

**PRINTZ PUNTS ON THE PALLADIUM OF RIGHTS: IT IS TIME
TO PROTECT THE RIGHT OF THE INDIVIDUAL
TO KEEP AND BEAR ARMS**

Guard with jealous attention the public liberty. Suspect everyone who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are inevitably ruined.

-Patrick Henry¹

I. INTRODUCTION

Are we ready to give up our rights? Many of today's politicians and the media seem to ask, or rather demand, that we should. They demand this regardless of the text of the Constitution, regardless of prevailing scholarly theory, and regardless of the possibility that society could become incapable of protecting itself. The disappointing result is, while a growing body of scholarly literature supports the individual right of the people to keep and bear arms,² the courts, including both state courts³ and the

1. Nicholas Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1, 49 (1992) (quoting Patrick Henry (July 29, 1788), in 4 J. ELLIOT, DEBATES IN THE GENERAL STATE CONVENTIONS 167, 380 (3d ed 1937)).

2. STEPHEN HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984); JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGIN OF AN ANGLO-AMERICAN RIGHT (1994); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987). Over the past ten years, scholarly work on the subject has experienced tremendous growth. This short list, along with the works of Robert J. Cottrol and Raymond T. Diamond, represents some of the more influential works.

3. *Robertson v. City of Denver*, 874 P.2d 325, 335 (Colo. 1994) (upholding Denver's restrictions on certain types of semi-automatic rifles); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 175 (Ohio 1993) (holding that a total ban on possession and sale of "assault weapons," with the exception of current owners who registered, was not constitutionally adverse to the fundamental individual right to bear arms); *Oregon State Shooting Ass'n v. Multonah County*, 858 P.2d 1315, 1321-22 (Or. Ct. App. 1993) (holding Oregon's constitutional right to arms inapplicable to certain "assault weapons").

Supreme Court,⁴ continue to pass on this right that Justice Story once called the "palladium of the liberties of a republic."⁵ To continue to ignore this fundamental right can only lead to its disappearance from the liberties that are currently enjoyed and, perhaps more ominously, lead to the disappearance of all the liberties inherent in a free society.⁶

This Article will examine various arguments establishing a federally protected individual right to keep and bear arms. Part II examines the text of the Second Amendment by breaking the Amendment down into its dependent participial phrase and independent clause and examining the individual words which its authors used. A textual analysis is a primary key to understanding this or any fundamental right. Part III looks at the right to keep and bear arms as a natural right to self-defense that predates organized government and is fundamental to the Lockean social contract theory upon which our government is based. In Part IV, the Second Amendment is viewed in light of the Ninth Amendment and, perhaps most importantly, the Fourteenth Amendment to the Constitution. This section reveals the importance of the Second Amendment in light of other constitutional amendments as well as considers the Supreme Court's failure to "incorporate" it into the Due Process Clause of the Fourteenth Amendment. Finally, Part V examines the rather short judicial history of the Second Amendment, paying special attention to recent Supreme Court decisions that have "punted" the chance to give modern viability to the Amendment.

Each part of this Article builds on the other parts in establishing this right to bear arms, and each part provides its own justification and reasoning to further challenge the Supreme Court to take action on this long overdue issue. It is hoped this Article will bring about a heightened sense of awareness for the individual's federally protected right to keep and bear arms. Because this right is the right that secures all others, the Unit-

4. *Printz v. United States*, 521 U.S. 898 (1997) (holding portions of the Brady Bill inapplicable based on Tenth Amendment concerns); *United States v. Lopez*, 514 U.S. 549 (1995) (holding Congress' "gun free school zones" unconstitutional by restricting application of the Commerce Clause).

5. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 708-09 (Carolina Academic Press 1987) (1833).

6. *Id.*

ed States' success at ensuring that the constitutional rights of the past two centuries are preserved for the minorities, the under-privileged, and the weak of centuries to come is dependent upon the Second Amendment's continued viability.

II. THE TEXT ITSELF SHOWS AN INDIVIDUAL RIGHT

Although the antiquated language of the eighteenth century can be confusing, the text of the amendment itself is still the best place to start our analysis. It states, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."⁷ The sentence as it is written seems grammatically flawed because the dependent participial phrase, "[a] well regulated Militia, being necessary to the security of a free State," modifies nothing unless it modifies the entire sentence adverbially. This introductory phrase has a subject and, hence, begins to sound more like a clause in which the subordinating conjunction is missing. While English grammar rules were not completely standardized in the eighteenth century, in present-day English the participial phrase beginning "being necessary to the security of a free State" would always function as an adjective that would modify "militia."⁸ However, because the sentence already has the subject "right," militia would then have no function in the sentence. The entire participial phrase must be treated as a clause in which the subordinating conjunction is missing. We then must conjecture what the phrase would mean in modern-day English, and it appears that the most likely way of reading this would be, "[Whereas] a well regulated Militia [] [is] necessary to the security of a free State, the right of the people to keep and bear Arms [] shall not be infringed."⁹

By adding the subordinating conjunction "whereas," it is only necessary to change the verb "to be" from its participial

7. U.S. CONST. amend. II.

8. See ANDREA LUNSFORD & ROBERT CONNOR, *THE ST. MARTIN'S HANDBOOK* 163-64 (3d ed. 1992).

9. Notice two commas are omitted to conform to modern punctuation patterns. *BLACK'S LAW DICTIONARY* defines the word "whereas" as meaning "when in fact." *BLACK'S LAW DICTIONARY* 1596 (6th ed. 1990). The word "whereas" seems to add the least additional meaning to the sentence.

form "being" to the present tense form "is." Some other choice of subordinating conjunction would necessitate the changing of the verb itself and not just its form, as well as resulting in the addition of other new words.¹⁰ It is desirable to add as few words as possible because adding words can add possible unintended meaning. The addition of "whereas" and the changing of the participle to the verb adds the least additional meaning while conforming to a modern-day grammatical construction. The addition, however, hopefully results in greater clarity and comprehension for the modern reader.

