386, 395 (1989) (analyzing a seizure under the Fourth Amendment "reasonableness" standard rather than "substantive due process" because it provides an "explicit textual source").

206. U.S. CONST. amends. I (free speech), IV (freedom from unreasonable searches and seizures), V (due process, no compulsory self-incrimination), VI (trial by impartial jury), and VIII (no cruel and unusual punishments).

207. Poindexter v. Greenhow, 114 U.S. 270, 291 (1885).

the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[208] The Second Amendment protects the right of the people to keep and bear arms related to use in a Militia. The Crime Law makes it illegal to keep, much less to bear, weapons necessarily related to use in a Militia, if they are made or imported after October 1994. Thus the law targets the quintessential purpose of the Second Amendment protection—the right of the people to keep and bear arms for the common defense and for the defense of themselves. The ban not only infringes the right, it derogates it.[209] The prohibition is clear. The ban violates the Constitution.

Banning weapons necessarily related to use in a Militia is unconstitutional. That criminals may use weapons in crime (though, very seldom those banned by the Crime Law), cannot overrule the validity of a right guaranteed to preserve the security of a free nation. History shows that the purposes of the Second Amendment are not outdated, since the threats it guards against are perennial.[210] Events in other countries provide abundant evidence that the Framers knew precisely what they were doing when they wrote the Second Amendment. Indeed, in the eight countries where there have been major genocides this century, with upwards of 50 million losing their lives, the people targeted have first been disarmed by their governments.[211] And many

---

208. Board of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

209. It may be argued in criticism that the assault weapons ban does not infringe the right to keep and bear arms because the people can still legally use other weapons under the crime law. There are two answers to this. First, the weapons targeted in the ban are precisely the kind related to use in a Militia. The Second Amendment prohibits an infringement on the right to keep them—here there is an outright denial of the right. Furthermore, if the weapons most clearly embraced in the protected right are fair game for a ban, then the slippery slope to complete disarming is immediately under foot.

210. Consider a lament in the Old Testament at a time when Israel was subjugated by its enemies: "Now there was no smith found throughout all the land of Israel: for the Philistines said, Lest the Hebrews make them swords or spears." *I Sam.* 13:19.

211. *See generally* JAY SIMKIN, AARON ZELMAN & ALAN M. RICE, LETHAL LAWS (Jews for the Preservation of Firearms Ownership, Inc., 2872 S. Wentworth Ave. Milwaukee, WI 53207 (414) 769-0760) (1994), discussing weapons laws and subsequent genocides in Turkey against Christian Armenians; in the Soviet Union against political opponents; in Nazi Germany against Jews; in China against political opponents; in Guatemala against Mayan Indians; in Uganda against Christians; in Cambodia against intellectuals and the educated.) Rwanda also had laws that disarmed the general population (*See* Actes Legislatifs de La République Rwandaise. Loi du 21 novembre 1964 sur le régime des armes à feu [Legislative Acts of the Republic of Rwanda, Law of 21 November 1964 on Firearms Regulation, (trans. auth.)], Art. 1-18; obtained through Jews for the Preservation of Firearms Ownership. (Copy on file with Regent University Law Review.)), yet over a million people were killed in the course of about six weeks, mostly with machetés.

more people have been killed in domestic massacres and partial or total genocides than in international wars.[212] In countries where the people were armed, those armed have never endured such treatment.[213]

CONCLUSION

After President Clinton signed the Crime Law that banned so-called "assault weapons," he used a duck hunting trip to announce that hunters still have guns and can use them,[214] since hunting weapons were not banned.[215] The Second Amendment, however, does not say, "The *permission to hunt* being necessary to the security of a free state."[216] It recognizes the Militia and protects the right of the people to keep and bear arms, and above all, arms related to use in a Militia.[217]

In enacting the semiautomatic weapons ban, Congress has violated the Second Amendment, and done the very thing the Framers had feared—that a great federal power would try to disarm the people. If Congress thinks the Second Amendment is outdated, and is irrelevant to today's world; that there will never be invasions to repel or insurrections to suppress; that no government is any longer given to tyranny; that the Framers had made a mistake in adopting the Second Amendment; then it would be more principled for Congress to begin debate to repeal it rather than to violate it.[218] That is what the amendment process is for.[219]

---

212. LETHAL LAWS, *supra* note 211 at vi (citing ROBERT F. MELSON, REVOLUTION AND GENOCIDE 285 (1992)).

213. See *supra* note 46, discussing Switzerland's armed population and lasting freedom. Consider also that the population of the United States has been armed since the beginning.

214. Ernie Freda, *Congress: The First 100 Days on Washington Duck Hunting Holds Lesson, Clinton Says*, ATLANTA J. AND CONST., Jan. 4, 1995, at A5.

215. The Crime Law specifically exempts hundreds of hunting rifles from the ban by name. *See supra* note 202 and accompanying text.

216. U.S. CONST. amend. II.

217. This is not to say that hunting rifles are fair game for a ban; but if protection of arms were measured by degree, clearly semiautomatic weapons related to use in a Militia deserve more protection, not less, from the Second Amendment than would hunting rifles.

218. Arguments for the repeal of the Second Amendment generally suggest that it is outdated. *See supra* note 6. That since there are no more frontiers, no more Redcoats or Indians to fight, or wild animals to ward off, there is no more need for it; never mind that no country's borders are eternally secure, that criminals arm themselves anyway, and that more people have been killed in the last hundred years by their own governments than by enemies in a war. This perspective fails to consider that the reason we may not seem to need the Second Amendment is precisely because it has worked. It may be warm in the house because the walls are solid and the wood stove is going; that does not mean it would still be so after knocking holes in the walls and putting out the fire.

219. U.S. CONST. art. V.

To repeal it would be, however, to ignore the lesson of history—that the right to keep and bear arms deserves respect and protection from government. From the time of the American Revolution to the present, the freedom and security Americans enjoy have been directly tied to that right. But when Congress acts in flagrant violation of a clearly fundamental, natural, individual, and constitutional right, it is the duty of federal courts to "say that such act is not the law of the land."[220]

MICHAEL I. GARCIA

220. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).