COSCA LAW CORPORATION
CHRIS COSCA SBN 144546
1007 7th Street, Suite 210
Sacramento, CA 95814
916-440-1010

AMY L. BELLANTONI
THE BELLANTONI LAW FIRM, PLLC
2 Overhill Road, Suite 400
Scarsdale, NY 10583
Telephone: 914-367-0090
Facsimile: 888-763-9761
Pro Hac Vice

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MARK BAIRD and
RICHARD GALLARDO,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California, and DOES 1-10,

Defendants.

Case No. 2:19-CV-00617

REPLY DECLARATION OF AMY L. BELLANTONI IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Date:	October 8, 2019
Time:	10:00 a.m.
Room:	3
Judge:	Hon. Kimberly J. Mueller
Trial date:	None set
Date filed:	April 9, 2019

REPLY DECLARATION OF AMY L. BELLANTONI

1. I am an attorney with The Bellantoni Law Firm, PLLC, attorneys of record for Plaintiffs, Mark Baird and Richard Gallardo. I have personal knowledge of the facts set forth herein and, if called and sworn as a witness, could and would testify competently thereto.

2. Attached hereto is the testimony of Eugene Volokh, September 23, 1998 as Exhibit 1.

3. Attached hereto is an excerpt from *Priorities for Research to Reduce the Threat of Firearm-Related Violence*, National Academies Press (2013) p. 4-5 as Exhibit 2.

4. Attached hereto is Perkins, William R. and Thomas L., *The Second Amendment and the Personal Right to Arms*, Duke University School of Law as Exhibit 3.

5. Attached hereto is U.S. News and World Report, *Open Carry Deters Crime*, (April 25, 2012) as Exhibit 4.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: October 1, 2019

Respectfully submitted,

THE BELLANTONI LAW FIRM, PLLC
/s/ Amy L. Bellantoni, Esq.
Amy L. Bellantoni, Esq.
Attorney for Plaintiffs
Pro Hac Vice
abell@bellantoni-law.com

EXHIBIT 1

Testimony of Eugene Volokh on the Second Amendment, Senate Subcommittee on the Constitution, Sept. 23, 1998.

reprinted as A Right of the People, California Political Review, Nov./Dec. 1998, p. 23.

Prof. Eugene Volokh, UCLA Law School *

Dear Mr. Chairman and Members of the Committee:

Eight years ago, I got into an argument with a nonlawyer acquaintance about the Second Amendment. The Amendment, this person fervently announced, clearly protects an individual right. Not so, I argued to him, thinking him to be something of a blowhard and even a bit of a kook.

Three years ago, I discovered, to my surprise and mild chagrin, that this supposed kook was entirely right. In preparing to teach a law school seminar on firearms regulation (one of the only about half a dozen such classes that I know of at U.S. law schools), I found that the historical evidence -- much of which I set forth verbatim in the Appendix -- overwhelmingly points to one and only one conclusion: The Second Amendment does indeed secure an individual right to keep and bear arms.

1. The Text of the Amendment Refers to an Individual Right

The Second Amendment, like the First, Fourth, and Ninth Amendments, refers to a "right of the people," not a right of the states or a right of the National Guard. The First Amendment guarantees the people's right to assemble; the Fourth Amendment protects the people's right to be free from unreasonable searches and seizures; the Ninth Amendment refers to the people's unenumerated rights. 1 These rights are clearly individual -- they protect "the right of the people" by protecting the right of each person. This strongly suggests that the similarly-worded Second Amendment likewise secures an individual right.

What about the seemingly odd two-clause construction, which some commentators have called "unusual," "special," and "nearly unique"? 2 It turns out that there's nothing odd about it at all. During the Framing Era, dozens of individual rights provisions in state constitutions were structured the same way, providing a justification clause explaining the right, and then an operative clause securing the right. The 1842 Rhode Island Constitution's Free Press Clause, for instance, reads

> The liberty of the press being essential to the security of freedom in a state, any person may publish his sentiments of any subject, being responsible for the abuse of that liberty 3

Just as with the Second Amendment, the second clause secures a right, while the first justifies it to the public.

And the two clauses of the Amendment are entirely consistent. The second clause guarantees a "right of the people," which is the right of each individual. The first clause explains that this right helps further a "well-regulated militia," a legal term of art that means "the body of the people capable of bearing arms" (here I quote from the New York Ratifying Convention's proposal that eventually became the Second Amendment 4) -- the entire armed citizenry, not some small National Guard-type unit. The current Militia Act, enacted in 1956 and derived from the original 1792 Militia Act, defines the "militia" as including all able-bodied male citizens from 17 to 45; 5 given the Court's sex equality jurisprudence, I feel comfortable saying that every able-bodied citizen from age 17 to 45, male or female, is a member of the militia. This is quite consistent with the second clause's securing an individual right to every person.

2. Contemporaneous Constitutions and Commentaries Unanimously Treat the Right as an Individual Right

Contemporaneous evidence from the late 1700s and 1800s unanimously supports the individual rights reading of the text. It's widely agreed that the Second Amendment right to keep and bear arms was an expanded version of a similar right in the 1688 English Bill of Rights. England, of course, didn't have states, so the English right couldn't have been a states' right; Sir William Blackstone, whose 1765 Commentaries were tremendously influential in Revolutionary Era America, described the right as a "right of the subject," an obviously individual rights characterization. 6

Many early state Bills of Rights also protected the right to keep and bear arms; since these rights were protections *against* state governments, they surely must have protected individuals, not the states themselves. And many of the constitutions made this quite explicit. The 1790 Pennsylvania and the 1792 Kentucky Constitutions described the right as "the right of the citizens"; the 1796 Tennessee Constitution spoke of "the right of the freemen"; the 1817 Mississippi, 1818 Connecticut,

1819 Maine, and 1819 Alabama Constitution specifically referred to the right of "every citizen." The 1776 Pennsylvania, 1777 Vermont, 1802 Ohio, 1816 Indiana, and 1820 Missouri Constitutions spoke of "the people['s] right to bear arms for the defence of themselves," referring to the people individually ("themselves") rather than collectively ("itself"). 7 Throughout the 1800s, these unambiguously individual rights were seen as directly analogous to the Second Amendment. 8

The same goes for all the notable constitutional commentators of the 1800s. St. George Tucker (1803) treated the Second Amendment right as equivalent to Blackstone's "right of the subject"; 9 William Rawle (1829) did likewise. 10 Justice Joseph Story (1833 and 1840) called it a "right of the citizens." 11 Thomas Cooley (1880 and 1898) took exactly the same individual right view; 12 so did the 1866 Freedmen's Bureau Act, which specifically secured to "all the citizens" "the constitutional right to bear arms" as part of their "personal liberty." 13 A recent exhaustive study reveals that there was exactly *one* statement in the 1800s cases or commentaries supporting the collective rights view, a concurring opinion in an 1842 Arkansas state court case. 14

3. The U.S. Supreme Court Cases Do Not Treat the Right as a Collective Right

The U.S. Supreme Court has said little about the Second Amendment, but it has certainly not said that the Amendment secures only a collective right.

Throughout the Court's history, the Justices have mentioned the Second Amendment, usually in passing, in 27 opinions. In 22 of these 27, the Justices quoted or paraphrased only "the right of the people to keep and bear arms" language, without even mentioning the Militia Clause. 15

One of the remaining five cases -- and the only extended 20th-century discussion of the right -- is *United States v. Miller* (1939), which held that the right extended only to weapons that were rationally related to the preservation of the militia. 16 But the Court emphatically did *not* hold that the right belonged only to the state or the National Guard. Rather, it reaffirmed that the "militia" referred to the entire armed citizenry, and considered on the merits a lawsuit that was brought by an individual (Miller), not by a state.

The only Supreme Court case that leans in the collective rights direction is *Lewis v. United States* (1980), which summarily rejected an ex-felon's claim of a right to possess a firearm, in passing citing some lower court cases that took a collective rights view. 17 But *Lewis* could equally well be explained as concluding only that *ex-felons* don't have a right to keep and bear arms (something that's also been held in the many states whose constitutions unambiguously guarantee an individual right to keep and bear arms). In any event, if one relies on passing mentions, *Casey v. Planned Parenthood* (1992) (quoting Justice Harlan) in passing described liberty as including "[freedom from] the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on" -- a description that treats the right to keep and bear arms as an individual right on par with the other individual rights. 18

Despite all the above evidence, the federal courts of appeal have unanimously subscribed to the states' right approach, though there are a few recent hints to the contrary in some opinions. 19 If the historical or textual evidence were in equipoise, and if the cases dealt carefully with the evidence and explained why the pro-states'-right evidence was more persuasive than the pro-individual-right evidence, then perhaps we might defer to these courts' views. But when the lower courts' decisions are contrary to the unanimous weight of the evidence, and do not really confront this evidence but rely

almost entirely on bald assertions or on citations to other lower court decisions, it seems to me that we must respectfully say that the lower courts are mistaken.

4. The Precise Scope of the Right Is a Matter of Considerable Debate

While the evidence that the right is an individual right is extremely strong, the precise scope of the right is a matter of considerable debate. This of course is true of all individual rights: Everyone agrees that the First Amendment, the Fourth Amendment, and other provisions secure individual rights, but reasonable minds differ on exactly what speech the First Amendment protects and exactly what searches the Fourth Amendment prohibits.

Thus, recognizing that the Second Amendment secures an individual right tells us little about most moderate gun controls, for instance background checks, waiting periods, or modest restrictions on the kinds of brands that may be marketed. I don't know how these laws should be treated; I suspect that many would be upheld, like many modest speech restrictions are upheld despite the existence of the First Amendment.

But our concern about these problems can't blind us to the clear verdict of the constitutional text and the constitutional history: The Framers of the Bill of Rights (and of the Fourteenth Amendment 20) saw the right to keep and bear arms as an individual right, entitled to the same sort of dignity and protection as the freedom of speech, the privacy of the home, the right to trial by jury, and our other constitutionally secured protections.

As the Court said when defending another often unpopular right -- the privilege against self-incrimination --

> If it be thought that [a right] is outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution [by constitutional amendment], not to whittle it down by the subtle encroachments of judicial opinion. 21

Constitutional rights may be respected, repealed, or modified; but they must never be ignored.

Appendix: Original Sources Relevant to the Second Amendment

I. Text of the Amendment and Related Contemporaneous Provisions

(I include here all the state rights to keep and bear arms enacted in 1820 or before, plus the provision from the first [1842] Constitution of Rhode Island, the last of the original states to set up a constitution.)