In modern English, a subordinate clause requires subordinating conjunction plus a subject and a predicate.¹¹ A subordinate clause is reduced to a single part of speech such as an adjective, adverb, or noun. Because it always modifies something, it cannot stand alone as a sentence. The original text of the Second Amendment contains only a participial phrase because it lacks this subordinating conjunction. When the subordinating conjunction "whereas" is added, an adverbial dependent clause is formed: "Whereas a well regulated Militia is necessary to the security of a free State." This clause modifies the sentence as a whole by telling why, how, or under what circumstances the action of "shall not be infringed" will take place.¹² The modern grammatical construction makes the sentence more accessible to analysis.

Having updated the archaic grammar, a look into the meanings of the terms contained in the amendment will help us construct an even clearer picture of the purpose and intent of the Framers. The first phrase to be considered is "well regulated Militia." The twentieth century notion of a militia is different from the notion of a militia in 1789. A modern reader is likely to

10. For example, using the subordinating conjunction "if," would have this result: "[If] a well regulated Militia [is] necessary to the security of a free State, [then] the right of the people to keep and bear Arms shall not be infringed." Other subordinating conjunctions such as "because," "inasmuch," and "since" would result in the same changes as "whereas."

11. H. RAMSEY FOWLER & JANE E. AARON, *THE LITTLE BROWN HANDBOOK* 172-75 (5th ed. 1995). Most commentators suggest incorrectly that the first part of the Second Amendment is a clause. See, e.g., David E. Johnson, *Taking a Second Look at the Second Amendment and Modern Gun Control Law*, 86 KY. L.J. 197, 200 (1997).

12. FOWLER & AARON, *supra* note 11, at 190-96.

associate this term not necessarily with the Army but with a body of soldiers, or at least a group whose members claim to be soldiers.¹³ Many would claim, or at least their groups would claim, that the Alabama Militia and the Montana Militia are militias in the constitutional sense because of traits such as the wearing of military-style uniforms, the ownership of guns, and the political claim that they are a militia. Likewise, some would say that the National Guard is the modern embodiment of the militia. These groups, however, are not the militia that the Founders were addressing.¹⁴ "In the eighteenth century, the term 'militia' was rarely used to refer to organized military units, and, indeed, eighteenth century *legal* usage seems never to have adopted that meaning. Rather, the 'militia' included all citizens who qualified for military service (*i.e.*, most adult males)."¹⁵ The "militia" is still statutorily defined today as consisting of all able-bodied males between the ages of seventeen and forty-five who are citizens or intend to become citizens of the United States.¹⁶ It is also interesting to note that "well-regulated" in eighteenth-century usage meant "properly disciplined" not "government-controlled."¹⁷

Additionally, the Constitution refers to a "Militia" in Article I, Section 8, and forbids the states to keep "Troops" without Congress consent in Article I, Section 10.¹⁸ The "Militia" and the "Troops" are clearly separate terms. The term "militia" was used to express a preference for a militia over a standing army of "troops" or even a "select militia" which could rule over the rest of a defenseless population.¹⁹ Many of the Framers feared

13. Lund, *supra* note 2, at 106.

14. *Id.*

15. *Id.* (citing First Militia Act, 1 Stat. 271 (1792)).

16. 10 U.S.C.A. § 311(a) (Supp. 1997). The statute also provides that women members of the National Guard are members of the militia. *Id.* Part (b) of the statute sets out who is in the organized and who is in the unorganized militia. *Id.* § 311(b).

17. David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 626 n.328 (1986).

18. U.S. CONST. art. I, § 8, cl. 16 (setting forth under what circumstance Congress can organize, arm, and discipline the militia and what authority the states retain over the militia); U.S. CONST. art. I, § 10, cl. 3 (prohibiting states from keeping troops and ships of war in time of peace).

19. David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to Arms*, 93 MICH. L. REV. 1333, 1355-56 (1995).

a standing army.²⁰ "A militia is the only safe form of military power that a popular government can employ; and because it is composed of the armed yeomanry, it will prevail over the mercenary professionals who man the armies of neighboring monarchs."²¹ Even today's National Guard would have been feared by the Framers because of its access to training and heavy armaments.²² Indeed, to grant the National Guard a right to keep arms through the Second Amendment would be a redundant waste of the Framers' space.²³ George Mason, a Virginian who refused to sign the Constitution because it contained no Bill of Rights asked, "Who are the Militia?" He answered his own question: "They consist now of the whole people."²⁴ This is also the sense in which the militia is referred to in the *Federalist Papers* and in Article I, Section 8, Clause 16 of the Constitution.²⁵ In fact, the version of the Amendment which passed the House and was later stylistically shortened by the Senate expressly stated that the militia is "composed of the body of the People."²⁶

The next phrase that could possibly be misconstrued is "being necessary to the security of a free State." Contrary to several lower court holdings, the "free state" language does not intend to establish a collective state right.²⁷ This is further evidenced by the next clause guaranteeing the right to the people. This express reference to the security of a "free state" is "not a refer-

20. Levinson, *supra* note 2, at 647-48.

21. *Id.* (quoting EDMUND MORGAN, *INVENTING THE PEOPLE* 157 (1988)).

