No. 03-_____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

SEAN SILVEIRA, JACK SAFFORD, PATRICK OVERSTREET, DAVID K MEHL, SGT STEVEN FOCHT, SGT DAVID BLALOCK, MARCUS DAVIS, VANCE BOYES, and KEN DEWALD,
PETITIONERS,

-versus-

BILL LOCKYER, Attorney General, and GRAY DAVIS, Governor, State of California,
RESPONDENTS.

On Writ of Certiorari to the US Court of Appeals for the Ninth Circuit, Stephen Reinhardt, Raymond C. Fisher, Circuit Judges, & Frank J. Magill, Senior Circuit Judge, Eighth Circuit, by designation.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in denying *standing* for Petitioner firearms owners and collectors to challenge under the Second & Fourteenth Amendments State statutes restricting such ownership, where Petitioners are: (**A**) seriously affected by the statutes, (**B**) in the zone of interests impacted, and (**C**) would risk prosecution and confiscation by further purchase, sale, transfer, or other noncompliance?

II. Whether the Second and Fourteenth Amendments protect the rights of *individual* persons to keep and bear arms for family, home, business and community defense, without the threat of forcible state confiscation, compulsory registration, or state-decreed monopolization?

A. Whether the right to keep and bear arms should be substantially *incorporated* into the Fourteenth, applied to the States, and *Presser v. Illinois* (US 1886) [1] limited or overruled?

B. Whether the Second Amendment should be held to be part of the Fourteenth Amendment protected *privileges and immunities* of citizens, as the documentary history suggests, and *Saenz v. Roe* (US 1999)[2], applied. Then, whether *United States v. Cruikshank* (US 1876)[3], and the *Slaughterhouse Cases* (US 1873)[4], should be limited or overruled?

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1 116 U.S. 252 (1886).
2 526 U.S. 489, 503-04 (1999).
3 92 U.S. 542 (1876).
4 83 U.S. (16 Wall.) 36 (1873).

III. Whether the heavily criticized and ambiguous decision of Justice McReynolds in *United States v. Miller* (US 1939)[5], decided without argument or counsel for Miller, should be limited or overruled after these 64 years, in favor of a comprehensive opinion from this Court recognizing as fundamental the individual right of family, home, business, and community defense under the Second and Fourteenth Amendment right to keep and bear arms?

IV. Whether a *heightened standard of review* should be applied to a State statute that specifically impacts fundamental rights expressly protected by the Second Amendment and incorporated into the Fourteenth for additional reasons of family, home, business, and community defense that further emerged after the Civil War with the forced disarming of the freedmen and oppression of their families and entire communities based upon race, as in the Colfax and New Orleans massacres?

V. Whether the judgment of the Court of Appeals should be reversed and the case remanded for trial on the merits, and a record of expert and factual testimony developed concerning the Second Amendment and the specific firearms and factual issues involved in this case?

VI. Whether for remand this Court should order assessment of §1988 interim litigation expenses and counsel fees for Petitioners prior to trial on the merits of the remaining factual and legal questions?

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5 307 U.S. 174 (1939).

PARTIES BELOW

The caption lists all of the parties below.

CORPORATE DISCLOSURE

No corporations or subsidiaries are involved here.

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It contains fundamental primary sources on the Constitution, Bill of Rights, and Fourteenth Amendment related to this case. The site also includes ELIOT'S DEBATES, FARRAND'S RECORDS, STATUTES AT LARGE, the ANNALS OF CONGRESS, and the CONGRESSIONAL GLOBE.

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The opinion of the US Court of Appeals for the Ninth Circuit under review is *Silveira* v. *Lockyer,* 312 F.3d 1052 (9th Cir.)(Reinhardt, J), *rehearing en banc denied,* 328 F.3d 567 (9th Cir. 2003)(six dissents)(**APPENDIX** at 43-136).

JURISDICTION OF THIS COURT

US Code title 28, §1254(1), confers jurisdiction upon the Court to decide this appeal on certiorari. Analogous cases granted, with comparable grounds for review include: *Lawrence* v. Texas, 539 U.S. ___ (2003), *Bunkley* v. *Florida,* 123 S Ct ___ (2003)(per curiam), *Virginia* v. *Black,* 123 S Ct ___ (2003), *Wilson* v. *Layne,* 526 U.S. 603 (1999)(family home as fortress), *Saenz* v. *Roe,* 526 U.S. 489 (1999)(privileges and immunities), *Troxel* v. *Granville,* 530 U.S. 57 (2000)(fundamental family protection rights), cf. *Doe* v. *Bolton,* 410 U.S. 179 (1973)(pre-enforcement standing and ripeness), *Truax* v. *Raich*, 239 U.S. 33, 38 (1915)(standing and ripeness).

(i) The panel judgment of the US Court of Appeals under review was filed initially December 05, 2002, and amended January 27, 2003. 312 F.3d 1052.

(ii) The Court of Appeals denied a petition for rehearing en banc on May 6, 2003. 328 F.3d 567. Six Circuit Judges dissented, four with opinions: Judges Kozinski, Kleinfeld, Gould, and Pregerson.)(**APP.** at 43).

STATEMENT OF THE CASE

Petitioners are a group of California gentlemen, good citizens, placed at great risk and disadvantage by California legislation[6] restricting the ownership, possession, and transfer of certain firearms useful for home, family, and community defense in cases of civil disturbance and terrorist disruption. Paragraphs 31 & 32 of the First Amended Complaint gave general notice of their vital interests at stake and the concrete impact of the laws upon them:[7]

"31. Plaintiffs own, or would like to own, semi-automatic rifles and/or pistols subject to the terms of the statute which prohibits and/or restricts possession, use, transfer and/or sale of semi-automatic rifles and/or pistols.

"32. Plaintiffs would like to exercise their right to possess, carry and conceal firearms ..."[8] in much the

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[6] The California statutes are referenced in the opinion of the US Court of Appeals below, set out in the APPENDIX, *infra*.

[7] Under *Conley* v. Gibson, 355 U.S. 41, 45 (1957), matters alleged are presumed to be established and provable in an appeal following dismissal on the pleadings.

[8] The nature, extent, and constitutional deficiencies of any *specific* restrictions on the right to keep and bear arms in this case should first be argued in depth and determined at trial on remand after guidance from this Court, and full expert and lay testimony. This petition does not present specific questions on the details of those complex Second Amendment issues. It squarely raises only the core Second/Fourteenth Amendment right to keep and bear arms issues, as well as the important need for a heightened standard of review of any infringements of this express fundamental right.

The Court should be aware that the pejorative expression "assault weapon" is used by anti-firearm activists to frighten and mislead, not to inform. The firearms in question are well-engineered and functionally ordinary rifles useful for home and

same manner as did the Founders of the Constitution and authors of the Bill of Rights. The First Amended Complaint states:

Para 35: "Plaintiff PATRICK OVERSTREET is a resident of Marin County …. He is employed by the San Francisco Police Department as a S.W.A.T. officer, and [is] a graduate of California State University…."

Para 37: "Plaintiff SGT. STEVEN FOCHT … performed military functions in Desert Storm …. He was honorably discharged, and currently [is] a Sergeant in the California Army National Guard."

Para 38: "Plaintiff SGT. DAVID BLALOCK is a resident of Sacramento County …. He was assigned to the 82nd Airborne Division [and] is a Purple Heart recipient from combat injuries …. [He is] currently a Sergeant in the California Army National Guard."[9]

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personal defense, sport, hunting, and protection against terrorists and looters in times of civil disturbance. "Assault weapon" belongs in the Political "Buzzword Hall of Fame." It obstructs rather than aids the constitutional inquiry. The same is true of the other "buzzword," "sawed-off shotgun." Our Revolutionary defenders used the analogous short-barreled shot-shooting "blunderbuss" defensively against the British, especially in close naval combat. Later, explorers such as Lewis & Clark, and stage coach guards, used short guns against highway robbers and grizzly bears. The British in 1775 forcibly disarmed Bostonians of some 38 blunderbusses because such short-barreled shotguns were useful and effective defensive weapons, and still are. *See* RICHARD FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON 95 (N.Y.: DaCapo Press 1970 ed.).

An excellent detailed and illustrated history of versatile short-barreled firearms as military and defensive weapons is IV SWEARENGEN, THE WORLD'S FIGHTING SHOTGUNS (Alex. Va.: Ironside Publ. 1978). Author-scholar Swearengen deflates much of the uninformed bias toward shotguns. He notes that while John Dillinger used short shotguns, so too did the US Military in World War I, and often the police in modern times. Id. at 278-288. The 18 or 20 inch barrel length was an arbitrary line, with no basis in Second Amendment language or history. A short shotgun is simply more maneuverable for close range defense.

9 The notice allegations in this case generally aver that plaintiffs have direct and immediate interests in contesting the restrictions of the law that affect them directly, sufficient to meet basic

ARGUMENTS FOR GRANT OF CERTIORARI

I. THE COURTS OF APPEAL ARE IN SERIOUS CONFLICT OVER THE REQUIREMENTS FOR *STANDING* OF LITIGANTS TO CHALLENGE RESTRICTIONS ON THE SECOND AND FOURTEENTH AMENDMENT RIGHT TO KEEP AND BEAR ARMS. THE OPINION BELOW ON STANDING CONFLICTS WITH: (A) THE CONTRARY RESULT IN *US V. MILLER*, 307 U.S. 174 (1939), (B) NUMEROUS HOLDINGS FROM THIS COURT, (C) THE PERSUASIVE IN-DEPTH ANALYSIS OF OTHER CIRCUITS & JUDGES, (D) THE ANALYSIS OF *US V. EMERSON*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 534 U.S. ___ (2002), & (E) THE CONSIDERED VIEWS OF JUDGES KOZINSKI, KLEINFELD, O'SCANNLAIN, NELSON & GOULD DISSENTING FROM DENIAL OF REHEARING EN BANC.

Georgetown Emeritus Professor Antieau points out that in the debates on the Fourteenth Amendment, Senator Howard assured supporters "that Black freedmen would have equality of right 'to keep and bear arms.'"
CONGRESSIONAL GLOBE, 39th Cong., 1st Sess., pp. 2765-66
ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 286 (Wm. Hein, Buffalo, N.Y. 1997)

Individual **standing** was not a difficult question in the 1939 Second Amendment case here, *US* v. *Miller.*[10] The government did not contest the standing of affected *individuals* to challenge firearms restrictions, when faced with possible enforcement, fines, disarmament, and other criminal penalties.[11] Standing

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requirements of standing and ripeness. Petitioner-plaintiffs assert federal question and civil rights jurisdiction under 28 U.S.C. §§1331, 1343, and raise meritorious federal constitutional claims.

[10] 307 U.S. 174 (1939). Similarly, Lawrence had standing to challenge the Texas law at issue in *Lawrence* v. *Texas,* 539 U.S. ___ (2002), although *Bowers* seemingly foreclosed his claim, until this Court overruled *Bowers. Miller* is at least as weak a precedent and ripe for overruling as *Bowers.* Here we have a fundamental enumerated right and a more extensive documentary history.

[11] It is undisputed that California enforces the statutes.

was evident in *Miller,* whether Jack Miller had sued before being prosecuted, or defended afterwards. Judge Kozinski in dissent points out that *Miller* upheld the standing of the individual defendants, and then moved on to the merits.[12] See also *Eisenstadt* v. *Baird,* 405 U.S. 438, 443-46 (1972)(leading standing case).

The *Silveira* decision below, however, approaches standing in an atypical awkward way. Judge Reinhardt relates standing to the merits, which he also determined incorrectly. The complaint is more than adequate for standing and ripeness under decisions of this Court.

The present Court and others have noted the American "background of widespread lawful gun ownership ...." *United States* v. *Harris*, 959 F.2d 246 (DC Cir. 1992)(per curiam)(Ruth Bader Ginsburg, Clarence Thomas, & Silberman, JJ).[13] The Court has repeatedly decided important standing cases where the existence of a new statute, and the reasonable possibility of prosecution, allows a pre-enforcement decision on the merits for persons adversely affected. *Gratz* v. *Bollinger,* 539 U.S. ___ (2003)(slip opinion pp. 11-14), *Thompson* v. *Western States Medical Center,* 534 U.S. ___ (2002)(pre-enforcement standing found), *Epperson* v. *Arkansas*, 393 U.S. 97 (1968)(ripeness

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[12] *Silveira* v. *Lockyer,* 328 F.3d 567, 569 (9th Cir. 2003)(Kozinski, *J,* dissenting from denial of rehearing en banc).

[13] One Colonial history after the other portrays the early American families as armed for protection. Benjamin Franklin organized one of the first private defensive militia when the Quaker government declined to do so. *See* AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 182-183 (Yale 2d ed. 2003). Males from 17 upward, and many females, used their privately held arms in joining with the informal and formal community militia in the revolution against British oppression. The British always had the disarming of American patriots high on their agenda. See RAPHAEL, A PEOPLE'S HISTORY OF THE AMERICAN REVOLUTION 49, 55 (N.Y. New Press 2001). The "shot heard round the world" was fired by British intent upon disarming Americans. That is part of the solid backdrop of the Second Amendment rationale for protecting the rights of citizens to be armed for defense against redcoats, burglars, looters, or terrorists.

without enforcement). See also *Ashcroft* v. *Free Speech Coalition,* 534 U.S. ___ (2002), on the Amendment adjacent to the Second. *See* Note, *Declaratory Relief in the Criminal Law,* 80 HARV. L. REV. 1490 (1967).

Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967), is a leading standing case that conflicts with the court below. Justice Harlan noted there:

"the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." Id. at 152.

The *Silveira* statement[14] on standing is this:

"The amendment protects the people's right to maintain an effective state militia, and does not establish an individual right to own or possess firearms for personal or other use. This conclusion is reinforced in part by *Miller*'s implicit rejection of the traditional individual rights position. [P]laintiffs lack standing …." 312 F.3d at 1056.

That quote from Judge Reinhardt is a *non sequitur,* with *multiple* errors. *Miller* did *not* reject an individual rights position at all. *Miller* accorded standing to Jack Miller, allowing him to challenge the statute on its merits, even though he was dead, and had no counsel

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[14] The *Silveira* opinion initially cited Michael A. Bellesiles, *Gun Control: A Historical Overview,* 28 CRIME & JUST. 137, 174-76 (2001) (discussing the enactment of the NATIONAL FIREARMS ACT OF 1934, ch. 757, 48 Stat. 1236 (1934) (current version codified as 26 U.S.C. §§ 5801-72)) …." 312 F.3d at 1052, 1057 n.1.

Michael Bellesiles is the historian who in 2002 resigned under pressure from Emory University, and was also stripped of his Bancroft Prize by Columbia University for faulty historical research on this issue, which the Court below embraced. On January 27, 2003, Judge Reinhardt deleted the Bellesiles cite and substituted another in its place: *See* EARL R. KRUSCHKE, GUN CONTROL 84, 170 (1995). The KRUSCHKE book, however, supports these petitioners.

Another Ninth Circuit panel promptly critiqued Judge Reinhardt for his advisory opinion in *Silveira*. *Nordyke* v. *King,* 319 F.3d 1185 (9th Cir. 2003), as did the six circuit judges dissenting from denial of rehearing en banc here. 327 F.3d at 567-592.

or argument in the Supreme Court.[15] The *Miller* litigation never was resolved because Jack Miller was gone. He could not therefore press to put on further evidence and argument at trial post-remand.

