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BLUNDERBUSS SCHOLARSHIP: PERVERTING THE ORIGINAL INTENT AND PLAIN MEANING OF THE SECOND AMENDMENT

Kenneth Lasson†

[E]fforts to undermine the Second Amendment, to deride it and degrade it . . . threaten not only the physical well-being of millions of Americans but also the core concept of individual liberty our founding fathers struggled to perfect and protect.

– Charleton Heston¹

[The Second Amendment] has been the subject of one of the greatest pieces of frauds, and I repeat the word “fraud,” on the American public by special interest groups that I have ever seen in my lifetime.

– Warren Burger²

I. INTRODUCTION

In America, guns have long evoked passions on all sides – from the revolutionary ardor of the Founding Fathers to the libertarian impulses of modern-day citizens, from gun-control advocates pursuing the limitation of violence both criminal and unintended, to the indignant fervor motivating the primary proponent of an individual’s right to bear arms, the National Rifle Association. Regardless of one’s perspective, however, there is no escaping the serious controversy and consequences of gun ownership.

The statistical ledger is staggering. A handgun is manufactured every twenty seconds in the United States.³ In a population of some 260 million, there are about 222 million firearms in circulation. Someone is injured or killed by a handgun every twenty seconds. Thirteen children are struck by bullets every day.⁴ Between the gun massacre at Columbine High School in Colorado in 1999 and March 2001, there were some twenty school shootings or attempted shootings around

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1. President of the National Rifle Association. See SAN FRANCISCO EXAM’R, Sept.12, 1997, at A-11.

2. Former Chief Justice, United States Supreme Court. *The MacNeil/Lehrer News Hour: First Freedoms* (Television Broadcast, Dec. 16, 1991).

3. Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 59 (1995).

4. *Id.* at 59-60.

the country.⁵ According to the Youth Risk Behavior Survey conducted by the Centers for Disease Control and Prevention, nearly six percent of the nation's high school students reported carrying a gun to school in the thirty days preceding the survey.⁶ The *Journal of the American Medical Association* reports that 1.2 million children have access to guns at home.⁷

Nevertheless, in the face of all these figures, the gun lobby's advocacy of a Constitutional right to bear arms becomes even more shrill. The NRA emphasizes the importance of self-protection and individual liberty as historic cornerstones of our democratic values. The Bush Administration has gone on record as opposing a United Nations resolution to reduce international trafficking in small arms.⁸ Attorney General John Ashcroft is a vocal member of the National Rifle Association and opposes gun-control legislation.⁹

Although critics of the gun culture are similarly vociferous, and reasonable people can differ on the historical interpretation of the Second Amendment and the legal issues raised by its jurisprudence, both pundits and scholars have often generated more heat than light on the subject. Of the ample literature both for and against gun control, many of the more recent articles have supported an individualist point of view — that is, that the Constitution confers on private citizens the

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5. Amanda Bower, *Scorecard of Hatred*, TIME, Mar. 19, 2001, at 31. There are many other statistics as well. For example, the leading cause of death among African-American males aged 15-19 is by gunshot wounds; see Herz, *supra* note 3, at 60. Statistical data is collected and maintained by both the Brady Center to Prevent Gun Violence and the Violence Policy Center. Competing statistics are kept by the National Rifle Association. But see David Limbaugh, *Gunning for Ashcroft*, WASH. TIMES, July 17, 2001, at A18 (“[S]ome 2.5 million times each year, law-abiding individuals use guns defensively to protect themselves and their property from assault. Individual gun ownership does make our streets (and homes) safer.”).
 6. Centers for Disease Control and Prevention, *Facts About Violence Among Youth and Violence in Schools* available at http://www.cdc.gov/od/oc/media/pressrel/r99_0421.htm (last visited Mar. 17, 2003).
 7. *Do Guns Make Us Safe?*, at <http://www.stopgunviolence.org/info/gun-safe.htm> (last visited Mar. 18, 2003).
 8. See John R. Bolton, U.S. Statement at Plenary Session UN Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects (July 9, 2001), available at <http://disarmament.un.org/cab/smallarms/statement/usE.html> (last visited Mar. 12, 2003); see also Brian Whitaker, *Plans to Cut Sales Resisted by U.S.*, THE GUARDIAN, July 10, 2001, at Guardian Foreign Pages 13.
 9. Aside from voting against no fewer than thirteen gun-control laws as a Senator, in 2001 Ashcroft made a pledge to the National Rifle Association in a letter read aloud at the NRA convention in Kansas City: “Let me state unequivocally my view that the text and the original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms.” Letter to NRA executive director James Jay Baker (May 17, 2001), quoted in Bob Herbert, *More Guns for Everyone!*, N.Y. TIMES, May 9, 2002, at A 39.

right to bear arms.¹⁰ A number of these articles are unabashedly funded by the National Rifle Association itself.¹¹ Some of them, however, are written by a new wave of formerly “liberal” scholars who have jumped on the current anti-gun-control bandwagon.

Those who argue that the Constitution confers upon every individual citizen a clear and inalienable right to own guns must inevitably struggle to reconcile their views with historical evidence, the plain language of the Second Amendment — and, most relevant, the almost uniformly narrow interpretation by courts, low and high, which refuse to recognize an individual right.

But much of the new scholarship flies in the face of a history of unequivocal holdings by the Supreme Court and lower federal courts supporting a collectivist point of view — that is, that the right to bear arms is conditioned upon the need for security of the (collective) group — as well as the courts’ clear understanding that the Constitution in no way limits states from enacting and imposing their own restrictive gun legislation.

There are other reasons for supporting the collective view, including the plain meaning of the words in the Second Amendment;¹² the original intent of the Framers (based on historical evidence indicating an emphasis on the need for a militia); and the fact that the Constitution is designed to be an evolving document (which can and should address the needs and capabilities of a dynamically changing society). This is especially true in the wake and midst of terrorism on American soil, a phenomenon that may have a profound effect on the way we choose to protect ourselves.

Though issues of national security remain justifiably paramount, the Constitution is supposed to change with the times. This long-accepted principle appears to be ignored in the spate of revisionist

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10. See, e.g., William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1242 (1994); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1141 (1996); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 267-68 (1983); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 108 (1987).
 11. See Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 2, 8-9 n.28 (2000) (cataloging the affiliations of individual rights proponents with the NRA and other gun rights organizations); see also NRA Civil Rights Defense Funds Research and Grants web page, available at <http://www.nradefensefund.org/docs/research.html> (last visited Mar. 12, 2003).
 12. According to former Chief Justice Burger, the first clause must be read, “because a well regulated Militia is necessary to the security of a free State,” which thereby renders the second clause clearly subordinate, as it was intended to be. Speech at news conference announcing introduction of the Public Health and Safety Act of 1992 (June 26, 1992); see also Burger, *The Right to Bear Arms*, PARADE MAGAZINE, Jan. 14, 1990; Interview with Chief Justice Burger, on McNeil/Lehrer News Hour (Dec. 16, 1991).

scholarship promulgated by proponents of an individualist point of view. The recent literature demonstrates anew that the academic voice can be manipulated to prove virtually any proposition, no matter how absurd. In our increasingly violent world, it becomes especially important to analyze the blunderbuss of newly minted Second Amendment scholarship, and to challenge it.

The blunderbuss proliferation of gun-rights scholarship in recent years has perverted both the historical context and plain meaning of the Second Amendment. This Article seeks to address the current spate of such revisionist history; to respond to the lone court decision supporting the individualist point of view;¹³ and to expose the pervasive extent and nefarious effects of NRA lobbying efforts — what Chief Justice Burger described as a fraud and others see as a calamitous perpetuation of preventable violence.

II. HISTORY OF THE SECOND AMENDMENT

If men could learn from history, what lessons it might teach us! But passion and party blind our eyes, and the light which experience gives us is a lantern to the stern which shines only on the waves behind us.

— Samuel Taylor Coleridge¹⁴

Any examination of the history and development of the Second Amendment should rest on one clear presumption: even without interpreting the Framers' "original intent" or parsing the "plain meaning" of the Second Amendment, gun regulation would still be justified because nowhere in the Constitution are states limited from so doing. At bottom, state action to control the sale, possession, or use of firearms can be justified simply from the high number of casualties incurred annually by deliberate and accidental use of firearms. It is a fundamental precept in Constitutional interpretation that present-day issues take precedence over "the obsolescent understandings of generations long past."¹⁵

From a strictly historical perspective, however, the overwhelming weight of available evidence demonstrates that the primary concern of the Founding Fathers was the concept of a militia — as distinguished from a standing federal army—not the right of each individual citizen to own firearms.¹⁶

13. *Emerson*, 46 F. Supp. 2d 598 (1999).

14. English poet and critic, 1772-1834. *THE NEW DICTIONARY OF THOUGHTS* 271 (Tryon Edwards ed., 1961).

15. Letter from a Federal Framer (Jan. 25, 1788), in 17 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 362-63 (John P. Kaminski & Gaspare J. Saladina eds., 1995); 2 *THE RECORDS OF THE FEDERAL CONVENTION 1787*, at 182, 330-31 (Max Farrand ed., 1966); see also Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 *CHI.-KENT L. REV.* 103, 107 (2000).

16. See, e.g., Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794*, 16 *LAW & HIST. REV.* 567, 588 (1998); Paul

At issue was where the boundary between national and state responsibilities would lie. As the records from the Constitutional Convention, the ensuing ratification campaign, and the debates in the First Congress of 1789 all demonstrate, the issue under debate was always the militia and who would control it.¹⁷

The primary discussions about the Second Amendment took place on the eighteenth and twenty-third of August, 1787. Nothing was said then to suggest that a militia would be composed of individuals spontaneously gathering together to defend against tyranny by the government. Any fair reading of these texts yields the conclusion that the debates of 1787-88 were primarily concerned with the question of a militia, and not whether there was or should be a constitutionally guaranteed right to own and carry firearms. The Second Amendment can thus be read as a distilled version of the comparable statements found in the state declarations of rights and the amendments recommended by several ratification conventions. The Amendment affirmed the fundamental proposition that liberty would be better served if the nation were to defend itself by using a militia composed of citizen-soldiers rather than by maintaining a permanent military establishment.¹⁸

Similarly, because personal firearms had little practical use at the time in the citizenry's private lives, it is anachronistic to argue that the Founding Fathers comprehended, much less addressed, the problem of firearms regulation in its modern form. In fact, whether or not individuals had a right to own firearms free of regulation by the states was a matter of complete indifference at the time the Second Amendment was being discussed. In those years the majority of American households probably did not possess firearms. There were few skilled gunsmiths in the colonies, so almost all weapons were imported. Nevertheless they were prone to rust and disrepair and likely to deteriorate rapidly. The militias of the time were poorly armed and trained. Americans had little use for hunting, which was considered a leisure activity for the elite; trapping was much more efficient.¹⁹

Records of gun regulation in the states, both before and after ratification of the Second Amendment, strongly suggest that it did not contemplate the ownership and use of firearms by private citizens. Following in the tradition of Great Britain, the several colonies had passed measures requiring citizens to carry and maintain arms in certain circumstances — and prohibiting ownership in others. Many of

Finkelman, "A Well Regulated Militia": *The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195, 236 (2000); Rakove, *supra* note 15, at 111-12; David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 597 (2000).

17. See Rakove, *supra* note 15, at 145.

18. *Id.* at 128-158.

19. See Bellesiles, *supra* note 16, at 582-83 *passim*.

the former laws grew out of the states' inability to sufficiently supply its militia; many of the latter were based on an underlying distrust of certain groups of people. These restrictive regulations were in force before the Constitutional Conventions took place, and were left unscathed after the ratification of the Second Amendment. Indeed, following ratification, the states continued to pass new laws that closely monitored gun ownership.²⁰

With but one exception, all courts in the early nineteenth century upheld gun regulations when they were challenged as a violation of individual rights.²¹ The lone exception occurred in Kentucky, where a restrictive law was struck down.²² However, the Kentucky legislature promptly amended the militia provision in its constitution, upon which the court's decision was based, so that it more closely resembled the language in the Second Amendment.

Proponents of an individual-rights reading of the Second Amendment often engage in highly selective use of historical facts to support their position. Perhaps most egregious is a remark by George Mason during the Virginia Ratification Convention, which advocates of the individual-right interpretation frequently cite as a clear statement that the Framers meant the militia to be a group of individual citizens: "Who are the militia? They consist now of the whole people, except a few public officers."²³ But that statement is lifted totally out of context by many individualist writers, who delete reference to Mason's very next sentence:

But I cannot say who will be the militia of the future day. If that paper on the table [the Constitution] gets no alteration, the militia of the future day may not consist of all classes, high and low, and rich and poor; but may be confined to the lower and middle classes of the people, granting exclusion to the higher classes of the people.²⁴

20. *Id.* at 587.