22. Today's National Guard weapons inventory includes tanks, artillery, and jets. These weapons are beyond the average citizen's grasp. Additionally, today's National Guard is as equally federally controlled as it is state controlled which could lead to indefinite call-up of the state's defense force. The "Militia" would take the place of the National Guard in its absence. Also, with the cutbacks in defense spending, the combat power of the state is weakening as the federal government shifts reserve and guard roles to combat support and service support, thereby stripping them of their effective combat power.

23. Kopel, *supra* note 19, at 1355.

24. Levinson, *supra* note 2, at 647 (quoting George Mason (June 14, 1788), in 3 J. ELLIOT, *DEBATES IN THE GENERAL STATE CONVENTIONS* 425 (3d ed. 1937)).

25. See, e.g., *THE FEDERALIST NOS. 25*, at 166, 29, at 184 (Alexander Hamilton), NO. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961).

26. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1166 (1991) (quoting E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* (1957)).

27. See STEPHEN, *supra* note 2.

ence to *the* security of THE STATE."²⁸ Also, in his original draft of the Second Amendment, James Madison referred to a "free country," not merely to a "free state."²⁹ Other countries, whose constitutions contain more explicit references to a secure state, "reflect the belief that recognition of any such right 'in the people' might well pose threat to the security of 'the state.'"³⁰ Under such constitutions it is not unusual to find that no one in the state except the army and police has the power to keep and bear arms.³¹ Our Second Amendment explicitly rejects this notion.³²

Now the adverbial dependent clause takes on a modern English meaning, and it can be coupled with the independent clause which lends itself more readily to analysis.³³ The independent clause states simply that "the right of the people to keep and bear Arms [] shall not be infringed."³⁴ This clause seems plain enough. The right to keep and bear arms is guaranteed not to the states but to the people. As it seems illogical that the Framers would use a word one way in one sentence and another way in the next, it then follows that people who are protected by the Second Amendment are the same people who are protected by the First Amendment, the Fourth Amendment, the Ninth Amendment, and the Tenth Amendment.

This right, then, the right of the people to keep and bear arms, shall not be infringed. Certainly, just as the First Amendment does not guarantee an absolute right to produce pornography, print libel, or threaten others violently, the Second Amendment does not guarantee an absolute right to keep and bear all types of arms. Even assuming that private citizens at large could afford such weaponry or train themselves in its use, the legitimate and compelling interest of the state would require a rule of reason preventing the ownership of nuclear, biological,

28. William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1244 (1994).

29. *Id.* at 1244 n.21 (citation omitted).

30. *Id.* at 1244.

31. *See id.*

32. *Id.*

33. As stated earlier, when words are added, meaning is added. It is my sole intention to add only those words which will add clarity and reflect a modern-day reading of the text.

34. U.S. CONST. amend. II (comma omitted for clarity).

and chemical weapons, war planes, missiles, and tanks that are better suited for organized military use and not for the private citizen. While this right is not absolute, it is also not impotent. The people have a right to retain weapons that are, at the very minimum, of average military suitability such as rifles, shot-guns, "assault weapons,"³⁵ and handguns³⁶ for the defense of country, state, home, and person. William Van Alstyne points out that:

[I]t may fairly be questionable, for example, [which] type[s] of arms one may have a "right to keep" [T]o 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."³⁷

Justice Story described the importance of a militia as "the natural defence of a free country' not only 'against sudden foreign invasions' and 'domestic insurrections' . . . but also against 'domestic usurpations of power by rulers.'"³⁸ Thus, it is for these purposes, of both assisting the government and standing as a check against it, that the Second Amendment protects the right to keep and bear arms as an individual right.

III. THE RIGHT TO BEAR ARMS AS A NATURAL RIGHT

An examination of the text of the Second Amendment discloses an obvious individually protected right to keep and bear

35. Assault weapons are differentiated from assault rifles. Assault rifles are fully automatic (select fire) light arms carried by today's modern armies. David B. Kopel, *Rational Basis of "Assault Weapon" Prohibition* 20 J. CONTEMP. L. 381, 386 (1994). Assault weapons are those of a class similar in appearance to assault rifles, but only fire in a semi-automatic configuration. *Id.* Assault weapons are irrationally targeted to be banned because of their "military-like" appearance. Assault rifles may be legally purchased with a tax stamp issued by the federal government that must be applied for every time the weapon changes hands. For a more thorough discussion of the legal issues concerning assault weapons, see *id.*

36. While having limited but viable military purposes, handguns are obviously useful for personal self-defense.

37. Van Alstyne, *supra* note 28, at 1254.

38. Levinson, *supra* note 2, at 649 (citing 3 JOSEPH STORY, COMMENTARIES § 1890 (1883)).

arms. However, beyond the actual text of the Amendment, there lies an even deeper justification for the individual's right to be armed. The Founders relied on this natural right to self-defense and self-preservation as a driving force in the wording of the text of the Constitution and the Second Amendment.³⁹ This fifth and last auxiliary right is defined by William Blackstone as follows:

[That the] right of the subject . . . 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.⁴⁰

It was this auxiliary right along with the rights of the Constitution, the powers and privileges of Parliament, the limitation on the king's prerogative, the right to apply to the courts of justice for redress of injuries, and the right to petition the king and the Houses of Parliament for grievances⁴¹ that acted not as inferior rights but rather as rights that protected the three primary rights of personal security, personal liberty, and private property.⁴² Social contract theorists John Locke and Thomas Hobbes both recognized that this right to defend oneself predated organized government in general and, likewise, this right would have predated the Constitution.⁴³ These great political thinkers both proposed a law of nature that was based on the fundamental right to defend oneself.⁴⁴ The Founders did not just see Locke's work as an abstract treatise on government; rather, they forged a revolution through the use of arms on the basis of his philosophy.⁴⁵ Arms were necessary for our settlers'

39. See, e.g., Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995 (1995) (book review). This is a book review of Joyce Lee Malcolm's book mentioned *supra* note 2.