Silveira recognized the divisive conflict of Circuits:

"Other courts have addressed Second Amendment claims on the merits, rather than under the rubric of standing doctrine. *See, e.g., Gillespie*, 185 F.3d at 710. ***" 312 F.3d at 1067 n.17.

II. THE COURTS OF APPEAL ARE IN FURTHER CONFLICT ON WHETHER THE SECOND AMENDMENT PROTECTS THE RIGHTS OF *INDIVIDUAL* PERSONS TO KEEP AND BEAR ARMS FOR FAMILY, HOME, BUSINESS, AND COMMUNITY DEFENSE. THE OPINION BELOW BY JUDGE REINHARDT DISREGARDS: (A) CONTRARY STATEMENTS IN *US V. MILLER*, 307 U.S. 174 (1939), (B) OTHER BILL OF RIGHTS AMENDMENTS, (C) FREQUENT LANGUAGE FROM THIS COURT, (D) THE PERSUASIVE IN-DEPTH ANALYSIS OF *US* V. *EMERSON*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 534 U.S. ___ (2002), & (E) THE STRONG ARGUMENTS PUT FORTH BY THE SIX CIRCUIT JUDGES BELOW DISSENTING FROM DENIAL OF REHEARING EN BANC.

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[15] As historical fact, Jack Miller was denied appellate counsel and argument. He was given only two weeks to obtain counsel and file a brief. *See* NATIONAL ARCHIVES, Supreme Court Case Records, *United States* v. *Miller,* October Term 1938, No. 696. The Justices noted probable jurisdiction in *Miller* on March 13, 1939. Under current practice, Rule 25[1], the government would have 45 days from March 13 to file the appellant's brief on the merits, to April 27, 1939. Counsel for Miller would then have 30 more days to file a brief for appellee, until May 27. However, in 1939, the Clerk gave Miller only until March **31** to file a brief and appear for argument. In fact argument was held one day before, with Miller not represented at all. 307 U.S. 174. This material was uncovered in 2003, and is the subject of a pending article: Lucas, *Miller* Revisited (2003). It is also included in a chapter of the forthcoming book analyzing the Second and Fourteenth Amendment right to arms issues: LUCAS, TO KEEP AND BEAR ARMS (2003-04).

" … John Adams quoted Serjeant-at-Law William Hawkin's Pleas of the Crown … regarding the right: 'Here every private person is authorized to arm himself' for his own defense. Similarly, Samuel Adams quoted Blackstone on the personal right to bear arms."

LEONARD LEVY, ORIGINS OF THE BILL OF RIGHTS 141 (Yale 1999)

The First, Fourth, Fifth, Sixth, Eighth, and Ninth Amendments all protect *individual* rights, *not* rights of the State. The Fourteenth Amendment also concerns *individual* rights, not rights of the former Confederate states. When James Madison in 1789 introduced the Bill of Rights he wrote that they "relate first to private rights." 12 PAPERS OF JAMES MADISON, CONGRESSIONAL SERIES 193 (Univ. Press of Virginia 1979). He was not introducing rights of States but of individuals.

The Second Amendment also pointedly assures that "*the right of the people to keep and bear arms shall not be infringed."* The *Silveira* Reinhardt opinion is at odds with the language and purposes of the Second, even moreso after ratification of the Fourteenth.[16] As Judge Kozinski noted in dissent below (**APP.** at 46),[17] the Fourteenth was preceded by frequent explicit discussion of the need for freedmen (and white supporters) to be protected in their rights to bear arms, and to defend themselves from attacks, lynching, and outright massacre by the Klan.[18]

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[16] *Silveira* acknowledges that *Miller* is "a somewhat cryptic discussion" and "offers little guidance as to what rights the Second Amendment does protect," 312 F.3d at 1061.

[17] *Silveira* v. *Lockyer,* 327 F.3d 567, 568-69 (9th Cir. 2003)(Kozinski, *J,* dissenting from denial of rehearing en banc).

[18] This material can be thoroughly developed in briefing. See generally FREEDMENS BUREAU ACT, 14 STAT. 173, 176 (JULY 16, 1866) (specifically "including the constitutional right to bear arms"), AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 257-68 (1998), MEYER, THE AMENDMENT THAT REFUSED TO DIE (Madison books 2000), Cottrol & Diamond, *The Second Amendment: Toward an Afro-American Reconsideration,* 80 GEO. L.J. 309 (1991), Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989)(article on errors of *Miller* and individual rights protected by

A. CONFLICT AMONG THE CIRCUITS

Silveira, and *Emerson* from the Fifth Circuit, are verbally at war on this point. Six dissenters from the Ninth are on the side of the Fifth, including Judges Kozinski, Kleinfeld, O'Scannlain, Nelson, and Gould (**APP**. at 45-76), aligned against Reinhardt. *Silveira* describes the broader disarray across all of the Circuits: "[T]he majority of circuit courts have, with comparatively little analysis, adopted the collective rights view[;] the Third and Tenth Circuits appear to have suggested the possible use of some form of intermediate model." 312 F.3d at 1064 n.11. 270 F.3d at 218-20. The Court in *Emerson* concluded in the words of Judge Garwood (who studied History at Princeton):

"We have found no historical evidence that the Second Amendment was intended to convey militia power to the states, … or applies only to members of a select militia while on active duty. All of the evidence indicates that the Second Amendment, like other parts of the Bill of Rights, applies to and protects individual Americans.
"We find that the history of the Second Amendment reinforces the plain meaning of its text, namely that it protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training." Id. at 260.

Silveira makes this forlorn observation:

"We agree that our determination in *Hickman* that *Miller* endorsed the collective rights position is open to serious debate. We also agree that the entire subject of the meaning of the Second Amendment deserves more consideration than we, or the Supreme Court, have thus far been able (or willing) to give it." 312 F.3d at 1064.

Second Amendment), Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983), Halbrook, *The Freedmen's Bureau Act …,* 29 NO. KY. L. REV. 683 (2002).

Petitioners will also respectfully urge former members of the First Circuit to exercise independent reconsideration of previous per curiams from their Circuit.[19] Those trace back to very early cases of the 1940s. The Court today can do far better than *US* v. *Miller* and *Cases* v. *United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied,* 319 U.S. 770 (1943), an early, unusual, and arguably erroneous application of *Miller*.

Within the Ninth Circuit there is also stark and repeated internal disagreement. Less than a month after *Silveira*, another Ninth Circuit panel disagreed on the merits, but also held itself bound by *Hickman*. *Nordyke* v. *King,* 319 F.3d 1185 (9th Cir. 2003), said this: "the *Silveira* panel's exposition of the conflicting interpretations of the Second Amendment was both unpersuasive and … unnecessary." A member of the *Nordyke* panel wrote an extensive rebuttal to *Silveira*. *Nordyke* v. *King, supra* (Gould, *J,* concurring). Judge Gould concluded:

"Hickman v. *Bloc*k, 81 F.3d 98 (9th Cir. 1996), was wrongly decided, that the remarks in *Silveira* v. *Lockyer,* 312 F.3d 1052 (9th Cir. 2002), about the 'collective rights' theory of the Second Amendment are not persuasive, and that we would be better advised to embrace an 'individual rights' view of the Second Amendment, as was adopted by the Fifth Circuit in *US* v. *Emerson,* 270 F.3d 203, 260 (5th Cir. 2001*),* consistent with *US* v. *Mille*r, 307 U.S. 174 (1939)." 319 F.3d at 1192. (*See also* **APP**. at 76).

The repeated conflicts in and among *Emerson, Nordyke, Silveira,* and other cases, are compelling reasons for the Court to take up this important case.

B. DICTUM REFERENCES TO INDIVIDUAL RIGHT

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[19] *See*, *e. g.*, *United States* v. *Friel*, 1 F.3d 1231 (1st Cir. 1993)(per curiam)(federal conviction for possessing a firearm after a felony conviction upheld – Second Amendment argument rejected.). *Friel* is distinguishable as a felon in possession case. This petition does not present any such issues.

This Court lastly appears, in repeated dicta, to regard the Second Amendment as an *individual* right. Surely the first relevant reference to the Second Amendment in the US Reports appears in the denial of *all* rights to Dred Scott in *Scott* v. *Sandford*, 60 U.S. (19 Howard) 393, 416-17 (1856)(Taney, *CJ*). Taney attempts to justify his denial of rights to slaves:

> "For if they were so received, and entitled to the privileges and immunities of citizens … . It would give to persons of the negro race … the full liberty of speech … ; to hold public meetings upon political affairs, and to keep and carry arms wherever they went."

Taney equates the First and Second amendments as fundamental core rights. He makes no mention of the grammatically prefatory militia clause in the Second Amendment. As these Petitioners and six dissenting Ninth Circuit judges suggest, that clause was a reminder of only one purpose of the Amendment, among several others. It is not worded as a limitation on the express right, and certainly does not restrict the Fourteenth Amendment. It does not say that the right belongs to the States. (States have *powers* more than rights.) Its negative usage is an example of historical revisionism.

The recent Copyright extension case, *Eldred* v. *Ashcroft*[20] is instructive by analogy. Eldred argued that the preambular language identified the sole purpose for which Congress may legislate, that the meaning of "limited Times" must be 'determined in light of that end. The preamble of Article I, §8, cl. 8 states a purpose "to Promote the Progress of science and useful arts …." This Court refused to accept a reading of the Copyright Clause tied to its Preamble: "by securing for limited times to authors." The Court declined to use the vague term "limited times" as a limitation on the term of a copyright. The militia clause in the Second Amendment is just as vague and not intended or

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[20] 123 S Ct 769 (2003).

written as a limitation on the right of the people to keep and bear arms. Significantly, Justice Ginsburg stated in *Eldred*: "It is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives."[21]

The Second Amendment has its "militia" preamble. That expresses *one* purpose. It does not deny others. The Court could clarify as it did in *Eldred* that such a preamble is not a narrow limitation. The militia interest is, under the *Eldred* approach, but one of several historical purposes, applicable today to home and business defense.[22] *Eldred* comes as a timely analogy. Congress has spoken for the right to keep and bear arms on many occasions, as when the Freedmen's Bureau Act was enacted in part to protect "the right of the people to keep and bear arms …."[23]

The *Silveira* court disregards further significant dicta from this Court. Chief Justice Rehnquist, in a well-considered reference in *US* v. *Verdugo-Urquidez,* 494 U.S. 259, 265 (1990), stated:

"The Second Amendment protects 'the right of the people to keep and bear Arms,' and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to 'the people.' See also US Const, Amend I ('Congress shall make no law … abridging … the right of the people peaceably to assemble')."

Similarly, the plurality opinion in *Planned Parenthood* v. *Casey* in considered dictum treats the Second Amendment as an individual right.[24] This

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21 Id. at 785.

22 A local reminder would be the recent tale of DC Mayor William's barber chasing a robber away with a defensive firearm. *See* Washington Post, B5, May 17, 2003.

23 14 STAT. 173, 176. *See generally* STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 (Praeger 1998).

24 The plurality opinion by Justices Souter, O'Connor, and Kennedy in *Casey* states:

reflects a widespread understanding that the Second Amendment protects a fundamental individual right to keep and bear arms. This right is all the more important because this Court has recognized no liberty right to protection by the police when being threatened or attacked.[25] Citizens *need* the Second Amendment for protection of their families, homes, and businesses.

A great many more jurists, scholars, and courts have found the Second Amendment right to be individual, as well as community oriented. These include Pulitzer Prize winning Bill of Rights scholar Leonard Levy.[26] Justice Joseph Story, certainly a

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"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. Constitution, Amendment IX. As the second Justice Harlan recognized:
'... This "liberty" 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; ... and so on. ... [C]ertain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.' " *Casey,* 505 U.S. 833, 849 (1992).

See also Black, *The Bill of Rights,* 35 N.Y.U. L. REV. 866 (1960)(incorporation of Bill of Rights into Fourteenth based upon legislative history of Fourteenth).

[25] Cases such as *Hernandez* v. *City of Goshen,* 324 F.3d 535 (7th Cir. 2003), uniformly find no police department liability under §1983 for reckless indifference in responding to imminent threats that turn fatal. This leaves the first line of self defense against home burglars, looters, and terrorists in the citizens' own hands.

[26] See, e. g., AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998), LEVY, LEONARD W., ORIGINS OF THE BILL OF RIGHTS 133-149 (Yale 1999 ed.), COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW sec. IV (1898), V RAWLE, WILLIAM, A VIEW OF THE CONSTITUTION OF THE UNITED STATES doc. 9 (Phila. 2d ed., 1829)(NY: DaCapo Press 1970), Kates, *The Second Amendment and the Ideology of Self-Protection,* 9 CONST. COMMENT. 87 (1992), Barnett & Kates, *Under Fire: The New Consensus on the Second Amendment,* 45 EMORY L.J. 1141 (1996), Hardy, *The Second Amendment and the Historiography of the Bill of Rights,* 4 J. LAW. & POL. 1 (1987), Van Alstyne, *The Second Amendment and the Personal Right to Arms,* 93 DUKE L.J. 1236 (1994).

credible authority on matters from the founding era, would agree with petitioners. He stated, long ago, and in context: "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic …." III STORY, JOSEPH, COMMENTARIES ON THE CONSTITUTION at 746, §1890 (Rothman 1st ed 1991). This Court should resolve these conflicts in the lower courts over "individual rights."

III. THE DECISION OF THE COURT OF APPEALS IS ALSO IN CONFLICT WITH PERSUASIVE EARLY DECISIONS OF THE HIGHEST COURTS OF SEVERAL STATES INTERPRETING THE FEDERAL SECOND AMENDMENT AS PROTECTING AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS.

One important conflicting historical State case is *Nunn* v. *Georgia*, 1 GA. 243, 250 (1846), decided by the highest court of one of the original thirteen States. *Nunn* stated:

"The language of the second amendment is broad enough to embrace both Federal and State governments …."

That Georgia Supreme Court held quite specifically:

"The right of the whole people, old and young, men and women, and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed … in the smallest degree …."[27]

The holding of *Nunn* reflects the venerable view of RAWLE, cited above. It also finds support in the dissenting opinion below of Judge Kleinfeld. (**APP**. at 56). *Nunn* is much closer to the history and heart of the Founders' Second Amendment.[28] The *Silveira*-

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[27] *Nunn* v. *Georgia,* 1 GA. 243, 251 (1846)(Lumpkin, *J).*

[28] A second historic and conflicting State Second Amendment decision, contrary to the Ninth Circuit, is *In re Brickey,* 70 Pac. 609, 101 Am. St Rep 215 (Idaho 1902)(Quarles, *CJ). Brickey* squarely held that a state law prohibiting private persons from carrying any deadly weapon, concealed or otherwise, within municipal limits violated the US Second Amendment. *See also*

Reinhardt opinion snubs the rich State court jurisprudence in this field. *Miller* also missed many thoughtful and relevant state constitutional provisions and cases.[29] Justice McReynolds relied on *Aymette* v. *State,* 21 Tenn. (2 Humphr) 154 (1840), which involved a ruffian aggressively brandishing a bowie knife after a quarrel. It would be a daunting task to find a case more inapposite for analyzing the fundamental Second Amendment rights of peaceable citizens.

This Court should grant certiorari to resolve these conflicts among the State and federal courts. A thorough analysis would surely agree with this: "Dispassionate scholarship suggests quite strongly that the right of the people to keep and bear arms meant just that." Justice Antonin Scalia, A MATTER OF INTERPRETATION 137 (Princeton 1997).