21. *See, e.g.*, *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840); *State v. Reid*, 1 Ala. 612 (1840).

22. *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822).

23. STEPHEN P. HALBROOK, "THAT EVERY MAN BE ARMED" THE EVOLUTION OF A CONSTITUTIONAL RIGHT 74 (Univ. of New Mexico Press 1984).

24. Rakove, *supra* note 15, at 136-37. Three notable examples of selective historians: HALBROOK, *supra* note 23, at 74; Kates, Jr., *supra* note 10, at 216 n.51; and Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 647 (1989). Mason's argument echoes one made by Luther Martin, a Maryland delegate to the Constitutional Convention who subsequently opposed ratification. Martin complained that the Constitution would "enable the government totally to discard, render useless, and even disarm the militia, when it would remove them out of the way of opposing its ambitious views. . . . The general government has a power . . . of which they may be rendered utterly useless and insignificant, when it suits the ambitious purposes of government." Luther Martin, *To the Citizens of Maryland*, Md. J., Mar. 18, 1788, in 16 THE DOCUMENTARY HISTORY OF THE RATIFI-

Similar misrepresentations of context appear elsewhere. Among them is the use made of James Madison's tribute to the militia in *The Federalist No. 46*.²⁵ Any attempt by a standing army to impose tyranny, quote the individual-right advocates: "[W]ould be opposed [by] a militia amounting to near half a million of citizens with arms in their hands. . . . It was to . . . 'be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops' as the national government could plausibly acquire."²⁶

Madison went on to remind his readers of "the advantage of being armed, which the Americans possess over the people of almost every other nation," — especially those living in European monarchies, which "are afraid to trust the people with arms."²⁷

But Madison's purpose, in both his *Federalist No. 45* and *No. 46*, was to compare the relative advantages that the national and state *governments* would enjoy in not competing for power. Nowhere did he address (or defend) the notion that an armed citizenry would be called upon to resist the oppression of a combined state and federal government. His argument throughout rests on the proposition that the militia is a part of the government, not a group of individual citizens.²⁸

So much for the original intent of the Framers.

Individualist theorists also have difficulties with the plain meaning of the Second Amendment. In fact only a handful of sources from the period bear directly on the currently controversial questions concerning the regulation of privately owned firearms.²⁹ The issues back then concerned the militia and its public functions — partly because eighteenth-century firearms were not nearly as threatening or lethal as those available today.³⁰

CATION OF THE CONSTITUTION 419 (John P. Kaminski & Gaspare J. Saladina eds., 1986); *see also* Rakove, *supra* note 15, at 138 n.88.

25. Rakove, *supra* note 15, at 142.

26. THE FEDERALIST NO. 46 (JAMES MADISON), in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 492 n.107 (John P. Kaminski & Gaspare J. Saladina eds. 1984); *see also* Rakove, *supra* note 15, at 142.

27. Rakove, *supra* note 15, at 142.

28. *Id.* at 142-143.

29. Rakove, *supra* note 15, at 109.

30. *Id.* at 109-10. As Professor Rakove points out:

Theirs was a rhetoric of public liberty, not public health; of the danger from standing armies, not that of casual strangers, embittered family members, violent youth gangs, freeway snipers, and careless weapons keepers. Guns were so difficult to fire in the eighteenth century that the very idea of being accidentally killed by one was itself hard to conceive. Indeed, anyone wanting either to murder his family or protect his home in the eighteenth century would have been better advised (and much more likely) to grab an axe or knife than to load, prime, and discharge a firearm. And even had guns been more effective as personal weapons, it is nearly inconceivable that eighteenth-century notions of the police power of state and local governments would have precluded their regulation in the name of some vague threat of tyranny. The American colo-

Likewise, individualists have difficulty with “textualist” readings of the Second Amendment, which presume that every word serves a specific purpose.³¹ Under this approach, the Second Amendment must yield the conclusion that “militia” meant “collective body of the people” and not individuals—indeed, those very words (“collective body of people”) appear in earlier drafts of the Amendment, and were ostensibly deleted for reasons of editorial concision.³²

In denying both the facts of contextual history and the virtually unanimous court jurisprudence that the Second Amendment guarantees militias and not private ownership rights, individualists betray the fundamental weaknesses of their position. Their approach ignores both history and judicial precedent.

Thoughtful historians face a daunting task in trying to determine objectively the intentions of the Founding Fathers as they drafted the Second Amendment. They must divest themselves of both their own prejudicial passions and a multitude of selective chronicles and commentaries about guns in early America. Who owned what? If one adheres strictly to an examination of the issue from a colonial perspective, the notion that there was an abundance of arms leisurely possessed by most colonial households becomes a myth — which when laid aside reveals the true nature of the debate waged by the Founding Fathers: whether an individual citizen had a right to bear arms beyond the context of a state militia. The evidence suggests that the answer to that question is resoundingly “no.”

The idea of extending the Second Amendment outside the framework of a state militia did not come about until after the Civil War — well after such forces as the primary defender of the state became obsolete.³³ Such an idea would have been news to the Founding Fathers; there is simply no evidence that it was the original intent of those who crafted the Second Amendment.

nies and states were not a libertarian utopia; their traditions of governance permitted legislatures and institutions of local government to act vigorously in the pursuit of public health and safety.

Id.

31. *See id.* at 126.

32. *Id.* at 124-26.

33. MICHAEL BELLESILES, *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE* (1996), Chapters 9-10. Although Bellesiles' table indicating that guns were not prevalent in estates prior to 1800 has been successfully challenged by scholars, his analysis of the rise of the gun culture in America subsequent to the Mexican War, and particularly after the Civil War, has not. Interview with Dr. Edward Papenfuse, State Archivist of Maryland, in Annapolis, MD, (March 4, 2003); *see also* James Lindgren, *Fall From Grace: Arming America and the Bellesiles Scandal*, 111 *YALE L.J.* 2195, 2202 (2002) (spearheading the attack on Bellesiles' work). *But see* Jon Wiener, *Emory's Bellesiles Report: A Case of Tunnel Vision*, and Lee W. Formwalt, *Bellesiles, OAH, and the Profession*, 31 *ORGANIZATION OF AMERICAN HISTORIANS NEWSLETTER* 1 (Feb. 2003).

However, the idea, once prevalent only in Pennsylvania and Kentucky, began to take hold after the Civil War.³⁴ But even then it was less grounded in a constitutional privilege than in a broad-scale advertising campaign launched in the second half of the 19th century.³⁵

The scholarship of gun-rights advocates, who doggedly assert that America has had a life-long history of firearm ownership, is a perception clouded by a dramatic post-Civil War increase in the private possession of pistols.

Possession of small arms became the way of the frontier thanks largely to Samuel Colt, who received a patent for his six-shot pistol in 1836. His efficient use of interchangeable parts and methodology of mass production not only made guns easily accessible for the average citizen, but also served to nurture the belief in a Constitutional right to bear them.

It is beyond controversy that the period's unprecedented demand for small firearms resulted from new gun regulation in the states — both before and after ratification of gun regulation in the states and before and after ratification technology pioneered by Colt.³⁶

At the time of debate over the Second Amendment, the drafters' conception of a military power did not contemplate an unqualified individual right to bear arms. The documentary evidence from the Constitutional Conventions supports the proposition that the issue of prime concern regarding the right to bear arms was preservation of the state militia. No fewer than eight *Federalist Papers* were devoted at least in part to defending the Constitutional Convention's decision that Congress provided for a standing army.³⁷ During the debate over ratification of the Constitution, several states expressed fear that providing for a federal army without an explicit and concurrent right of the sovereign states to maintain their own militias might render the southern states defenseless against slave insurrection, and might subject the states' militiamen to unjust deployment at the political prerogative of the federal government.³⁸

Prior to the debates over ratification of the Constitution and the Bill of Rights, several states already had in their constitutions a provision concerning a right to bear arms. Among them were Delaware, Maryland, Massachusetts, New York, New Hampshire, North Carolina,

34. PA CONST. art. I, § 13; KY CONST. § 1.

35. Interview with Edward Papenfuse, *supra* note 33.

36. For a brief description and diagram of Colt's six-shooter, see KENNETH LASSON, *MOUSETRAPS AND MUFFLING CUPS: ONE HUNDRED BRILLIANT AND BIZARRE UNITED STATES PATENTS 18-19* (Arbor House 1986).

37. See THE FEDERALIST Nos. 8, 23, 24, 25, 26, 28 (Alexander Hamilton); Nos. 41, 46 (James Madison).

38. Carl Bogus, *Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 348-50 (1998).

Pennsylvania, Vermont, and Virginia.³⁹ In fact, the entire Bill of Rights can arguably be derived from these state constitutions.⁴⁰

The various provisions regarding the right to bear arms reveal the precise lines of political factions on the debate surrounding arms: one side of the debate not recognizing a right to bear arms as necessary for the preservation of a state militia, the other seeing to the contrary and in addition other purposes served by such a right. Meanwhile, in the middle was a moderate faction recognizing the right — but only in the interests of state security. Maryland, founded originally as a haven from religious persecution, but has since developed into a stalwart of other constitutional civil liberties,⁴¹ provided in its constitution for a militia, but not for an explicit right to bear arms.⁴² Maryland took the position that some state control of military forces was preferable, but stood only for the proposition that “substituting a militia in place of a standing army is an essential right in maintaining governments of free men.”⁴³

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39. Delaware’s Declaration of Rights stated that “a well regulated militia is the proper, natural and safe defence of a free government.” DEL. CONST. art. I, § 18, (1776). Maryland declared in its Declaration of Rights that “a well regulated militia is the proper and natural defence of a free government.” MD. CONST. art. 25 (1776). The Declaration of Rights of the Commonwealth of Massachusetts declared that “the people have a right to keep and bear arms for the common defence.” MASS. CONST. pt. 1, art. XVII (1780). New Hampshire’s Bill of Rights stated that a “well regulated militia is the proper, natural, and sure defence of a state” and that “[n]o person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto.” N.H. CONST. pt. 1, art. XIII (1784). New York, in its Constitution, provided that “the militia of this State, at all times hereafter, as well in peace as in war, shall be armed and disciplined, and in readiness for service.” N.Y. CONST. art. I, § 50 (1777). North Carolina’s Declaration of Rights stated that “the people have a right to bear arms, for the defence of the State.” N.C. CONST. art. XVII (1776). Pennsylvania, in its Declaration of Rights, stated that “the people have a right to bear arms for the defence of themselves and the state.” PA. CONST. art. I, § 13 (1776). Vermont’s Declaration of Rights declared that “the people have a right to bear arms for the defence of themselves and the State. . . .” VT. CONST. CH. I, art. XV (1777). Virginia’s Bill of Rights stated that “a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state. . . .” VA. CONST. art. I, § 13 (1776).
40. Edward Dumbauld, *State Precedents for the Bill of Rights*, 7 J. PUB. L. 323, 343-44 app. A (1958).
41. See generally Daniel Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMPLE L. REV. 637 (1998).
42. MD. CONST. art. 29.
43. Eight of the thirteen states — Delaware, Georgia, Maryland, New Hampshire, New Jersey, New York, South Carolina, and Virginia — represented one side of the debate: that a well-regulated militia is an important function of state security. For those states, the idea of an individual right to bear arms was necessary — for the security of the individual was never contemplated. Bogus, *supra* note 38, at 365; Dumbauld, *supra* note 40, at 343-44; see also Robert Hardaway, Elizabeth Gormley, & Bryan Taylor, *The Inconvenient Militia Clause: Why the Supreme Court Declines to Resolve the Debate Over the Right to Bear Arms*, 16 ST. JOHNS J. LEGAL COMMENT. 41, 79-80 (2002).

Prior to the recognition of this interest within some of the states, Madison arguably had no intention of including an arms provision in his proposed Bill of Rights.⁴⁴ Only those states whose constitutions provided explicitly for a right of the people to bear arms pursued its inclusion in the Bill of Rights. Of those, all but New Hampshire explicitly stated the purpose behind the right.⁴⁵ North Carolina, Massachusetts, and Virginia looked upon the right as no more than one necessary for the defense of the state.⁴⁶

Only two states — Pennsylvania and Vermont — went beyond the state-defense rationale for a right to bear arms.⁴⁷ Their constitutions explicitly granted a right to bear arms for the purpose of defending oneself in addition to the state. Even in Pennsylvania, which naturally pressed for a constitutional amendment granting a right to bear arms, that right was never referred to outside the context of the federal military.⁴⁸ Vermont was not yet a state, and the documentary history is scarce.