40. 1 WILLIAM BLACKSTONE, COMMENTARIES *136, *139.

41. *Id.* at 140-41.

42. See *id.*

43. See THOMAS HOBBS, LEVIATHAN 117 (Herbert W. Schneider ed., Liberal Arts Press 1858) (1651); JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 116-17 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690).

44. HOBBS, *supra* note 43, at 117; LOCKE, *supra* note 43, at 116-17.

45. See Amar, *supra* note 26, at 1163.

survival in the country's early days to ward off attacks by natives, to hunt and defend themselves from wild animals, and ultimately to gain their independence. Surely in colonial times, fifty years before a civilian police force,⁴⁶ the Founders recognized this right to defend property and life as well as to defend the community.

An argument can be made that an armed citizenry is no longer necessary in our current "civilized" state because there is no true chance of serious political oppression in this country. One commentator argues that this premise is incorrect on two grounds.⁴⁷ The first is that the argument is based less on history and more on the hope "that the future will bring only the best of what has occurred in the past []." ⁴⁸ The second is that it ignores "the fundamental right of self-preservation."⁴⁹ One does not have to look far to American history to see that even in very recent times, such as during the civil rights movement, gun control laws were used to oppress black Americans.⁵⁰ It is foolish to think that just because the United States has no current enemy *de jour* threatening its shores,⁵¹ that the country is permanently safe from both internal subversion and possible future external attack. Given the debacles of the past, such as civil rights failures following the Civil War, the South through the 1960s, and the Japanese internment during World War II, it is also folly to think that the United States will always respect the constitutional rights of its oppressed.

A natural right to bear arms is also implied by the language of the Second Amendment itself. For example, that the Founders used the phrase "the right of the people," instead of the phrase

46. See generally Lund, *supra* note 2, at 118 (recognizing that there were no organized police forces in colonial times). Additionally, the Supreme Court held in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196 (1989), that the Due Process Clause generally confers no right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests. The absence of a requirement that police come to the aid of citizens and the inability for police to be everywhere at once further bolsters this argument (for example, the Los Angeles riots of 1992).

47. See Lund, *supra* note 2, at 116.

48. *Id.*

49. *Id.*

50. *Id.* (speaking particularly about the Jim Crow era).

51. That is unless one would include China, Iraq, North Korea, Libya, and terrorist or internal militia groups aimed at overthrowing the government.

"the people shall have the right," suggests a right that preexisted the drafting of the Bill of Rights and one that at least "encompasses the right to arms for militia purposes but that presumably is even broader."⁵² Social contract theory, Blackstone's commentary, *Of the Rights of Persons*,⁵³ and the firmly entrenched English tradition of the right to bear arms helped form the early American healthy respect for the right to arms that preexisted government. Because it is rooted in the very nature of a free people, Americans have a natural right to bear arms both in self-defense and self-preservation that goes above and beyond a simple textual Second Amendment right.

IV. THE NINTH AND FOURTEENTH AMENDMENTS ALSO REVEAL AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS

In addition to the Second Amendment's textual protection and the natural right of people to defend themselves, the Constitution has other amendments which tend to show the existence of a federally protected individual right to bear arms. The Fourteenth Amendment is perhaps the most important amendment because it defines the application of incorporated amendments to the states. Unfortunately, the Supreme Court has not taken its opportunity to "incorporate" the Second Amendment as it has most other amendments.⁵⁴ The doctrine of incorporation, which makes the Bill of Rights applicable to the states in addition to the federal government, has been applied to virtually all of the Bill of Rights' guarantees.⁵⁵ Only four rights out of the first eight amendments have been ignored; these include the right to keep and bear arms, the right against quartering soldiers, the

52. See Cottrol & Diamond, *supra* note 39, at 1003 (citation omitted).

53. See 1 WILLIAM BLACKSTONE, COMMENTARIES *129, *141.

54. A more detailed examination of the Supreme Court's decisions on the right to bear arms is discussed *infra* Part V.

55. *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (right to criminal jury); *Miranda v. Arizona*, 384 U.S. 436, 442-43 (1966) (privilege against compelled self-incrimination and right to counsel); *New York Times v. Sullivan*, 376 U.S. 254, 264-65 (1964) (freedom of speech and press); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 215-16 (1963) (non-establishment of religion); *Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963) (right to counsel); *Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961) (exclusion of evidence obtained by unreasonable search and seizure).

right to a civil jury, and the right to a grand jury.

Why is it that the Court, so expansive in the 1960s, failed to incorporate these rights but included virtually all others? Is it intellectually honest of the Court to pick and choose which of the rights it will bestow via the Fourteenth Amendment and which it will decide are unworthy of state recognition? Perhaps the Court is excused, at least for the Third Amendment, because there does not seem to be a modern application that has brought about the appropriate case by which to incorporate it.⁵⁶ I offer no explanation for the Court's refusal to reverse lower court rulings that do not allow the right to civil juries and grand juries. The Second Amendment, however, remains alone in light of its text which clearly states that it is the people's right that shall not be infringed. The Court has not looked at the Amendment this way. Instead, it has chosen to ignore the Second Amendment's similarities to the First and Fourth Amendment, apparently deciding by abstention that the "people" referred to in the Second Amendment are not as important to protect as the "people" referred to in the First and Fourth Amendments.⁵⁷