IV. THE COURTS OF APPEAL ARE IN ADDITIONAL CONFLICT ON WHETHER THE SECOND AMENDMENT APPLIES TO THE STATES THROUGH THE DUE PROCESS AND/OR PRIVILEGES & IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT, AND WHETHER *PRESSER* V. *ILLINOIS*, 116 U.S. 252 (1886), SHOULD BE LIMITED OR

State v. *Nickerson,* 247 P.2d 188, 192 (Mont. 1952)(Adair, *J*), for a classic home defense case with extensive early case law discussion. A fine book that covers the early state case law well is CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE 63 (Praeger 1994).

The Second Amendment makes no distinction between concealed arms and not. There is considerable evidence of lower crime rates in States where law-abiding citizens may carry concealed defensive weapons and keep others at home. Guns in the hands of law-abiding citizens and at home deter burglars. *See generally* LOTT, JOHN, THE BIAS AGAINST GUNS (Regnery 2003), GUN CONTROL & GUN RIGHTS (N.Y.U.: McClurg, Kopel, & Denning eds. 2002), POE, RICHARD, THE SEVEN MYTHS OF GUN CONTROL (Random House: Prima 2001), WATERS, ROBERT A., GUNS SAVE LIVES (WA: Loompanics.com 2002).

[29] *See* Kopel, *What State Constitutions Teach About the Second Amendment,* 29 NO. KY. L. REV. 827 (2002), Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998).

OVERRULED, AND A FORM OF INCORPORATION INTO THE DUE PROCESS CLAUSE APPLIED, OR A *SAENZ* V. *ROE* (US 1999)[30] ANALYSIS UTILIZED.

An important issue splitting several US Courts of Appeal is *how* the Second Amendment applies to the States. One approach is the due process clause of Amendment XIV. Another is the privileges and immunities clause. A third is to follow *Presser* v. *Illinois*[31] of the 1886 Court, from the era of so many discredited decisions, such as *Plessy* v *Ferguson*[32] and *Bradwell* v. *The State.*[33]

On this point *Silveira* and *Emerson* agree, but there is abundant discord with other Circuits, the Fourth and Seventh, and within the Ninth Circuit. *See Love* v. *Pepersack*, 47 F.3d 120 (4th Cir.), *cert. denied,* 516 U.S. 813 (1995)(Second Amendment not applicable), *Quilici* v. *Village of Morton Grove*, 695 F.2d 261 (7th Cir.)(2-1)(follows *Presser*), *cert. denied*, 464 U.S. 863 (1983).

Justice Brennan with characteristic understatement observed: "Many still believe that the dissenting opinion in the *Slaughterhouse Cases* expressed the sounder view." Brennan, *The Bill of Rights and the States,* 36 N.Y.U.L. REV. 761, 767 (1961).

Silveira and *Emerson,* and other judges on the Ninth Circuit reject *Presser* v. *Illinois,* and *US* v. *Cruikshank,* both *supra,* as no longer authoritative. *Silveira* states:

"we are in agreement with the Fifth Circuit ... that *Cruikshank* and *Presser* rest on a principle that is now thoroughly discredited. *See Emerso*n, 270 F.3d at 221 n.13." *Silveira,* 312 F.3d at 1067 n.17.[34]

Only "some" of the Ninth Circuit, however, rejects *Cruikshank* and *Presser.* Directly contrary to *Silveira* is

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30 526 U.S. 489, 503-04 (1999).
31 116 U.S. 252 (1886).
32 163 U.S. 537 (1896).
33 83 U.S. 130 (1873).
34 *Emerson,* a federal case, did not involve incorporation.

Fresno RPC v. *Van de Kamp*, 965 F.2d 723 (9th Cir. 1992)(Second Amendment does not apply to States).

Highest courts of more than one State have refused to apply the Second Amendment. New Hampshire now has its own broad "right [of persons] to keep and bear arms in defense of themselves, their families, their property and the state." N.H. CONST. Pt I, art 2-A (1982), and applies the article with strict scrutiny, as in *State* v. *Smith,* 571 A.2d 279 (N.H. 1990)(Johnson, J).[35] Other examples are: *Harris* v. *State,* 432 P.2d 929 (Nev. 1967), *Commonwealth* v. *Davis,* 343 N.E.2d 847 (Mass. 1976), *State* v. *Friel,* 508 A.2d 123 (Me. 1986).

To place the importance of these issues in context, consider if **nine** Circuits and four State high Courts decided *not* to apply the First and Fourth Amendments to the States. Would such cases be certworthy?[36]

A. INCORPORATION FOLLOWING *BENTON* AND *DUNCAN*

The usual and well-settled jurisprudence for applying an Amendment to the States is explained in *Benton* v. *Maryland,* 395 U.S. 704 (1969), following *Duncan* v. *Louisiana,* 391 U.S. 145 (1968):

"[T]he Fifth Amendment represents a fundamental ideal in our constitutional heritage.... [It] ... should apply to the

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[35] Earlier, New Hampshire upheld a conviction for unlicensed mere possession of pistols in *State* v. *Sanne*, 364 A.2d 630 (N.H. 1976). The accused, however, had no appellate counsel in this firearms possession case to argue for incorporation. The State was well represented by a gentleman named Souter.

[36] There was a lingering unargued right to keep minor arms issue here recently in *Bunkley* v. *Florida,* 123 S Ct ___ (2003)(per curiam). Bunkley carried a closed pocket knife with a ~2½ inch blade. This is no different from the innocuous Swiss Army knife carried by millions for numerous purposes, including use of its screwdriver and bottle opener. *See* www.swiss-knife.com. The "original" Swiss model has a 3¾ in. blade. Some have clippers, scissors, a compass, whistle, and spotlight, all useful for self defense and survival, as well as peeling oranges in Florida. Yet in Florida innocent possession can be the difference between five years versus **life** because that simple right of having minimal self protection has not been recognized.

States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko* v. *Connecticut* is overruled." 395 U.S. at 794.

The individual right to keep and bear arms – Second Amendment - also is "a fundamental ideal in our constitutional heritage." To the extent that *Presser* undercuts the Second Amendment, so too should *Presser* be finally overruled. *Presser* is even more vulnerable in reasoning than *Bowers* v. *Hardwick,* 478 U.S. 186 (1986), overruled last Term.

B. INCORPORATION FOLLOWING *SAENZ* AND *DOE*

At least three generations of law students and constitutional lawyers have understood that the *Slaughterhouse Cases,* 83 U.S. 36 (1873)(5-4), and *United States* v. *Cruikshank,* 92 U.S. 542 (1876), were not well considered.[37] It is no coincidence that *Slaughterhouse* in the Reports sits next to *Bradwell* v. *The State,* 83 U.S. 130 (1873), another legacy of then judicial disregard for the Fourteenth Amendment and individual rights.[38] Dissenting Justice Noah Swayne

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[37] Modern persuasive scholarly analysis of the Fourteenth Amendment and privileges and immunities clause includes: MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE (Duke 1986), MEYER, THE AMENDMENT THAT REFUSED TO DIE (Madison 2000), SCATURRO, THE SUPREME COURT'S RETREAT FROM RECONSTRUCTION (Greenwood Press 2000), Aynes, *On Misreading John Bingham and the Fourteenth Amendment,* 103 YALE L.J. 57 (1993), Amar, *Second Thoughts,* 65 LAW & CONTEMP. PROBS. 103 (2002), Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States,* 78 N.C.L. REV. 1071 (2000), Harrison, *Reconstructing the Privileges or Immunities Clause,* 101 YALE L.J. 1385 (1992). The recent book by Judge Sneed of the Ninth Circuit covers the material well. *See* SNEED, JOSEPH T. III, FOOTPRINTS ON THE ROCKS OF THE MOUNTAIN – AN ACCOUNT OF THE ENACTMENT OF THE FOURTEENTH AMENDMENT (1997).

[38] *Bradwell* allowed the State of Illinois to exclude women as a class from the practice of law, regardless of demonstrated skills, natural talent, and considerable education, as well as licensure in other States. The reasoning was minimalist. *Bradwell* follows *Slaughterhouse* in the pages of 83 U.S. Reports.

observed in *Slaughterhouse* that the majority turned "what was meant for bread into a stone." 83 U.S. at 129. One need not be a constitutional scholar to shudder at the reasoning and reality of *Slaughterhouse* and *Cruikshank.* They gutted the privileges or immunities clause, leaving next to no protection for the lives and liberty of freedmen, freedwomen, and those who supported their cause.[39]

Cruikshank did so following the murderous "Colfax massacre" in Louisiana of freedmen.[40] Federal prosecutors charged Klansmen with conspiracy to prevent blacks from exercising civil rights, including the rights to vote and to bear arms for defense of their community. The *Cruikshank* Court freed the Klansmen to ride again, with not a mention of the massacre.

Decades after *Cruikshank,* this Court used the due process clause of the Fourteenth to strengthen individual rights against oppressive state action, by incorporating most of the Bill of Rights into due process, one by one, and also recognizing home and family rights, as in *Troxel* v. *Granville,* 530 U.S. 57 (2000)(fundamental family rights).

Saenz v. *Roe,* 526 U.S. 489 (1999), is important here. *Saenz* recalled that "Justice Stewart reminded us

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[39] MEYER, THE AMENDMENT THAT REFUSED TO DIE 64-67, 74-94 (Madison 2000), is a thorough short study of the history and errors of both the *Slaughterhouse* and *Cruikshank* cases.

[40] *Cruikshank* ignored the brutal facts of the Colfax Massacre, which today would be considered crimes against humanity. The HARPWEEK website contains this concise summary: "The second worst incident of violence was the Colfax Massacre of April 13, 1873. The fighting left ... 70 black men dead, with half ... killed after they surrendered. Federal officials arrested and indicted over 100 white men. They were later freed, however, when the U.S. Supreme Court ruled that the basis for their prosecution (part of the 1870 enforcement act) was unconstitutional." http://blackhistory.harpweek.com/7Illustrations/Reconstruction/GatheringTheDead.htm. *See generally* VANDAL, RETHINKING SOUTHERN VIOLENCE: HOMICIDES IN POST-CIVIL WAR LOUISIANA, 1866-1884 (Ohio State 2000), HOLLANDSWORTH, AN ABSOLUTE MASSACRE: NEW ORLEANS RACE RIOT OF JULY 30, 1866 (L.S.U. 2001).

in *Shapiro* v *Thompson*, 394 U.S. 618, 643 (1969), [that] the right [to travel] is so important that it is 'assertable against private interference as well as governmental action ... a virtually unconditional personal right, guaranteed by the Constitution ...."'(concurring opinion). In *Silveira* we have the *explicit* Second Amendment right, protected by both the due process and privileges & immunities clauses of the Fourteenth Amendment. All of the authorities from varying venues cited in footnotes 18, 26 & 37 agree, as well as Blackstone, Rawle, and Cooley. Amar states:

"[T]he framers of the Fourteenth Amendment strongly believed in an individual's right to own and keep guns for self-protection. Blacks and Unionists down South could not always count on the local police to keep white night-riders at bay. When guns were outlawed, only Klansmen would have guns. Thus, the Reconstruction Congress made quite clear that a right to keep a gun at home for self-protection was indeed a constitutional right -- a true 'privilege' or 'immunity' of citizens."[41]

The *Cruikshank* Court restored the Klan and supporting lawless officialdom to power. This Court can undo that wrong.[42]

V. THE COURTS OF APPEAL & CITIZENS HAVE HAD *NO* DIRECT SECOND AMENDMENT GUIDANCE FROM THIS COURT SINCE THE SEVERELY CRITICIZED 1939 OPINION OF JUSTICE JAMES MCREYNOLDS IN *US V. MILLER*, WELL OVER 60 YEARS AGO, DESPITE THE PROLIFERATION OF FIREARMS LAWS & LITIGATION. *MILLER* SHOULD BE CAREFULLY RECONSIDERED BECAUSE IT: (A) BADLY

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41 Amar, *Second Thoughts,* 65 LAW & CONTEMP. PROBS. 103, 110 (2002).

42 The State action ignored in *Cruikshank* was the failure of the State to provide equal police protection to freedmen, as well as the active participation of local lawmen who were accomplices in the massacre and homicides. *See* VANDAL and HOLLANDSWORTH, *supra* note 40. The mass killings at Colfax were not unlike some recent scenes in Bosnia that have been prosecuted at the Hague.

MISREADS HISTORY, (B) THE *MILLER* COURT CASUALLY DENIED COUNSEL TO MILLER IN A RUSH TO JUDGMENT WITHIN A MATTER OF ONLY A FEW WEEKS, DURING WHICH TIME THE MILLER SIDE HAD NO COUNSEL, BRIEF OR ARGUMENT, & (C) THE *MILLER* DECISION HAS CREATED INCONSISTENCY AND CONFUSION IN THE LOWER COURTS, APART FROM BEING A PLAIN MISCARRIAGE OF JUSTICE.

Recent scholarship on Justice James McReynolds and *United States* v. *Miller*[43] painfully exposes the inadequacies of the decision, as well as the Justice's unparalleled record of opinions systematically upholding every form of abridgment of fundamental rights. Those negative decisions ranged from racism in education[44], the judicial system[45], and voting,[46] to denial of First Amendment rights.[47] McReynolds even refused to sign the Memorial to Justice Brandeis or attend his funeral, so rigid was McReynolds' anti-Semitism. 306 U.S. at vi.[48]

That other Justices did not write in *Miller*, and concurred silently at the hurried end of the Term speaks nothing of the result if the case had been

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[43] 307 U.S. 174 (1939). A thorough exposition of the *Miller* confusion is Denning, *Can the Simple Cite be Trusted?: Lower Court Interpretations of United States v. Miller and The Second Amendment,* 26 CUMBERLAND L. REV. 961 (1996)(analysis of misapplications of *Miller* in the US Courts of Appeal). *See also* Gardiner, *The Second Amendment and the U.S. Courts of Appeal,* 29 NO. KY. L. REV. 805 (2002).

[44] McReynolds, for example, dissented in the law school racial desegregation case of *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337, 353 (1938), although the State had no black law school at all.

[45] Justice McReynolds did not attend argument in the Scottsboro cases. See *Patterson* v. *Alabama*, 294 U.S. 600, 607 (1935).

[46] McReynolds would have sanctioned the voting discrimination against blacks found in *Lane* v. *Wilson,* 307 U.S. 268 (1939).

[47] He dissented against applying the First Amendment to the States in *Stromberg* v. *California*, 283 U.S. 359, 370 (1931).

[48] *See* THE FORGOTTEN MEMOIR OF JOHN KNOX (Univ of Chicago: Hutchinson & Garrow eds. 2002). Online material includes: www.michaelariens.com/ConLaw/justices/mcreynolds.html.

briefed and argued in a normal objective way. The other Justices had some **30** additional full opinions to write in the few weeks before the Term ended on June 5, 1939. Moreover, in that era, dissent was strongly discouraged. Some 80% of decisions were unanimous. The rare dissent was usually noted, without an opinion. *See* MICHAEL E. PARRISH, THE HUGHES COURT: JUSTICES, RULINGS, & LEGACY, Table 1.2 at 25 (ABC-CLIO 2002). An example of a unanimous *Miller*-era decision by this Court that was later overturned would be *Commonwealth* v. *Gardner,* 15 N.E.2d 222 (Mass), *appeal dismissed*, 305 U.S. 559 (1938)(per curiam), overruled *de facto* in *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972).