Historical documents provide no direct evidence of the colonial period of these states, or reasonable inferences derived therefrom, as to why they felt the need for an individual right.

Concerning the balance between federal and state military powers, there is a great distance in philosophy between the states whose constitutions granted a right to bear arms for the purpose of self-defense and those which did not. Pennsylvania and Vermont both took a decidedly extreme position in respect to constitution-making, for these documents were political, and not regulatory. In the context of the debate over original intent, there is an important distinction to be drawn between the right to “bear” arms and the right to “use” them. The right to “bear arms” is aimed at a political end. It is a distinct military phrase having political implications. A person in the pursuit of game or target shooting might carry his rifle, yet it would never be said that he had borne arms.⁴⁹ These military connotations were even more strewn about in the earlier drafts of the Amendment, from Madison’s original text to other contemporary uses of the phrase “bear arms.”⁵⁰ More important, splitting the Amendment in two — often argued by revisionist historians — is implausible: the “bear

44. Bogus, *supra* note 38, at 364.

45. N.H. CONST. pt. 1, art. XIII (1784).

46. N.C. CONST. art. I, § 17 (1776); MASS. CONST. pt. 1, art. XVII (1780); VA. CONST. art. I, § 13 (1776).

47. *See* PA. CONST. art. I, § 13 (1776); VT. CONST. ch. 1, art. XV (1777).

48. *See generally* *The Address and Reasons for Dissent of the Minority of the Convention of Pennsylvania Speaking to their Constituents* (Dec. 18, 1787), in 2 *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 662 (Bernard Schwartz ed., McGraw-Hill 1971).

49. Akhil Reed Amar, *Enduring and Empowering: The Bill of Rights In the Third Millennium: Second Thoughts*, 65 *LAW & CONTEMP. PROBS.* 103, 104 (2002).

50. David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 *MICH. L. REV.* 588, 618 (2000).

arms" language, having a military connotation, reflects the Amendment's purpose of protecting the militia articulated in the first clause.⁵¹

On the other hand, the right to "use" is by its nature a right implicating regulation. Such a right is subject to the changing times and developments in technology. The overwhelming amount of evidence indicates that the Second Amendment sought to address the political right. At the time the Amendment was adopted, the dominant meaning of the phrase "bear arms," particularly in a political context, was in reference to the use of weapons by soldiers or militiamen.⁵²

Even if Pennsylvania and Vermont sought to have the Second Amendment grant a right for individuals to freely own and use arms in addition to militia rights, this argument was rejected by virtue of the constitutional process of compromise. Resources exist indicating what Madison considered when drafting and deciding what to include in the Bill of Rights. In drafting the Bill of Rights as a whole, he took into account the more than four hundred separate clauses of the state constitutions. For the Second Amendment, he specifically drew from the concerns expressed at the Virginia ratifying convention of 1788.⁵³ Those concerns consisted entirely of slave control and the power of the federal army.⁵⁴ Thus, the debate over the Second Amendment was narrowed to the issue of how to divide military power between the states and the federal government for the purpose of state security – that is, steering clear of an oppressive federal army.

It is important to keep in mind the essence of the constitutional process and debate which took place in Philadelphia: compromise. The compromise was not one that everyone agreed upon; it was one of the majority. The extreme viewpoints in dissent on all issues were excluded by way of the compromise process. In its opposition to ratification, the dissenting minority of the Pennsylvania convention stated its concern over the absence of a right to bear arms.⁵⁵

Benjamin Franklin aptly characterized the final product of the Constitutional Conventions: "I confess that there are several parts of this Constitution which I do not at present approve, but I am not sure I shall never approve them; for the older I grow, the more apt I am to doubt my own judgment and to pay more respect to the judgment of others."⁵⁶

51. *Id.* at 617.

52. *See id.* at 619-21.

53. *See* Schwartz, *supra* note 48, at 705.

54. Virginia Ratifying Convention (June 27, 1788), *in* Schwartz, *supra* note 48, at 765.

55. *See* Schwartz, *supra* note 48, at 628, 665.

56. Benjamin Franklin, *Speech to the Constitutional Convention* (Sept. 17, 1787), *in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, 213 (John P. Kaminski & Gaspare J. Saladina eds., 1981).

III. INTERPRETATIONS BY THE COURTS

*“[T]hat the Second Amendment poses no barrier to strong gun laws is perhaps the most well-settled proposition in American constitutional law.”*⁵⁷

Indeed, virtually all of the case law construing the Second Amendment limits the right of individuals to bear arms.⁵⁸ Lower federal courts have consistently held that only those using firearms in connection with their service in an organized state militia are so entitled.⁵⁹ Moreover, the courts have invariably ruled that various laws limiting the private sale, ownership, and use of firearms do not violate the Second Amendment because such restrictions have no effect on the maintenance of a well-regulated militia — that is, the National Guard.⁶⁰

The ultimate interpreter of the Constitution, the Supreme Court, has likewise affirmed the rights of American citizens to protect themselves — but only in the context of the maintenance of a militia or other such public-security force.⁶¹

A. *Supreme Court Case Law*

In fact, there have been only three Supreme Court decisions that have dealt directly with the Second Amendment, the latest and most substantive of which was well over a half-century ago.⁶² In that case, *United States v. Miller*,⁶³ the defendants were charged with unlawfully transporting an unregistered firearm in interstate commerce.⁶⁴ The Court sustained a statute requiring registration of sawed-off shotguns under the National Firearms Act.⁶⁵ In construing the Second Amendment in that instance, the Supreme Court stated:

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

57. Erwin N. Griswold (former Solicitor General of United States), *Phantom Second Amendment ‘Rights’*, WASH. POST, Nov. 4, 1990, at C7 (emphasis added).

58. See Herz, *supra* note 3, at 75-76.

59. *Id.* at 68; see also *infra* Part III.B-C.

60. Herz, *supra* note 3, at 68, 75-76; see also *infra* Part III.B & C.

61. See *United States v. Miller*, 307 U.S. 174, 178 (1939).

62. See *United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992) (noting that the Supreme Court has not addressed a Second Amendment issue since the *Miller* decision) (citing *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942)).

63. 307 U.S. 174 (1939).

64. *Miller*, 307 U.S. at 175.

65. *Id.* at 178.

any part of the ordinary military equipment or that its use could contribute to the common defense.⁶⁶

Although *Miller* also contained some historical information about the colonists and the restrictions on and reasons for bearing arms, its narrow holding is often used by opponents of gun control legislation to suggest that the collective-right view implied by the Court was somewhat less than unambiguous. But that interpretation ignores the clear context of the decision, as well as some other pertinent language in the opinion. After noting that the Constitution, as originally adopted, granted Congress the power to:

provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.⁶⁷

The Court went on to conclude that:

[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view. The Militia which the states were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress.⁶⁸

Thus the most plausible interpretation of *Miller* is that an individual using a firearm must be doing so in the context of service in a government-organized (not independent) militia.

In the two earlier cases, the Supreme Court offered passing instruction about even narrower Second Amendment issues. *United States v. Cruikshank*⁶⁹ held that the Second Amendment leaves the people to look to the "internal police" for their protection.⁷⁰ And *Presser v. Illinois*⁷¹ flatly rejected the idea of a right to bear arms in order to organize independent armies or to prepare for insurrection against a potentially despotic government. In *Presser*, the defendant had led a parade of rifle-bearing members of a German nationalist organization without obtaining the permit required under the challenged Illinois statute, which prohibited any group of men other than the officially

66. *Id.* (citation omitted).

67. U.S. CONST. art. I, § 8.

68. *Miller*, 307 U.S. at 178-79.

69. 92 U.S. 542 (1875).

70. *See id.* at 553.

71. 116 U.S. 252 (1886).

organized Illinois voluntary militia from associating as a military organization. The Court expressly rejected the insurrectionist view of the Second Amendment, and said it made little sense in light of the militia's constitutionally commanded role of suppressing insurrections.⁷² As one commentator succinctly contended:

[h]ow can the militia be a collection of citizens with the constitutionally guaranteed right to engage in armed resistance against their government if the Constitution itself grants Congress the power to call out the militia . . . [to suppress Insurrections]. The Constitution cannot view the militia *both* as a means by which government can suppress insurrection *and* as an instrument for insurrection against the government.⁷³

Although there is much discussion today about what "militia" means, the Supreme Court had no trouble with the term. The Court found the word defined in Article I, Section 8 of the Constitution — "the militia organized by Congress and subject to joint federal and state control."⁷⁴ This is generally referred to as the "collective right" model because it contents that the Second Amendment grants the people a collective right to an armed militia, rather than an individual right to keep and bear arms for one's own purposes, notwithstanding governmental regulation.⁷⁵

The collective-right model remained widely accepted for nearly a century — steadfastly adhered to by the lower courts, relying on the Supreme Court's three opinions.⁷⁶

The Supreme Court has rejected both the broad individual-right view and any private right to bear arms for collective insurrectionist purposes — as well as repeated attempts to incorporate the Second Amendment into the Fourteenth. Thus, the right to bear arms poses no restrictions on the states.⁷⁷

B. *The Lower Federal Courts*

Taking their cue from the Supreme Court every federal appellate decision since *Miller* has rejected the broad-individual-rights position, instead focusing the analysis on whether the use of a weapon was related to maintaining a well-regulated militia. Similarly, the lower ap-

72. *See id.* at 254, 262-66.

73. Herz, *supra* note 3, at 70-71 (citation omitted).

74. *See* U.S. CONST. art. I, § 8, cl. 16.

75. Bogus, *supra* note 11, at 3-4.

76. *Id.*

77. Herz, *supra* note 3, at 71-74. Gun-rights activists have argued that these decisions are invalid because they came prior to the onset of the modern incorporation doctrine. But the Court has refused to grant certiorari in any of the cases dismissing Second Amendment challenges to state regulations on non-incorporation grounds. *Id.*

pellate courts have uniformly rejected the contention that *Miller* extends constitutional protection to all weapons with military utility.⁷⁸

The Tenth Circuit, for example, has noted that “[t]he purpose of the [S]econd [A]mendment as stated by the Supreme Court [in *Miller*] was to preserve the effectiveness and assure the continuation of the state militia.”⁷⁹ Likewise, the Seventh Circuit reviewed *Miller* in the process of upholding the ban of the Village of Morton Grove, Illinois, on handgun possession: “Construing this language [of the Second Amendment] according to its plain meaning, it seems clear that the right to bear arms is inextricably connected to the preservation of a militia.”⁸⁰ The Eleventh Circuit dismissed as “without merit” the assertion that a federal ban on private ownership of automatic machine guns obtained after 1986 was unconstitutional — a decision that the NRA called “the first ban on firearms possession by law-abiding citizens in American history.”⁸¹

In a later case, gun-rights activists had claimed that the Second Amendment offered a judicially enforceable collective right, or that it presented a fundamental individual right.⁸² The Eighth Circuit did not feel the need even to discuss the “collective” versus the “individual” right distinction, stating: “Whether the ‘right to bear arms’ for militia purposes is ‘individual’ or ‘collective’ in nature is irrelevant where, as here, the individual’s possession of arms is not related to the preservation or efficiency of a militia.”⁸³

The lower federal courts have almost uniformly ruled that the Second Amendment right to bear arms applies only to those individuals using firearms in connection with their service in an organized state militia.⁸⁴ An extraordinarily consistent body of case law has held that a variety of restrictions on private firearms ownership, use, and sales do not violate the Second Amendment, because such restrictions have no effect on the maintenance of a well-regulated militia, such as the National Guard.⁸⁵ Until very recently, the lower federal courts have consistently found an inviolable nexus between the right to bear arms and the establishment of a militia.⁸⁶

As far back as 1943, federal courts have held that “the federal government can limit the keeping and bearing of arms by a single individual as well as by a group of individuals, but it cannot prohibit the

78. *Id.* at 74.

79. *United States v. Oakes*, 564 F.2d 384, 387 (1977).

80. *Quilici v. Morton Grove*, 695 F.2d 261, 270 (1982).

81. *Farmer v. Higgins*, 907 F.2d 1041, 1042, 1045 (11th Cir. 1990).

82. *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992).

83. *Id.*

84. *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942); *see, e.g., supra* note 61.

85. *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996); *see generally, infra* notes 92-94.