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

English Bill of Rights: That the subjects which are protestants may have arms for their defence suitable to their conditions and as allowed by law (1689). 22

Alabama: That every citizen has a right to bear arms in defence of himself and the state (1817). 23

Connecticut: Every citizen has a right to bear arms in defense of himself and the state (1818). 24

Indiana: That the people have a right to bear arms for the defense of themselves and the State, and that the military shall be kept in strict subordination to the civil power (1816). 25

Kentucky: [T]he right of the citizens to bear arms in defense of themselves and the State shall not be questioned (1792). 26

Maine: Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned (1819). 27

Massachusetts: The people have a right to keep and to bear arms for the common defence (1780). 28

Mississippi: Every citizen has a right to bear arms, in defence of himself and the State (1817). 29

Missouri: That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances by petition or remonstrance; and that their right to bear arms in defence of themselves and of the State cannot be questioned (1820). 30

North Carolina: [T]he people have a right to bear arms, for the defence of the State; and, as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power (1776). 31

Ohio: That the people have a right to bear arms for the defence of themselves and the State; and as standing armies, in time of peace, are dangerous to liberty, they shall not be kept up, and that the military shall be kept under strict subordination to the civil power (1802). 32

Pennsylvania: That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination, to, and governed by, the civil power (1776). 33

The right of the citizens to bear arms in defence of themselves and the State shall not be questioned (1790). 34

Rhode Island: The right of the people to keep and bear arms shall not be infringed (1842). 35

Tennessee: [T]he freemen of this State have a right to keep and bear arms for their common defence (1796). 36

Vermont: [T]he people have a right to bear arms for the defence of themselves and the State -- and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power (1777). 37

Virginia: That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power (1776). 38 [The Virginia Constitution didn't mention a right to keep and bear arms until 1971.]

II. Calls for the Right to Keep and Bear Arms from State Ratification Conventions

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Five of the states that ratified the Constitution also sent demands for a Bill of Rights to Congress. All these demands included a right to keep and bear arms. Here, in relevant part, is their text:

New Hampshire: Twelfth[:] Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion.

Virginia: . . . Seventeenth, That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil power.

New York: . . . That the People have a right to keep and bear Arms; that a well regulated Militia, including the body of the People capable of bearing Arms, is the proper, natural and safe defence of a free State; That the Militia should not be subject to Martial Law except in time of War, Rebellion or Insurrection. That Standing Armies in time of Peace are dangerous to Liberty, and ought not to be kept up, excess in Cases of necessity; and that at all times, the Military should be under strict Subordination to the civil Power.

North Carolina: Almost identical to Virginia demand, but with "the body of the people, trained to arms" instead of "the body of the people trained to arms."

Rhode Island: Almost identical to Virginia demand, but with "the body of the people capable of bearing arms" instead of "the body of the people trained to arms," and with a "militia shall not be subject to martial law" proviso as in New York.

III. "The Right of the People" in Other Bill of Rights Provisions

First Amendment: Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

Ninth Amendment: The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Tenth Amendment: [Speaking of "the powers . . . of the people" rather than "the right . . . of the people"] The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

IV. Some Other Contemporaneous Constitutional Provisions With a Similar Grammatical Structure

40

Rhode Island Free Press Clause: The liberty of the press being essential to the security of freedom in a state, any person may publish sentiments on any subject, being responsible for the abuse of that liberty 41

Massachusetts Free Press Clause: The liberty of the press is essential to the security of freedom in a state it ought not, therefore, to be restricted in this commonwealth. 42

Massachusetts Speech and Debate Clause: The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation of prosecution, action or complaint, in any other court or place whatsoever. 43

New Hampshire Venue Clause: In criminal prosecutions, the trial of the facts in the vicinity where they happen is so essential to the security of the life, liberty, and estate of the citizen, that no crime or offence ought to be tried in any other county than that in which it is committed 44

V. 18th- and 19th-Century Commentary

A. William Blackstone, Commentaries on the Laws of England (1765)

45

In the three preceding articles we have taken a short view of the principal absolute rights [personal security, personal liberty, private property] which appertain to every Englishman. But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.

1. The constitution, powers, and privileges of parliament . . . .

2. The limitation of the king's prerogative . . . .

3. . . . [A]pplying to the courts of justice for redress of injuries.

4. . . . [T]he right of petitioning the king, or either house of parliament, for the redress of grievances.

5. The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute . . . and is indeed a public allowance, under due

restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

. . . [T]o vindicate [the three primary rights], when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence.

B. St. George Tucker, Blackstone's Commentaries (1803)

46

[Annotation to Blackstone's discussion of the right to have arms as the fifth and last auxiliary right:]

The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence [fn40] suitable to their condition and degree, and such as are allowed by law. [fn41]

[fn40] The right of the people to keep and bear arms shall not be infringed, and this without any qualification as to their condition or degree, as is the case in the British government.

[fn41] Whoever examines the forest, and game laws in the British code, will readily perceive that the right of keeping arms is effectually taken away from the people of England. The commentator himself informs us, "that the prevention of popular insurrections and resistence [*sic*] to government by disarming the bulk of the people, is a reason oftener meant than avowed by the makers of the forest and game laws."

[A separate discussion in an Appendix, specifically about the Second Amendment.]

A well regulated militia being necessary to the security of a free state, the right of the people to keep, and bear arms, shall not be infringed.

This may be considered as the true palladium of liberty . . . . The right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms, is under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.

In England, the people have been disarmed, generally, under the specious pretext of preserving the game: a never failing lure to bring over the landed aristocracy to support any measure, under that mask, though calculated for very different purposes. True it is, their bill of rights seems at first view to counteract this policy: but the right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorise the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subject to a penalty. [Editorial note: I understand that this last sentence is considered by some historians to be an exaggeration. 47]

C. Joseph Story, Familiar Exposition of the Constitution of the United States (1840)

48

The next amendment is, "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." One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia. The friends of a free government cannot be too watchful, to overcome the dangerous tendency of the public mind to sacrifice, for the sake of mere private convenience, this powerful check upon the designs of ambitious men.

The importance of this article will scarcely be doubted by any persons, who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our National Bill of Rights.

D. Thomas Cooley, Principles of Constitutional Law (1898)

49

Section IV. -- The Right to Keep and Bear Arms.

The Constitution. -- By the Second Amendment to the Constitution it is declared that "a well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."

The amendment, like most other provisions in the Constitution, has a history. It was adopted with some modification and enlargement from the English Bill of Rights of 1688, where it stood as a protest against arbitrary action of the overturned dynasty in disarming the people, and as a pledge of the new rulers that this tyrannical action should cease. The right declared was meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of regaining rights when temporarily overturned by usurpation.

The Right is General. -- It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who,

under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose. But this enables the government to have a well regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.

Standing Army. -- A further purpose of this amendment is, to preclude any necessity or reasonable excuse for keeping up a standing army. A standing army is condemned by the traditions and sentiments of the people, as being as dangerous to the liberties of the people as the general preparation of the people for the defence of their institutions with arms is preservative of them.

What Arms may be kept. -- The arms intended by the Constitution are such as are suitable for the general defence of the community against invasion or oppression, and the secret carrying of those suited merely to deadly individual encounters may be prohibited.

VI. Selected Supreme Court Cases

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

[This is the only extensive modern discussion of the Amendment.]

An indictment in the District Court Western District Arkansas, charged that Jack Miller and Frank Layton "did unlawfully, knowingly, wilfully, and feloniously transport in interstate commerce from the town of Claremore in the State of Oklahoma to the town of Siloam Springs in the State of Arkansas a certain firearm, to-wit, a double barrel 12-gauge Stevens shotgun having a barrel less than 18 inches in length [contrary to the National Firearms Act] . . . ."

A duly interposed demurrer alleged: The National Firearms Act is not a revenue measure but an attempt to usurp police power reserved to the States, and is therefore unconstitutional. Also, it offends the inhibition of the Second Amendment to the Constitution -- "A well regulated Militia, being necessary to the security of a free State, the right of people to keep and bear Arms, shall not be infringed." The District Court held that section eleven of the Act violates the Second Amendment. It accordingly sustained the demurrer and quashed the indictment.

. . .

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

The Constitution as originally adopted granted to the Congress 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." With 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. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia -- civilians primarily, soldiers on occasion.

The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These 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." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time. [Citing further sources, e.g., the Virginia Act of October 1785 providing for a Militia of "all free male persons between the ages of eighteen and fifty years," with certain exceptions.]

Most if not all of the States have adopted provisions touching the right to keep and bear arms. Differences in the language employed in these have naturally led to somewhat variant conclusions concerning the scope of the right guaranteed. But none of them seem to afford any material support for the challenged ruling of the court below.

B. Lewis v. United States, 445 U.S. 55, 65 (1980)

[Lewis was convicted of being a felon in possession of a firearm, and challenged the conviction on various statutory grounds, on the ground that his prior felony conviction was uncounseled and therefore shouldn't be considered, and on constitutional grounds. The Court held:]

The firearm regulatory scheme at issue here is consonant with the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment if there is "some þrational basis' for the statutory distinctions made . . . or . . . they þhave some relevance to the purpose for which the classification is made." [fn1]

Section 1202(a)(1) clearly meets that test. . . .

[fn1] These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See United States v. Miller, 307 U.S. 174, 178, 59 S.Ct. 816, 818, 83 L.Ed. 1206 (1939) (the Second Amendment guarantees no right to keep and bear a firearm that does not have "some reasonable relationship to the preservation or efficiency of a well regulated militia"); United States v. Three Winchester 30-30 Caliber Lever Action Carbines, 504 F.2d 1288, 1290, n. 5 (CA7 1974); United States v. Johnson, 497 F.2d 548 (CA4 1974); Cody v. United States, 460 F.2d 34 (CA8), cert. denied, 409 U.S. 1010, 93 S.Ct. 454, 34 L.Ed.2d 303 (1972) (the latter three cases holding, respectively, that § 1202(a)(1), § 922(g), and § 922(a)(6) do not violate the Second Amendment).

C. Casey v. Planned Parenthood, 505 U.S. 833, 848 (1992) (dictum)

Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U.S. Const., Amdt. 9. As the second Justice Harlan recognized: "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This þliberty´ is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman,* [367 U.S. 497, 543 (1961)] (opinion dissenting from dismissal on jurisdictional grounds).

D. List of Cases Mentioning the Second Amendment

U.S. Supreme Court cases that refer to the right to keep and bear arms and also quote the militia clause:

1. Houston v. Moore, 18 U.S. 1 (1820).
2. United States v. Miller, 307 U.S. 174 (1939).
3. Adams v. Williams, 407 U.S. 143, 149-51 (1972) (Justice Douglas's dissent).
4. Lewis v. United States, 445 U.S. 55, 65 (1980).
5. Printz v. United States, 117 S. Ct. 2365, 2385-86 (1997) (Justice Thomas's concurrence).

U.S. Supreme Court cases that refer to the right to keep and bear arms without even mentioning the militia clause:

1. Dred Scott v. Sandford, 60 U.S. 393, 416-17, 449-51 (1857).
2. United States v. Cruikshank, 92 U.S. 542, 551 (1876).
3. Presser v. Illinois, 116 U.S. 252, 264-66 (1886).
4. Logan v. United States, 144 U.S. 263, 286-87 (1892).
5. Miller v. Texas, 153 U.S. 535, 538-39 (1894).
6. Brown v. Walker, 161 U.S. 591, 635 (1896) (Justice Field's dissent).
7. Robertson v. Baldwin, 165 U.S. 275, 280 (1897).
8. Maxwell v. Dow, 176 U.S. 581, 597 (1900).
9. Kepner v. United States, 195 U.S. 100, 123-24 (1904).
10. Trono v. United States, 199 U.S. 521, 528 (1905).
11. Twining v. New Jersey, 211 U.S. 78, 98 (1908).
12. Adamson v. California, 332 U.S. 46, 78 (1947) (Justice Black's dissent).
13. Johnson v. Eisentrager, 339 U.S. 763, 784 (1950).
14. Knapp v. Schweitzer, 357 U.S. 371, 378 n.5 (1958).
15. Konigsberg v. State Bar, 366 U.S. 36, 49 & n.10 (1961).
16. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Justice Harlan's dissent).
17. Roe v. Wade, 410 U.S. 113, 169 (1973) (Justice Stewart's concurrence) (quoting Justice Harlan's dissent in *Poe v. Ullman*).
18. Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion) (quoting Justice Harlan's dissent in *Poe v. Ullman*).