This Court should grant certiorari to remedy the inadequacies of *United States* v. *Miller,* 307 U.S. 174 (1939), and to replace that flawed and ambiguous McReynolds opinion with well-reasoned principles to guide citizens and the lower courts. *Miller* misstates and misunderstands law and history repeatedly. The government argued in its unopposed *Miller* brief that:

"… [T]he carrying of weapons was always a crime under the common law of England and of this country."[49]

That claim, however, is untrue and contradictory. The authoritative writings of Blackstone, Rawle, Justice Story, Cooley, and English historical documents and treatises demonstrate overwhelmingly that the carrying of weapons was *not* generally a crime under the common law of England or of this country. Historian-lawyer David Hardy carefully details this background in his valuable book ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT 12 & *passim* (Blacksmith, AZ 1986). Hardy notes:

"Yet more recent historians have traced the individual legal duty to own arms and be skilled in their use to

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[49] Brief of the United States, *United States* v. *Miller*, at 4 (US, October Term 1938, No. 696).

690 A.D., and concluded that it is in fact 'older than our oldest records.' J BAGLEY & P ROWLEY, I A DOCUMENTARY HISTORY OF ENGLAND 152." [50]

Typically in those ancient years the possession of arms was never a crime, unless there was a factor of monarchial, parliamentary, or religious persecution-discrimination. Our Founders generally frowned upon such a legal rationale, and many British traditions. Also, there might be an offense if the carrier of arms were menacing the populace, rather than carrying for self or other defense. Hardy, *supra,* and Joyce Lee Malcolm develop this historical material well.[51] The government and Justice McReynolds did not.

Madison pointed out in THE FEDERALIST NO. 46 that Americans possess "the advantage of being armed … [unlike] the people of almost every other nation …." Moreover, other "governments are afraid to trust the people with arms."[52] The British were different. Parliament and Monarchs ruled. It is incongruous to rely upon English statutory law spawned by a haphazard hereditary monarchy, when that very law sought to suppress the American Revolution by disarming and shooting at our nation's Founders.

Blackstone stated in his 1803 COMMENTARIES:[53]

"5. The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence …."
"[It] 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."

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[50] DAVID HARDY, ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT 12 (Blacksmith, AZ 1986).

[51] *See* MALCOLM, GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE (Harv. 2002).

[52] THE FEDERALIST No. 46, at 335 (N.Y.: Wright ed. 1961).

[53] II Blackstone, The Rights of Persons, in COMMENTARIES bk. 1, c. I, 127, 143, 144 (1803).

"… the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birth-right to enjoy entire …."

The *Miller* opinion cites BLACKSTONE,[54] but the wrong chapter, and for an irrelevant proposition. The most often quoted errant paragraph from *Miller* states:

"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. *Tennessee*, 2 Humphr 154, 158 (Tenn. 1840)." 307 U.S. at 178.

If such evidence were constitutionally significant to a Second Amendment analysis, the Court could have remanded for further findings, or researched the topic of shotguns used in military and defensive engagements. More than enough historical material exists for an impressive book, namely SWEARENGEN, IV THE WORLD'S FIGHTING SHOTGUNS (Alex. Va.: Ironside Publ. 1978)(available in DC at Borders). The Court would have found that short-barreled shotguns were legitimately useful from pre-Revolutionary times to date, as can be developed with judicial notice materials in the briefs to follow.[55] Mr Miller's shotgun would be quite effective in defending a household from invasion by multiple combatants, gangs, or terrorists at close range. Justice McReynolds made erroneous bare assumptions without evidence, knowledge, or judicial

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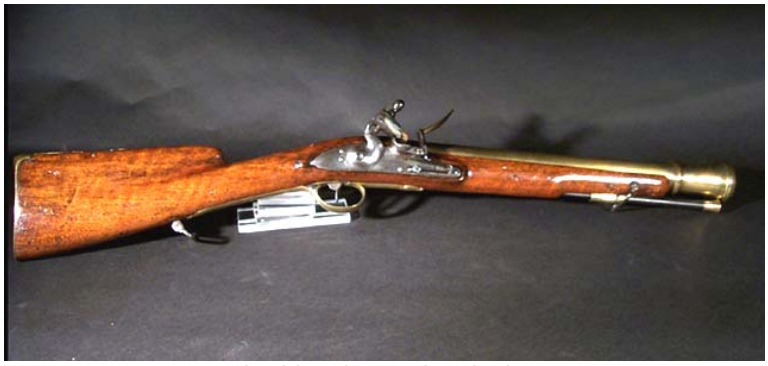
[54] Justice McReynolds cites BLACKSTONE'S COMMENTARIES, Vol. 2, Ch. 13, p. 409 on King Alfred. *Miller*, 307 U.S. at 179.

[55] An excellent article on short shotguns in American history, and the material missed completely by Justice McReynolds is Puckett, *United States* v. *Miller* and Short-Barreled Shotguns (2003)(essay – publication pending).

notice materials. The Justice invented the militia-useful suggestion, without any historical or textual authority, or study of weaponry, military or otherwise. Moreover, the indictment did not charge Miller with having a firearm unrelated to potential personal or common defense, much less a militia connection.

Justice McReynolds does observe that "ordinarily when called for service these [Militia] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[56] Bostonians had blunderbusses for defense against the British, who tried to confiscate them! *See* RICHARD FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON 95 (N.Y.: DaCapo Press 1970 ed.) Lewis & Clark were men of the time and armed themselves with blunderbusses, the 1803 version of a short-barreled shotgun, for protection from Natives and Bears.



Lewis & Clark's Short Blunderbuss c. 1760
National Museum of American History, Washington, D.C.
www.loc.gov/exhibits/lewisandclark/images/lcp0041s.jpg

Justice McReynolds cites in a final footnote three "important opinions and comments by writers," including Thomas Cooley.[57] McReynolds mistakenly cited the Story discussion of a militia, not of "the right

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

57 His specific cite is: "Cooley's Constitutional Limitations, Vol 1, p 729; Story on The Constitution, 5th Ed, Vol 2, p. 646." 307 U.S. at 182 n.3. The *Miller* opinion has only three footnotes.

of the citizens to keep and bear arms." McReynolds also cited the wrong Cooley treatise.

Cooley's pertinent work, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW sec. IV (1898), explains:

> *"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 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."

The historical and legal authorities he cited - Story and Cooley - both flatly contradict his holding and military connection. The absence of quality in the reasoning and historical analysis of *Miller* is another reason why the case should be revisited and overruled. *Compare Lawrence* v. *Texas,* 539 U.S. ___ (2003)(Slip op. 7-17)(critique of *Bowers* decision).

UNWARRANTED DENIAL OF COUNSEL & ARGUMENT TO *MILLER*, AND RUSH TO JUDGMENT

The report of *United States* v. *Miller*, 307 U.S. 174, 175 (1939), recites only Gordon Deans' appearance, seven other government lawyers on the brief, and no representation at all for Miller or Layton. This was a denial of appellate counsel and argument. The hurried events are documented in the National Archives case file. The Court nonetheless noted probable jurisdiction (and heard oral argument 17 days later!).

The Clerk on March 15, 1939, wrote to Miller's previous Arkansas trial counsel, Paul Gutensohn, stating that he should appear March **31** for oral argument.[58] That allowed hardly two weeks for the

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[58] Letter, Charles Elmore Cropley, Clerk, to Paul E. Gutensohn, Esq, Mar. 15, 1939, NATIONAL ARCHIVES, SUPREME COURT CASE RECORDS, *United States* v. *Miller,* October Term 1938, No. 696. The

drafting and printing of a full brief, preparation for oral argument, and travel. Counselor Gutensohn replied March 22 that he had not even received the brief of the government, nor the record.[59] He had only been court-appointed trial counsel. Clerk Cropley responded March 25, five days before the scheduled argument, that Gutensohn should file a brief early the next week.[60] Gutensohn replied March 28 with a Western Union telegram stating: "SUGGEST CASE BE SUBMITTED ON APPELLANTS BRIEF. UNABLE TO OBTAIN ANY MONEY FROM CLIENTS TO BE PRESENT AND ARGUE CASE = PAUL E GUTENSOHN."[61] This suggestion was directly against the interests of his clients.

Jack Miller, accordingly, did not have a brief or any representation at the oral argument on March 30, 1939. The Chief Justice did not pass the case and inquire about the absence of counsel, or appoint other counsel to undertake representation for reargument.

The railroad rush, the absence of briefing, and the failure to appoint counsel, all diminish *Miller* as a credible precedent. The case was a classic miscarriage of justice, unthinkable today. It was no *Gideon.*

The defining issue here is whether an indigent appellee, in a government appeal to the Supreme Court, is entitled to appointed counsel. *Hardy* v. *United States,* 375 U.S. 277 (1964), for example, squarely held that an indigent defendant convicted in the District of Columbia had a federal constitutional right to a complete transcript on appeal to the US

Court actually heard argument March 30. If Gutensohn had appeared March 31 as directed, he would have been a day late.

[59] Letter, Paul E Gutensohn, Esq, to Charles Elmore Cropley, Clerk, Mar. 22, 1939, Id.

[60] Letter, Charles Elmore Cropley, Clerk, to Paul E. Gutensohn, Esq, Mar. 25, 1939, Id.

[61] Telegram, Paul E. Gutensohn, Esq, to Charles Elmore Cropley, Clerk, Mar. 28, 1939, Id.

Court of Appeals. The Court appointed counsel when the trial lawyer withdrew.

Recent decisions on ineffective counsel also support this analysis of *Miller* as a defective decision, such as *Roe* v. *Flores-Ortega,*[62] and *Penson* v. *Ohio.*[63] The *Miller* case was an instance of "the forfeiture of a proceeding itself." *Roe,* 528 U.S. at 483. This Court surely must not allow *Miller* to remain as authority for any point of law, much less the sole [**mal**]interpretation of a key right in the Bill of Rights, the Second Amendment.

VI. THE COURTS OF APPEAL ARE IN DISARRAY ON WHETHER TO APPLY A HEIGHTENED STANDARD OF REVIEW IN SECOND AMENDMENT CASES. EXPRESS FUNDAMENTAL RIGHTS ARE DIRECTLY INVOLVED AND SHOULD RARELY BE LIMITED, AND THEN ONLY FOR THE MOST COMPELLING OF JUSTIFICATIONS.

Petitioners suggest a heightened standard of review in all Second Amendment cases, as with the First Amendment, because express fundamental rights are involved. Beyond that is the further right to protect and defend home and family, recognized in the cases leading up to *Troxel* v. *Granville,* 530 U.S. 57 (2000). The heightened scrutiny applied in *Troxel* is appropriate.[64] Protecting family and children are core purposes of the Second Amendment. Violent home invasions take place on a serious scale, as do assaults upon citizens in their workplaces. Indeed, because of the risk of violence, both defendants have taxpayer-paid armed bodyguards, as do many other California

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[62] 528 U.S. 470, 481-483 (2000)(failure to file notice of appeal held ineffective).

[63] 488 U.S. 75, 88-89 (1988)(claim that counsel did not represent defendant on appeal).

[64] While *Lawrence* v. *Texas, supra,* did not discuss standard of review at length, the Court relied upon a number of strict scrutiny decisions such as *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972). Those apply with greater strength here because the Second Amendment is an express fundamental right.

officials.[65] The rounding up of guns from private homes, facilitated by gun registration, leaves families defenseless against burglary, gangs, violent civil disorder, and terror, unless they have exceptional wealth or hold high office. Civil disorders such as those in D.C. and L.A. from time to time especially show the need for business owners to have deterrent defensive weapons to prevent looting and arson.

Historically, gun registration has led to confiscation and attendant horrors. Judge Kozinski notes this in his dissenting opinion below. 327 F.3d at 568-70. (**APP.** at 46-48). The well-researched book, GUN CONTROL: GATEWAY TO TYRANNY – THE NAZI WEAPON LAW 18 MARCH 1938, J. Simkin & A. Zelman (1992), also documents how the SS inherited lists of firearm owners and their arms in March 1933. The SS used these lists to seize privately held firearms from persons who were not considered to be "reliable." *See* www.jpfo.org/GCA_68.html.

Private firearms in the hands of 6 million European Jews would have altered the course of history for many of our ancestors who did not survive.

As the concurring opinion of Justice Thomas in *Troxel* reminds, "strict scrutiny [applies] to infringements of fundamental rights." 530 U.S. at 80. A heightened standard of review would clarify Second Amendment jurisprudence immensely and align it with First Amendment practice that is closely analogous.

VII. THIS COURT SHOULD REVERSE THE JUDGMENT OF THE US COURT OF APPEALS IN *SILVEIRA V. LOCKYER*, 312 F.3d 1052 (9th Cir 2003), AND REMAND FOR FURTHER PROCEEDINGS, INCLUDING AN ASSESSMENT OF REASONABLE INTERIM COUNSEL FEES UNDER 42 U.S.C.

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[65] The Associated Press in August 2000 reported: "Among all the states, only California provides bodyguards to all its statewide officials .... More than $31 million this year .... California Attorney General Bill Lockyer is protected by special agents ...."

§1988 PRIOR TO TRIAL OF THE REMAINING FACTUAL QUESTIONS.

If Petitioners prevail in this Court sufficiently on the issues set out above, they will have assisted the Court in sorting out the law of the Second and Fourteenth Amendments from the past 64 years. As substantially prevailing parties, Petitioners should receive costs, reasonable counsel fees, and appropriate litigation expenses under 42 U.S.C. §1988.

This would fit the requirement from *Hanrahan* v. *Hampton,* 446 U.S. 754, 758 (1980)(per curiam), that: "Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims." Prevailing on the principal questions presented by this Petition would be a far greater victory than an award of nominal damages, sufficient in *Farrar* v. *Hobby,* 506 U.S. 103 (1992). *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), applies. This Court should order that the fees be assessed before other proceedings below on remand in the district court.

CONCLUSIONS

For the reasons set out, this Court should grant the petition for writ of certiorari, reverse the judgment of the US Court of Appeals in *Silveira* v. *Lockyer,* 312 F.3d 1052 (9th Cir. 2003), and remand for trial.

This would be the first Second Amendment appeal to be heard since 1939. The case presents several complex and important constitutional questions. Petitioners suggest that the Court allow two and one-half hours for oral argument and 75 pages for briefs, with permission to file appendices (8.5 x 11) containing essential historical documents and authorities.

RESPECTFULLY,

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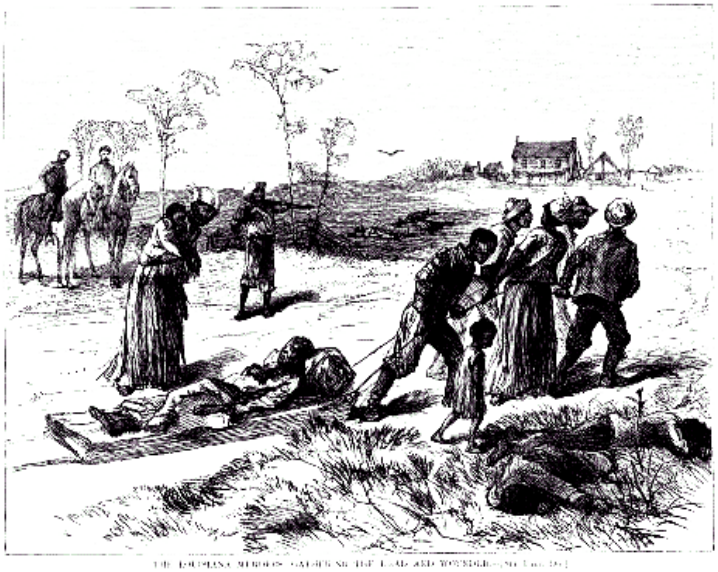
APPENDIX



GATHERING THE DEAD AND WOUNDED
Harpers, May 10, 1873
(After the Colfax Massacre, before *US* v. *Cruikshank* - RL)

APPENDIX TO PETITION FOR CERTIORARI

Counsel have personally reformatted these opinions into MSN Word 2002 from the pdf versions published electronically by the Ninth Circuit. Counsel take responsibility for any errors that may remain after thorough checking.
All opinions now are officially reported as well.
312 F.3d 1052 & 328 F.3d 567.