86. *See infra* Part III.C.1 and accompanying text.

possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia.”⁸⁷

In 1976, a federal appellate court in Ohio upheld the conviction of a defendant who had been charged with possessing an unregistered submachine gun.⁸⁸ The Court of Appeals affirmed the conviction, holding that:

the Second Amendment guaranteed a collective rather than an individual right; that the fact that defendant, in common with all adult residents and citizens of Ohio, was subject to enrollment in the state militia did not confer any Second Amendment right upon him to possess the submachine gun; that the National Firearms Act did not attempt to tax the right to keep and bear arms and thus did not apply to any right protected by the Second Amendment; and that the possession of an unregistered submachine gun was not an additional fundamental right protected by the Ninth Amendment.⁸⁹

The court further noted, in 1971, it had held that, “[s]ince the Second Amendment right ‘to keep and bear Arms’ applies only to the right of the State to maintain a militia and not to the individual’s right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm.”⁹⁰ Furthermore, said the court in *Warin*, “there is absolutely no evidence that a submachine gun in the hands of an individual ‘sedentary militia’ member would have any, much less a ‘reasonable relationship to the preservation or efficiency of a well regulated militia.’”⁹¹

Later federal courts have held that plaintiffs lack standing to challenge the denial of a permit to carry a concealed weapon, because the Second Amendment is a “right held by states,” not by private citizens.⁹² In addition, the courts have held that a federal prohibition pertaining to the possession of a firearm by a felon has a justifiable defense, which “ensures that [the provision] does not collide with the Second Amendment.”⁹³ Also, the courts have held that a member of an unorganized militia in Georgia was unable to establish that his possession of machine guns and pipe bombs bore any connection to the preservation or efficiency of a well-regulated militia.⁹⁴

87. *See Cases*, 131 F.2d at 922.

88. *United States v. Warin*, 530 F.2d 103, 103 (6th Cir. 1976).

89. *Id.* at 106.

90. *Id.* (quoting *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971)).

91. 530 F.2d at 106 (quoting *Miller v. United States*, 307 U.S. 174, 178 (1939)).

92. *Block*, 81 F.3d 103 (holding that the right to keep and bear arms is meant solely to protect the right of the states to keep and maintain armed militia).

93. *United States v. Gomez*, 92 F.3d 770, 775 n.7 (9th Cir. 1996).

94. *United States v. Wright*, 117 F.3d 1265 (11th Cir. 1997); *Love v. Peppersack*, 47 F.3d 120 (4th Cir. 1995). The court declined to consider the issue of whether the Second Amendment applies to the states through the Four-

Even where the Second Amendment is applicable, it does not constitute an absolute barrier to the Congressional regulation of firearms. After considering several arguments, the Third Circuit decided the case on the "broader ground" that weapon-bearing "was never treated as anything like an absolute right by the common law. It was regulated by statute as to time and place as far back as the Statute of Northampton in 1328 and on many occasions since."⁹⁵

The most recent federal case to deal with the Second Amendment, and potentially the most controversial, is *United States v. Emerson*.⁹⁶ There, a district judge in Lubbock, Texas, dismissed federal charges against a physician for possessing a firearm while under a restraining order in a domestic case, holding that the Second Amendment applies to individuals.⁹⁷ By striking down the anti-gun law as unconstitutional, the court overturned a long line of decisions holding precisely the opposite point of view.⁹⁸

Despite acknowledging that "the government claimed it is 'well settled' that the Second Amendment creates a right held by the States and does not protect an individual right to bear arms," the court held that the federal statute under which defendant was indicted was unconstitutional.⁹⁹ In so holding, the Court rejected the collective right argument, instead stating that "the right to keep and bear arms is a personal right retained by the people, as opposed to a collective right held by States."¹⁰⁰

The court took some pains to describe what it called "Second Amendment Schools of Thought," providing both textual and historical analyses. It concluded that a textual analysis of the Second Amendment supports an individual right to bear arms. The Court noted that if the Amendment consisted solely of its independent clause, "the right of the people to keep and bear Arms, shall not be infringed," then there would be no question whether the right is individual in nature.¹⁰¹

The plain language of the amendment, however, shows:

teenth Amendment or whether the Second Amendment imposes any limitations on governmental authority to regulate firearms. *Love*, 47 F.3d at 123.

95. *United States v. Tot*, 131 F.2d 261, 266 (3rd Cir. 1942).

96. 46 F. Supp. 2d 598 (N.D. Tex. 1999).

97. *Id.* at 598-610.

98. *See id.* at 607-08; *see also* *Miller v. Texas*, 153 U.S. 535, 538-39 (1894). For example, an old Texas statute prohibiting "the carrying of dangerous weapons" was found not to abridge the Second Amendment of the United States Constitution. *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1877) (offering *dicta* that laws which forbid the carrying of concealed weapons by individuals do not violate the Second Amendment).

99. *Emerson*, 46 F. Supp. 2d at 599-600, 610.

100. *Id.* at 601.

101. *Id.* at 600-07.

That the function of the subordinate clause was not to qualify the right, but instead to show why it must be protected. The right exists independent of the existence of the militia. If this right were not protected, the existence of the militia, and consequently the security of the state, would be jeopardized.¹⁰²

The *Emerson* court's historical analysis yielded a similar conclusion:

[The] right to bear arms, from English antecedents to the drafting of the Second Amendment, bears proof that the right to bear arms has consistently been, and should still be, construed as an individual right. . . . English citizens were also required to provide local police services, such as pursuing criminals and guarding their villages.¹⁰³

Moreover, the court concludes, "[w]ithout that individual right, the colonists never could have won the Revolutionary War."¹⁰⁴

Unfortunately, Senate debate on the issue was held in secret, and therefore no record exists of that body's deliberations. Thus, the *Emerson* court's reading of history is entirely speculative and conjectural.

The court is similarly cavalier in its handling of the Supreme Court's decision in *Miller*. That case, it declared:

"[D]id not answer the crucial question of whether the Second Amendment embodies an individual or collective right to bear arms. Although its holding has been used to justify many previous lower federal court rulings circumscribing Second Amendment rights, the Court in *Miller* simply chose a very narrow way to rule on the issue of gun possession under the Second Amendment, and left for another day further questions of Second Amendment construction."¹⁰⁵

Emerson, likewise, dismisses the scholarship that supports a collectivist interpretation of the Second Amendment:

Some scholars have argued that even if the original intent of the Second Amendment was to provide an individual right to bear arms, modern-day prudential concerns about social costs outweigh such original intent and should govern current review of the amendment. However, there is a problem with such reasoning. If one accepts the plausibility of any of

102. *Id.* (citing David E. Johnson, Note, *Taking a Second Look at the Second Amendment and Modern Gun Control Laws*, 86 Ky. L.J. 197, 201 (1997-98)).

103. *Emerson*, 46 F. Supp. 2d at 601 (citing CLAYTON E. CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS 24-25 (Praeger Press 1994); JOYCE LEE MALCOM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 2 (Harvard Univ. Press 1994)).

104. *Id.* at 603.

105. *Id.* at 608-09.

the arguments on behalf of a strong reading of the Second Amendment, but, nevertheless, rejects them in the name of social prudence and the present-day consequences of an individual right to bear arms, why do we not apply such consequentialist criteria to each and every part of the Bill of Rights?¹⁰⁶

The short answer to that question is, we do. For example, the “separate but equal” doctrine applied by the Court in 1896 was found to be unworkable, so it was rejected in 1954.¹⁰⁷

The *Emerson* court cites Justice Scalia with favor, that there would be:

“[F]ew tears shed if and when the Second Amendment is held to guarantee nothing more than the state National Guard, this would simply show that the Founders were right when they feared that some future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights.”¹⁰⁸

But Scalia also said that, “there is no need to deceive ourselves as to what the original Second Amendment said and meant. Of course, properly understood, it is no limitation upon arms control by the states.”¹⁰⁹

The court is likewise selective in its reference to historical evidence. Professional historians often chide legal academics for the way they “pick and choose [historical] facts and incidents ripped out of context that serve their purposes.”¹¹⁰ Selective readings of history is precisely what was done by the *Emerson* court.

C. Law Review Analyses

Until the 1970s, the Second Amendment had received little attention from legal scholars.¹¹¹ From 1870 (when law reviews first began to appear) until 1970, all eleven articles discussing the Second Amendment that were published endorsed the collective right model.¹¹² Since then, however, there has been a proliferation of arti-

106. *Id.* at 609 (citing Levinson, *supra* note 24, at 658).

107. See *Brown v. Board of Education*, 349 U.S. 294, 301 (1954); *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896).

108. *Emerson*, 46 F. Supp. 2d at 610 (quoting Sanford Levinson, *Is the Second Amendment Finally Becoming Recognized As Part of the Constitution? Voices from the Courts*, 1998 BYU L. REV. 127, 132).

109. *Emerson*, 46 F. Supp. 2d at 610 (citing Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 137 n.13 (Amy Gutmann, ed., 1997)).

110. Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 554 (1995).

111. Bogus, *supra* note 11, at 4.

112. *Id.* at 5 n.8.

cles both for and against gun control, certainly attributable to the ever increasing debate over the Second Amendment.¹¹³

At first most of the legal scholarship reflected the view in the courts, that the Second Amendment did not confer upon each citizen the right to bear arms. That perspective began to change, however, in the last decade, during which several prominent constitutional scholars came out in favor of an individual-rights perspective. Among the more influential were Sanford Levinson of the University of Texas School of Law, Akhil Reed Amar of Yale, William Van Alstyne of Duke, and Laurence H. Tribe of Harvard.¹¹⁴

As Professor Bogus incisively points out, regardless of the merits of their arguments, their membership in the individual-right school was politically important. They gave this position respectability, and their advocacy was loudly trumpeted by the gun rights community.¹¹⁵

Part of this phenomenon can be explained by what one observer calls the "law journal breeding ground,"¹¹⁶ which spawns a contrarian editorial attraction to articles more for their distinctiveness than their scholarship.

The influx of revisionist Second Amendment scholarship began in 1989, when Sanford Levinson published an article entitled, *The Embarrassing Second Amendment* in the *Yale Law Journal*.¹¹⁷ The article drew attention not only because of the pedigree of the author, but also because it went against the grain of what the courts had been saying.¹¹⁸

113. *Id.* at 8. From 1970 to 1989, there were twenty-five articles published which advocated the collective-right view, and twenty-seven articles endorsing the individual-right model. *Id.* Of the latter, "almost sixty percent - were written by lawyers who had been directly employed by or represented the NRA or other gun rights organizations, although they did not always so identify themselves. . . ." *Id.*; see, e.g., Barnett & Kates, *supra* note 10; Kates, Jr., *supra* note 10; cf. Articles by Stephen P. Halbrook. Between the two of them, Kates and Halbrook have written or edited at least eight books, twenty-three law review articles, and countless op-ed pieces advocating the right to bear arms and condemning the evils of gun control; Halbrook was paid by the NRA; Kates was promoted by the Second Amendment Foundation. See Bogus, *supra* note 11, at 7. A comprehensive listing of law review literature treating the Second Amendment can be found in the symposium issue on the subject: *Symposium on the Second Amendment: Fresh Look*, 76 CHI.-KENT L. REV. 3(2000).

114. See Bogus, *supra* note 11, at 8, 14-18.

115. *Id.* at 21-22.

116. Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 349 (2000).

117. Bogus, *supra* note 11, at 12 (discussing Levinson, *supra* note 24). Some speculate that as a Democrat Levinson wants his party to stop supporting gun control because the party needs gun owners in a coalition. See *id.*

118. Bogus, *supra* note 11, at 12. Levinson acknowledged that "the implications of what he viewed as a proper reading of history might push us in unexpected, even embarrassing, directions." *Id.* Professor Bogus notes that Levinson is a political opponent of gun control (a Democrat who wants his party to stop supporting gun control because he believes it needs gun owners in its coalition). *Id.* at 13.

The piece was instantly popular with supporters of the National Rifle Association, and it remains perhaps the best known law review article on the subject. The weakness of Levinson's article is not that it concludes with a favorable nod to the gun lobby's reading of the right to bear arms, but that it almost completely ignores the substantial case law denying that right.

Several years later Professor Amar appeared with his tome on the Bill of Rights. The Second Amendment, he asserted, was the Bill of Rights' answer to the federal government's ability to raise a standing army, the guarantee to the populace that the instruments with which they might alter and abolish the government, even with its standing army, would not be taken from them.¹¹⁹ "If the amendment is not about the critical difference between the vaunted 'well regulated Militia' of 'the people' and the disfavored standing army, it is about nothing."¹²⁰ But the gun lobby interpreted Amar's stance as in its favor.