19. United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).
20. Casey v. Planned Parenthood, 505 U.S. 833, 848 (1992) (quoting Justice Harlan's dissent in *Poe v. Ullman*).
21. Albright v. Oliver, 510 U.S. 266, 306-07 (1994) (Justice Stevens's dissent) (quoting Justice Harlan's dissent in *Poe v. Ullman*).
22. Muscarello v. United States, 118 S. Ct. 1911, 1921 (1998) (Justice Ginsburg's dissent).

VII. Relevant Statutes

A. Militia Act of 1792

Sec. 1. *Be it enacted* . . . That each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia . . . . That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder. . . .

Sec. 2. [Exempting the Vice President, federal judicial and executive officers, congressmen and congressional officers, custom-house officers and clerks, post-officers and postal stage drivers, ferrymen on post roads, export inspectors, pilots, merchant mariners, and people exempted under the laws of their states.] 50

B. The currently effective Militia Act

(a) The militia of the United States consists of all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.

(b) The classes of the militia are --

(1) the organized militia, which consists of the National Guard and the Naval Militia; and

(2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia. 51

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1. *See* Appendix, Part III.

2. *See, e.g.,* Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein & Mark V. Tushnet, Constitutional Law Supp. 53-54 (3rd ed., Supp. 1997) (describing it as "unusual"); L. Tribe, American Constitutional Law 299 n.6 (2nd ed. 1988) (describing it as "nearly unique"); Sanford Levinson, *The Embarrassing Second Amendment,* 99 Yale L.J. 637, 644 (1989) (describing it as "special," though concluding that it secures an individual right).

3. I give some more examples in the Appendix, Part IV; Eugene Volokh, *The Commonplace Second Amendment,* 73 NYU L. Rev. 793, 814-21 (1998) (collecting examples).

4. The various states' proposals are set forth in the Appendix, Part II.

5. Both Acts are set forth in the Appendix, Part VII.

6. Quoted extensively in the Appendix, Part V.A.

7. All these provisions are set forth in full in the Appendix, Part I.

8. *See, e.g.,* David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment,* 101 Yale L.J. 551, 590 (1991) ("the Second Amendment was copied from right to arms provisions in state constitutions, and the debates at the time reveal no suggestion that the scope of the right changed when adopted into the federal Bill of Rights"; Professor Williams says this even though he believes the Second Amendment does *not* secure an individual right).

9. Quoted extensively in the Appendix, Part V.B.

10. *See infra* William Rawle, A View of the Constitution of the United States of America 126 (1829).

11. Quoted extensively in the Appendix, Part V.C.

12. Quoted extensively in the Appendix, Part V.D.

13. Freedmen's Bureau Act, ch. 200, 14 Stat. 173, sec. 14 (1866) (re-enacting and extending Act of Mar. 3, 1865, ch. 90, 13 Stat. 507) ("the full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such state or district without respect to race or color, or previous condition of slavery.").

14. David B. Kopel, *The Second Amendment in the Nineteenth Century,* 1998 BYU L. Rev. (forthcoming). The lone case was State v. Buzzard, 4 Ark. 18 (1842).

15. I give a comprehensive list in the Appendix, Part VI.D.

16. Quoted extensively in the Appendix, Part VI.A.

17. Quoted extensively in the Appendix, Part VI.B.

18. Quoted extensively in the Appendix, Part VI.C.

19. *See, e.g,* Fraternal Order of Police v. United States, 1998 WL 543822, *3 (Aug. 28) (acknowledging the debate but concluding that it needs not be resolved in the particular case); Runnebaum v. Nationsbank of Maryland, 123 F.3d 156, 171 (4th Cir. 1997) (en banc) (dictum) ("individuals have the constitutional right to peaceably assemble, see U.S. Const. amend. I; and to 'keep and bear Arms,´ U.S. Const. amend. II").

20. *See generally* Stephen Halbrook, *Personal Security, Personal Liberty, And "The Constitutional Right To Bear Arms": Visions Of The Framers Of The Fourteenth Amendment,* 5 Seton Hall Const. L.J. 431 (1995).

21. Ullmann v. United States, 350 U.S. 422, 427-28 (1956) (Frankfurter, J.).

22. 1 Wm. & Mary sess. 2, ch. 2 (1689).

23. Ala. Const. art. I, § 23 (1819).

24. Ct. Const. art. I, § 17 (1818). Connecticut had no Constitution until 1818.

25. Ind. Const. art. I, § 20 (1817).

26. Ky. Const. art. XII, § 23 (1792).

27. Maine Const. art. I, § 16 (1819).

28. Mass. Const. pt. 1, art. 17 (1780).

29. Miss. Const. art. I, § 23 (1817).

30. Missouri Const. art. XIII, § 3 (1820).

31. N.C. Const. Bill of Rights, § XVII (1776).

32. Ohio Const. art. VIII, § 20 (1802).

33. Penn. Const. Declaration of Rights, cl. XIII (1776).

34. Penn. Const. art. IX, § 21 (1790).

35. R.I. Const. art. I, § 22 (1842). Rhode Island had no Constitution until 1842.

36. Tenn. Const. art. XI, § 26 (1796).

37. Vt. Const. ch. I, art. 16 (1777).

38. Va. Const. art. I, § 13 (1776).

39. *See* The Complete Bill of Rights 181-83 (Neil H. Cogan ed. 1997).

40. *See generally* Eugene Volokh, *The Commonplace Second Amendment,* 73 NYU L. Rev. 793 (1998) (giving more such provisions, and discussing them in more detail).

41. R.I. Const. art. I, § 20 (1842).

42. Mass. Const. pt. I, art. XVI (1780); *see also* N.H. Const. pt. I, art. XXII (1784) ("The Liberty of the Press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved").

43. Mass. Const. pt. I, art. XXI (1780); *see also* N.H. Const. pt. I, art. XXX (1784) (same); Vt. Const. chap. I, art. XVI (1786) (same, but with "either house of" omitted).

44. N.H. Const. pt. I, art. XVII (1784).

45. William Blackstone was the leading British legal commentator of the 1700s, and was widely read in the Colonies; he was writing about the more limited right found in the English Bill of Rights.

46. St. George Tucker's Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia (1803), contained the earliest prominent commentary on the U.S. Constitution. Tucker taught law at the University of William and Mary, and was a Virginia state judge. This material is from p. 143 of book 1 and p. 300 of the Appendix.

47. *See, e.g.,* Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 122-34 (1994).

48. U.S. Supreme Court Justice Joseph Story was, of course, the leading constitutional commentator of the early 1800s.

49. Michigan Supreme Court Justice Thomas Cooley was probably the leading constitutional commentator of the late 1800s.

50. 2nd Cong. sess. I, ch. 33 (1792).

51. 10 U.S.C. § 311 (enacted 1956, amended 1958).

□

EXHIBIT 2

considering whether firearm-related homicide and suicide have become accepted as ways of resolving problems, especially among youth. However, there is a lack of empirical research to address these two issues.

MAJOR CONCLUSIONS

Empirical research on firearms and violence has resulted in important findings that can inform policy decisions. In particular, a wealth of descriptive information exists about the prevalence of firearm-related injuries and deaths, about firearms markets, and about the relationships between rates of gun ownership and violence. Research has found, for example, that higher rates of household firearms ownership are associated with higher rates of gun suicide, that illegal diversions from legitimate commerce are important sources of crime guns and guns used in suicide, that firearms are used defensively many times per day, and that some types of targeted police interventions may effectively lower gun crime and violence. This information is a vital starting point for any constructive dialogue about how to address the problem of firearms and violence.

While much has been learned, much remains to be done, and this report necessarily focuses on the important unknowns in this field of study. The committee found that answers to some of the most pressing questions cannot be addressed with existing data and research methods, however well designed. For example, despite a large body of research, the committee found no credible evidence that the passage of right-to-carry laws decreases or increases violent crime, and there is almost no empirical evidence that the more than 80 prevention programs focused on gun-related violence have had any effect on children's behavior, knowledge, attitudes, or beliefs about firearms. The committee found that the data available on these questions are too weak to support unambiguous conclusions or strong policy statements.

Drawing causal inferences is always complicated and, in the behavioral and social sciences, fraught with uncertainty. Some of the problems that the committee identifies are common to all social science research. In the case of firearms research, however, the committee found that even in areas in which the data are potentially useful, the complex methodological prob-

lems inherent in unraveling causal relationships between firearms policy and violence have not been fully considered or adequately addressed.

Nevertheless, many of the shortcomings described in this report stem from the lack of reliable data itself rather than the weakness of methods. In some instances—firearms violence prevention, for example—there are no data at all. Even the best methods cannot overcome inadequate data and, because the lack of relevant data colors much of the literature in this field, it also colors the committee's assessment of that literature.

DATA RECOMMENDATIONS

If policy makers are to have a solid empirical and research base for decisions about firearms and violence, the federal government needs to support a systematic program of data collection and research that specifically addresses that issue. Adverse outcomes associated with firearms, although large in absolute numbers, are statistically rare events and therefore are not observed with great frequency, if at all, in many ongoing national probability samples (i.e., on crime victimization or health outcomes). The existing data on gun ownership, so necessary in the committee's view to answering policy questions about firearms and violence, are limited primarily to a few questions in the General Social Survey. There are virtually no ongoing, systematic data series on firearms markets. Aggregate data on injury and ownership can only demonstrate associations of varying strength between firearms and adverse outcomes of interest. Without improvements in this situation, the substantive questions in the field about the role of guns in suicide, homicide and other crimes, and accidental injury are likely to continue to be debated on the basis of conflicting empirical findings.

Emerging Data Systems on Violent Events

The committee reinforces recommendations made by past National Research Council committees and others to support the development and maintenance of the National Violent Death Reporting System and the National Inci-

Ownership Data

The inadequacy of data on gun ownership and use is among the most critical barriers to better understanding of gun violence. Such data will not by themselves solve all methodological problems. However, its almost complete absence from the literature makes it extremely difficult to understand the complex personality, social, and circumstantial factors that intervene between a firearm and its use. Also difficult to understand is the effect, if any, of programs designed to reduce the likelihood that a firearm will cause unjustified harm, or to investigate the effectiveness of firearm use in self-defense. We realize that many people have deeply held concerns about expanding the government's knowledge of who owns guns and what type of guns they own. We also recognize the argument that some people may refuse to supply such information in any system, especially those who are most likely to use guns illegally. **The committee recommends a research effort to determine whether or not these kinds of data can be accurately collected with minimal risk to legitimate privacy concerns.**

A starting point is to assess the potential of ongoing surveys. For example, efforts should be undertaken to assess whether tracing a larger fraction of guns used in crimes, regularly including questions on gun access and use in surveys and longitudinal studies (as is done in data from the ongoing, yearly Monitoring the Future survey), or enhancing existing items pertaining to gun ownership in ongoing national surveys may provide useful research data. To do this, researchers need access to the data. **The committee recommends that appropriate access be given to data maintained by regulatory and law enforcement agencies, including the trace data maintained by the Bureau of Alcohol, Tobacco, and Firearms; registration data maintained by the Federal Bureau of Investigation and state agencies; and manufacturing and sales data for research purposes.**

In addition, researchers need appropriate access to the panel data from the Monitoring the Future survey. These data may or may not be useful for understanding firearms markets and the role of firearms in crime and violence. However, without access to these systems, researchers are unable to assess their potential for providing insight into some of the most important

the Monitoring the Future survey. These data may or may not be useful for understanding firearms markets and the role of firearms in crime and violence. However, without access to these systems, researchers are unable to assess their potential for providing insight into some of the most important firearms policy and research questions. Concerns about security and privacy must be addressed in the granting of greater access to these data, and the systems will need to be continually improved to make them more useful for research. Nevertheless, there is a long-established tradition of making sensitive data available with appropriate safeguards to researchers.