ORDER OF THE US COURT OF APPEALS, MAY 6, 2003, DENYING REHEARING EN BANC: SIX DISSENTS, AND FOUR OPINIONS

***SILVEIRA* v. *LOCKYER*,**
328 F.3d 567 (9th Cir. May 6, 2003)

SEAN SILVEIRA; JACK SAFFORD; PATRICK OVERSTREET; DAVID K. MEHL; STEVEN FOCHT, Sgt.; DAVID BLALOCK, Sgt.; MARCUS DAVIS; VANCE BOYCE; KENETH DEWALD,
Plaintiffs-Appellants,
v.
BILL LOCKYER, Attorney General, State of California; GRAY DAVIS, Governor, State of California, *Defendants-Appellees.*

No. 01-15098

D.C. No. CV-00-00411-WBS

ORDER

Filed May 6, 2003

Before: Stephen Reinhardt, Frank J. Magill,* and Raymond C. Fisher, Circuit Judges.

Dissent by Judge Pregerson;
Dissent by Judge Kozinski;
Dissent by Judge Kleinfeld;
Dissent by Judge Gould

*The Honorable Frank J. Magill, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

A majority of the panel has voted to deny the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of

the votes of the nonrecused active judges in favor of en banc reconsideration. FED. R. APP. P. 35.
The petition for rehearing en banc is denied.

PREGERSON, Circuit Judge, dissenting from the denial of rehearing en banc:
I agree with the panel's decision to uphold California's Assault Weapons Control Act. But I part from the panel's Second Amendment analysis. The right to keep and bear arms is in no way absolute; it is subject to reasonable restrictions such as those embedded in the statute the California legislature enacted. However, the panel misses the mark by interpreting the Second Amendment right to keep and bear arms as a collective right, rather than as an individual right. Because the panel's decision abrogates a constitutional right, this case should have been reheard en banc.

KOZINSKI, Circuit Judge, dissenting from denial of rehearing en banc:
Judges know very well how to read the Constitution broadly when they are sympathetic to the right being asserted. We have held, without much ado, that "speech, or . . . the press" also means the Internet, *see Reno* v. *ACLU*, 521 U.S. 844 (1997), and that "persons, houses, papers, and effects" also means public telephone booths, *see Katz* v. *United States*, 389 U.S. 347 (1967). When a particular right comports especially well with our notions of good social policy, we build magnificent legal edifices on elliptical constitutional phrases—or even the white spaces between lines of constitutional text. *See, e.g.*, *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc), *rev'd sub nom. Washington* v. *Glucksberg*, 521 U.S. 702 (1997). But, as the panel amply demonstrates, when we're none too keen on a particular constitutional guarantee, we can be equally ingenious in burying language that is incontrovertibly there.
It is wrong to use some constitutional provisions as springboards for major social change while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us. As guardians of the Constitution, we must be consistent in interpreting its provisions. If we adopt a jurisprudence sympathetic to individual rights, we must give broad compass to all constitutional provisions that protect individuals from tyranny. If we take a more static

approach, we must give all such provisions narrow scope. Expanding some to gargantuan proportions while discarding others like a crumpled gum wrapper is not faithfully applying the Constitution; it's using our power as federal judges to constitutionalize our personal preferences.

The able judges of the panel majority are usually very sympathetic to individual rights, but they have succumbed to the temptation to pick and choose. Had they brought the same generous approach to the Second Amendment that they routinely bring to the First, Fourth and selected portions of the Fifth, they would have had no trouble finding an individual right to bear arms. Indeed, to conclude otherwise, they had to ignore binding precedent. *United States* v. *Miller*, 307 U.S. 174 (1939), did *not* hold that the defendants lacked standing to raise a Second Amendment defense, even though the government argued the collective rights theory in its brief. *See* Kleinfeld Dissent at 6011-12; *see also* Brannon P. Denning & Glenn H. Reynolds, *Telling* Miller*'s Tale: A Reply to David Yassky*, 65 Law & Contemp. Probs. 113, 117-18 (2002). The Supreme Court reached the Second Amendment claim and rejected it *on the merits* after finding no evidence that Miller's weapon—a sawed-off shotgun—was reasonably susceptible to militia use. *See Miller*, 307 U.S. at 178. We are bound not only by the outcome of *Miller* but also by its rationale. If Miller's claim was dead on arrival because it was raised by a person rather than a state, why would the Court have bothered discussing whether a sawed-off shotgun was suitable for militia use? The panel majority not only ignores *Miller*'s test; it renders most of the opinion wholly superfluous. As an inferior court, we may not tell the Supreme Court it was out to lunch when it last visited a constitutional provision.

The majority falls prey to the delusion—popular in some circles—that ordinary people are too careless and stupid to own guns, and we would be far better off leaving all weapons in the hands of professionals on the government payroll. But the simple truth—born of experience—is that tyranny thrives best where government need not fear the wrath of an armed people. Our own sorry history bears this out: Disarmament was the tool of choice for subjugating both slaves and free blacks in the South. In Florida, patrols searched blacks' homes for weapons, confiscated those

found and punished their owners without judicial process. *See* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 338 (1991). In the North, by contrast, blacks exercised their right to bear arms to defend against racial mob violence. *Id.* at 341-42. As Chief Justice Taney well appreciated, the institution of slavery required a class of people who lacked the means to resist. *See Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393, 417 (1857) (finding black citizenship unthinkable because it would give blacks the right to "keep and carry arms wherever they went"). A revolt by Nat Turner and a few dozen other armed blacks could be put down without much difficulty; one by four million armed blacks would have meant big trouble.

All too many of the other great tragedies of history—Stalin's atrocities, the killing fields of Cambodia, the Holocaust, to name but a few—were perpetrated by armed troops against unarmed populations. Many could well have been avoided or mitigated, had the perpetrators known their intended victims were equipped with a rifle and twenty bullets apiece, as the Militia Act required here. *See* Kleinfeld Dissent at 5997-99. If a few hundred Jewish fighters in the Warsaw Ghetto could hold off the Wehrmacht for almost a month with only a handful of weapons, six million Jews armed with rifles could not so easily have been herded into cattle cars.

My excellent colleagues have forgotten these bitter lessons of history. The prospect of tyranny may not grab the headlines the way vivid stories of gun crime routinely do. But few saw the Third Reich coming until it was too late. The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed—where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.

Fortunately, the Framers were wise enough to entrench the right of the people to keep and bear arms within our constitutional structure. The purpose and importance of that right was still fresh in their minds, and they spelled it out clearly so it would not be forgotten. Despite the panel's

mighty struggle to erase these words, they remain, and the people themselves can read what they say plainly enough:

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 sheer ponderousness of the panel's opinion—the mountain of verbiage it must deploy to explain away these fourteen short words of constitutional text—refutes its thesis far more convincingly than anything I might say. The panel's labored effort to smother the Second Amendment by sheer body weight has all the grace of a sumo wrestler trying to kill a rattlesnake by sitting on it—and is just as likely to succeed.

KLEINFELD, Circuit Judge, with whom Circuit Judges **KOZINSKI**, **O'SCANNLAIN**, and **T**. **B**. **NELSON** join, dissenting from denial of rehearing en banc:

I respectfully dissent from our order denying rehearing en banc. In so doing, I am expressing agreement with my colleague Judge Gould's special concurrence in *Nordyke v. King*,[66] and with the Fifth Circuit's opinion in *United States v. Emerson*,[67] both taking the position that the Second Amendment secures an individual, and not collective, right to keep and bear arms.

The panel opinion holds that the Second Amendment "imposes no limitation on California's [or any other state's] ability to enact legislation regulating or prohibiting the possession or use of firearms"[68] and "does not confer an individual right to own or possess arms."[69] The panel opinion erases the Second Amendment from our Constitution as effectively as it can, by holding that no individual even has standing to challenge any law restricting firearm possession or use. This means that an individual cannot even get a case into court to raise the question. The panel's theory is that "the Second Amendment affords only a collective right,"[70] an odd deviation from the individualist philosophy of our Founders. The panel strikes a novel blow in favor of states' rights, opining that "the amendment was

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66 319 F.3d 1185 (9th Cir. 2003).
67 270 F.3d 203 (5th Cir. 2001).
68 Silveira v. Lockyer, 312 F.3d 1052, 1087 (9th Cir. 2002).
69 Id. at 1056.
70 Id. at 1092.

not adopted to afford rights to individuals with respect to private gun ownership or possession,"[71] but was instead "adopted to ensure that effective state militias would be maintained, thus preserving the people's right to bear arms."[72] It is not clear from the opinion whom the states would sue or what such a suit would claim were they to try to enforce this right. The panel's protection of what it calls the "people's right to bear arms" protects that "right" in the same fictional sense as the "people's" rights are protected in a "people's democratic republic."

Our circuit law regarding the Second Amendment squarely conflicts with that of the Fifth Circuit.[73] It is inconsistent with decisions of the Supreme Court that have construed the Second Amendment and phrases within it.[74] Our circuit has effectively repealed the Second Amendment without the democratic protection of the amendment process, which Article V requires.[75]

The panel decision purports to undertake historical analysis. Historical context has its uses in understanding the context and purposes of any law, constitutional or legislative,[76] but like legislative history, the use of history is subject to abuse. Where the historical scholarship is partial and tendentious, relying on it becomes like relying on legislative history: "entering a crowded cocktail party and looking over the heads of the guests for one's friends."[77]

Much of the panel decision purports to be an attempt to figure out what the word "militia" means in the Second Amendment. But the panel's failure to cite the

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71 Id. at 1087.

72 Id. at 1086.

73 See United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

74 See United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), United States v. Miller, 307 U.S. 174 (1939).

75 U.S. Const. art. V (describing amendment procedure).

76 See Portland 76/Auto Truck Plaza v. Union Oil, 153 F.3d 938, 944 (9th Cir. 1998) ("The statute and not the legislative history tells us what solution Congress adopted for the problem, but the legislative history is useful to determine what the problem was.").

77 Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (paraphrasing Judge Harold Leventhal).

contemporaneous implementing[78] statute defining the term demonstrates the tendentiousness of its analysis. The statute defining the militia, which in substance provides that the "militia" consists of all adult male citizens without regard to whether they are in any state or federal military service, has been subsequently altered to expand its coverage, but the federal militia statute remains in effect.[79] Besides overlooking the statute, the panel somehow failed to notice that the United States Supreme Court, in *United States v. Miller,*[80] held that the term "militia" in the Second Amendment meant, and means, "all males physically capable of acting in concert for the common defense." We are an inferior court, bound by this holding of the Supreme Court.

The panel opinion swims against a rising tide of legal scholarship to the contrary, relying heavily on a single law review article that claims "keep and bear" means the same thing as "bear," which itself means only to carry arms as part of a military unit.[81]

About twenty percent of the American population, those who live in the Ninth Circuit, have lost one of the ten amendments in the Bill of Rights. And, the methodology used to take away the right threatens the rest of the Constitution. The most extraordinary step taken by the panel opinion is to read the frequently used Constitutional phrase, "the people," as conferring rights only upon collectives, not individuals. There is no logical boundary to this misreading, so it threatens all the rights the Constitution guarantees to "the people," including those having nothing to do with guns. I cannot imagine the judges on the panel similarly repealing the Fourth Amendment's protection of the right of "the people" to be secure against unreasonable searches and seizures,[82] or the right of "the

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78 Congress voted to send the Bill of Rights to the states in September 1789, and it was ratified by the states on December 15, 1791. The Militia Act was enacted in 1792.

79 See Militia Act, 1 Stat. 271 (1792); 10 U.S.C. § 311.

80 307 U.S. 174, 179 (1939).

81 Silveira, 312 F.3d at 1074 (citing Michael C. Dorf, What Does the Second Amendment Mean Today?, 76 Chi.-Kent L. Rev 291, 294 (2000)).

82 U.S. Const. amend. IV.

people" to freedom of assembly,[83] but times and personnel change, so that this right and all the other rights of "the people" are jeopardized by planting this weed in our Constitutional garden.

I.

The Constitution with its amendments is the supreme law of this land, not historical artifact, so we must read it, determine what it means, and follow it, regardless of our policy preferences. The Second Amendment to the Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[84] To figure out what the Second Amendment means, we should apply standard and commonly accepted rules of statutory and constitutional construction, such as the rule that all the words must ordinarily be given force. The forceful language in the operative language in the Amendment, "the right of the people to keep and bear Arms, shall not be infringed," is quite clear, as will be set out below. The statement of the purpose preceding these operative words, "A well regulated Militia, being necessary to the security of a free State," makes the conclusion unavoidable, once "militia" is read seriously, that the operative words guarantee an individual right.

The panel's strongest argument (but not strong enough) is that the word "bear" in the phrase "bear Arms" "customarily relates to a military function," so that when not acting in a military capacity, "the people" have no right to bear Arms.[85] The military meaning is certainly among the meanings of "bear," as is "large, heavily built, furry, four-legged mammal," and "investor pessimistic about the stock market." But the primary meaning of "bear" is "to carry,"[86] as when we arrive at our host's home "bearing gifts" and arrive at the airport "bearing burdens." The only way to limit "bear" to its military meaning is to misread "militia" in the preamble as though it meant regulars in a standing military

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83 U.S. Const. amend. I.

84 U.S. Const. amend. II.

85 Silveira, 312 F.3d at 1072-75.

86 See 2 Oxford English Dictionary 20 (J.A. Simpson & E.S.C. Weiner, eds. 2d ed. 1989).

service, which, as shall be shown below, it emphatically does not.

Of course one can cherry-pick dictionary definitions, just as one can carefully select from legislative and other history. The panel opinion cites a law review article citing the *Oxford English Dictionary*, and asserts that the OED "defines 'to bear arms' as 'to serve as a soldier, do military service, fight.' "[87] This is correct as far as it goes,[88] but it is also misleading, because the OED says that the "main sense"[89] of "bear" is "to carry."[90] True, sense 6(a) of "bear" in the OED is "To carry about with one, or wear, ensigns of office, weapons of offence or defence,"[91] and the OED lists among the fourth sense of "arms," "to bear arms" — marked as figurative by the editors — defined as "to serve as a soldier, do military service, fight." Certainly the phrase has often been used this way, in judicial opinions and elsewhere. But that does not vitiate the "main sense" of "bear": to carry. The word was used the same way when Congress adopted the Second Amendment. Webster's 1828 Dictionary offers "To support" and "To carry" as the first and second meanings of "bear."[92] If we used the panel's methodology, taking each word according a right in the Bill of Rights in the narrowest possible sense, then we would limit the freedom of "speech" protected by the First Amendment to oral declamations. The right of the people to "bear" arms means, taking the word in its ordinary sense both then and now, the right of the people

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87 Silveira, 312 F.3d at 1073 (citing David Yassky, The Second Amendment: Structure, History and Constitutional Change, 99 Mich. L. Rev. 588, 619 (2000) (internal citation omitted)).