In 1994, Professor Van Alstyne weighed in with his article titled: *The Second Amendment and the Personal Right to Arms*, in which he opined: "The Second Amendment has generated almost no useful body of law."¹²¹ But, as Herz points out, Van Alstyne addresses "only the scant Supreme Court case law, ignoring the many state and lower federal court decisions of the last fifty-five years."¹²² Nevertheless, Van Alstyne ultimately concludes, "the essential claim . . . advanced by the NRA with respect to the Second Amendment is extremely strong."¹²³

Although Professor Tribe can be said ultimately to embrace the collective-right model (the sum and substance of which is that the Second Amendment protects the right of the states to have an armed militia), he argues that the Second Amendment also grants individuals a constitutional right, which must be taken seriously.¹²⁴ But he concedes that "no rights are absolute; and gun control measures that 'seek only to prohibit a narrow type of weaponry (such as assault rifles) or to regulate gun ownership by means of waiting periods, registration, mandatory safety devices, or the like . . . are plainly constitutional.'¹²⁵ In fact Amar, Van Alstyne, and Tribe appear more recently to have shied away from an absolutist position about individual rights.¹²⁶

119. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 47-57 (Yale Univ. Press 1998).

120. *Id.* at 56.

121. Van Alstyne, *supra* note 10, at 1239 ("Indeed, it is substantially accurate to say that the useful case law of the Second Amendment, even in 1994, is mostly just missing in action.").

122. Herz, *supra* note 3, at 141 (discussing Van Alstyne, *supra* note 10).

123. Van Alstyne, *supra* note 10, at 1255.

124. Bogus, *supra* note 11, at 18-20.

125. *Id.* at 19. Others have noted that Tribe's formulation, seeking to fulfill a purpose that would satisfy populists and republicans and federalists, is too vague to be useful. *See id.*

126. *Id.* at 15-18 (criticizing their theses).

Following the school shootings in Littleton, Colorado in April of 1999, Tribe and Amar seemed to have had second thoughts about the Second Amendment — or at least about the political ramifications of their work. Amar published an article in the *New Republic*, and Amar and Tribe together wrote an op-ed piece for the *New York Times*.¹²⁷ The theme of both articles was that “no right is absolute, so (whatever the Second Amendment may mean) ‘reasonable’ and ‘[r]ealistic’ gun controls are constitutionally permissible.”¹²⁸

As it turned out, at the end of the century the scholarly debate was just beginning to heat up. Eugene Volokh of the University of California (Los Angeles) wrote *The Commonplace Second Amendment*,¹²⁹ in which he dissected the amendments clauses into “purpose” and “operative” clauses, and concluded that we should give primacy to the latter — i.e., the right of the citizen to own and bear weapons.¹³⁰ In response, David Williams of Indiana countered with *The Unitary Second Amendment*, in which, although he argued for reading the Amendment as “a unitary whole,” he nevertheless characterized it as “outdated” and “meaningless” in today’s world.¹³¹ In a rejoinder, *The Amazing Vanishing Second Amendment*, Volokh engaged in another torturous manipulation of logic and language to conclude once again that his interpretive technique was superior.¹³²

The spate of revisionist scholarship finding an individual right did not go unchallenged. Indeed, if the effectiveness of a pro-gun control scholarly analysis can be measured by the response to it, one of the most provocative law review articles of recent vintage was *Gun Crazy* by Andrew D. Herz. Professor Herz noted two differing interpretations of the Second Amendment — what he called the “Operative and Fabricated Meanings.” The gun lobby’s view infers a virtually absolute right for all law-abiding citizens to possess firearms by focusing almost exclusively on the second clause, that “the right of the people to keep and bear Arms shall not be infringed.” Those adopting this position clearly emphasize what were allegedly the personal attitudes of the Founders — statements in favor of private firearm ownership for various purposes but “especially for the purpose of arming the citizenry as a precautionary counterweight against potentially tyrannical government.”¹³³

127. See Bogus, *supra* note 11, at 20.

128. *Id.*

129. Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998).

130. *Id.* at 807.

131. David C. Williams, *Response: The Unitary Second Amendment*, 73 N.Y.U. L. REV. 822, 826 (1998).

132. See Eugene Volokh, *Rejoinder: The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. REV. 831 (1998).

133. Herz, *supra* note 3, at 63-67.

As we have seen, proponents of a more limited reading of the Second Amendment contend that the right to bear arms was established only to preserve a well-regulated militia — that is, a force drawn from a specified segment of the population, rather than a collection of all armed and independent citizens, and organized, trained, and disciplined by the government. The broad individual-right view leans heavily on little more than various statements by colonial leaders.¹³⁴ As Herz pointed out:

The ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. The gun lobby's broad-individual-right view falls apart in our time. The passage of two centuries has brought wholesale changes in the composition of the well-regulated militia, and in the role of firearms in American society.¹³⁵

Herz eschewed the academic voice in speaking the plain language understandable by laymen and lawyers alike. According to Herz, "[t]he Second Amendment was designed to keep alive the militia." The gun lobby tells a "constitutional fish story . . . swallowed by the public, and rarely challenged by politicians, the media, or legal scholars." "The constitutional barrier constructed by the gun lobby, the marketing of guns and their images, and the doctrinal inflexibility of firearms fundamentalism have been significant factors contributing to America's unparalleled level of gun violence."¹³⁶ He quoted Justice William O. Douglas: "A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment Our decisions belie that argument, for the Second Amendment, as noted, was designed to keep alive the militia."¹³⁷

In concluding that "[t]he second most dangerous consumer product on the market is also one of the least regulated . . . [enabling] America [to] become the runaway world leader in gun violence. . . ."¹³⁸ Herz also put some of the blame on legal scholars themselves — for dereliction of responsibility in both failing to speak out and failing to speak the truth. As Professor Levinson has said: "To put

134. *Id.* at 65-66. ("The passage of two centuries has brought wholesale changes in the composition of the well-regulated militia, and in the role of firearms in American society.")

135. *Id.* at 67.

136. *See id.* at 57, 61, 112.

137. *Adams v. Williams*, 407 U.S. 143, 150-51 (1972) (Douglas, J., dissenting). Justice Douglas, dissenting in *Adams v. Williams* and citing *Miller*, opined that "there is no reason why all pistols should not be barred to everyone except the police." *Id.* at 150.

138. Herz, *supra* note 3, at 61, 58.

it mildly, the Second Amendment is not at the forefront of constitutional discussion. . . .¹³⁹ The Second Amendment is barely discussed in Constitutional Law classes, or in the leading texts or casebooks.¹⁴⁰

Some have suggested that this silence is due to the very fact that the courts have so clearly rejected the individual-right view, and that the issue is closed until and unless it is revisited by the Supreme Court. On the other hand, as Herz points out, “the stakes of the political battle, and the tone of the spitting match that passes for a debate on gun control, are as high and as heated as one could find.”¹⁴¹

Suffice it to say that *Gun Crazy* generated an almost immediate reaction from the individual-rights lobby. Among the first to respond were Randy E. Barnett and Don B. Kates, longtime members and supporters of the activities of the National Rifle Association. In *Under Fire: The New Consensus on the Second Amendment*,¹⁴² they retorted with particular vehemence — characterizing the great majority of legal scholars as supporters of the individual-rights point of view:

In 1981 Northwestern University law professor Daniel D. Polsby ridiculed the individual rights view of the Amendment as “a lot of horsedung.” But as of 1994, having acquainted himself with the rather substantial literature of the intervening years, Polsby commented: Almost all of the qualified historians and constitutional-law scholars who have studied the subject [concur]. The overwhelming weight of authority affirms that the Second Amendment establishes an *individual* right to bear arms, which is not dependent upon joining something like the National Guard. It goes without saying that like all constitutional rights, the right to keep and bear arms

139. Levinson, *supra* note 24, at 639.

140. Herz provides an interesting statistical analysis of Second Amendment scholarship in which:

The Second Amendment has only a slightly higher profile within the pages of the nearly 650 law reviews and journals listed in the Index of Legal Periodicals. At the beginning of the 1993-94 academic year, the AALS-member law schools employed 1368 self-described constitutional law professors. Of that group, only nine have ever written a law review article focusing on the Second Amendment. Between January 1973 and June 1994, law reviews published only fifty-seven articles with a significant Second Amendment focus, according to the ILP. Of those fifty-seven articles, leading gun-rights litigators and lobbyists produced at least twenty-six, or nearly half. Not content to rely solely on its own lawyers and activists, the gun lobby is also working hard to flood the law reviews with friendly scholarship from sympathetic law professors and promising law students.

Herz, *supra* note 3, at 137-38.

141. *Id.* at 139.

142. Barnett & Kates, *supra* note 10, at 1139.

is subject to reasonable regulation consistent with its purposes.¹⁴³

To Barnett and Kates, the “most plausible” interpretation of *Miller* is to recognize the Court’s implicit support of individual rights, particularly insofar as its reference to the term *militia*.¹⁴⁴

[T]he history and legislation of [the] Colonies and [the] States . . . show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense . . . [a] body of citizens enrolled for military discipline . . . that ordinarily when called for service . . . were expected to appear bearing arms *supplied by themselves* and of the kind in common use at the time.¹⁴⁵

In addition, said Barnett and Kates, “*Gun Crazy* fails to mention, much less address, the general agreement among those scholars who have addressed the issue that the Privileges or Immunities Clause of the Fourteenth Amendment was specifically intended to incorporate the personal right to arms.”¹⁴⁶

While *Miller* remains the only case in which the Supreme Court specifically construed the Second Amendment, various commentators have pointed to *dicta* in earlier and later cases where the Court mentioned in passing the right to bear arms. The earliest was Chief Justice Taney’s infamous opinion in *Dred Scott*,¹⁴⁷ in which he reasoned that to “hold that blacks could be citizens would involve accepting that they enjoyed all the rights of citizens: ‘the full liberty of speech . . . and to keep and carry arms wherever they went.’”¹⁴⁸

According to individual rights commentators, Taney’s opinion assumed that at that time all white citizens enjoyed the guarantee of an individual right to keep and carry arms, making no reference to militia service, and that his comments represented his generation’s universal understanding.¹⁴⁹

143. *Id.* at 1141; *see also* Spitzer, *supra* note 116, at 379 (noting that gun-rights groups have a vested interest in promoting academic writing to legitimize their political agendas). Academics for the Second Amendment (ASA) received \$6,000 from the NRA, which also offered a first prize of \$25,000 for its 1994-95 essay contest titled “Stand Up for the Second Amendment.” Spitzer, *supra* note 116, at 379. It is all “part of a concerted campaign to persuade the courts . . . to reject what has long been a judicial consensus.” *See id.* at 380. The first fruits of this effort may be seen in the 1999 Texas case of *United States v. Emerson*. *See supra* note 11 and accompanying text.

144. Barnett & Kates, *supra* note 10, at 1154-55.

145. *Id.* at 1155 (quoting *U.S. v. Miller*, 307 U.S. 174, 179 (1939)).

146. *Id.* at 1156.

147. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

148. Barnett & Kates, *supra* note 10, at 1158 (quoting *Dred Scott*, 60 U.S. at 417).

149. *Id.* at 1158-59 (“Though abolitionist legal theorists disagreed with Taney on virtually everything else, they agreed with him on this.”).

Similarly, scholars who advocate the individual citizen's right to bear arms cite the relatively recent case of *Planned Parenthood v. Casey*,¹⁵⁰ which reaffirmed the right of privacy as one to be protected by the states.¹⁵¹ In that case, Justices Kennedy, O'Connor, and Souter quoted with approval Justice Harlan's statement that "the 'full scope . . . of liberty' is not limited to 'the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures.'"¹⁵² Thereby, according to the anti-gun control forces, conveying the view that "such an unenumerated right had the same constitutional status as all the enumerated rights in this list."¹⁵³

The blunderbuss attacks on *Gun Crazy* certainly did not go unanswered. Most notable among the more recent defenders of the collective-right theorists has been Carl T. Bogus of the Roger Williams University School of Law. In *The Hidden History of the Second Amendment*,¹⁵⁴ Professor Bogus offers a thorough and compelling history behind the Amendment, particularly the motivations of its principal drafter, James Madison, which yields ample evidence that the Framers did not embrace the notion that every citizen should have an individual right to bear arms.

Subsequently, in a symposium issue of the *Chicago-Kent Law Review*, Bogus presented a comprehensive catalogue of the research data on interpretation of the Second Amendment. From the time law review articles first began to be indexed in 1887 until 1960, all law review articles dealing with the Second Amendment endorsed the collective right model. Things changed, however, "[f]rom 1970 to 1989, twenty-five articles adhering to the collective right view were published . . . but so were twenty-seven articles endorsing the individual right model."¹⁵⁵ At least sixteen of these individual right articles (almost sixty percent), however, were written by lawyers who had been directly employed by or represented the NRA or other gun rights organizations, although they did not always so identify themselves.¹⁵⁶

150. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992).

151. *Id.* at 834.