Methodological Approaches

Difficult methodological issues exist regarding how different data sets might be used to credibly answer the complex causal questions of interest.

The committee recommends that a methodological research program be established to address these problems. The design for data collection and analysis should be selected in light of particular research questions. For example, how, if at all, could improvements in current data, such as firearms trace data, be used in studies of the effects of policy interventions on firearms markets or any other policy issue? What would the desired improvements contribute to research on policy interventions for reducing firearms violence? Linking the research and data questions will help define the data that are needed. **We recommend that the results of such research be regularly reported in the scientific literature and in forums accessible to investigators.**

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RESEARCH RECOMMENDATIONS

Firearms, Criminal Violence, and Suicide

Despite the richness of descriptive information on the associations between firearms and violence at the aggregate level, explaining a violent death is a difficult business. Personal temperament, the availability of weapons, human motivation, law enforcement policies, and accidental circumstances all play a role in leading one person but not another to inflict serious violence or commit suicide.

Because of current data limitations, researchers have relied primarily on two different methodologies. First, some studies have used case-control methods, which match a sample of cases, namely victims of homicide or suicide, to a sample of controls with similar characteristics but who were not affected by violence. Second, some "ecological" studies compare homicide or suicide rates in large geographic areas, such as counties, states, or countries, using existing measures of ownership.

Case-control studies show that violence is positively associated with firearms ownership, but they have not determined whether these associations reflect causal mechanisms. Two main problems hinder inference on these questions. First and foremost, these studies fail to address the primary inferential problems that arise because ownership is not a random decision.

firearms ownership, but they have not determined whether these associations reflect causal mechanisms. Two main problems hinder inference on these questions. First and foremost, these studies fail to address the primary inferential problems that arise because ownership is not a random decision. For example, suicidal persons may, in the absence of a firearm, use other means of committing suicide. Homicide victims may possess firearms precisely because they are likely to be victimized. Second, reporting errors regarding firearms ownership may systemically bias the results of estimated associations between ownership and violence.

Ecological studies currently provide contradictory evidence on violence and firearms ownership. For example, in the United States, suicide appears to be positively associated with rates of firearms ownership, but homicide is not. In contrast, in comparisons among countries, the association between

rates of suicide and gun ownership is nonexistent or very weak but there is a substantial association between gun ownership and homicide. These cross-country comparisons reflect the fact that the suicide rate in the United States ranks toward the middle of industrialized countries, whereas the U.S. homicide rate is much higher than in all other developed countries.

The committee cannot determine whether these associations demonstrate causal relationships. There are three key problems. First, as noted above, these studies do not adequately address the problem of self-selection. Second, these studies must rely on proxy measures of ownership that are certain to create biases of unknown magnitude and direction. Third, because the ecological correlations are at a higher geographic level of aggregation, there is no way of knowing whether the homicides or suicides occurred in the same areas

create biases of unknown magnitude and direction. Third, because the ecological correlations are at a higher geographic level of aggregation, there is no way of knowing whether the homicides or suicides occurred in the same areas in which the firearms are owned.

In summary, the committee concludes that existing research studies and data include a wealth of descriptive information on homicide, suicide, and firearms, but, because of the limitations of existing data and methods, do not credibly demonstrate a causal relationship between the ownership of firearms and the causes or prevention of criminal violence or suicide. The issue of substitution (of the means of committing homicide or suicide) has been almost entirely ignored in the literature. What sort of data and what sort of studies and improved models would be needed in order to advance understanding of the association between firearms and suicide? Although some knowledge may be gained from further ecological studies, the most important priority appears to the committee to be individual-level studies of the association between gun ownership and violence. Currently, no national surveys on ownership designed to examine the relationship exist. **The committee recommends support of further individual-level studies of the link between firearms and both lethal and nonlethal suicidal behavior.**

Deterrence and Defense

Although a large body of research has focused on the effects of firearms on injury, crime, and suicide, far less attention has been devoted to understanding the defensive and deterrent effects of firearms. Firearms are used by the public to defend against crime. Ultimately, it is an empirical question whether defensive gun use and concealed weapons laws generate net social benefits or net social costs.

Defensive Gun Use

Over the past decade, a number of researchers have conducted studies to measure the prevalence of defensive gun use in the population. However, disagreement over the definition of defensive gun use and uncertainty over the

accuracy of survey responses to sensitive questions and the methods of data collection have resulted in estimated prevalence rates that differ by a factor of 20 or more. These differences in the estimated prevalence rates indicate either that each survey is measuring something different or that some or most of them are in error. Accurate measurement on the extent of defensive gun use is the first step for beginning serious dialogue on the efficacy of defensive gun use at preventing injury and crime.

For such measurement, the committee recommends that a research program be established to (1) clearly define and understand what is being measured, (2) understand inaccurate response in the national gun use surveys, and (3) apply known methods or develop new methods to reduce reporting errors to the extent possible. A substantial research literature on reporting errors in other contexts, as well as well-established survey sampling methods, can and should be brought to bear to evaluate these response problems.

Right-to-Carry Laws

A total of 34 states have laws that allow qualified adults to carry concealed handguns. Right-to-carry laws are not without controversy: some people believe that they deter crimes against individuals; others argue that they have no such effect or that they may even increase the level of firearms violence. This public debate has stimulated the production of a large body of statistical evidence on whether right-to-carry laws reduce or increase crimes against individuals.

However, although all of the studies use the same basic conceptual model and data, the empirical findings are contradictory and in the committee's view highly fragile. Some studies find that right-to-carry laws reduce violent crime, others find that the effects are negligible, and still others find that such laws increase violent crime. The committee concludes that it is not possible to reach any scientifically supported conclusion because of (a) the sensitivity of the empirical results to seemingly minor changes in model specification, (b) a lack of robustness of the results to the inclusion of more recent years of data (during which there were many more law changes than in the earlier period), and (c) the statistical imprecision of

cause of (a) the sensitivity of the empirical results to seemingly minor changes in model specification, (b) a lack of robustness of the results to the inclusion of more recent years of data (during which there were many more law changes than in the earlier period), and (c) the statistical imprecision of the results. The evidence to date does not adequately indicate either the sign or the magnitude of a causal link between the passage of right-to-carry laws and crime rates. Furthermore, this uncertainty is not likely to be resolved with the existing data and methods. If further headway is to be made, in the committee's judgment, new analytical approaches and data are needed. (One committee member has dissented from this view with respect to the effects of these laws on homicide rates; see Appendix A.)

Interventions to Reduce Violence and Suicide

Even if it were to be shown that firearms are *a* cause of lethal violence, the development of successful programs to reduce such violence would remain a complex undertaking, because such interventions would have to address factors other than the use of a gun. Three chapters in this report focus specifically on what is known about various interventions aimed at reducing firearms violence by restricting access, or implementing prevention programs, or implementing criminal justice interventions. These chapters focus largely on what is known about the effects of different interventions on criminal violence. Although suicide prevention rarely has been the basis for public support of the passage of specific gun laws, such laws could

tion programs, or implementing criminal justice interventions. These chapters focus largely on what is known about the effects of different interventions on criminal violence. Although suicide prevention rarely has been the basis for public support of the passage of specific gun laws, such laws could have unintended effects on suicide rates or unintended by-products. **Thus, in addition to the recommendations related to firearms and crime below, the committee also recommends further studies of the link between firearms policy and suicide.**

Restricting Access

Firearms are bought and sold in markets, both formal and informal. To some observers this suggests that one method for reducing the burden of firearm injuries is to intervene in these markets so as to make it more expensive, inconvenient, or legally risky to obtain firearms for criminal use or suicide. Market-based interventions intended to reduce access to guns by criminals and other unqualified persons include taxes on weapons and ammunition, tough regulation of federal firearm licensees, limits on the number of firearms that can be purchased in a given time period, gun bans, gun buy-backs, and enforcement of laws against illegal gun buyers or sellers.

Because of the pervasiveness of guns and the variety of legal and illegal means of acquiring them, it is difficult to keep firearms from people barred by law from possessing them. The key question is substitution. In the absence of the pathways currently used for gun acquisition, could individuals have obtained alternative weapons with which they could have wrought equivalent harm? Substitution can occur in many dimensions: offenders can obtain different guns, they can get them from different places, and they can get them at different times.

Arguments for and against a market-based approach are now largely based on speculation, not on evidence from research. It is simply not known whether it is actually possible to shut down illegal pipelines of guns to criminals nor the costs of doing so. Answering these questions is essential to knowing whether access restrictions are a possible public policy. The committee has not attempted to identify specific interventions, research strategies, or data that might be suited to studying market interventions, substitu-

tion, and firearms violence. Rather, the committee recommends that work be started to think carefully about possible research and data designs to address these issues.

Prevention Programs and Technology

Firearm violence prevention programs are disseminated widely in U.S. public school systems to children ages 5 to 18, and safety technologies have been suggested as an alternative means to prevent firearm injuries. The actual effects of a particular prevention program on violence and injury, however, have been little studied and are difficult to predict. For children, firearm violence education programs may result in *increases* in the very behaviors they are designed to prevent, by enhancing the allure of guns for young children and by establishing a false norm of gun-carrying for adolescents. Likewise, even if perfectly reliable, technology that serves to reduce injury among some groups may lead to increased deviance or risk among others.

The committee found little scientific basis for understanding the effects of different prevention programs on the rates of firearm injuries. Generally, there has been scant funding for evaluation of these programs. For the few that have been evaluated, there is little empirical evidence of positive effects on children's knowledge, attitudes, beliefs, or behaviors. Likewise, the extent to which different technologies affect injuries remains unknown. Often, the literature is entirely speculative. In other cases, for example the empirical evaluations of child access prevention (CAP) laws, the empirical literature reveals conflicting estimates that are difficult to reconcile.

In light of the lack of evidence, the committee recommends that firearm violence prevention programs should be based on general prevention theory, that government programs should incorporate evaluation into implementation efforts, and that a sustained body of empirical research be developed to study the effects of different safety technologies on violence and crime.