It seems that, regardless of the Supreme Court's continued refusal to incorporate the Second Amendment, the Fourteenth Amendment was intended to include the protections offered by the Second Amendment. Congress passed the Fourteenth Amendment after the Civil War to cure, in particular, the southern states' indifference to human rights.⁵⁸ After the slaves were released by the Thirteenth Amendment,⁵⁹ the rebellious states began passing the infamous Black Codes which kept black Americans from voting, owning property, having access to the courts, and keeping arms.⁶⁰ The effect of these laws was that slavery was continued in a *de facto* manner by suppressing the

56. For an account of several views regarding incorporation see Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

57. Compare U.S. CONST. amend. I, with U.S. CONST. amend. II; U.S. CONST. amend. IV.

58. Amar, *supra* note 56, at 1217.

59. U.S. CONST. amend. XIII.

60. See Amar, *supra* note 56, at 1217. Alabama's provision, for example, provided for a three-month imprisonment term or a fine of up to \$100 for any free black owning firearms. 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. 341, 403 (1995).

ex-slaves' state and federal constitutional rights.⁶¹ As evidence of incidents involving whites both robbing and taking arms from blacks grew, Congress decided that it must take action to state in clear and precise language what the rights of all men were.⁶² Congress' intent was to preserve the rights of black Americans through the passage of the Fourteenth Amendment, thereby precluding the states from passing such restrictive laws.⁶³

The text of the Fourteenth Amendment provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁶⁴

The intent of the Fourteenth Amendment is evidenced through the Freedmen's Bureau Act which passed contemporaneously with it.⁶⁵ The Freedmen's Bureau Act specifically recognizes the right of all people, including black people, to keep arms as a means of protecting one's home and person from attack.⁶⁶ It was Congress' intent to protect these new citizens' rights from being trampled by the states before they were ever realized. The framers of the Fourteenth Amendment voted for both of these pieces of legislation because they recognized the importance of being able to protect oneself as paramount to protecting other rights.⁶⁷ That those members of Congress voted for both the Fourteenth Amendment and the Freedmen's Bureau Act (which contained an explicit reference to the right of the individual to keep and bear arms) shows that Congress implicitly understood what the effect of the Fourteenth Amendment was to be and what it was to accomplish.

Though the congressional intent to incorporate the Second Amendment seems clear, the Court has failed to incorporate it. Under a view of total incorporation,⁶⁸ it would seem obvious

61. Halbrook, *supra* note 60, at 347-52 (citation omitted).

62. *Id.* at 347-51

63. *Id.*

64. U.S. CONST. amend. XIV, § 1.

65. Freedmen's Bureau Act, 14 Stat. 173 (1866); see Halbrook, *supra* note 60, at 434.

66. 14 Stat. at 176.

67. Halbrook, *supra* note 60, at 432-33.

68. Total incorporation, embraced by Justice Hugo Black, is the view that

that the Court has failed to do its judicial duty. Even under a selective view of incorporation,⁶⁹ it seems that at least the amendments containing the phrase guaranteeing "the right of the people" would be incorporated. It is possible that the Courts have looked at the Second Amendment as simply a restriction on states. After all, the first clause does speak of the necessity of the militia to a free state. This view, however, is inconsistent with the textual analysis which reveals that the Second Amendment was meant to apply not to a standing body of troops or even a select militia, but to the people.

The Fourteenth Amendment does not mention the individual amendments by name. Rather, it refers to the "privileges and immunities" of citizens. Recently, a "refined incorporation" view has developed which is based more on the "privileges and immunities" clause.⁷⁰ This view focuses on the applicability to the individual of each of the privileges and immunities implied in the Bill of Rights.⁷¹ Under this view, the 1866 meaning of the Second Amendment takes on a greater role than the 1789 meaning because it is the 1866 meaning that was meant to be applied to the states.⁷² The practically concurrent passage of the Freedmen's Bureau Act and the Thirty-ninth Congress' continued reliance on Blackstone's texts and the common law demonstrate that Congress understood the right to self-defense and self-preservation were rights that all men should have.⁷³ To those who would wish to apply the Second Amendment only in its strictest definitional sense, the Second Amendment guarantees the right of the people in the context of a militia (voting male citizens over the age of twenty-one). The Fourteenth Amendment's provisions, however, apply to all citizens and not just those of voting age who were militarily qualified.⁷⁴ Thus,

Amendments I-VIII are incorporated in their entirety by the Fourteenth Amendment. See Amar, *supra* note 56, at 1262-64.

69. Selective incorporation, embraced by Justice Brennan, is the view that each clause of each amendment should be examined to determine its applicability as a fundamental right. See *id.* at 1263. These two views often seem to collide and lead to the same result. See *id.*

70. See generally *id.* at 1264-66 (discussing the Second Amendment).

71. *Id.* at 1264.

72. Amar, *supra* note 56, at 1266.

73. *Id.* at 1269.

74. *Id.* at 1282.

even if the Second Amendment originally applied only to persons eligible to be in a militia, the language used in the Fourteenth Amendment referring to the privileges and immunities of all citizens shows that in 1866 the right to keep and bear arms was recognized as a quintessential individual right.⁷⁵ As such, the Supreme Court is remiss in failing to incorporate at least the second portion of the Second Amendment along with the other rights that it holds to be so precious.

In addition to the Fourteenth Amendment, the Ninth Amendment can be used to justify an individual right to bear arms. The Ninth Amendment states that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."⁷⁶ It seems well settled that this amendment's provisions were enacted to allay the fear of the Founders that by listing the rights that were reserved to the states and people in the Bill of Rights, the rights that were listed would become exclusive of any other rights. This amendment was inserted as a signal that the list was not exhaustive and that the people retained all sorts of other rights not enumerated. Although its provisions taken to the extreme could be used to justify almost anything as a guaranteed right, the Ninth Amendment has been taken less seriously and for the most part ignored. This difficulty in interpretation (just what exactly does it protect?) has sent it the forgotten way of the Second Amendment.