152. *See* Barnett & Kates, *supra* note 10, at 1159.

153. *Id.* at 1159. "All these rights retained by the people are considered by the Court to be on par. No mention of a militia-centric qualification is made." *Id.* at 1159-60.

154. Bogus, *supra* note 38, at 309.

155. *See id.* at 8.

156. *See* Bogus, *supra* note 11, at 3-5. To date, Halbrook and Kates have written or edited at least eight books, twenty-three law review articles, and numerous op-ed pieces about the right to bear arms and the evils of gun control. *See supra* note 113 and accompanying text.

1. History as Construed by Law Professors

In 1994, Harvard University Press published *To Keep and Bear Arms: The Origins of an Anglo-American Right*¹⁵⁷ by Joyce Lee Malcolm, a source often used by individual-rights theorists to bolster their case.¹⁵⁸ But, as historian Michael Bellesiles has found, actual firearms ownership in America has been greatly exaggerated and mythologized.¹⁵⁹ Moreover, the definition of the citizen militias at the center of this debate was always limited to men roughly between the ages of eighteen and forty-five. Legal protection for personal self-defense arises from the British common law tradition and modern criminal law, not from constitutional law. The Constitution clearly and forcefully disdains anything resembling a right of revolution, as it gives Congress the powers “to provide for calling forth the Militia to execute the Laws of the Union.”¹⁶⁰

Robert J. Spitzer of the State University of New York, in *Lost and Found: Researching the Second Amendment*, likewise finds that the meaning of the Second Amendment is relatively clear — reiterating what former Chief Justice Warren Burger wrote: “[The Second Amendment] must be read as though the word ‘because’ was the opening word.”¹⁶¹ He too points out that debate during the First Congress over the language that eventually became the Second Amendment dealt entirely with several narrow military questions — and that some legal writers, publishing primarily in law journals, have sought to spin out other interpretations of the Second Amendment—regardless of history and jurisprudence.¹⁶²

Professor Spitzer echoes the sentiment that such claims reflect a shameless attempt to give legitimacy to a claim that cannot stand on its merits. The primary argument of the individualists is made by “plucking key phrases from court cases and colonial or federal debate that refer to a right of Americans to own and carry guns.”¹⁶³ Then comes a “unilateral declaration that the individualist view represents a new academic consensus . . . roughly akin to a participant in a contest who suddenly stops competing, declares victory, and leaves in the hope that the declaration may become fact.”¹⁶⁴

157. JOYCE LEE MALCOLM, *TO KEEP & BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994).

158. Justice Antonin Scalia described the book as “excellent.” Bogus, *supra* note 11, at 11.

159. See Bellesiles, *supra* note 16, at 567.

160. U.S. CONST. art. I, § 8, cl. 15.

161. Spitzer, *supra* note 116, at 350.

162. *Id.* at 350-52.

163. *Id.* at 356.

164. *Id.* at 356. Spitzer argues that the idea that vigilantism and armed insurrection are as constitutionally sanctioned as voting is an absurd proposition, ignoring “a considerable portion of the body of writing on the Second Amendment.” *Id.* at 362, 381-82.

The Second Amendment is based partly on the British 1688 Bill of Rights, and is related to the right-to-bear-arms provisions in Framing-era state constitutions. The revolutionary focus of the Second Amendment is founded on the idea that the right to bear arms exists to protect the American populace from governmental tyranny.¹⁶⁵ The individualist vision of the Second Amendment, as derived from a Reconstruction-Era re-interpretation of the Amendment, has by now become predominant in the minds of governments and policy-makers. The right to bear arms as a necessity of revolution, like the ability of the people to practice that right, is a distant memory.¹⁶⁶

One of the most thoroughgoing historical examinations by a law professor is Michael Dorf's *What Does the Second Amendment Mean Today?*¹⁶⁷ The relevance of the opening (purpose) clause to its meaning, says Dorf, "would seem so obvious as not to need justifying were it not for academic efforts to minimize its weight."¹⁶⁸

Some non-lawyer historians labor under the misimpression that Constitutional interpretation tries to recapture nothing more than "original meaning." Dorf points an accusing finger at Malcolm: If we disagree with the Founding Fathers' views as she understands them, he says, we have misinterpreted history; the only legitimate path to change that history is by way of Constitutional amendment. For example, the Second Amendment neither prevents the establishment or maintenance of a federal standing army, nor does it insulate state militias from federal control. Why, then, did anti-federalists and others who disdained standing armies settle for the Second Amendment? Even professional historians specializing in the period do not have a definitive answer to this question.¹⁶⁹

2. The Constitution in Evolution

Is the Second Amendment an anachronism? The argument made by various commentators over the past several years is that the Amendment was drafted to serve a particular political purpose that has long since dried up, a theory that would render the question whether citizens have the right to bear arms constitutionally irrelevant.¹⁷⁰

165. See Brent J. McIntosh, *The Revolutionary Second Amendment*, 51 ALA. L. REV. 673, 674 (2000).

166. See *id.* at 674-79.

167. Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI-KENT L. REV. 291 (2000).

168. *Id.* at 301.

169. *Id.* at 309-312. "[T]he armed resistance Madison contemplates in *The Federalist No. 46* quite clearly occurs . . . [among] the states—not by self-styled patriots." *Id.* The Founders' conception of armed resistance, as well as their concern about standing armies, "is probably best understood . . . as part of a struggle between the states and the federal government rather than between individuals and . . . the government." *Id.*

170. *Id.* at 302.

It has often been said that the Constitution is a living document, one that was purposefully designed to be read and interpreted according to the tenor of the times.¹⁷¹ It is not the work of men who could foresee all future events and choose words that would fit them. Its interpretation calls for strong degrees of contemporary wisdom and flexibility.¹⁷²

The task of applying the Founders' understanding of weaponry to a world they could not have anticipated — such as chemical and biological and nuclear armaments — is obviously subjective. This is not, of course, unique to the Second Amendment. The Supreme Court, for example, had no trouble understanding that freedom of the press should apply to radio and televisions as well as to newspapers. Similarly, advanced forms of surveillance call for new interpretations of the Fourth Amendment.¹⁷³

In colonial times, “[p]ossession of firearms was not understood as a collective right but rather as a collective duty.”¹⁷⁴ Said Judge Robert Bork, concurring in *Ollman v. Evans*: “[I]t is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know.”¹⁷⁵

In the eighteenth century, the militia's primary responsibility was internal security, as opposed to public defense.¹⁷⁶ With the Civil War emerged organized police forces and state militias. The right to bear arms was largely the duty of a responsible citizenry to participate in the collective self-defense of the community. Today that duty is performed by the government in its maintenance of a professional police force.¹⁷⁷ When self-styled patriots objected to what they saw as acts of tyranny in the Whiskey Rebellion, they took up arms — what they perceived as their Second Amendment right — and the rebellion was put down by the militias.¹⁷⁸

As a democracy matures, the risk that a tyrant will seize the reins of government diminishes, as does the need for a “well-regulated militia” to quell tyranny. As one commentator stated:

The most common argument for most forms of gun control — from laws prohibiting the carrying of concealed weapons, to those requiring trigger locks, even to near-complete bans on possession — is that firearms possession does not make for greater safety but actually increases the risk of injury or

171. *United States v. Silberman*, 732 F. Supp. 1057, 1061 (S.D. Cal. 1990).

172. Dorf, *supra* note 167, at 340-41.

173. *Id.* at 318.

174. Bellesiles, *supra* note 16, at 573-74.

175. 750 F.2d 970, 995 (D.C. Cir. 1984).

176. Bellesiles, *supra* note 16, at 581.

177. Dorf, *supra* note 167, at 323.

178. *Id.* at 320. Prior to the Civil War, it may have still been thought “that state-organized armed resistance remained available as the ultimate check on federal power. That bloody conflagration taught otherwise.” *Id.* at 321.

death. A (hand)gun obtained for defense against felons has a greater chance, gun control advocates say, of being used opportunistically against a family member or discharging accidentally. Others contest these claims. They argue . . . firearm ownership reduces . . . violent crime because criminals are deterred by the risk to themselves if they attack armed law-abiding citizens.¹⁷⁹

D. *The Plain Meaning of the Second Amendment*

Simply put, the plain meaning of the Second Amendment should be clear to a reasonably literate reader of the English language—as it has been to the Supreme Court and virtually all other courts—which have concluded that the Amendment does not confer upon every citizen the right to own a firearm.¹⁸⁰

Standard rules of constitutional interpretation do not support the arguments of those favoring individual rights.¹⁸¹ A more plausible reading of the Second Amendment is that it was intended to prevent the federal government from abolishing state militias.¹⁸² This conclusion does not require the kind of tortured exegesis of the Second Amendment that some scholars feel necessary.¹⁸³

Many gun-rights activists dismiss the introductory clause as nothing more than a declaration of political philosophy, but the plain meaning of that language suggests a narrow focus on the militia. As the late Justice Brennan asked, “The ultimate question must be, what do the words of the text mean in our time?”¹⁸⁴

Recognizing that interpretation of words depends largely on the predilections of the interpreter, cannot (and should not) a line be drawn between generally accepted definitions and contextual meanings and speculative conjecture?¹⁸⁵ On its face, the language of the Second Amendment should not lend itself to ambiguity, especially in light of its historical context. Properly punctuated, the sentence should read as follows: A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms

179. *Id.* at 332.

180. *See infra* notes 220-25; *see also supra* Part III.A-C.

181. *See generally* Dorf, *supra* note 167 (arguing both the individual and collective rights interpretation of the Second Amendment).

182. *See id.* at 294.

183. *See generally id.* at 291. Professor Dorf’s historical analysis appears unimpeachable, and his carefully organized and meticulously rationalized analysis yields the same conclusion — that the collective-right theory is the correct one — as the much simpler interpretive approach advocated here. *Id.* But his study, like many on both sides of the question, runs the risk of missing the forest for the trees: in being so exhaustively thorough it is overdone; its sheer weight may be its undoing.

184. Herz, *supra* note 3, at 65-66.

185. *See infra* Part V.

shall not be infringed.¹⁸⁶ The first clause thus becomes clearly prefatory, put there to explain the primary purpose of the Second Amendment as set out in the second clause. The two clauses are intentionally and inextricably related. The reason that the people must have the right to keep and bear arms is to enable a well-regulated militia.

It is the excess of commas that cause confusion, but even with them the meaning of the sentence is not substantially changed. "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."¹⁸⁷ In grammatical terminology, although there is no need for the first comma (after "Militia"), its presence merely makes the second clause ("being necessary to the security of a free State") restrictive — that is, it explains that a well-regulated militia is needed for security. If that comma were removed, the first clause would become explanatory apposition of the second, but all of it would still carry a similar meaning. Either way, the first clause(s) are intended to represent the reason for the second clause(s).

The comma between "Arms" and "shall" is, as a matter of style and clarity, confusing and superfluous. The only comma necessary to understanding the sentence is the one that follows the word "State."

Gun advocates who also fancy themselves as grammarians have particular difficulty with this analysis. G. Gordon Liddy, for example, offers an explanation that is clearly wrong. Liddy claims that those who would link the two clauses of the Second Amendment simply do not know how to parse an English sentence; the first clause is not prefatory, he says, but is a present participle — standing alone as a separate thought.¹⁸⁸ Liddy thus fails to understand several of the more esoteric rules of English structure: That a present participle followed by a comma is directly related to the clause that follows, whether or not it is restrictive or nonrestrictive.¹⁸⁹

IV. LAWSUITS, LOBBIES, AND LEGISLATION

*Outlaw Guns and Only Outlaws Will Have Guns.*¹⁹⁰

186. Cf. U.S. CONST. amend. II.

187. U.S. CONST. amend. II.

188. Liddy is the host of the *G. Gordon Liddy Show*, a conservative radio program. Others have likewise confused the plain meaning of the Amendment (as advocated in this Article) by way of tortured grammatical acrobatics. See, e.g., Ronald S. Resnick, *Private Arms as the Palladium of Liberty: The Meaning of The Second Amendment*, 77 U. DET. MERCY L. REV. 1, 1-12 (1999).

189. See JOHN C. HODGES ET AL., *THE WRITER'S HARBORACE HANDBOOK* 427, 641-42, 782 (Harcourt Coll. 2001).

190. The argument suggested by this slogan has been a staple of NRA lobbying for many years. Gun-rights advocates contend that firearm regulation focusing on law-abiding citizens who use guns for legal purposes, rather than on criminals who would ignore any restrictive gun laws, is misplaced. See generally J. Warren Cassidy, *The Case for Firearms. . . The NRA's Executive Vice President Says Guns Will Keep America Free*, TIME, Jan. 29, 1990, at 22.