Criminal Justice Interventions

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Criminal Justice Interventions

Despite these apparent associations between crime and policing policy, however, the available research evidence on the effects of policing and sentencing enhancements on firearm crime is limited and mixed. Some sentencing enhancement policies appear to have modest crime-reducing effects, while the effects of others appear to be negligible. The limited evidence on Project Exile suggests that it has had almost no effect on homicide. Several city-based quasi-random interventions provide favorable evidence on the effectiveness of targeted place-based gun and crime suppression patrols, but this evidence is both application-specific and difficult to disentangle. Evidence on Operation Ceasefire, perhaps the most frequently cited of all targeted policing efforts to reduce firearms violence, is limited by the fact that it is a single case at a specific time and location. Scientific support for the effectiveness of the Boston Gun Project and most other similar types of targeted policing programs is still evolving.

The lack of research on these potentially important kinds of policies is an important shortcoming in the body of knowledge on firearms injury interventions. These programs are widely viewed as effective, but in fact knowledge of whether and how they reduce crime is limited. Without a stronger research base, policy makers considering adoption of similar programs in other settings must make decisions without knowing the true benefits and costs of these policing and sentencing interventions.

The committee recommends that a sustained, systematic research program be conducted to assess the effect of targeted policing and sentencing aimed at firearms offenders. Additional insights may be gained from using observational data from different applications, especially if combined with more thoughtful behavioral models of policing and crime. City-level studies on the effect of sentencing enhancement policies need to engage more rigorous methods, such as pooled time-series cross-sectional studies that allow the detection of short-term impacts while controlling for variation in violence levels across different areas as well as different times. Another important means of assessing the impact of these types of targeted policing and sentencing interventions would be to conduct randomized experiments to disentangle the effects of the various levers, as well as to more generally assess the effectiveness of these targeted policing programs.

EXHIBIT 3

ESSAY

THE SECOND AMENDMENT AND THE PERSONAL RIGHT TO ARMS

WILLIAM VAN ALSTYNE†

INTRODUCTION

Perhaps no provision in the Constitution causes one to stumble quite so much on a first reading, or second, or third reading, as the short provision in the Second Amendment of the Bill of Rights. No doubt this stumbling occurs because, despite the brevity of this amendment, as one reads, there is an apparent non sequitur—or disconnection of a sort—in midsentence. The amendment opens with a recitation about a need for "[a] well regulated Militia."[1] But having stipulated to the need for "[a] well regulated Militia," the amendment then declares that the right secured by the amendment—the described right that is to be free of "infringement"—is not (or not just) the right of a state, or of the United States, to provide a well regulated militia. Rather, it is "the right of the people to keep and bear Arms."

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall uot be infriuged.[2]

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† William R. and Thomas L. Perkins Professor of Law, Duke University School of Law.

1. The subject is that of "*A* well regulated Militia"—a militia the amendment declares to be "necessary to the security of a free State." U.S. CONST. amend. II. But it is hard to say on first reading whether the reference is to a well-regulated *national* militia or, instead, to a well-regulated *state* militia (i.e., a militia *in each state*). Perhaps, however, the reference is to both at once—a militia in each state, originally constituted under each state's authority, but subject to congressional authority to arm, to organize, and to make provision to call into national service, as a national militia. The possibility that this may be so tends to send one looking for other provisions in the Constitution that may help to clear this matter away. And a short search readily turns up several such provisions: Article I, section 8, clauses 15 and 16, and Article II, section 2, clause 1. *See infra* note 16.

2. U.S. CONST. amend. II.

The postulation of a "right of the people to keep and bear Arms" would make sense standing alone, however, even if it necessarily left some questions still to be settled.[3] It would make sense in just the same unforced way we understand even upon a first reading of the neighboring clause in the Bill of Rights, which uses the exact same phrase in describing something as "the right of the people" that "shall not be violated" (or "infringed"). Just as the Second Amendment declares that "the right of the people to keep and bear Arms[] shall not be infringed," so, too, the Fourth Amendment declares:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .[4]

Here, in the familiar setting of the Fourth Amendment, we are not at all confused in our take on the meaning of the amendment; it secures to each of us personally (as well as to all of us collectively) a certain right—even if we are also uncertain of its scope.[5] Nor are we confused in turning to other clauses. For example, the Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .[6]

And so, too, the Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .[7]

That each of these rights—that all of these rights—are examples of personal rights protected by the Bill of Rights seems perfectly clear. And, were it not for the opening clause in the Second Amendment, though there would still be much to thrash out, it is

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3. For example, one might well still be uncertain of the breadth of the right to keep and bear arms (e.g., just what *kinds* of "Arms"?).

4. U.S. CONST. amend. IV.

5. For example, does the protection of "houses" and "effects" from unreasonable searches and seizures extend to trash one may have put outside in a garbage can? May it matter whether one has put the can itself outside one's garage or farther out, beside the street? *See* California v. Greenwood, 486 U.S. 35, 37 (1988).

6. U.S. CONST. amend. VI.

7. *Id.* amend. VII.

altogether likely the Second Amendment would be taken in the same way.

To be sure, as we have already once noted, were the Second Amendment taken in just this way, the scope of the right that *is* protected (namely, the right to keep and bear arms) would still remain to be defined.[8] But by itself, that sort of definitional determination would be of no unusual difficulty. For so much is true with respect to every right secured from government infringement, whether it be each person's freedom of speech (that freedom is not unbounded, either) or any other right specifically protected from infringement elsewhere in the Bill of Rights.[9] And in addressing this type of (merely general) problem, neither has the Supreme Court nor have other courts found it intractable and certainly none of these other clauses have been disparaged, much less have they been ignored. To the contrary, with respect to each,

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8. For example, with respect to the kind of "Arms" one may have. Perhaps these include all arms as may be useful (though not exclusively so) as an incident of service in a militia—and indeed, this would make sense of the introductory portion of the amendment as well. *See* United States v. Miller, 307 U.S. 174, 178 (1939).

9. So, for example, though the Sixth Amendment provides a right to a "*speedy*" and "*public*" trial whenever one is accused of a (federal) crime, the amendment does not declare just *how* "speedy" the trial must be (i.e., exactly how soon following indictment the trial must be held) nor *how* "public" either (e.g., must it be televised to the world, or is an open courtroom, albeit with very limited seating, quite enough?). And the Fourth Amendment does not say there can be *no* searches and seizures—rather, only no "unreasonable" searches and seizures. Yet there is a very substantial body of highly developed case law that has given this genuine meaning and effect.

Likewise, when the Sixth and Seventh Amendments speak of the right to trial by "jury," then (even as is true of the Second Amendment in its reference to "Arms"?), though each of these amendments is silent as to what a jury means (a "jury" of how many people? a "jury" selected in what manner and by whom?), the provision means to be—and tends to be—given some real, some substantial, and some constitutionally significant effect. The point is, of course, that though there are questions of this sort with respect to *every* right furnished by the Bill of Rights, the expectation remains high that the right thus furnished will neither be ignored—treated as though it were not a right at all—nor so cynically misdefined or "qualified" in its ultimate description as to be reduced to an empty shell. It is only in the case of the Second Amendment that this is approximately the current state of the law. Indeed, it is only with respect to the Second Amendment that the current state of the law is roughly the same as was the state of the law with respect to the First Amendment's guarantees of freedom of speech and of the press as recently as 1904. As a restraint on the federal government, the First Amendment was deemed to be a restriction merely on certain kinds of prior restraint and hardly at all on what could be forbidden under threat of criminal sanction. *See, e.g.*, Patterson v. Colorado, 205 U.S. 454, 462 (1907). As to the states, the amendment was not known as necessarily furnishing any restraint at all. *See id.*

a strong, supportive case law has developed in the courts, albeit case law that has developed gradually, over quite a long time.

In startling contrast, during this same time, however, the Second Amendment has generated almost no useful body of law. 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. In its place, what we have is roughly of the same scanty and utterly underdeveloped nature[10] as was characteristic of the equally scanty and equally underdeveloped case law (such as it then was) of the First Amendment in 1904, as of which date there was still to issue from the Supreme Court a single decision establishing the First Amendment as an amendment of any genuine importance at all.[11] In short, what was true of the First Amendment as of 1904 remains true of the Second Amendment even now.

The reason for this failure of useful modern case law, moreover, is not that there has been no occasion to develop such law. So much is true only of the Third Amendment.[12] In contrast, it is

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10. The most one can divine from the Supreme Court's scanty decisions ("scanty" is used advisedly—essentially there are only two) is that such right to keep and bear arms as may be secured by this amendment may extend to such "Arms" as would be serviceable within a militia but not otherwise (so a "sawed-off" shotgun may not qualify, though presumably—by *this* test—heavy duty automatic rifles assuredly would). *See* United States v. Miller, 307 U.S. 174, 178 (1939); *see also* Lewis v. United States, 445 U.S. 55, 65 n.8 (1980) (noting that legislative restrictions on the right of felons to possess firearms do not violate any constitutionally protected liberty); Robertson v. Baldwin, 165 U.S. 275, 282 (1897) (referring to "the right of the people to keep and bear Arms" as a personal right). These casual cases aside ("casual," because in *Miller*, for example, there was not even an appearance entered by the defendant-appellant in the Supreme Court), there are a few 19th-century decisions denying any relevance of the Second Amendment to the states; but these decisions, which have never been revisited by the Supreme Court, merely mimicked others of the same era in holding that *none* of the rights or freedoms enumerated in the Bill of Rights were made applicable by the Fourteenth Amendment to the states. *See, e.g.*, Presser v. Illinois, 116 U.S. 252, 265 (1886) (citing United States v. Cruikshank, 92 U.S. 542, 553 (1875)). The shaky foundation of these cases ("shaky" because the effect was to eviscerate the Fourteenth Amendment itself) has long since been recognized—and long since repudiated by the Court in general. Notwithstanding, the lower courts continue ritually to rely upon them, and the Supreme Court quite as regularly declines to find any suitable for review. *See, e.g.*, Quilici v. Village of Morton Grove, 695 F.2d 261, 269–70 (7th Cir. 1982) (holding that municipal handgun restrictions were constitutional), *cert. denied*, 464 U.S. 863 (1983). And why does one suppose that this is so?

11. *See supra* note 9.

12. Troops have not generally been quartered in private homes "in time of peace . . . without the consent of the Owner," nor even "in time of war," U.S. CONST. amend. III, for a very long time, and no Third Amendment case has ever been decided

no more true of the Second Amendment than of the First Amendment or the Fourth Amendment that we have lacked for appropriate occasions to join issue on these questions. The tendency in the twentieth century (though not earlier) of the federal government has been ever increasingly to tax, ever more greatly to regulate, and ever more substantially to prohibit various kinds of personal gun ownership and use.[13] This tendency, that is, is at least as commonplace as it was once equally the heavy tendency to tax, to regulate, and too often also to prohibit, various kinds of speech. The main reason there is such a vacuum of useful Second Amendment understanding, rather, is the arrested jurisprudence of the subject as such, a condition due substantially to the Supreme Court's own inertia—the same inertia that similarly afflicted the First Amendment virtually until the third decade of this twentieth century when Holmes and Brandeis finally were moved personally to take the First Amendment seriously[14] (as previously it scarcely ever was).