The Ninth Amendment, however, must have some purposeful meaning. Assuming that meaning is beyond historical antiquity, several interpretations of the Ninth Amendment reveal a right to bear arms. There are competing theories as to how the Ninth Amendment should be interpreted. Some commentators have supposed that the standard for the amendment is flexible and is useful in supporting rights which "arise on their own merits through an examination of their fit with, and necessity to, the functioning of our constitutional structure."⁷⁷ Commentators have suggested that maybe this right applies in situations in which the asserted right is viewed by the courts as funda-

75. Amar, *supra* note 56, at 1284.

76. U.S. CONST. amend. IX.

77. Johnson, *supra* note 1, at 4.

mental to a free society.⁷⁸ Another predominant view is that the Ninth Amendment protects those rights which predate government. These natural rights, according to Lockean governmental theory, include the right to keep and bear arms as a means of self-defense.⁷⁹ Blackstone's commentaries were also influential in shaping how the Framers viewed inalienable individual rights.⁸⁰ Blackstone described the right to bear arms as both statutory and natural and such a primary law of nature that it cannot be "taken away by the law of society."⁸¹ The government, being consensual in nature, only has power because its citizens allow it to have power. Armed citizenry is a valid check against government abuse; the right to "armed self-defense is a freedom which citizens cannot properly cede and government cannot validly impair."⁸² The Ninth Amendment bolsters, or rather amplifies, the Second Amendment by protecting the natural right to defend oneself, and it stands as a check against the government.

In light of the fact that the federal government has taken broad, plenary powers, it might be difficult to see a modern-day application to the states for the Ninth Amendment. If we ignore its provisions, however, we undoubtedly change the way we look at the document as a whole. The right to bear arms is a historically recognized, fundamental right which is the type of right the Ninth Amendment should protect. Assuming, *arguendo*, that the Second Amendment is to be read only as a communal right of the state to maintain a militia, the Ninth Amendment would recognize the right of the individual to bear arms in defense of oneself, one's family, and one's property. Beyond the defense of just state and country then, this Ninth Amendment right, viewed in the context of the way people in the late eighteenth century thought about weapons, would protect the traditionally recognized common law individual right to keep at home, work,

78. *Id.* at 4-5.

79. *Id.* at 35.

80. *Id.*

81. 3 WILLIAM BLACKSTONE, COMMENTARIES *4.

82. Johnson, *supra* note 1, at 32 (arguing that the government must be consensual and an individual right to bear arms is an essential element of consensual government); THE FEDERALIST NO. 28, at 227 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

and while traveling any weapon that would be both suitable and necessary for self-defense.

Nicholas Johnson notes that "[i]f we take the Ninth Amendment seriously, and we believe we can derive rights from it in an objective, apolitical fashion, then we must thoughtfully consider the implications of endorsing more trendy unenumerated rights while denying that there is a principled basis for establishing an individual right to arms."⁸³

Recently, the Ninth Amendment has been used in attempts to justify "a right to engage in sodomy, a right to wear long hair, protection against imprisonment in maximum security, a right to transport lewd materials in interstate commerce, a right to a healthful environment, and affirmative rights to government services."⁸⁴ By granting any of these more modern, "popular" rights without recognizing the older more universal right of self-defense, the Court will show a lack of intellectual honesty.

V. THE SECOND AMENDMENT'S HISTORY IN THE COURTS

Despite the fact that the text of the Second Amendment, the history of natural rights theory, and the Ninth and Fourteenth Amendments all recognize the individual right to keep and bear arms, the courts, both state courts and the Supreme Court, continually ignore this fundamental right.⁸⁵ It is not that courts have lacked the opportunities to acknowledge this right and incorporate it. The recent *Printz* and *Lopez* decisions both involved gun-related legislation.⁸⁶ *Printz v. United States* concerned the constitutionality of the temporary provision of the Brady Act which required "chief law enforcement officers" to perform background checks on prospective handgun purchasers.⁸⁷ In *United States v. Lopez*, the legislation in question was

83. Johnson, *supra* note 1, at 36-37.

84. *Id.* at 80.

85. For an account of recent state court decisions and their impact on the Second Amendment, see David Kopel et al., *A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts*, 68 TEMP. L. REV. 1177 (1995).

86. *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

87. *Printz*, 521 U.S. at 902-03.

the Gun-Free School Zones Act of 1990, which made it a federal crime to knowingly possess a firearm in a school zone.⁸⁸ The Supreme Court could have used either of these cases broadly to incorporate the Second Amendment like it did in the 1960s to incorporate other guarantees of the Bill of Rights.⁸⁹ The Court, however, chose to hold the statutes challenged in the cases unconstitutional, based on Tenth Amendment concerns in *Printz* and Commerce Clause grounds in *Lopez*.⁹⁰ While a small victory for Second Amendment supporters was achieved through the failure of these restrictive provisions to pass constitutional muster, the larger question remains: "When will the Court recognize and incorporate this fundamental right's protections to the states?"

The Supreme Court's past decisions on the Second Amendment do not take long to summarize. Only three mentionable cases have been handed down by the Court on the Second Amendment. The first, *United States v. Cruikshank*,⁹¹ decided in 1875, held that the Second Amendment, insofar as it provides for any rights at all, "means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government"⁹² The Court in *Presser v. Illinois*,⁹³ using the language of the *Cruikshank* Court, affirmed an Illinois statute prohibiting "any body of men whatever, other than the regular organized volunteer militia of this state, and the troops of the United States . . . to drill or parade with arms in any city, or town, of this state, without the license of the governor thereof"⁹⁴ Both of these decisions reflect that the Second Amendment acted, as did the other provisions of the Bill of Rights did, as a check only on federal congressional power.