A. *Lawsuits*

Although many lawsuits have been dismissed for failure to state a claim on which relief can be granted, Ohio's Supreme Court agreed to review Cincinnati's appeal against gun manufacturer Beretta.¹⁹¹

In 1998, the city of New Orleans became the first municipality to file a lawsuit against gun manufacturers. In its suit against fifteen of them, the city sought to recover the costs of "police protection, emergency services, police pensions, medical care and lost tax revenue related to handgun violence."¹⁹² The city's primary arguments were that guns are unreasonably dangerous because they do not have safety devices to prevent unauthorized use, and that gun manufacturers failed to warn consumers about the danger of children obtaining a gun that could still have a round of ammunition in it even after the magazine had been removed.¹⁹³

Similar suits ensued, from the cities of Atlanta, Bridgeport (Conn.), Chicago, and Miami/Dade County (Fla.). Using the alternate theory of "public nuisance," Chicago alleged that the gun manufacturers "knowingly oversupply or saturate the market with their products in areas where gun control laws are less restrictive, knowing that persons will illegally bring them into the jurisdictions where they are illegal" and that "many of the firearms the defendants manufacture are designed specifically for street fighting and not for self-protection or valid recreational purposes."¹⁹⁴

In the Bridgeport and Miami-Dade suits, the cities sued for compensatory damages under the theories of design defects, and inadequate warnings, and/or public nuisance. Judges dismissed the lawsuits in both cases.¹⁹⁵

In the past, plaintiffs have relied on two theories of strict liability when suing gun manufactures: the risk-utility test and the "abnormally dangerous activity" doctrine.¹⁹⁶ Using the risk-utility approach, the plaintiff must prove that the risks of the product outweigh its social utility.¹⁹⁷ Under the "abnormally dangerous activity" doctrine, the plaintiff would have to prove that "one who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exer-

191. Carolyn Magnuson, *Cities, Gun Makers Keep Firing*, 37 TRIAL 17 (Mar. 2001); see also *Cincinnati v. Beretta U.S.A. Corp.*, 740 N.E.2d 1111 (Ohio 2001).

192. Doug Morgan, *What in the Wide, Wide World of Torts is Going On? First Tobacco, Now Guns: An Examination of Hamilton v. Accu-tek and the Cities' Lawsuits Against the Gun Industry*, 69 Miss. L.J. 521, 529 (1999).

193. *Id.* at 528-30.

194. *Id.* at 532.

195. *Ganim v. Smith & Wesson Corp.*, No. CV990153198S, 1999 WL 1241909 (Conn. Super. Ct. Dec. 10, 1999); *Penelas v. Arms Tech., Inc.*, No. 99-1941 CA-06, 1999 WL 1204353 (Fla. Cir. Ct. Dec. 13, 1999).

196. Morgan, *supra* note 191, at 537.

197. *Id.* at 537-38.

cised the utmost care to prevent the harm.”¹⁹⁸ Courts have rejected this argument because “the doctrine encompasses activity that is dangerous in and of itself, and the manufacturing of handguns is a matter of common usage.”¹⁹⁹

In 1985, a Maryland court did impose strict liability on the manufacturer of an inexpensive type of handgun known as the “Saturday Night Special” — finding that manufacturers of such pistols could be held strictly liable “to innocent persons who suffer gunshot injuries from the criminal use of their products.”²⁰⁰ Subsequently, however, the Maryland legislature superceded that decision by prohibiting the imposition of strict liability upon gun manufacturers for damages resulting from the criminal use of a firearm by a third person.²⁰¹

B. Lobbies

Former Chief Justice Warren Burger’s view of the gun lobby’s Second Amendment distortions — which he angrily described as a “fraud on the American public”²⁰² — has been lost in a sea of gun-rights propaganda.

Although over the years Congress has placed some limitations on the receipt, possession and transportation of firearms and proposals for national registration or prohibition of firearms,²⁰³ the National Rifle Association has been virtually omnipotent in pushing federal and state legislation that diminish restrictions on gun ownership. During the last decade alone, the NRA poured more than \$15 million into the campaigns of congressional candidates and political parties.²⁰⁴ In 1999, the U.S. House of Representatives voted to *loosen* restrictions on gun purchases and gun safety, handing the NRA a well-bought victory.²⁰⁵ In 2001, there were only two anti-gun bills introduced in Congress, and neither passed.²⁰⁶

198. *Id.* at 541 (quoting RESTATEMENT (SECOND) OF TORTS § 519 (1976)).

199. *Id.* at 542.

200. *Kelley v. R.G. Indus. Inc.*, 304 Md. 124, 157, 497 A.2d 1143, 1159 (1985).

201. MD. CODE ANN. art. 27 § 36-1(h) (2002).

202. *The MacNeil/Lehrer News Hour: First Freedoms* (PBS television broadcast, Dec. 16, 1991).

203. Especially since 1971, when the National Commission on Reform of Federal Criminal Laws was established.

204. Scott Harshbarger, *ElectionEar Spotlight on the NRA: Power & Influence Through Money*, 1 COMMON CAUSE 4, May 12, 2000, available at <http://www.commoncause.org/campaign2000/051200.htm>. (last visited May 15, 2003).

205. Eric Pianin & Juliet Eilperin, *House Votes to Weaken Senate Gun Show Checks*, WASH. POST, June 18, 1999, at A1.

206. H.R. 891, 107th Cong. (2001); H.R. 2773, 107th Cong. (2001). The No Guns for Violent Perpetrators Act, introduced by Rep. Dennis Moore on March 6, 2001, and The Accidental Shooting Prevention Act, introduced by Rep. James R. Langevin on August 3, 2001; see also Dick Snider, *Guns ‘n Moses: The NRA’s Disarming Deception*, TOPEKA CAPITAL - JOURNAL, May 23,

The NRA's power comes in large measure from convincing its four million members that any gun control, no matter how reasonable, is the first step down a slippery slope at the bottom of which is the establishment of a police state that will confiscate all private guns.²⁰⁷ In so doing the organization ignores historical facts:

1. There hasn't been any governmental seizure of privately-owned weapons since colonial times.
2. The Founding Fathers viewed such regulation as both legal and necessary.
3. There was ample regulatory legislation governing the storage of arms and gunpowder.
4. A large portion of the adult white, male population of Pennsylvania, by some estimates as much as forty percent, was considered unqualified to own a firearm.
5. There were never enough private guns to confront a militia; nor was there ever a militia force that included all able-bodied men. The Continental Army, not any militia, won the Revolutionary War.²⁰⁸

In 1993, the NRA created a group known as Academics for the Second Amendment, and began distributing large sums of money to scholars who shared its views of the Second Amendment. In 1994, it launched an annual "Stand Up for the Second Amendment" essay contest, offering a first prize of \$25,000 for publication of law review pieces supporting the rights of gun owners.²⁰⁹

The gun lobby's misinformation campaign distorts the text of the Constitution itself. Official NRA products, from belt buckles to beer mugs, simply eliminate the Second Amendment's troublesome introductory clause, and quoting only what it wants to advertise: "The right of the people to keep and bear arms shall not be infringed."²¹⁰ In so doing, the gun lobby asserts that the Second Amendment is (or should be) an all-purpose barrier to virtually all gun control proposals. This Constitutional deception has been repeated so often that the public is largely ignorant of what the Second Amendment says. A 1991 *Los Angeles Times* poll found that although only thirty-nine percent of those surveyed felt that the Constitution should protect the right of all individuals to own guns, sixty-two percent believed that the Bill of Rights explicitly granted such a right.²¹¹

2001, available at http://www.cjonline.com/stories/052301/opi_snider.shtml.

207. Snider, *supra* note 206.

208. *Id.*

209. Bogus, *supra* note 11, at 13-14. In 1991 and 1992, the N.R.A. gave \$38,569 to Halbrook alone. *Id.*; see also Halbrook, *supra* note 23.

210. Herz, *supra* note 3, at 94.

211. *Id.* at 107-08 ("Other surveys have documented a similar ignorance of the Second Amendment's narrow judicial interpretation.").

Gun-rights advocates employ three basic arguments against virtually all gun-control proposals: “(1) *Guns Don’t Kill, People Do*; (2) *Outlaw Guns and Only Outlaws Will Have Guns*; and (3) *There are already 20,000 state and national firearms regulations, and those places with the strictest gun control have the highest crime rates.*”²¹²

The NRA’s endless mantra that “guns don’t kill people — people kill people” ignores the many studies indicating that people without easy access to guns kill far fewer people than those with easy access. Research indicates that an assault on friends and family involving a gun is twelve times more deadly than one without a gun. Some killers seek out lethal weapons after deciding to kill; however, more often gun-inflicted deaths result from impromptu arguments and fights where the killer already has access to a gun. Thus, it seems clear that “these deaths would largely be replaced by non-fatal injuries if a gun were not handy.”²¹³

Thus a far more appropriate generality would be that “[p]eople without guns injure people, guns kill them.”²¹⁴

“Outlaw Guns and Only Outlaws Will Have Guns” is another facile deception. The NRA fervently opposes even background checks for potential gun buyers.²¹⁵ Under current law, for example, private unlicensed dealers — those who sell their weapons at gun shows and flea markets — are not required to perform background checks, and often sell their firearms to minors.²¹⁶ The boys who committed massacre at Columbine High School in Littleton, Colorado had their weapons purchased legally at a gun show.²¹⁷

The NRA claims that few of the federal gun-control statutes already on the books are being effectively enforced — that there has been only one prosecution under the federal law. The United States Sentencing Commission, however, noted that 7.6% of all federal sentences imposed were for firearms violations, totaling 4,489.²¹⁸ This is not to mention the numerous state prosecutions as well.²¹⁹ Similarly misleading is the claim that jurisdictions with the strictest gun

212. *Id.* at 83.

213. *Id.* at 82 n.107.

214. Susan P. Baker, *Without Guns, Do People Kill People?*, 75 AM. J. PUB. HEALTH 587, 588 (1985) (“To put it more plainly, as a police officer remarked to a journalist: ‘We’ve yet to see a drive-by stabbing.’”); see also Editorial, *Hand-guns Kill More than They Protect*, CHICAGO TRIBUNE, Sept. 14, 1992, at 16.

215. Dan Eggen, *Domestic Abusers Bought Guns; Background Checks for Thousands Not Completed*, GAO SAYS, WASH. POST, June 26, 2002.

216. Andy Kravetz, *Organization Says Newspapers Should Police Themselves on Firearm Sales*, PEORIA JOURNAL STAR, Dec. 5, 2002.

217. CBS News: *Evening News with Dan Rather: Gun Shows Selling Machine Gun Parts* (CBS Broadcast, Nov. 12, 2000).

218. U.S. Sentencing Commission, *Distribution of Sentenced Guideline Offenders by Select Primary Offense Category*, available at www.ussc.gov/JUDPACK/2001/4c01.pdf (last visited May 15, 2003).

219. *Id.*

controls have the highest crime rates. A more plausible explanation is that jurisdictions with the highest crime rates feel the need to enact stricter gun controls.

The media and legal scholars owe their readers the full story in context. Stories about gun-control inevitably refer to the battles between the gun-control advocates and those who trumpet the Constitution's hallowed "right" to bear arms. There is virtually no coverage in the press of the almost universally narrow judicial interpretation of the Second Amendment.²²⁰

Elected officials, meanwhile, unashamedly pander to the gun lobby. U.S. Attorney General John Ashcroft is a prime example. During his confirmation hearing he had promised that he would defend the nation's gun laws. But after taking office, he sent a letter to the NRA for distribution at its annual convention, in which he touted his pro-gun views on the Second Amendment.²²¹

Perhaps, then, U.S. actions regarding the recent United Nations conference to limit small-arms trafficking should not have come as any surprise. The conference was intended to result in a non-binding action plan against trafficking in small arms.²²² The proposed international accord, which deals with the illegal sale of military weapons across national borders, would do nothing to restrict the sale of guns within the United States.²²³ It was therefore little more than a gratuitous and blatant appeal to the National Rifle Association for the U.S. representative at the conference to invoke the Second Amendment to justify the administration's objections to the United Nations report. The real reason for the U.S. position is that America is the world's largest exporter of small arms (accounting for about \$1.3 billion of the \$4 billion total sold worldwide), and the major small-arms producers and buyers oppose it.²²⁴

On the other hand, gun-control advocates would like to license and register all handguns, eliminate the gun-show loophole, and assure responsibility within the gun-manufacturing industry. Current federal law allows anyone who wants to buy a gun to do so at one of the 4,500

220. Herz, *supra* note 3, at 57-58.

221. See Neal Knox, *Ashcroft Declares for Second Amendment* (May 20, 2001), available at www.ournation.org/gun_news.htm (reprinting letter from Attorney General John Ashcroft to NRA convention).