With respect to the larger number of state and local regulations (many of these go far beyond the federal regulations), moreover, the case law of the Second Amendment is even more arrested; and this for the reason that the Supreme Court has simply declined to reconsider its otherwise discarded nineteenth-century decisions—decisions holding that the Fourteenth Amendment enacted little protection of anything, and none (i.e., *no* protection) drawn from the Bill of Rights.[15]

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by the Supreme Court. Evidently, a Third Amendment case has arisen only once in a lower federal court. *See* Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982) (holding that the Third Amendment protects the legitimate privacy interests of striking correction officers in keeping their housing from being used for quartering National Guard troops).

13. For a comprehensive review of congressional action since 1934, see United States v. Lopez, 2 F.3d 1342, 1348–60 (5th Cir. 1993).

14. *See, e.g.*, Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis and Holmes, JJ., concurring); Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes and Brandeis, JJ., dissenting); United States *ex rel.* Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 417 (1921) (Holmes and Brandeis, JJ., dissenting); Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes and Brandeis, JJ., dissenting). *See generally* SAMUEL J. KONEFSKY, THE LEGACY OF HOLMES AND BRANDEIS 181–256 (1956) (reviewing the Holmes-Brandeis legacy of the First Amendment).

15. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); GERALD GUNTHER, CONSTITUTIONAL LAW 408–10 (12th ed. 1991). The *Slaughter-House Cases* denied that the Privileges and Immunities Clause of the Fourteenth Amendment extended any protection from the Bill of Rights against the states. Within three decades, however, the Court began the piecemeal abandonment of that position (albeit by relying on the Due Process Clause instead). *See* Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897) (applying

To trust to this arrested treatment of the Second Amendment—and of the Fourteenth Amendment—in 1994, in short, is as though one were inclined so to trust to the arrested treatment of the First Amendment in 1904. The difficulty in such a starting place is perfectly plain. No convincing jurisprudence is itself really possible under such circumstances. In the case of the First Amendment, we know quite well that such a jurisprudence effectively became possible only rather late, in the 1920s (but, one may add, better late than never). In the case of the Second Amendment, in an elementary sense, that jurisprudence is even now not possible until something more in the case law of the Second Amendment begins finally to fall into place. That "something more," I think, requires one to consider what one might be more willing to think about in the following way—that *perhaps the NRA is not wrong, after all, in its general Second Amendment stance*—a stance we turn here briefly to review.

I

The stance of those inclined to take the Second Amendment seriously reverts to the place we ourselves thought to be somewhat worthwhile to consult—namely, the express provisions of the Second Amendment—and it offers a series of suggestions fitting the respective clauses the amendment contains. Here is how these several propositions run:

1. The reference to a "well regulated *Militia*" is in the first as well as the last instance a reference to the ordinary citizenry. It is not at all a reference to regular armed soldiers as members of

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the Fifth Amendment prohibition against the taking of private property for public use without just compensation and holding it to be equally a restraint against the states). In 1925, the Court proceeded in like fashion with respect to the Free Speech Clause of the First Amendment, *see Gitlow*, 268 U.S. at 666, and subsequently with respect to most of the rights enumerated in the Bill of Rights (exclusive, however, of the right to keep and bear arms). As already noted, the Court has declined to reexamine its 19th century cases (*Presser* and *Cruikshank*) that merely relied on the *Slaughter-House Cases* for their rationale. *Cf.* discussion *infra* Part IV.

some standing army.[16] And quite obviously, neither is it a reference merely to the state or to the local police.

2. The very assumption of the clause, moreover, is that ordinary citizens (rather than merely soldiers, or merely the police) *may* themselves possess arms, for it is from these ordinary citizens who as citizens have a right to keep and bear arms (as the second clause provides) that such well regulated militia as a state may provide for, is itself to be drawn.

3. Indeed, it is more than merely an "assumption," however, precisely because "the right of the people to keep and bear Arms" is itself stipulated in the second clause. It is *this* right that is expressly identified as "*the* right" that is not to be ("*shall not be*") infringed. That right is made the express guarantee of the clause.[17] There is thus no room left for a claim that, despite this language, the amendment actually means to reserve to Congress some power to contradict its very terms (e.g., that "the Congress may, if it thinks it proper, forbid the people to keep and bear arms to such extent Congress sees fit to do").[18]

4. Nor is there any basis so to read the Second Amendment as though it said anything like the following: "Congress may, if it thinks it proper, forbid the people to keep and bear arms if, notwithstanding that these restrictions it may thus enact are inconsistent with the right of the people to keep and bear arms, they are not inconsistent with the right of each state to maintain some kind

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16. Article I vests power in Congress "[t]o raise and support Armies," i.e., to provide for a national standing army as such, *see* U.S. CONST. art. I, § 8, cl. 12. It is pursuant to two different clauses that Congress is given certain powers with respect to the militia, such as the power "for *calling forth the Militia* to execute the Laws of the Union, suppress Insurrections and repel Invasions," *id.* cl. 15 (emphasis added), and the power "[t]o provide for organizing, arming, and disciplining, *the Militia*, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of *training the Militia* according to the discipline prescribed by Congress," *id.* cl. 16 (emphasis added). So, too. the description of the executive power carries over the distinction between the regular armed forces of the United States in a similar fashion. Accordingly, Article II, section 2 provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, *and of the Militia* of the several States, when called into the actual Service of the United States." *Id.* art. II, § 2, cl. 1 (emphasis added).

17. And it is from the people, whose right this is, that such militia as the state may (as a free state) compose and regulate, shall be drawn—just as the amendment expressly declares.

18. Compare the utter incongruity of this suggestion with the actual provisions the Second Amendment enacts.

of militia as it may deem necessary to its security as a free state."[19]

Rather, the Second Amendment adheres to the guarantee of the right of the people to keep and bear arms as the predicate for the other provision to which it speaks, i.e., the provision respecting a militia, as distinct from a standing army separately subject to congressional regulation and control. Specifically, it looks to an ultimate reliance on the common citizen who has a right to keep and bear arms rather than only to some standing army, or only to some other politically separated, defined, and detached armed cadre, as an essential source of security of a free state.[20] In relating these propositions within one amendment, moreover, it does not disparage, much less does it subordinate, "the right of the people to keep and bear arms." To the contrary, it expressly *embraces* that right and indeed it erects the very scaffolding of a free state upon *that* guarantee. *It derives its definition of a well-regulated militia in just this way for a "free State"*: The militia to be well-

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19. Compare this incompatible language and thought with the actual provisions of the amendment. Were the Second Amendment a mere federalism ("States' rights") provision, as it is not, it would assuredly appear in a place appropriate to that purpose (i.e., not in the same list with the First through the Eighth Amendments, but nearby the Tenth Amendment), and it would doubtless reflect the same federalism style as the Tenth Amendment; for example, it might read: "*Congress shall make no law impairing the right of each state to maintain such well regulated militia as it may deem necessary to its security as a free state.*" But it neither reads in any such fashion nor is it situated even to imply such a thought. Instead, it is cast in terms that track the provisions in the neighboring personal rights clauses of the Bill of Rights. Just as the Fourth Amendment provides that "*[t]he right of the people to be secure in their persons, houses, papers, and effects . . . shall not be violated,*" U.S. CONST. amend. IV (emphasis added), so, too, the Second Amendment matches that language and likewise provides that "*the right of the people to keep and bear Arms, shall not be infringed,*" *id.* amend. II (emphasis added); *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) ("The Second Amendment protects 'the right of the people to keep and bear Arms' . . . ."). In further response to the suggestion that the Second Amendment is a mere States' rights clause in analogy with the Tenth Amendment (by, e.g., Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 57 (1989)), see STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984). As Halbrook notes,

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

Id. at 83 (emphasis added).

20. *See supra* note 16 and accompanying text.

regulated is a militia to be drawn from just such people (i.e., people with a right to keep and bear arms) rather than from some other source (i.e., from people without rights to keep and bear arms).

II

There is, to be sure, in the Second Amendment, an express reference to the security of a "*free* State."[21] It is not a reference to *the* security of THE STATE.[22] There are doubtless certain national constitutions that put a privileged emphasis on the security of "the state," but such as they are, they are all *unlike* our Constitution and the provisions they have respecting their security do not appear in a similarly phrased Bill of Rights. Accordingly, such constitutions make no reference to any right of the people to keep and bear arms, apart from state service.[23] And why do they not do so? Because, in contrast with the premises of constitutional government in this country, they reflect the belief that recognition of any such right "in the people" might well pose a threat to the security of "the state." In the view of these different constitutions, it is commonplace to find that no one within the state other than its own authorized personnel has any right to keep and bear arms[24]—a view emphatically rejected, rather than embraced, however, by the Second Amendment to the Constitution of the United States.

This rather fundamental difference among kinds of government was noted by James Madison in *The Federalist Papers*, even prior to the subsequent assurance expressly furnished by the Sec-

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21. U.S. CONST. amend. II (emphasis added). In James Madison's original draft of the amendment, moreover, the reference is to "a free country" (and not merely to "a free State"). *See* BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1026 (1971).

22. Once again, see the amendment, and compare the difference in thought conveyed in these different wordings as they might appear, in contrast, in actual print.

23. *See, e.g.*, XIANFA (1982) [Constitution] art. 55, cl. 2 (P.R.C.), *translated in* THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA 41 (1983); *infra* note 44.

24. A position evidently preferred by many today in this country as well, with the apparent approval even of the ACLU. *See* AMERICAN CIVIL LIBERTIES UNION, POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION 95 (1986) ("Except for lawful police and military purposes, the possession of weapons by individuals is not constitutionally protected."). It is quite beyond the scope of this brief Essay to attempt to account for the ACLU's stance—which may even now be undergoing some disagreement and internal review.

ond Amendment in new and concrete terms. Thus, in *The Federalist* No. 46, Madison contrasted the "advantage . . . the Americans possess" (under the proposed constitution) with the circumstances in "several kingdoms of Europe . . . [where] the governments are afraid to trust the people with arms."[25] Here, in contrast, as Madison noted, they were, and no provision was entertained to empower Congress to abridge or to violate that trust, any more than, as Alexander Hamilton noted, there was any power proposed to enable government to abridge the freedom of the press.[26]

To be sure, in the course of the ratification debates, doubts were expressed respecting the adequacy of this kind of assurance (i.e., the assurance that no power was affirmatively proposed for Congress to provide any colorable claim of authority to take away or to abridge these rights of freedom of the press and of the right of the people to keep and bear arms).[27] And the quick resolve to add the Second Amendment, so to confirm that right more expressly, as not subject to infringement by Congress, is not difficult to understand.