88. *Lopez*, 514 U.S. at 551.

89. While these cases did arise out of federal law, the Court could have decided them on Second Amendment grounds and at least in dicta declared their applicability to the states. See *Printz*, 521 U.S. at 937-39 (Thomas, J., concurring); *Lopez*, 514 U.S. at 561 n.3.

90. *Printz*, 521 U.S. at 935; *Lopez*, 514 U.S. at 566-68.

91. 92 U.S. 542 (1875)

92. *Cruikshank*, 92 U.S. at 553.

93. 116 U.S. 252 (1886).

94. *Presser*, 116 U.S. at 253 (quoting Military Code of Illinois, Act of May 28, 1879, Laws 1876, art. 11, § 5).

These decisions should now be viewed as antiquated just as the other "pre-incorporation" decisions are. There is no reason for these decisions to be binding precedent in the wake of the Court's otherwise vibrant use of the Fourteenth Amendment to incorporate other provisions of the Bill of Rights.

Since the first case incorporating guarantees of the Bill of Rights was decided, only once has the Court addressed the Second Amendment directly. In *United States v. Miller*,⁹⁵ the Court upheld the National Firearms Act of 1934, which prohibited moving certain types of firearms in interstate commerce.⁹⁶ The Court based its decision not on whether there is an individual right to keep and bear arms but on whether the particular type of weapon involved was suitable for militia use.⁹⁷ The Court held that a sawed-off shotgun such as the one in question would not have a "reasonable relationship to the preservation or efficiency of a well regulated militia."⁹⁸ The decision, however, does not completely decry the amendment. The Supreme Court correctly held "that the Second Amendment protects an individual's right to keep and bear arms and thus rejected the untenable collective right theory."⁹⁹ The Court stated that "ordinarily when called for service these men [the militia] were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."¹⁰⁰ This implicit recognition of an individual right to bear arms is a good start; however, the Court fails to finish its job.

Over twenty thousand state and local gun control laws exist, and not one Supreme Court opinion attempts to interpret them.¹⁰¹ This is an odd recognition of federalism by a Court

95. 307 U.S. 174 (1939).

96. *Miller*, 307 U.S. at 183.

97. *Id.* at 178.

98. *Id.* That the respondent, Jack Miller, was not present to brief his side did not help his case. Lund, *supra* note 2, at 109. After the lower court held that the Act was unconstitutional on Second Amendment grounds and acquitted Miller, he was nowhere to be found. *Id.* Also, the Court was incorrect in deciding that a sawed-off shotgun does not have military uses. *Id.* (citing Black, *From Trenches to Squad Cars*, AM. RIFLEMAN, June 1982, at 30, 72-73). In fact, sawed-off shotguns are highly effective weapons useful for close combat such as trench and urban warfare. *Id.*

99. Lund, *supra* note 2, at 110.

100. *Miller*, 307 U.S. at 179.

101. Lund, *supra* note 2, at 110.

that has in the past trounced on the notion.¹⁰² However, considering that former Chief Justice Warren Burger has stated that he believed the Second Amendment's inclusion in the Bill of Rights was a mistake, this avoidance is not surprising.¹⁰³ The fact that incorporation is now so fully entrenched in jurisprudence should signal the Court to abandon the precedent of the pre-incorporation cases.¹⁰⁴ Forty-three states have constitutional provisions which guarantee the right to keep and bear arms, but only seven states' constitutions contain no such provisions.¹⁰⁵ While the old trend in state courts was generally to uphold this right, newer decisions evaluating "assault weapons" laws have led state supreme courts to defend untenable if not intellectually dishonest positions.¹⁰⁶ Regardless, many states do not have an extensively developed body of law interpreting the right to bear arms,¹⁰⁷ and the Supreme Court has never reviewed a state law restricting this right.¹⁰⁸

Evidently, the Supreme Court refuses to grant certiorari to cases arising from state law restrictions. It is refreshing to see the Court limit Congress' Commerce Clause power in the *Lopez* decision by holding that Congress could not prohibit the possession of a firearm in a school zone because it is not an economic activity and does not affect interstate commerce.¹⁰⁹ But the Court should have gone further. It should have, at least in dicta, expressed a commitment to upholding the fundamental right to bear arms.

The recent *Printz* decision was an even better opportunity to display a commitment to the Second Amendment.¹¹⁰ The case involved two local chief law enforcement officers' claims that

102. See, e.g., Kathleen M. Sullivan, *The Supreme Court, 1995 Term—Comment: Dueling Sovereignities: United States Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 80 (1995) (analyzing the Supreme Court's use of federalism).

103. Cottrol & Diamond, *supra* note 39, at 997.

104. See *id.*

105. Kopel, *supra* note 35, at 382. Alabama's provision provides "[t]hat every citizen has a right to bear arms in defense of himself and the state." ALA. CONST. art. I, § 26.

106. See Kopel, *supra* note 35, at 382-83.

107. *Id.*

108. Lund, *supra* note 2, at 110.

109. *United States v. Lopez*, 514 U.S. 549, 567-68 (1995).

110. *Printz v. United States*, 521 U.S. 898 (1997).

the federal law requiring them to conduct background checks of prospective gun purchasers was an unconstitutional "congressional action compelling state officers to execute federal laws."¹¹¹ The Court agreed, holding that the Tenth Amendment restricts the federal government's power from circumventing the *New York v. United States*¹¹² prohibition against compelling states to enforce a federal regulatory program by commandeering the state's agents directly.¹¹³ While this holding is encouraging, Justice Thomas was the only member of the Supreme Court to address the Second Amendment concerns of the case.¹¹⁴ He correctly pointed out that, assuming the Second Amendment guarantees a personal right to bear arms, "a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections."¹¹⁵ His concurrence recognized that the Court needs to address the Second Amendment issue.