88 Oxford English Dictionary 634 (J.A. Simpson & E.S.C. Weiner, eds. 2d ed. 1989).

89 The Oxford English Dictionary divides meanings broadly into "senses." See id. at xxxviii - xxix.

90 2 Oxford English Dictionary 20 (J.A. Simpson & E.S.C. Weiner, eds. 2d ed. 1989).

91 Id. at 21.

92 Webster's 1828 Dictionary, available at www.cbtministries.org/resources/webster1828.htm (last visited April 21, 2003).

to "carry" arms, subject as all constitutional rights are to reasonable regulation and restrictions.[93]

The word "keep" poses a much more difficult problem for those who, like the panel, favor judicial repeal of the Second Amendment. While "bear" often has a military meaning, "keep" does not. For centuries, the primary meaning of "keep" has been "to retain possession of."[94] There is only one straightforward interpretation of "keep" in the Second Amendment, and that is that "the people" have the right to retain possession of arms, subject to reasonable regulation and restrictions.

The panel claims that "[t]he reason why that term was included in the amendment is not clear."[95] Of course it is not clear to those who have chosen in advance to evade the ordinary meaning of the word. Professing mystification by the meaning of "keep," the panel does a very creative dance around the Founders' language, arguing that because "bear" means only to bear in military service, and "keep" is used in the same "unitary" phrase, "keep" must also be limited to military service.[96] Thus, "keep" means no more than "bear," that is to possess in the course of rendering service in a state militia. The dancers eventually trip up, though, because it is "a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute."[97] The word "keep" must refer to something different from the word "bear." We, the people, are entitled by its separate meaning and the word "and" to have it construed as giving us a right separate from and additional to the right attached to the word "bear." Calling the phrase "unitary" is just a fancy way of depriving the word "keep" of any force. One might as well say that if someone has a right to keep and drive a car, and dies, his estate loses the right to keep the car because he can no longer drive it.

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93 See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)(permitting reasonable restrictions on exercise of right of free speech).

94 See The American Heritage Dictionary 698 (2d ed. 1982).

95 Silveira, 312 F.3d at 1074.

96 Id. at 1074.

97 Williams v. Taylor, 529 U.S. 362, 404 (2000) (internal citations and quotations omitted).

Colonial statutes, as well as those more recent, used "keep" and "bear" to mean two different things. These statutory usages show that before, during, and after Congress adopted the Second Amendment, "keep" and "bear" were not used in a "unitary" sense, nor was "keep" limited to militia service. For instance, seamen and others exempt from militia service were sometimes nevertheless required to "keep" arms.[98] Contemporary legal usage in statutes, as well as the plain meaning of the words, shows that law directed at the right or duty to "keep" arms was distinct from duties to "bear" arms in militia service.

II.

The most important phrase for determining the scope of the operative words of the Second Amendment (and the most troublesome to the panel) is "the right of the people." The operative words of the amendment syntactically protect the right of "the people," not the "militia," to keep and bear arms. Despite the panel's extensive discussion of "keep," "bear," and the preamble, it simply skips over "the right of the people" and attempts no direct analysis of the phrase. *Marbury v. Madison* held that "It cannot be presumed that any clause in the Constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it."[99] Yet the panel's conclusion that the Second Amendment creates no individual rights whatsoever, only a "collective right" apparently not enforceable by anyone, requires that this clause establishing a "right of the people" be read as though it were "without effect."

The "collective rights" interpretation of the Second Amendment, that it confers a "right" only on state governments with respect to state militias, is a logical and verbal impossibility in light of the phrase "right of the people." As our Constitution is written, governments have "powers" but no "rights." People have both "rights" and "powers." And the Bill of Rights carefully distinguishes between the powers of the states and the rights of the

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98 See Don B. Kates, Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L. Rev. 204 (1983).

99 Marbury v. Madison, 5 U.S. 137, 174 (1803).

people, never speaking of rights of the people when it means powers of the states.

The Tenth Amendment expressly draws both distinctions, between powers and rights, and between powers of state governments and powers 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."[100] The Tenth Amendment reserves "powers," not "rights," to the state governments, and the Ninth preserves "rights" for "the people." By use of the word "or," the Tenth Amendment makes it crystal clear that "the people" are distinct from the state governments and hold some reserved powers that the state governments do not. The Ninth Amendment, speaking of "rights" rather than "powers," prohibits a construction that would deny unenumerated "rights" to "the people." Without it, the inference from an express listing of rights might have been that there are no others. The Ninth Amendment does not prohibit such an *expressio unius est exclusio alterius* inference with respect to the state governments, and the Tenth Amendment carefully avoids sorting out which powers are reserved to the states, and which to the people.

The Fifth Circuit conducts this same analysis in *United States v. Emerson.*[101] *Emerson* points out that the Constitution describes what governments exercise as "powers" or "authority."[102] The "legislative Powers" are vested in Congress and the "executive Power" is vested in the President. A "right," however, is *always* exercisable by an individual. Indeed, it was not until recognition of the corporation as a legally cognizable "person" that the concept of an entity other than an individual having constitutional "rights" was even coherent, and the according of "rights" to "corporations" was and could be accomplished only by holding that they were "persons."[103]

The panel's holding that the right of "the people" with respect to weapons "was not adopted in order to afford

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100 U.S. Const. amend. X (emphasis added).

101 270 F.3d 203 (5th Cir. 2001).

102 Id. at 228.

103 See Pembina Consol. Silver Mining & Milling v. Pennsylvania, 125 U.S. 181, 189 (1888).

rights to individuals"[104] but only so that "they would have the right to bear arms in the service of the state"[105] is logically absurd. This becomes clear if one interprets the phrase "the people" consistently, as sound construction always requires,[106] and applies the same construction to other amendments. The First Amendment preserves "the right of the people peaceably to assemble."[107] The panel's construction implies that no individual can sue in court for an abridgment of his or her right to assemble, because the right is reserved to the people acting collectively. The Fourth Amendment preserves "the right of the people" to security from unreasonable searches and seizures.[108]

The panel's construction implies that no individual has a right enforceable in court to be free from unreasonable search and seizure, only "the people" as a collective. Because "the people" act collectively through their governments, the panel's logic suggests that the right to free assembly and the right to be free from unreasonable searches and seizures are protected only when people are acting, in the panel's phrase, "in the service of the state." That is not our country.

The panel's interpretation is inconsistent with the decision of the Supreme Court in *United States v. Verdugo-Urquidez*.[109] The Supreme Court said that the phrase "the people" "seems to be a term of art" used in the Preamble to the Constitution ("We the People"), Article I § 2 (members of the House are chosen by "the People"), and the First, Second, Fourth, Ninth and Tenth Amendments, with the same meaning in each place. The term "the people" means "a class of persons who are part of a national community or

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104 Silveira, 312 F.3d at 1087.

105 Id. at 1076.

106 See, e.g., Dept. of Revenue of Oregon v. ACF Indus., 510 U.S. 332, 342 (1994) (noting the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.") (quoting Sorenson v. Secretary of Treasury, 475 U.S. 851, 860 (1986)) (internal quotations omitted).

107 U.S. Const. amend. I.

108 U.S. Const. amend. IV.

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

who have otherwise developed sufficient connection with this country to be considered part of that community."[110]
In the usage of the Bill of Rights, a right of "the people" is precisely what the panel says it is not: a right of individuals that, like their right to peaceably assemble and to be free from unreasonable search and seizure, the Constitution entitles them to assert against the government.[111]
There is also a collective aspect to "the people," but hardly the government-run collective contemplated by the panel. "We the People," when we "ordain and establish this Constitution," [112] act through convention, and then ratification in each state through conventions of delegates chosen in each state by the people. The act of "the people" in this sense was revolutionary, replacing an old regime, the Articles of Confederation, with a new one. And a core value protected by the Second Amendment for "the people" was "the Right of the people to alter or abolish"[113] tyrannical government, as they had done a decade before. The concept had been established by law in England as well, after its revolution from 1640 to 1660. In 1765, Blackstone explained the right of every Englishman "of having arms for their defence" arose from "the natural right of resistance and

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110 Id.

111 The Supreme Court has not determined whether the Second Amendment has been "incorporated" so as to apply against the states. Some commentators suggest that a battle over incorporation stands between the Amendment and any right enforceable against state legislation. See, e.g., Gil Grantmore, The Phages of American Law, 36 U.C. Davis. L. Rev. 455, 474-75 (2003). The problem of exegesis posed by the First Amendment, "Congress shall make no law . . . ." is that somehow the prohibition against federal laws has to be extended to state laws. The Second Amendment says that "the right of the people . . . shall not be infringed," without limiting this protection of "the people's" right to protection against the federal government, so there is no verbal barrier to incorporation as there was with the First Amendment. Since it is plain that the First and Fourth amendments, also protecting rights of "the people," are incorporated against the states, it is hard to discern any sound reason why the right of "the people" in the Second Amendment would not be similarly incorporated.

112 U.S. Const. pream.

113 The Declaration of Independence para. 2 (U.S. 1776).

self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[114] As Blackstone describes the "natural right" of an Englishman to keep and bear arms, the arms are for personal defense as well as resistance to tyranny. The two are not always separable. After the Civil War, southern states began passing "Black Codes," designed to limit the freedom of blacks as much as possible.[115] The "Black Codes" often contained restrictions on firearm ownership and possession.[116] The codes sometimes made it a crime for whites even to loan guns to blacks.[117] A substantial part of the debate in Congress on the Fourteenth Amendment was its necessity to enable blacks to protect themselves from White terrorism and tyranny in the South.[118] Private terrorist organizations, such as the Ku Klux Klan, were abetted by southern state governments' refusal to protect black citizens, and the violence of such groups could only be realistically resisted with private firearms. When the state itself abets organized terrorism, the right of the people to keep and bear arms against a tyrant becomes inseparable from the right to self-defense.

III.

The Second Amendment begins with the clause "A well-regulated Militia, being necessary to the security of a free State . . . ."[119] Like the words "keep," "bear," and "the people," this prefatory language requires a construction that accords it independent meaning. As we shall see, far from limiting the right of the people to keep and bear arms to

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114 1 William Blackstone, Commentaries on the Laws of England 139 (Legal Classics Library 1983) (1765).

115 Robert J. Cottrol and Raymond T. Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 Geo. L.J. 309, 344 (1991).

116 Id. at 345.

117 Id. at 345 n.178.

118 Stephen P. Halbrook, That Every Man Be Armed 110-15 (2d ed. 1994). Chief Justice Taney, in contrast, had earlier led the Supreme Court to deny citizenship to blacks precisely because it was so unthinkable they should have the full rights of citizenship — including the right "to keep and carry arms wherever they went." Dred Scott v. Sandford, 60 U.S. 393, 417 (1857).

119 U.S. Const. amend. II.

their active military service in some state-run unit, the prefatory language compels an interpretation that protects the right of people as individuals to keep and bear arms.

Much of the panel opinion addresses the meaning of the term "militia," yet the panel fails to acknowledge the controlling authorities that establish the meaning. The word "militia" is a term of art, and does not mean in the Constitution and laws of the United States what it means in some popular and journalistic usage — a group of ultra-right wing individuals who arm themselves as a paramilitary force. The panel defines militia as "the permanent state militia, not some amorphous body of the people as a whole."[120] But the law establishes with the utmost clarity that the militia is precisely what the panel says it is not, an "amorphous body of the people as a whole."

The United States Supreme Court's decision in *United States v. Miller*[121] establishes the definition of "militia" in the Second Amendment, a definition we, as an inferior court, must apply. *Miller* holds that "[t]he signification attached 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.' "[122] As no intervening Supreme Court decision has altered this holding, we must proceed on the basis that a militia is a body of citizens, comprised at least of all males physically capable of acting in concert for the common defense. We shall see that "enrolled," for purposes of militia service, means something more like being registered for the draft, listed in the computer rolls for potential jury service, or enrolled by social security number for payment of taxes, than showing up at an armory for signup and training. The panel offers no explanation (and none could suffice) for failing to follow *Miller*'s definition.

The Second Amendment was ratified in 1791. The next year, Congress enacted the Militia Act,[123] implementing the

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120 Silveira, 312 F.3d at 1072.

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

122 Id. at 179.

123 Militia Act, 1 Stat. 271 (1792).

Amendment and incorporating the general understanding of the time as to what the word meant, and establishing that the militia was indeed what the panel says it was not — an "amorphous body of the people as a whole."[124] The Militia Act of 1792 defined the "militia" as: "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."[125] Thus, contrary to the "collective rights" notion in the panel opinion, the militia was precisely *not* "a state entity, a state fighting force,"[126] limited to those who are active members of such a collective organization. It was *all* the able-bodied white male citizens from 18 to 45, whether they were organized into a state fighting force or not.

In the appendix, I have reproduced the full text of this act of the Second Congress of the United States, and the text of section one appears in the footnote. It is worth noting a few additional aspects of the act. First, "each and every" "free able-bodied white male citizen" between 18 and 45 is in the militia. Second, each such person "shall" be enrolled by the commanding officer and notified of his enrollment, whether he wants to be enrolled or not.[127] Most importantly, third,

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124 That contemporaneous Congressional enactments should inform our interpretation of the Bill of Rights is well established. See Marsh v. Chambers, 463 U.S. 783, 788-92 (1983) (in discussing the constitutionality of opening legislative sessions with a prayer, "It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.").

125 Id.

126 Silveira, 312 F.3d at 1070.

127 CHAP. XXXIII.— An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States. (a)

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, 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 by the captain or commanding officer of the

the act required this "amorphous body of the people as a whole" to arm themselves, as opposed to the historical notion concocted by the panel that the Second Amendment merely "preserved the *right of the states* to arm their militias."[128] The key language of this enactment, contemporaneous with the Second Amendment, is that "every citizen so enrolled and notified shall, within six months thereafter, *provide himself* with a good musket or firelock . . . or with a good rifle."[129] Each militiaman also, by

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company, within whose bounds such citizen shall reside, and that within twelve months after the passing of this act. And it shall at all times hereafter be the duty of every such captain or commanding officer of a company to enrol every such citizen, as aforesaid, and also those who shall, from time to time, arrive at the age of eighteen years, or being of the age of eighteen years and under the age of forty-five years (except as before excepted) shall come to reside within his bounds; and shall without delay notify such citizen of the said enrolment, by a proper noncommissioned officer of the company, by whom such notice may be proved. 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; and shall appear, so armed, accoutred and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack. That the commissioned officers shall severally be armed with a sword or hanger and espontoon, and that from and after five years from the passing of this act, all muskets for arming the militia as herein required, shall be of bores sufficient for balls of the eighteenth part of a pound. And every citizen so enrolled, and providing himself with the arms, ammunition and accoutrements required as aforesaid, shall hold the same exempted from all suits, distresses, executions or sales, for debt or for the payment of taxes.

128 Silveira, 312 F.3d at 1087 (emphasis added).

129 1 Stat. 271 (1792) (emphasis added).