The original constitutional provisions regarding the militia[28] placed major new powers in Congress beyond those previously conferred by the Articles of Confederation. These new powers not only included a wholly new power to provide for a regular, standing, national army even in peacetime,[29] but also powers for "calling forth the Militia,"[30] for "*organizing, arming, and disciplining*, the Militia,"[31] and for "governing such Part of them as may be employed in the Service of the United States."[32] Indeed, all that was *expressly* reserved from Congress's reach was "the Appointment of the officers" of this citizen militia, for even "the Authority of training the Militia," though reserved in the first instance from Congress, was itself subordinate to Congress in the

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25. THE FEDERALIST NO. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961).
26. *Id.* NO. 84 at 513–14 (Alexander Hamilton).
27. *See, e.g.*, Leonard W. Levy, *Bill of Rights (United States)*, *in* 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 113, 114–15 (Leonard W. Levy et al. eds., 1986).
28. *See supra* note 16.
29. U.S. CONST. art. I, § 8, cls. 12–13.
30. *Id.* cl. 15.
31. *Id.* cl. 16 (emphasis added).
32. *Id.*

important sense that such training was to be "according to the discipline prescribed *by Congress*."[33]

These provisions were at once highly controversial, respecting their scope and possible implications of congressional power. In attempting to counter anti-ratification objections to the proposed constitution—objections that these lodgments of powers would concentrate excessive power in Congress in derogation of the rights of the people—Hamilton and Madison argued essentially three points:[34] (a) the appointment of militia officers was exclusively committed to state hands;[35] (b) the localized civilian-citizen nature of the militia would secure its loyalty to the rights of the people;[36] and (c) the people otherwise possessed a right to keep and bear arms—which right Congress was given no power whatever to regulate or to forbid.[37] And, as to the argument that the plan was defective insofar as it left the protection of the rights of the people insecure because no *express* prohibition on Congress was *separately* provided in respect to those rights (rather, the powerlessness of Congress to infringe them was solely a deduction from the doctrine of enumerated powers alone), Hamilton insisted that to specify anything further—to provide an *express* listing of particular prohibitions on Congress—was not only unnecessary but itself would be deeply problematic, because the implication of such a list would be that anything not named in the list might somehow be thought therefore in fact to be subject to regulation or prohibition by Congress though no enumerated power to affect any such subject was provided by the Constitution itself.[38] In brief, Hamilton maintained that to do anything in the nature of adding a Bill of Rights would cast doubt upon the doctrine of enumerated powers itself.

These several explanations were deemed insufficient, however, and to meet the objections of those in the state ratifying conventions unwilling to leave the protection of certain rights to mere inference from the doctrine of enumerated powers, objections raised in the course of several state ratification debates, the Bill of

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33. *Id.* (emphasis added).
34. *See* THE FEDERALIST NOS. 28, 29, 84 (Alexander Hamilton); *id.* NO. 46 (James Madison) (Clinton Rossiter ed., 1961).
35. *Id.* NO. 29 at 182, 186 (Alexander Hamilton) (emphasizing this point).
36. *See id.* at 185–87.
37. *See id.* NO. 46 at 299–300 (James Madison).
38. *Id.* NO. 84 at 512–14 (Alexander Hamilton).

Rights was promptly produced by Madison, in the first Congress to assemble under the new Constitution, in 1789. Accordingly, as with "the freedom of the press," the protection of "the right of the people to keep and bear arms" was thus made *doubly* secure in the Bill of Rights.[39] Thomas Cooley quite accurately recapitulated the controlling circumstances in the leading nineteenth century treatise on constitutional law:

> The [Second] [A]mendment, like most other provisions in the Constitution, has a history. It was adopted with some modification and enlargement from the English Bill of Rights of 1688, where it stood as a protest against arbitrary action of the overturned dynasty in disarming the people, and as a pledge of the new rulers that this tyrannical action should cease. . . .
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> *The Right is General.* . . . The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose.[40]

Cooley's reference to English history, moreover, in illuminating the Second Amendment right (as personal to the citizen as such), is useful as well. For in this, he merely followed William Blackstone, from Blackstone's general treatise from 1765.

In chapter 1, appropriately captioned "Of The Rights of Persons," Blackstone divided what he called natural personal rights into two kinds: "primary" and "auxiliary."[41] The distinction was between those natural rights primary to each person intrinsically and those inseparable from their protection (thus themselves indispensable, "auxiliary" personal rights). Of the first kind, generically, are "the free enjoyment of personal security, of personal liberty,

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39. *See* JOYCE L. MALCOLM, TO KEEP AND BEAR ARMS 164 (1994). William Rawle, George Washington's candidate for the nation's first attorney general, made the same point. *See* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125–26 (2d ed. 1829).

40. THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 270–71 (1880). To be sure, Cooley went on to note that the Second Amendment had, as a "further" purpose (not the chief purpose—which, as he says, was to confirm the citizen's personal right to keep and bear arms—but as a "further purpose"), the purpose to preclude any excuse of alleged need for a large standing army. *Id.*; *see also* PA. CONST. of 1776, art. VIII ("That the people have a right to bear arms for the defence of themselves, and the state; and as standing armies in the time of peace, are dangerous to liberty, they ought not to be kept up: and that the military should be kept under strict subordination to, and governed by the civil power.").

41. 1 WILLIAM BLACKSTONE, COMMENTARIES *129, *141.

and of private property."[42] Of the latter are rights possessed "to vindicate" one's primary rights; and among these latter, Blackstone listed such things as access to "courts of law," and, so, too, "the right of petition[]," and "*the right of having and using arms for self-preservation and defence.*"[43]

In contrast with all of this, the quite different view—the view of "the secure state" we were earlier considering—of countries *different* from the United States—assumes no right of the people to keep and bear arms. Rather, these differently constituted states put their own first stress on having a well regulated army (and also, of course, an internal state police). To be sure, such states also may provide for some kind of militia, but insofar as they may (and several do),[44] one can be quite certain that it will *not* be a

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42. *Id.* at *144.

43. *Id.* (emphasis added). Against this background, incidentally, the Supreme Court's decision in DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989), may be important to take into account in understanding the underpinnings of the personal right to keep and bear arms in the Blackstone minimal sense of the right to keep arms for self-preservation itself. To the extent that there is no enforceable constitutional obligation imposed on government in fact to protect every person from force or violence—and also no liability for a per se failure to come to any threatened person's aid or assistance (as *DeShaney* declares altogether emphatically)—the idea that the same government could nonetheless threaten one with criminal penalties merely "for having and using arms for self-preservation and defense" becomes impossibly difficult to sustain consistent with any plausible residual view of auxiliary natural rights. *See also* Nicholas Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through The Ninth Amendment*, 24 RUTGERS L.J. 1, 64–67 (1992) (collecting prior articles and references to the strong natural rights history of the personal right to possess essential means of self defense).

An impressive number of authors, whose work Nicholas Johnson reports (and to which he adds in this article), have sought to locate the right to keep and bear arms in the Ninth Amendment. They note that the Ninth Amendment provides precautionarily that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. And they go forward to show that the right to bear arms was a right of just this sort, i.e., that "the right to keep and bear Arms" was itself so utterly taken for granted, and so thoroughly accepted, that it fits the Ninth Amendment's description very aptly. *See* Johnson, *supra*, at 34–37. Unsurprisingly, however, the sources relied upon to show that this was so, strong as they are (and they are quite strong), are essentially just the very same sources that inform the Second Amendment with respect to the predicate clause on the right of the people to keep and bear arms. That is, they are the same materials that also show that there was a widespread understanding of a common right to keep and bear arms, which is itself the express right the Second Amendment expressly protects. Recourse to the same materials to fashion a Ninth Amendment ("unenumerated") right is not only largely replicative of the Second Amendment inquiry, but also singularly inappropriate under the circumstances—the right to bear arms is not left to the vagaries of Ninth Amendment disputes at all.

44. *E.g.*, XIANFA [Constitution] art. 55, cl.2 (P.R.C.), *translated in* THE CONSTITUTION

militia drawn from the people with a "right to keep and bear Arms." For in these kinds of states, there is assuredly no such right. To the contrary, such a state is altogether likely to forbid the people to keep and bear arms unless and until they are conscripted into the militia, after which—to whatever extent they are deemed suitably "trustworthy" by the state—they might then (and only then) have arms fit for some assigned task.

But, again, the point to be made here is that the Second Amendment represented not an adoption, but a rejection, of this vision—a vision of the security state. It did not concede to any such state. Rather, it speaks to sources of security within a free state, within which (to quote the amendment itself still again) "*the right of the people to keep and bear Arms[] shall not be infringed.*" The precautionary text of the amendment refutes the notion that the "well regulated Militia" the amendment contemplates is somehow a militia drawn from a people "who have no right to keep and bear arms." Rather, the opposite is what the amendment enacts.[45]

OF THE PEOPLE'S REPUBLIC OF CHINA 41 (1983) ("It is the honourable duty of citizens of the People's Republic of China to perform military service and join the militia in accordance with the law.").

45. *See* MALCOLM, *supra* note 39, at 135–64 (tracing the English antecedents and reviewing the full original history of the Second Amendment). Professor Malcolm concludes, exactly as Thomas Cooley did a century earlier, *see supra* note 40, that

> [t]he Second Amendment was meant to accomplish two distinct goals, each perceived as crucial to the maintenance of liberty. First, it was meant to guarantee the individual's right to have arms for self-defence and self-preservation. Such an individual right was a legacy of the English Bill of Rights [broadened in scope in America from the English antecedent]. . . .
>
> . . . .
>
> The clause concerning the militia was not intended to limit ownership of arms to militia members, or return control of the militia to the states, but rather to express the preference for a militia over a standing army.

MALCOM, *supra*, at 162–63. For other strongly confirming reviews, see, e.g., SUBCOMMITTEE ON THE CONSTITUTION OF THE COMM. ON THE JUDICIARY, THE RIGHT TO KEEP AND BEAR ARMS, 97th Cong., 2d Sess. (1982); HALBROOK, *supra* note 19, at 67–80; David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31, 33–43 (1976); Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131 (1991); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 604–15 (1986); David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1, 43–62 (1987); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 206, 211–45 (1983); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 645–51 (1989); Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS., Winter 1986, at 125, 133–41. *But see* Ehrman & Henigan, *supra* note 19; Dennis A. Henigan,

III

The Second Amendment of course does not assume that the right of the people to keep and bear arms will not be abused. Nor is the amendment insensible to the *many* forms which such abuses may take (e.g., as in robbing banks, in settling personal disputes, or in threatening varieties of force to secure one's will). But the Second Amendment's answer to the avoidance of abuse is to support such laws as are directed to those who threaten or demonstrate such abuse and to no one else. Accordingly, those who do neither—who neither commit crimes nor threaten such crimes—are entitled to be left alone.

To put the matter most simply, the governing principle here, in the Second Amendment, is not different from the same principle governing the First Amendment's provisions on freedom of speech and the freedom of the press. A person may be held to account for an abuse of that freedom (for example, by being held liable for using it to publish false claims with respect to the nutritional value of the food offered for public sale and consumption). Yet, no one today contends that just because the publication of such false statements is a danger one might in some measure reduce if, say, *licenses* also could be required as a condition of owning a newspaper or even a mimeograph machine, that therefore licensing can be made a requirement of owning either a newspaper or a mimeograph machine.[46]

The Second Amendment, like the First Amendment, is thus not mysterious. Nor is it equivocal. Least of all is it opaque. Rather, one may say, today it is simply unwelcome in any community that wants no one (save perhaps the police?) to keep or bear arms at all. But assuming it to be so, i.e., assuming this is how some now want matters to be, it is for them to seek a repeal of this amendment (and so the repeal of its guarantee), in order to have their way. Or so the Constitution itself assuredly appears to require, if that is the way things are to be.

Arms, Anarchy and the Second Amendment, 26 VAL. U. L. REV. 107, 111 n.17 (1991) (listing additional articles by others).