222. CBSNEWS.COM, *U.S. Sticks To Its Guns* (July 10, 2001), available at www.cbsnews.com/stories/2001/07/09/main300402.html.

223. Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, U.N. Doc. A/CONF. 192/15 (2001), available at <http://disarmament.un.org/cab/smallarms>.

224. *U.S. Panders to Gun Lobby on Small-Arms Treaty*, NEWSDAY, July 11, 2001, at A26. The U.N. had "hoped the meeting might produce serious and binding restrictions on the international sale of assault rifles," which "have fueled 46 of the world's 49 largest conflicts since 1990. . . . Such arms are killing an estimated 200,000 people a year in armed conflicts." *Free Fire at the United Nations*, WASH. POST, July 10, 2001, at A20.

gun shows held annually — at which they can legally purchase a firearm without any background check, waiting period, or registration requirement.²²⁵ The proposed licensing scheme would be similar to that required of drivers before allowing them to use cars. The waiting period would give police time to check local criminal records, and allow people to “cool off” (diminishing impulse suicides and other rash acts of violence).²²⁶

Gun-control advocates would also like to make gun manufacturers liable for any damage resulting from negligent design and marketing — similar to what has been done in the automobile and tobacco industries. Virtually every other consumer product in the country is regulated as well. Handguns are the most notable and lethal exception.

In addition, guns can and should be made child-proof. In 1997, federal legislation was introduced to require child-safety devices on handguns.²²⁷ Some eight gun manufacturers agreed to the proposal, including the nation’s largest gun producer, Smith and Wesson.²²⁸ When Smith and Wesson announced that “child safety locks make sense for its business;” that it wants to manufacture and sell guns differently; that it would like to make guns easier to trace; and that it endorses both safety courses for gun owners and background checks at gun shows, the company received a letter from the NRA stating that the gun makers had been conned by the government.²²⁹

Nor has the NRA allowed gun manufacturers voluntarily to enter into the area of reform. In March 2000, Smith and Wesson, the nation’s largest producer of handguns, entered into an agreement with the federal government in an attempt to ward off potential lawsuits. The agreement provided that gun dealers would begin maintaining “computerized records of every sale and store all their guns . . . in some kind of a vault [and] . . . limit customers to one gun every two

225. Press Release, Americans for Gun Safety (AGS) Foundation, New Report Shows 32 States with Gun Show Loophole are Flooding the Nation with Crime Guns (April 19, 2001), available at www.w3.agsfoundation.com/press_041901.html.

226. Letter from Sarah Brady, Registered in Your Name: 2000 Referendum on Guns and Violence in the United States (on file with author); see *Waiting Periods for Handgun Purchases*, Americans for Gun Safety Foundation, at http://w3.agsfoundation.com/s_waitl.html.

227. Press Release, Handgun Control, Inc., *Jim and Sarah Brady Call for Child Safety Locks to be Sold With Every Handgun* (Mar. 12, 1999) available at www.bradycampaign.org/press/release.asp?Record=59.

228. See, e.g., Pat Griffith, *Clinton Also Hail Eight Firms Making New Handgun Locks*, PITTSBURGH POST-GAZETTE, October 10, 1997, at A12.

229. ABC News, *A Conspiracy Against Smith & Wesson?*, (Mar. 30, 2000) at <http://abcnews.go.com/sections/us/DailyNews/guns000330.html> (last visited May 15, 2003). Smith & Wesson, the nation’s largest gun manufacturer, recently signed a binding agreement with various jurisdictions in which it agreed to drastically change the way guns are manufactured and distributed. *Id.*

weeks.²³⁰ Not to be deterred, the NRA notified its over three million members of the proposed agreement, and Smith and Wesson was inundated with phone calls and e-mail messages decrying the pact. The bad publicity also led other gun manufacturers, including Glock, to back out of the agreement, leaving Smith and Wesson alone among potential reformers in the industry.²³¹

The Juvenile Justice bill required a seventy two-hour background check for guns sold at gun shows.²³² The NRA argued that gun shows would go out of business if 72-hour checks were required: “[g]un haters are trying to dismantle the Second Amendment.”²³³

C. Legislation

In the wake of gun violence in the schools, various states have tried to enact gun-control legislation aimed at parents and children. In 2001, a bill entitled the “Firearms Safety and Accident Avoidance Program” was proposed in the Maryland General Assembly.²³⁴ The measure, which would have mandated that the State Board of Education establish a “firearms safety and accident avoidance program for students in kindergarten through grade 6,” failed in committee.²³⁵

Other jurisdictions have attempted to control gun violence by holding parents responsible for their children’s offenses. In 1995, the New Jersey legislature debated the Parental Responsibility Bill.²³⁶ How would parental liability affect gun violence by teenagers? The common-law rule is that no one is responsible for the negligent acts of another, however, an exception can be made for a special relationship

230. See Matt Bai, *A Gun Deals’s Fatal Wound*, NEWSWEEK, February 5, 2001, at 30; see also, Michael Powell, *Call to Arms*, WASH. POST, August 6, 2000, at W08.

231. *Id.*

232. William Neikirk, *Democrats, GOP Blame Each Other for Lack of Progress on Gun Control*, CHI. TRIB., May 16, 2000, at 4.

233. The NRA is not always successful. Bart Stupak, a Democratic congressman from Michigan, voted with the NRA from 1992 to 1999. But he opposed the NRA position on the waiting period in the months before the 2000 election. The NRA abandoned Stupak and endorsed his opponent, businessman Chuck Yob. The rift moved into the national spotlight, where the lobby’s hard-nosed tactics were exposed in major newspapers and an ABC News special, *Peter Jennings Reporting: The Gun Fight* (ABC television broadcasts, Oct. 9, 1999). Stupak won re-election by almost 20% in his strongly pro-gun district without a single contribution from the NRA. Roll Call, Nov. 1, 1999. See *Gun Control Wins Across the Nation in Election 2000*, available at <http://www.bradycampaign.org/press/release.asp?Record=39> (last visited Mar. 11, 2003). In May of 2000, the NRA found itself at loggerheads with none other than President Bush. Long regarded as staunch allies, they appeared to differ strongly over a significant piece of gun-control legislation, a ban on semiautomatic assault weapons. See Eric Lichtblau, *Irking N.R.A., Bush Supports the Ban on Assault Weapons*, N.Y. TIMES, May 8, 2003, at A1.

234. H.D. 130, 2001 Leg. Sess. (Md. 2001).

235. *Id.*

236. Mike Dorning, *In Growing Trend, If Child Does Crime, Parents May Do the Time*, CHI. TRIB., Dec. 11, 1995, at 11.

such as that between a parent and a child.²³⁷ States like this theory because they “seek to prompt parents to control their children, to provide a better example for them, and to offer an alternate source of support for their children.”²³⁸

Forms of parental liability can vary from state to state. A New Mexico statute permits a parent to be made a party to any complaint alleging a child’s delinquency.²³⁹ California law allows for parents of delinquent gang members to be held liable for their children’s actions by subjecting the parents to fine and/or imprisonment for failing to properly observe and control their children.²⁴⁰ Other states require that parents attend counseling and provide financial support for their children if they are detained for specific offenses.²⁴¹

Critics of parental responsibility bills argue that such legislation would have a disparate impact on various lower socio-economic groups — including urban families, single-parent families, and children from two-parent homes whose parents both work — and that the legislation would be held unconstitutional in a court challenge. While the concept of holding parents accountable for their children’s actions may sound like a viable alternative, the right of privacy is implicated.²⁴²

Another problem with parental liability legislation is that it assumes that parents have the ability to control their children. Although most states’ legislation attaches parental liability only where the parent “knew or should have known” about the activities of their offspring, this standard cannot possibly encompass every parent/child relationship. There is a general consensus that parents have a diminishing ability to control their children as the children grow older.²⁴³

In 2000, Congress enacted legislation to close a loophole in the Brady Bill,²⁴⁴ which had allowed individuals to purchase guns at gun shows without a background check and without identification.²⁴⁵ On

237. RESTATEMENT (SECOND) OF TORTS §§ 314, 316 (1965) (discussing affirmative duties); *Lanterman v. Wilson*, 277 Md. 364, 371, 354 A.2d 432, 436 (1976).

238. Michelle L. Maute, *New Jersey Takes Aim at Gun Violence by Minors: Parental Criminal Liability*, 26 RUTGERS L.J. 431, 441 (1995).

239. N.M. STAT. ANN. § 32A-2-28(a) (Michie 1999).

240. CAL. PENAL CODE § 272 (West Supp. 1999).

241. Maute, *supra* note 238, at 441-42.

242. *Id.* at 450.

243. *Id.* at 458.

244. 18 U.S.C.A. § 922 (1993). The Brady Bill, or Brady Handgun Violence Prevention Act of 1993, provides for a waiting period before a handgun can be sold by a firearms dealer. Additionally, the Act established the instant criminal background check system, which is used by gun dealers to conduct background check before a sale can be made. *Id.*

245. 18 U.S.C. 9200(t)(1)(B)(ii)(2000). The Bill states:

[A] licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless . . . 3 business days (meaning a day on

the state level, the New Jersey Senate approved a bill requiring child safety locks on all handguns when the locks become “commercially available.”²⁴⁶ Connecticut passed legislation allowing judges to issue warrants for the “seizure of any firearms possessed by a person who poses a risk of imminent personal injury to himself . . . or to other individuals.”²⁴⁷

V. SUMMARY AND CONCLUSION

The blunderbuss proliferation of gun-rights scholarship in recent years has perverted both the historical context and plain meaning of the Second Amendment. This Article has sought to debunk the current spate of such revisionist history, to re-focus upon the lone court decision supporting the individualist point of view, and to expose the pervasive extent and blinding effects of lobbying by the National Rifle Association.

Much of the new scholarship flies in the face of a history of unequivocal holdings by the Supreme Court and lower federal courts supporting a collectivist point of view — that is, that the right to bear arms is conditioned upon the need for security of the (collective) group — as well as the courts’ clear understanding that the Constitution in no way limits states from enacting and imposing their own restrictive gun legislation.

The overwhelming weight of available historical evidence demonstrates that the primary concern of the Founding Fathers was the concept of a militia, as distinguished from a standing federal army, not the right of individual citizens to own firearms. Historical documents provide no clear data that either the colonies or the early states contemplated the need for an individual right.

The documentary evidence from the Constitutional Conventions supports the proposition that the issue of prime concern regarding the right to bear arms was preservation of the state militia. Eight of the original thirteen states — Virginia, Maryland, Delaware, New Hampshire, New York, New Jersey, South Carolina, and Georgia — represented the position that a well-regulated militia is an important function of state security. For them, the idea of an individual right to bear arms was necessary for the security of the individual was never addressed.

which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section.

Id.

246. See S.B. 2045, 208th Leg. (N.J. 1999).

247. See Act of June 29, 1999, Conn. Pub. Acts 99-212, §B (1999) (codified at CONN. GEN. STAT. § 29-38c (2003)).

James Madison, the architect of the Second Amendment, did not consider an armed citizenry existing independently of any government as the best deterrent against despotism.

On the other hand, the various provisions regarding the right to bear arms do reveal the precise lines of political factions on the debate: One side not recognizing a right to bear arms as necessary for the preservation of a state militia, the other seeing to the contrary and in addition other purposes served by such a right. Meanwhile, in the middle was a moderate faction recognizing the right — but only in the interests of state security.

Maryland, founded originally as a haven from religious persecution, but since developed into a stalwart of other constitutional civil liberties, provided in its constitution for a militia, but not for an explicit right to bear arms. Maryland took the position that some state control of military forces was preferable, but stood only for the proposition that substituting a militia in place of a standing army is an “essential right in maintaining governments of free men.”

Records of gun regulation in the states, both before and after ratification of the Second Amendment, likewise, strongly suggest that it did not contemplate the ownership and use of firearms by private citizens.

Although interpretation of words depends largely on the predilections of the interpreter, the plain meaning of the Second Amendment is also dictated by basic rules of grammatical construction and dictionary definitions. Thus — as virtually every court facing the issue has found — the right to bear arms is wholly dependent upon the need to maintain a militia.

Moreover, history strongly leads to the conclusion that the Framers' intentions regarding the Second Amendment were equally clear. The Founding Fathers were concerned with communal defense. They never contemplated, nor were they likely ever to consider, the right of every citizen to purchase, possess, or use whatever weapon might be on the market at the time — lock, stock, and barrel, musket or machine gun.

They were much too sensible for that.