A musket is a shoulder gun, not necessarily rifled, named as guns used to be after a small bird of prey. A firelock is a flintlock, igniting the powder by flint and steel much as a Zippo ignites lighter fluid; a rifle is a shoulder gun with grooves in the barrel to make the bullet spin like a football as it flies. See 5 Oxford English

federal law, had to "*provide himself*" with a bayonet, two spare flints, at least 24 cartridges if he brought a musket or firelock, or 20 balls (bullets) if he brought a rifle, and all sorts of other shooting equipment denoted in the finest detail by the statute.[130] The weapons, ammunition and accessories were, by federal statute, "exempted" from all suits and execution "for debt or for the payment of taxes."[131] Thus militiamen were entitled to keep their weapons even if a creditor could take the rest of their property, and even if that creditor was the government (for unpaid taxes).

An incidental benefit from reading this contemporaneous implementing statute is that it makes perfectly obvious what "well regulated" meant at the time the Second Amendment was adopted. The panel seems to imagine that a well regulated militia is a people disarmed until the government puts guns in their hands after summoning them to service. But the contemporaneous statute shows that a well regulated militia is just the opposite, a people who have armed themselves at least to minimal national standards, and whom the militia officers inspect to assure that they have not wandered in off the streets without guns.[132] The "regulat[ion]" contemplated was not to disarm people when they were not at militia exercises, but rather to make sure they were armed, with their own guns. This was consistent

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Dictionary 950 (J.A. Simpson & E.S.C. Weiner, eds. 2d ed. 1989) (firelock); 10 Oxford English Dictionary 132 (J.A. Simpson & E.S.C. Weiner, eds. 2d ed. 1989) (musket); and see generally John Olson, The Book of the Rifle, 7-9 (1974); NRA Firearms Fact Book 33-35 (3d ed. 1989).

130 1 Stat. 271 (1792) (emphasis added).

131 Id.

132 The notion of regulation requiring rather than prohibiting civilians to carry guns is not so antique as this reference may be taken to imply. The previously silent Alaska statutes were amended in 1949 to require flyers of small planes to carry emergency equipment including “one pistol, revolver, shotgun, or rifle, and ammunition for the same” much as the colonial statutes did, in order to enable the pilot to protect against bears if the plane went down before completing its flight. This requirement was deleted from the statute in 2001. See Alaska Stat. § 02.35.110 (current version); ACLA § 32-6-13 (1949), amended by § 2 ch 128 SLA 1949 (adding provision requiring firearms); and § 10 ch 56 SLA 2001 (deleting that provision).

with the colonial pattern of laws that typically "required colonists to carry weapons."[133] Among the acts of the crown seen as oppressions to be prevented from ever happening again were the Militia Acts of 1757 through 1763 authorizing British officials "to seize and remove the arms" of colonial militias when they thought it necessary to the peace of the kingdom.[134] The American Revolution was triggered when General Gage ordered troops to march from Boston to Lexington and Concord to do just that.[135] "[T]he Framers very arguably rejected as basic a Weberian notion as the state's monopoly on legitimate violence . . . . [T]he Framers weren't late-twentieth-century Americans (much less late-twentieth-century Europeans) . . . . "[136] They were the heirs of two revolutions, the English and the American, with an altogether different worldview.

The federal militia act promulgated immediately after the Second Amendment was ratified assured that no state could lighten the burden of its militia-eligible citizens, perhaps by requiring of them only a dozen rounds of ammunition instead of two dozen. And the militia officers had to check to make sure all the able-bodied white male citizens showed up when summoned, as a jury clerk does. Beyond that, they had to conduct inspections to make sure everyone had the firearms, bullets, bayonets, two spare flints, quarter pound of powder, ammunition pouch, and all the accessories the statute required of them.[137] These were the national regulations of the "well regulated militia."

The interpretation the panel gives to the phrase "well regulated" makes no more sense than the interpretation it gives to "militia." The panel relies on a single law review article for the proposition that the purpose of a "well regulated Militia" is inconsistent with an individual right to

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133 See Joyce Lee Malcom, To Keep and Bear Arms 139 (Harvard 1994).

134 Id. at 144.

135 Id. at 145.

136 Glenn Harlan Reynolds, The Second Amendment as a Window on the Framer's Worldview, in Eugene Volokh, Robert J. Cottrol, Sanford Levinson, L.A. Powe, Jr., & Glenn Harlan Reynolds, The Second Amendment as Teaching Tool in Constitutional Law Classes, 48 J. Legal Educ. 591, 598 (1998).

137 1 Stat. 271 (1792).

own weapons.[138] The law review article simply presents the author's opinion, as an *ipse dixit*, that "[The Second Amendment] does not apply to the 'unorganized' militia, because that militia is certainly not 'well regulated' . . . The majority in the First Congress intended to reassure the Anti-federalists that the national government would not disarm those who are trained by the state militia and in that body — the 'well regulated Militia.' "[139] One reason this makes no sense is that the Second Congress, consisting of many of the same personnel as the first, described precisely what sort of regulation they had in mind for a "well regulated" militia, and far from requiring that anyone with a gun be trained and supervised, they required that all the untrained and unsupervised white male citizens between 18 and 45 acquire and maintain guns and ammunition. Another reason is that, as the panel concedes, the Second Amendment was written in part to avoid the necessity of standing armies, and protect the citizenry against standing armies, precisely the opposite of requiring that only members of formally organized standing collective government organizations have guns.

Were the modern federal statute to narrow the meaning of "militia" to something like the organized national guard that the panel envisions, then the statutory meaning of the term would differ from the meaning in the Second Amendment, and we would be bound, for Constitutional purposes, by the broader definition established by *Miller*. It would be as though Congress defined "press" for purposes of issuing press passes to a reserved section of the Capitol building to mean something narrower than "press" for purposes of the "freedom . . . of the press" protected by the First Amendment. The new, narrower statutory meaning would not limit the Constitutional freedom.

We need not parse this problem, though, because Congress has broadened rather than narrowed the term. Today the United States Code still defines the term "militia."[140] The

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138 Silveira, 312 F.3d at 1072 (citing Paul Finkelman, "A Well Regulated Militia": The Second Amendment in Historical Perspective, 76 Chi.-Kent L. Rev. 195, 234 (2000)).

139 Finkelman, 76 Chi.-Kent L. Rev. at 234.

140 10 U.S.C. § 311. Militia: composition and classes

modern statute, instead of narrowing the militia to an organized body of regularly supervised and trained part time soldiers, *broadens* the term. The statute specifies that the "militia" consists not only of the "organized" militia, consisting of the National Guard and the Naval Militia, but also an "unorganized militia." The "unorganized militia" is precisely what the panel says it is not, "an amorphous body of the people as a whole." Now, instead of being limited to white male citizens between 18 and 45, the militia has (of course) no racial restriction. Non-citizens are now included, provided they have declared an intention to become citizens. The sex restriction is gone and females are included if they are members of the National Guard. People become part of the militia now at age 17 instead of 18. The only narrowing of the statutory scope is that we are no longer required by law to own and furnish guns, ammunition and bayonets. So now the militia consists not only of all white male citizens between 18 and 45, but also all able-bodied non-white males, whether citizens or non-citizens declared for citizenship, between 17 and 45, and all females in the National Guard. Those of us who are male and able-bodied have almost all been militiamen for most of our lives whether we know it or not, whether we were organized or not, whether our state governments supervised our possession and use of arms or not.

Thus, as used in law, the meaning of the word has not changed significantly, other than to grow more inclusive. It is, and always has been, emphatically the case that militia members do not have to be "organized" in a "collective" state service, because the statute provides expressly for the existence of the "unorganized" militia. Members of the

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The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, 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.

The classes of the militia are—

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

National Guard are in the "organized militia," and those not in the National Guard are also in the "unorganized militia." Various classes of persons are exempt from militia service, most notably the "organized fighting force," as the panel would put it, who are active "[m]embers of the armed forces." Thus, soldiers, as we now use the term, are generally *not* in the militia, and the rest of us *are*. Far from being an organized collectivity functioning as a fighting force, the militia is like the jury pool, consisting of "the people," limited, like the jury pool, to those capable of performing the service for which militias or jury pools are established. The militia is indeed "the people," as individuals and not as an organized collective body, and the Second Amendment expressly prohibits government from disarming the people.

IV.

The next analytic task is to determine how the prefatory or purpose clause of the Second Amendment, "A well-regulated Militia, being necessary to the security of a free State," bears on the meaning of "the right of the people to keep and bear Arms." The panel's interpretation that the Second Amendment protects only the right of the states to arm their militias is syntactically impossible, because the language expressly provides that the right belongs to "the people" rather than the states or the militias. Treating the right the Second Amendment assigns to "the people" as a power of the militia is even less defensible than it would be to limit the Congressional power to grant copyrights only to those writings that actually do "promote the Progress of Science and useful Arts,"[141] rendering *The Wizard of Oz* and *Steamboat Willie* uncopyrightable. The task of providing a sounder interpretation is assisted by consideration of the historical context of the Second Amendment, the analytic approach used by the Supreme Court in *United States v. Miller*, and the practical consequences for militia service of an armed, or disarmed, populace.

The historical context of the Second Amendment is a long struggle by the English citizenry to enable common people to possess firearms. When the Amendment was adopted, the drafters doubtless turned to provisions in many of the state

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141 U.S. Const. art. I.

constitutions as models.[142] These provisions themselves had models, in the tradition of common-law lawyers copying older forms. Like many of our individual liberties, the right to keep and bear arms was cemented into English law in the aftermath of the English Revolution, a little over a century before the Second Amendment was drafted. And like many provisions of the federal Constitution, the Second Amendment had state constitutional models, among which justificatory preambles were common.[143]

The history that led to the drafting of the Second Amendment evolved for centuries in England, leading to its immediate predecessor in the English Declaration of Rights. A 1328 statute provided for forfeiture of arms and imprisonment if they were improperly used or carried.[144] A 1686 case construing that statute held that its purpose was "to punish people who go armed to terrify the King's subjects,"[145] apparently limiting the statute. Of course the King's subjects decided to quit being subjects in the English revolution, from 1640 to 1660, and seized for commoners rights that had previously been limited. After the Restoration, following a long series of grievances against James II, Parliament declared in 1689 that the English throne was "vacant."[146] In response to these grievances, and prior to offering the throne to William of Orange and Mary, parliament drafted the Declaration of Rights. In the debates leading up to the passage of the Declaration of Rights, members of parliament complained of Charles II's and James II's attempts to disarm their subjects.[147] Parliament conditioned William's and Mary's accession upon their acceptance of the Declaration of Rights (or Bill of Rights as it is usually termed) of 1689.

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142 Eugene Volokh, The Commonplace Second Amendment, 73 N.Y.U. L. Rev. 793, 814 et seq. (1998).

143 Id. at 794 et seq.

144 Statute of Northampton, 2 Edw. 3, c. 3 (1328) (quoted in 5 The Founders' Constitution 209 (Philip B. Kurland & Ralph Lerner, eds., Liberty Fund 1987)).

145 Sir John Knight's Case, 87 Eng. Rep. 75 (K.B. 1686) (quoted in 5 The Founders' Constitution 209 (Philip B. Kurland & Ralph Lerner, eds., Liberty Fund 1987)).

146 Joyce Lee Malcom, To Keep and Bear Arms 113 (Harvard 1994).

147 Id. at 115.

The English Bill of Rights, a century before ours, provided "That the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law."[148] Since England had no states, obviously this right of "subjects" was a right of individuals, not of states. William Blackstone, who wrote his *Commentaries* roughly 75 years after the Declaration of Rights, provided the standard reference work for Colonial and early American lawyers. "[His] works constituted the preeminent authority on English law for the founding generation,"[149] and he was "the Framers' accepted authority on English law and the English Constitution."[150] Because Blackstone covered the whole of the common law in only four easily read, highly portable, well indexed volumes, it is easy to see why our Founders found his treatise so useful, and copied from it as much as they did. Blackstone explains that the right of "having" arms is among the five basic rights of every Englishman, those rights which serve to secure the "primary rights."[151] The right to have arms is a natural right, in Blackstone's view, because it arises from the natural right of self preservation, and the right (as an Englishman writing only a century after the English Revolution would be mindful of) of "resistance . . . to the violence of oppression." Blackstone wrote: "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 1 W. & M. st. 2. c.2 [the provision of the English Bill of Rights quoted above] 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."[152] Though Blackstone refers to the right of resistance against oppression, his

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148 1 W. & M., 2d sess., c, 2, Dec. 16, 1689 (quoted in 5 The Founders' Constitution 210 (Philip B. Kurland & Ralph Lerner, eds., Liberty Fund 1987)).

149 Alden v. Maine, 527 U.S. 706, 715 (1999).

150 Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, Souter, & Ginsburg, JJ., concurring in part and dissenting in part).

151 1 William Blackstone, Commentaries on the Laws of England 136, 139 (Legal Classics Library 1983) (1765).

152 Id. at 139.

reasoning in the preceding pages is based more on the idea that life and limb are a gift of God, that natural liberty consists of "the right of personal security, the right of personal liberty, and the right of private property,"[153] and that the high value of life is what pardons homicide if in self defense.[154]

The English Bill of Rights and the Constitution's predecessor state constitutions based on it protected a private and individual right to bear arms both for self defense and for defense against oppression, as Blackstone explained. The Second Amendment was not novel, but rather codified and expanded upon long established principles. These principles protected individual, not collective, rights to keep and bear arms. And it was so understood. William Rawle's *A View of the Constitution*, published in 1829, explained "The prohibition [in the Second Amendment] is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both."[155] Likewise, Justice Joseph Story wrote that "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

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153 Id. at 125.

154 Id. at 126.

155 William Rawle, A View of the Constitution of the United States, 125-26 (2d. ed 1829) (quoted in 5 The Founders' Constitution 214 (Philip B. Kurland & Ralph Lerner, eds., Liberty Fund 1987)).

these are successful in the first instance, enable the people to resist and triumph over them."[156]

Judge Thomas Cooley, in his *The General Principles of Constitutional Law* wrote "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."[157] Both Judge Cooley and Justice Story are, of course, expressly cited as "important" commentators by the Supreme Court's opinion in *Miller*.[158]

As Justice Thomas has written, "a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right."[159]

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156 3 Joseph Story, Commentaries on the Constitution § 1890 (1833) (quoted in 5 The Founders' Constitution 214 (Philip B. Kurland & Ralph Lerner, eds., Liberty Fund 1987)).

157 Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 281-82 (2d ed. 1891) (quoted in David B. Kopel, The Second Amendment in the Nineteenth Century, 1998 B.Y.U. L. Rev. 1359, 1465 (1998)).

158 United States v. Miller, 307 U.S. 174, 182 n.3 (1939).

159 Printz v. United States, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring) (citing J. Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 162 (1994); S. Halbrook, That Every Man Be Armed, The Evolution of a Constitutional Right (1984); Van Alstyne, The Second Amendment and the Personal Right to Arms, 43 Duke L.J. 1236 (1994); Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193 (1992); Cottrol & Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 Geo. L.J. 309 (1991); Levinson, The

The embarrassed attitude of many of the honest scholars who have so concluded, contrary to their own policy preferences, is well stated by the title of one of the seminal articles, "The Embarrassing Second Amendment." The texts and treatises appear generally to be moving to the view expressed in this opinion.[160]

V.