Printz was defined early by the district court not as a Second Amendment case, but as a case that would determine the proper roles that state and federal governments assume.¹¹⁶ This Article does not criticize the Tenth Amendment holding, but rather asks why the district court and the Supreme Court refused to address the Second Amendment issue as well. Perhaps the political fallout from a decision either way would be too "unpopular." While the judiciary is supposed to be insulated from such pressures, it seems that occasionally hard cases are avoided when their results are politically undesirable or would result in a loss of popularity and respect for the Court.

In the now infamous *Dred Scott* decision,¹¹⁷ Chief Justice Taney argued that neither slaves nor free blacks could be citizens because the restrictions imposed on them would be impermissible to impose on whites.¹¹⁸ While the Court's decision on

111. *Id.* at 905.

112. 505 U.S. 144 (1992).

113. *Printz*, 521 U.S. at 933.

114. *Id.* at 937-39 (Thomas, J., concurring).

115. *Id.*

116. *United States v. Printz*, 854 F. Supp. 1503, 1507 (D. Mont. 1994).

117. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)

118. *Dred Scott*, 60 U.S. at 416-17.

the merits of the citizenship of blacks stands as obviously erroneous today, Taney's thought process is nevertheless revealing. In deciding that blacks were not citizens, he rationalized that to grant them such status would endow on them "full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went."¹¹⁹ Therefore, the Court in 1857 must have thought that carrying arms was a fundamental right that was guaranteed to all citizens. Chief Justice Rehnquist, in *United States v. Verdugo-Urquidez*,¹²⁰ agreed that the people protected by the First, Second, and Fourth Amendments and to whom the rights and powers are reserved to in the Ninth and Tenth Amendments, are the same class of persons who are part of a national community or intend to be members of the national community.¹²¹ The Court recognizes the right to bear arms as a general right, but continually fails to make the final step toward incorporation.

VI. PRACTICAL CONSIDERATIONS AND CONCLUSION

The text of the Second Amendment taken in context with its historical background reveals an individual federal right to keep and bear arms. A natural rights theory also implies this is a fundamental right of all people. The Ninth Amendment's guarantee reserving to the people the rights that are not enumerated protects the individual's right to self-defense which predates government, and it is well settled that the Fourteenth Amendment applies the Bill of Rights through incorporation. It is now time for the Supreme Court to hand down a long overdue decision and show judicial integrity by facing this controversial issue. An examination of the issues discussed in this Article will surely lead the Court to the same conclusion arrived at here, that there is a constitutionally guaranteed right to keep and bear arms that, while not absolute, is substantive and is applicable to the states.

119. *Id.* at 417.

120. 494 U.S. 259 (1990).

121. Cottrol & Diamond, *supra* note 39, at 1002 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)).

While a vast majority of state constitutions contain a provision that guarantees this right to some extent, seven do not, and many of the states that do contain such a provision have not developed it fully.¹²² Meanwhile, legislation and executive orders continually arise attempting to slow the importation and manufacturing of guns in the United States. Recent school yard shootings in the South have prompted President Clinton to call for the complete ban on importation of "assault weapons."¹²³ The President is merely cloaking his agenda to disarm the public by using a senseless but heart-wrenching tragedy to sway public opinion. Unfortunately, some tragedies cannot be averted, but the real answer is enforcing laws already on the books. The rate of abuse for firearms has been calculated at 0.0000625% for murder and 0.0009188% for aggravated assault.¹²⁴ This demonstrates that the majority of gun owners are responsible, law-abiding citizens who use guns mainly for sports and in self-defense.

The only people who have ever obeyed gun control laws are law-abiding, gun-owning citizens. The criminals have not and will not magically begin to obey strict gun laws. It is time that the United States government and the states enforce the criminal laws they currently have and stop their efforts to control a symptom of the problem and not the disease.¹²⁵ The perceived gun problem is peripheral to the problem of crime. As criminals generally do not like to target armed individuals for their prey, widespread ownership of guns, coupled with responsible use and training, would most likely reduce crime.

Unfortunately, this Article contains mainly research derived from law review notes and books and not from the case law. I

122. See Kopel, *supra* note 35, at 382-83.

123. Proclamation No. 7084, 63 Fed. Reg. 20051 (1998).

124. Johnson, *supra* note 1, at 78-79. The calculations were done by dividing the number of incidents involving firearms by the number of total firearms in the United States.

125. *But cf.* Daniel French, *Biting the Bullet: Shifting the Paradigm from Law Enforcement to Epidemiology: A Public Health Approach to Firearm Violence in America*, 45 SYRACUSE L. REV. 1073, 1097-98 (1995) (suggesting that instead of gun control, bullet control should be implemented by taxing bullets out of existence). The author fails to recognize that bullets are even easier to smuggle and produce than guns are. By trying to circumvent the problem by eliminating a symptom, his solution also fails to go to the root of the problem—criminals.

point this out to emphasize that because of judicial inaction there is no major body of case law to discuss. Perhaps, in the near future Justice Thomas's call for a chance to review this fundamental liberty will be heeded, and the Court will select a case from the states for review.¹²⁶ Otherwise, as Justice Story warned us about the "palladium of the liberties of the republic . . . [t]here 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," and, likewise, undermine the protection of our other rights.¹²⁷

The people are waiting.

Roland H. Beason

126. *Printz v. United States*, 521 U.S. 898, 939 (1997).

127. *STORY*, *supra* note 5, at 708-09.