46. Compare the claim of a power in government to require "licensing" the right to keep arms.

IV

In the first instance, enacted as it was as part of the original Bill of Rights of 1791, the Second Amendment merely was addressed to Congress and not to the states. The mistrust and uncertainty of how *Congress* might presume to construe its new powers—powers newly enumerated in Article I of the Constitution—resulted in the Bill of Rights inclusive of the Second Amendment, proposed in the very first session of the new Congress in 1789. As it was then apprehended that although Congress was never given any power to preempt state constitutional provisions respecting freedom of speech or of the press, Congress might nonetheless presume to regulate those subjects to its own liking under pretext of some other authority if not barred from doing so by amendment, the Second Amendment—and the other amendments composing the original Bill of Rights—reflected the same mistrust and were adopted for the same reason as well. But, to be sure, neither the First nor the Second Amendment,[47] nor any of the other amendments in the Bill of Rights were addressed as limits on the states.[48]

In 1866, however, this original constitutional toleration of state differences with respect to their internal treatment of these rights came to an end, in the aftermath of the Civil War. The immunities of citizens with respect to rights previously secured only from abridging acts of Congress were recast in the Fourteenth Amendment as immunities secured also from any similar act by any state.[49] It was precisely in this manner that the citizen's right to

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47. The Second Amendment was originally the fourth amendment of twelve approved by the requisite two-thirds of both houses of Congress in 1789 and at once submitted for ratification by the state legislatures. Because only six states approved either the first or second of these twelve amendments during the ensuing two years (1789–1791), however, neither of these was adopted (since, unlike the others, they failed to be confirmed by three-fourths of the states). So, what was originally proposed as the third amendment became the First Amendment and what was originally proposed as the fourth amendment became the Second Amendment in turn. (On May 22, 1992, however, the original proposed second amendment of 1789 was declared by Congress to have acquired sufficient state resolutions of ratification as of May 7, 1992, as also itself to have become effective as well. The result is that what was originally submitted as the second amendment has become the Twenty-Seventh Amendment instead.) *See* William Van Alstyne, *What Do You Think About the Twenty-Seventh Amendment?*, 10 CONST. COMMENTARY 9 (1993).

48. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 249 (1833) ("These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.").

49. *See* U.S. CONST. amend. XIV.

keep and bear arms, formerly protected only from acts of Congress, came to be equally protected from abridging acts of the states as well.

So, in reporting the Fourteenth Amendment to the Senate on behalf of the Joint Committee on Reconstruction in 1866, Senator Jacob Meritt Howard of Michigan began by detailing the "first section" of that amendment, i.e., the section that "relates to the privileges and immunities of citizens."[50] He explained that the first clause of the amendment (the "first section"), once approved and ratified, would "restrain the power of the States"[51] even as Congress was already restrained (by the Bill of Rights) from abridging

> the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; *the right to keep and to bear arms*; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures[; etc., through the Eighth Amendment].[52]

In the end, Senator Howard concluded his remarks as follows: "*The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.*"[53] There was no dissent from this description of the clause.

Following ratification of the Fourteenth Amendment, therefore, some state constitutions might presume to provide even *more* protection of these same rights than the Fourteenth Amendment (and some continue even now to do so[54]), but none could there-

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50. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Jacob Meritt Howard). Senator Howard is speaking here—and in his ensuing remarks—in explanation of the "first section" of the Fourteenth Amendment that provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."

51. *Id.* at 2766.

52. *Id.* at 2765 (emphasis added).

53. *Id.* at 2766 (emphasis added). For the most recent review of this matter, with useful references to the previous scholarship on the same subject, and reaching the same conclusion still again, see Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993).

54. *See* Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U.

after presume to provide any less—whether the object of regulation was freedom of speech and of the press or of the personal right to arms. And it is quite clear that in the ratification debates of the Fourteenth Amendment, no distinction whatever was drawn between the "privileges and immunities" Congress was understood already to be bound to respect (pursuant to the Bill of Rights) and those now uniformly also to bind the states. Each was given the same constitutional immunity from abridging acts of state government as each was already recognized to possess from abridgment by Congress. What was previously forbidden only to Congress to do was, by the passage of the Fourteenth Amendment, made equally forbidden to any state. Moreover, the point was acknowledged to be particularly important in settling the Second Amendment right as a citizen's personal right, i.e., personal to each citizen as such.[55]

V

Again, however, one does not derive from these observations that each citizen has an uncircumscribable personal constitutional right to acquire, to own, and to employ any and all such arms as one might desire so to do, or necessarily to carry them into any place one might wish. To the contrary, restrictions generally con-

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DAYTON L. REV. 59, 79 (1989) ("State courts have on at least 20 reported occasions found arms laws to be unconstitutional."); Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177 (1982) (reviewing state constitutional clauses and the right to keep and bear arms).

55. The inclusion of this entitlement for personal protection is, in the Fourteenth Amendment, even more clear than as provided (as a premise) in the Second Amendment itself. It was, after all, the defenselessness of Negroes (denied legal rights to keep and bear arms by state law) from attack by night riders—even to protect their own lives, their own families, and their own homes—that made it imperative that they, as citizens, could no longer be kept defenseless by a regime of state law denying them the common right to keep and bear arms. Note the description of the right as a personal rigbt in the report by Senator Howard. *See supra* text accompanying note 52. For confirming references, see also the examples provided in MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE 24, 43, 56, 72, 138–41, 164, 203 (1986); HALBROOK, *supra* note 19, at 107–23; Skayoko Blodgett-Ford, *Do Battered Women Have a Right to Bear Arms?*, 11 YALE L. & POL'Y REV. 509, 513–24 (1993); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Kates, *supra* note 45, at 254–57. For an overall responsible general review, see also Levinson, *supra* note 45. For the most recent critical review, however, see Raoul Berger, *Constitutional Interpretation and Activist Fantasies*, 82 KY. L.J. 1 (1993–1994) (with additional references to previous books and articles).

sistent merely with safe usage, for example, or restrictions even of a particular "Arms" kind, are not all per se precluded by the two constitutional amendments and provisions we have briefly reviewed. There is a "rule of reason" applicable to the First Amendment, for example, and its equivalent will also be pertinent here. It is not the case that one may say whatever one wants and however one wants, wherever one wants, and whenever one likes—location, time, and associated circumstances do make a difference, consistent even with a very strong view of the freedom of speech and press accurately reflected in conscientious decisions of the Supreme Court. The freedoms of speech and of the press, it has been correctly said, are not absolute.

Neither is one's right to keep and bear arms absolute. It may fairly be questionable, for example, whether the type of arms one may have a "right to keep" consistent with the Second Amendment extend to a howitzer.[56] It may likewise be questionable whether the "arms" one *does* have a "right to keep" are necessarily arms one also may presume to "bear" wherever one wants, e.g., in courtrooms or in public schools. To be sure, each kind of example one might give will raise its own kind of question. And serious people are quite willing to confront serious problems in regulating "the right to keep and bear arms," as they are equally willing to confront serious problems in regulating "the freedom of speech and of the press."[57]

The difference between these serious people and others, however, was a large difference in the very beginning of this country and it remains as a large difference in the end. The difference is that such serious people begin with a constitutional understanding that declines to trivialize the Second Amendment or the Fourteenth Amendment, just as they likewise decline to trivialize any other right expressly identified elsewhere in the Bill of Rights. It is difficult to see why they are less than entirely right in this unremarkable view. That it has taken the NRA to speak for them, with respect to the Second Amendment, moreover, is merely inter-

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56. In contrast, the suggestion that it does not extend to handguns (in contrast to howitzers) is quite beyond the pale (i.e., it is wholly inconsistent with any sensible understanding of a meaningful right to keep arms as a personal right).

57. Such questions, moreover, are hardly on that account (merely as questions) necessarily hard or difficult to answer in reasonable ways, even fully conceding a strong view of the right to keep and bear arms (e.g., rules of tort or of statutory liability for careless storage endangering minors or others foreseeably put at unreasonable risk).

esting—perhaps far more as a comment on others, however, than on the NRA.

For the point to be made with respect to Congress and the Second Amendment[58] is that the essential claim (certainly not every claim—but the essential claim) advanced by the NRA with respect to the Second Amendment is extremely strong. Indeed, one may fairly declare, it is at least as well anchored in the Constitution in its own way as were the essential claims with respect to the First Amendment's protection of freedom of speech as first advanced on the Supreme Court by Holmes and Brandeis, seventy years ago.[59] And until the Supreme Court manages to express the central premise of the Second Amendment more fully and far more appropriately than it has done thus far, the constructive role of the NRA today, like the role of the ACLU in the 1920s with respect to the First Amendment (as it then was), ought itself not lightly to be dismissed.[60] Indeed, it is largely by the "unreasonable" persistence of just such organizations in this country that the Bill of Rights has endured.

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58. And equally with respect to the states, pursuant to the Fourteenth Amendment.

59. *See supra* notes 9–14 and accompanying text.

60. Unless, of course, one holds the view that it is really desirable after all that the Constitution should indeed be construed—the Second and Fourteenth Amendments to the contrary notwithstanding—to say that the right to keep and bear arms is the right to keep and bear arms as it is sometimes understood (i.e., as though it had the added words, "but only according to the sufferance of the state").

EXHIBIT 4

U.S. News & World Report CIVIC

Open Carry Deters Crime

By **Larry Pratt**, Contributor April 25, 2012

OPEN CARRY IS LEGAL IN 28 states without restriction. In another 13 states, a license is required. As ABC entitled a recent report, "Open carry is on the rise." Shane Belanger is the head of the Maine Open Carry Association. He organized a rally where attendees were carrying openly. He told ABC News that the purpose of the public display was to accustom people to seeing guns and realize that they are not threatening.

[See the latest political cartoons.]

As San Bernardino County (Calif.) Sheriff's Sargent, Dave Phelps said, "Gang members aren't known to open carry." For people living in jurisdictions where concealed carry is not legal, but open carry is, the latter is their only option. Other reasons for open carry include providing a visible deterrent to crime and providing more comfort and quicker access than concealed carry. A 1985 Department of Justice survey of incarcerated felons reported that 57 percent of the felons polled agreed that "criminals are more worried about meeting an armed victim than they are about running into the police."

Researcher Gary Kleck found that 92 percent of criminal attacks are deterred when a gun is merely shown (or, rarely, a warning shot fired). By inference, this means that open carry would have the effect of deterring crime in the same way that a thief might choose another restaurant when he sees police eating at his intended target.

Also, larger handguns with more potent ammunition are easier to carry openly. I personally have taken part in public awareness campaigns. On one occasion I was contacted by a Gun Owners of America member, Ray Seidel, who lives in Ruidoso, N.M. The mayor of the village had proclaimed that guns be banned everywhere within its boundaries.

[Read America's Gun Culture and Its Effect on the 2012 Election.]

A hearing was held in Ruidoso last fall with an overflow attendance. In defiance of the mayor, but consistent with the state's explicit constitutional protection of the right to open carry, many of us testifying were openly carrying. The mayor's proposal was shot down, so to speak.

Awareness of an armed citizenry has been shown to lower crime. In 1982, Atlanta suburb Kennesaw required all households to have a gun. The residential burglary rate subsequently dropped 89 percent in Kennesaw, compared to the modest 10.4 percent drop in Georgia as a whole.

Ten years later the residential burglary rate in Kennesaw was still 72 percent lower than when the ordinance was passed.

No wonder open carry is on the march.

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Larry Pratt, Contributor

Executive Director of Gun Owners of America

Tags: gun control and gun rights, Second Amendment

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