What we have, in the Second Amendment, is a prohibition against government infringement of an individual right to keep and bear arms, consistent with what had long been understood to be a natural right guaranteed by the English Bill of Rights to Englishmen. The militia clause expanded the protection from the English Bill of Rights to emphasize the importance of a check and balance on standing armies in addition to the traditional English right to possess arms for purposes of self-defense. Like any right, it is not absolute. Just as the right to freedom of speech is subject to limitations for defamation, threats, conspiracy, and all sorts of other traditional qualifications, so is the right to keep and bear arms. Indeed, the word "infringed" in the Second Amendment suggests that the right, such as it is, may not be "encroached upon,"[161] rather than that it, unlike all the other rights in the Bill of Rights, is absolute. The one thing that is absolute is that the Second Amendment guarantees a personal and individual right to keep and bear arms, and prohibits government from disarming the people.

The Supreme Court's decision in *United States v. Miller*[162] establishes the method by which we must apply the Amendment's opening clause, "A well regulated militia, being necessary to the security of a free state." In *Miller*, two defendants tried to get an indictment for possessing a sawed

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Embarrassing Second Amendment, 99 Yale L.J. 637 (1989); Kates, Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L.Rev. 204 (1983)).

160 See, e.g., 1 Laurence H. Tribe, American Constitutional Law 902 n.211 (3d. ed. 2000) (recognizing a "right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in the defense of themselves and their homes 8 .") and Akhil Reed Amar, The Bill of Rights 46-63 (1998) (adopting individual rights view).

161 The American Heritage Dictionary 661 (2d ed. 1982).

162 307 U.S. 174 (1939).

off shotgun dismissed on the basis of the Second Amendment right to keep and bear arms. The district court granted their motion. The Supreme Court reversed and remanded. *Miller* teaches that the Amendment has the "obvious purpose to assure the continuation and render possible the effectiveness"[163] of state militias who would be "civilians primarily, soldiers on occasion," [164] because of the wariness at the time toward standing armies. The term "militia," *Miller* holds, was intended in the Second Amendment to denote substantially "all males physically capable of acting in concert for the common defense."[165] Far from being armed by the state governments as they found desirable, as the panel says,[166] *Miller* holds that "these men were expected to appear bearing arms supplied by themselves." [167] *Miller* cites Blackstone, Adam Smith, and colonial history sources, explaining the civilian aspect of militias, as opposed to standing armies, and that the militia system implied not just a right, but "the general obligation of all adult male inhabitants to possess arms,"[168] to assist as needed in defense, and to furnish ammunition, subject to fines if they did *not* possess arms.[169] Many of the colonies' laws, quoted extensively in *Miller*, established minimum standards to assure that the weapons were adequate, such as that a musket had to be at least 3'9" long. Much as building codes today require smoke detectors in the home, a man had to have a bullet mould, a pound of powder, four pounds of lead, and twenty bullets, to be produced when called for by a militia officer.[170]

Thus *Miller* cemented in, rather than reading out, the interpretation of the Second Amendment that I have followed. The Amendment reflected the Founders' hostility to standing armies, and had as its purpose assuring the effectiveness of a civilian non-standing militia consisting of

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163 Id. at 178.
164 Id. at 179.
165 Id.
166 Silveira, 312 F.3d at 1087.
167 307 U.S. at 179.
168 Id. (quoting 1 Osgood, The American Colonies in the 17th Century).
169 Id. at 180.
170 Id. at 180-81.

most of the able-bodied male population, who were expected and often required to own their own guns. The reason that the defendants (who did not appear on appeal[171]) lost their case was that "*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."[172]

What is striking about the reversal in *Miller* is the great care the court took to limit its holding. *Miller* did not adopt the "collective rights" notion that only state governments as supervisors of the militia could possess arms, though the government had urged that interpretation on the Court in its brief.[173] *Miller* rejected the notion of a sawed-off shotgun as a militia weapon. It did not reject the right of individuals to possess arms. And *Miller* qualified even the rejection of sawed-off shotguns, by limiting the holding to a case where there was no evidence, and judicial notice could not be taken, of any "reasonable relationship" of sawed-off shotguns to militia use. Had the Court been of the view that the Second Amendment protected only the powers of the states to arm their militias, it would have accepted that argument from the government's brief, and never would have reached the issue of the relationship of sawed off shotguns to militias.

What private possession of arms does carry a "reasonable relationship to the preservation or efficiency of a well-regulated militia?" This is the question we must ask because this is the Second Amendment test *Miller* construes from the introductory clause of the Amendment. At the time the Amendment was drafted, when states were likely to have inadequate revenues to arm their militias, it was necessary that those who might be useful arm themselves with military type weapons. That is probably less relevant today,

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171 Stephen P. Halbrook, That Every Man Be Armed 165 (2d ed. 1994).

172 Miller, 307 U.S. at 178 (emphasis added).

173 United States v. Emerson, 270 F.3d 203, 223 (5th Cir. 2001).

though times can always change. But the issue of furnishing arms for combat is not the only one involved in militia effectiveness. An effective militia requires not only that people have guns, but that they be able to shoot them with more danger to their adversaries than themselves. Standing next to a nineteen year old who for the first time has a loaded gun in his hands is like taking a fifteen or sixteen year old for his first driving lesson. And if no one knew how to shoot except designated shooters, a military supply unit of new recruits would be as helpless as if no one knew how to drive except designated drivers. Just as military mobility is enhanced by near-universal civilian knowledge of how to drive, likewise military effectiveness is promoted by widespread civilian shooting skills (and, we shall see, Congress has so decided and provided for civilian firearms training).

An effective militia undoubtedly requires that a considerable portion of the members enter it with some familiarity with gun safety and use. Beginning in 1916, Congress provided for the army to promote "practice in the use of rifled arms" by giving free weapons and ammunition to "youth-oriented organizations" and selling army surplus weapons to adults, in an army-assisted "Civilian Marksmanship Program."[174] In 1996, Congress created an independent federal corporation, the first board of directors to be appointed by the Secretary of the Army, to carry on the same program,[175] which is in effect today, for "instruction of citizens of the United States in marksmanship."[176] Congress directed that the corporation "give priority to activities that benefit firearms safety, training, and competition for youth and that reach as many youth participants as possible."[177] Thus, regardless of what policy preferences others might have, the policy Congress has adopted (and re-adopted in 1996) is to provide for a well regulated militia by putting guns in young people's hands and teaching them how to handle them safely and how to shoot them.

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174 10 U.S.C. § 4308 (1995).

175 36 U.S.C. § 5501 (1996) (current version at 36 U.S.C. §§ 40701-02).

176 36 U.S.C. § 5502 (1996), recodified at 36 U.S.C. § 40722.

177 36 U.S.C. § 5502 (1996) recodified at 36 U.S.C. § 40724.

Though the stated justification and purpose of the Amendment relates to the militia, the language is carefully drafted to avoid abridging the traditional English Bill of Rights entitlement of individuals to possess arms for self defense. It would have, of course, been highly unlikely that the American Revolutionaries a few years later would have wanted to deprive Americans of rights they had always had as Englishmen. They protected this traditional right by attaching the "right . . . to keep and bear Arms" to "the people," rather than establishing it as a "power" of the states. The English right was retained, and expanded.

Like most serious discussions of the Second Amendment, this dissent focuses heavily on history. Though general history, like legislative history, cannot be used to supplant the words of the law, it informs us of what social problem the writers of the law intended to address.[178] The problem the Founders sought to avoid was a disarmed populace. At the margins, the Second Amendment can be read various ways in various cases, but there is no way this Amendment, designed to assure an armed population, can be read to allow government to disarm the population.

VI.

Constitutional interpretation cannot properly be based on whatever policy judgments we might make about the desirability of an armed populace, or the relevance of the Amendment's concern with citizen militias to modern times. Those who think the Second Amendment is a troublesome antique inappropriate to modern times can repeal it, as provided in Article V. That has been done before, as with legislative selection of Senators, and with Prohibition. There is a serious argument for its continued relevance, from those who think that the natural right to self defense, protected by the English Bill of Rights as well as the Second Amendment, is still important as a matter of policy. A police force in a free state cannot provide everyone with bodyguards. Indeed, while some think guns cause violent crime, others think that widespread possession of guns on balance reduces violent crime.[179] None of these policy

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[178] See Portland 76/Auto Truck Plaza v. Union Oil, 153 F.3d 938, 944 (9th Cir. 1998).

[179] See, e.g., John Lott, More Guns, Less Crime (1998).

arguments on either side affects what the Second Amendment says, that our Constitution protects "the right of the people to keep and bear Arms."

Neither can judges' policy concerns affect our duty as a court. Congress and the states may enact reasonable restrictions to manage the ways in which the populace exercises its right to keep and bear arms, just as reasonable restrictions are imposed on our rights to free speech, free assembly, freedom from search and seizure, and all our other constitutional rights. What the Second Amendment prohibits is not reasonable regulation consistent with its purposes, but disarmament of the people. Where the Constitution establishes a right of the people, no organ of the government, including the courts, can legitimately take that right away from the people. All of our rights, every one of them, may become impediments to the efficient functioning of our government and our society from time to time, but fortunately they are locked in by the Constitution against permanent loss because of temporary impediments. The courts should enforce our individual rights guaranteed by our Constitution, not erase them.

GOULD, Circuit Judge, with whom Circuit Judge **KOZINSKI** joins, dissenting from denial of rehearing en banc:

The error of *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), is repeated once again, thus I respectfully dissent from denial of rehearing en banc for the reasons stated in my concurring opinion in *Nordyke v. King*, 319 F.3d 1185, 1192-98 (9th Cir. 2003) (Gould, J., specially concurring). As I there explained, restricting the Second Amendment to a "collective rights" view and ignoring the individual right of the people to keep and bear arms is inconsistent with the Second Amendment's language, structure, and purposes, and weakens our Nation against recurrent internal and external threats that may undermine individual liberty. *See also United States v. Emerson,* 270 F.3d 203 (5th Cir. 2001).

DECISION OF US COURT OF APPEALS
***SILVEIRA* v. *LOCKYER*,**
312 F.3d 1052 (9TH Cir. Dec. 5, 2002,
amended Jan. 27, 2003)
http://caselaw.lp.findlaw.com/data2/circs/9th/0115098ap.pdf

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

SEAN SILVEIRA, et al, *Plaintiffs-Appellants,* v. BILL LOCKYER, Attorney General, State of California; GRAY DAVIS, Governor, State of California, *Defendants-Appellees.*

No. 01-15098

OPINION

Appeal from the United States District Court
Eastern District of California
William B. Shubb, District Judge, Presiding
Argued and Submitted
February 15, 2002—San Francisco, California
FILED DECEMBER 5, 2002
Before: Stephen Reinhardt, Frank J. Magill,* and Raymond C. Fisher, Circuit Judges.
Opinion by Judge Reinhardt;
Concurrence by Judge Magill

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*The Honorable Frank J. Magill, Senior Circuit Judge, US Court of Appeals, Eighth Circuit, sitting by designation.

COUNSEL

Gary W. Gorski, Fair Oaks, California, for appellants.
Nancy Palmieri, Deputy Attorney General, Office of the Attorney General, San Diego, California, for the appellees.

ORDER

The majority opinion filed Dec. 5, 2002, is hereby amended as follows:
1 At Slip Op. at 7, footnote 1, replace "*See* Michael A. Bellesiles, *Gun Control: A Historical Overview*, 28 CRIME & JUST. 137, 174-76 (2001) (discussing the enactment of the National Firearms Act of 1934, ch. 757, 48 Stat. 1236

(1934) (current version codified as 26 U.S.C. §§ 5801-72)), as a reaction to the use of machine guns by mobsters and the depiction of such violence in films such as *Scarface*)."
with
"*See* EARL R. KRUSCHKE, GUN CONTROL: A REFERENCE HANDBOOK 84, 170 (1995) (discussing the enactment of the National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (1934) (current version codified as 26 U.S.C. §§ 5801-72), as a reaction to the use of machine guns by mobsters and "organized crime elements")."
2. At Slip Op. at 44, footnote 37, delete "(quoted in Michael A. Bellesiles, *The Second Amendment in Action*, 76 CHI.-KENT L. REV. 61, 65 (2000))"

OPINION

REINHARDT, Circuit Judge:

In 1999, the State of California enacted amendments to its gun control laws that significantly strengthened the state's restrictions on the possession, use, and transfer of the semiautomatic weapons popularly known as "assault weapons." Plaintiffs, California residents who either own assault weapons, seek to acquire such weapons, or both, brought this challenge to the gun control statute, asserting that the law, as 5 SILVEIRA v. LOCKYER amended, violates the Second Amendment, the Equal Protection Clause, and a host of other constitutional provisions. The district court dismissed all of the plaintiffs' claims. Because the Second Amendment does not confer an individual right to own or possess arms, we affirm the dismissal of all claims brought pursuant to that constitutional provision. As to the Equal Protection claims, we conclude that there is no constitutional infirmity in the statute's provisions regarding active peace officers. We find, however, no rational basis for the establishment of a statutory exception with respect to retired peace officers, and hold that the retired officers' exception fails even the most deferential level of scrutiny under the Equal Protection Clause. Finally, we conclude that each of the three additional constitutional claims asserted by plaintiffs on appeal is without merit.

I. INTRODUCTION

In response to a proliferation of shootings involving semiautomatic weapons, the California Legislature passed the Roberti-Roos Assault Weapons Control Act ("the AWCA") in 1989. *See* 1989 Cal. Stat. ch. 19, § 3, at 64, codified at CAL. PENAL CODE § 12275 *et seq*. The immediate cause of the AWCA's enactment was a random shooting earlier that year at the Cleveland Elementary School in Stockton, California. An individual armed with an AK-47 semi-automatic weapon opened fire on the schoolyard, where three hundred pupils were enjoying their morning recess. Five children aged 6 to 9 were killed, and one teacher and 29 children were wounded. *Kasler v. Lockyer*, 2 P.3d 581, 587 (Cal. 2000).

The California Assembly met soon thereafter in an extraordinary session called for the purpose of enacting a response to the Stockton shooting. 1 CAL. ASSEMBLY J., at 436-37 (Feb. 13, 1989). The legislation that followed, the AWCA, was the first legislative restriction on assault weapons in the nation, and was the model for a similar federal statute enacted in 1994. Public Safety and Firearms Use Protection Act, Pub. L. 6 SILVEIRA v. LOCKYER No. 103-322, 108 Stat. 1996 (codified at 18 U.S.C. §§ 921 *et seq*.). The AWCA renders it a felony offense to manufacture in California any of the semi-automatic weapons specified in the statute, or to possess, sell, transfer, or import into the state such weapons without a permit. CAL. PENAL CODE § 12280.[180] The statute contains a grandfather clause that

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[180] Semiautomatic weapons differ from fully automatic machine guns in the following respects: Automatic weapons feed ammunition into the gun's chamber immediately after the firing of each bullet, so that the weapon will continue to reload and fire continuously so long as the trigger is depressed. Purchase and ownership of automatic weapons has been restricted by the federal government since the days of Al Capone and the machine gun violence associated with the Prohibition Era. *See* Michael A. Bellesiles, *Gun Control: A Historical Overview,* 28 CRIME & JUST. 137, 174-76 (2001) (discussing the enactment of the National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (1934) (current version codified as 26 U.S.C. §§ 5801-72)), as a reaction to the use of machine guns by mobsters and the depiction of such violence in films such as *Scarface*).

In contrast to automatic weapons, only one bullet is fired when the user of a semi-automatic weapon depresses the trigger, but

permits the ownership of assault weapons by individuals who lawfully purchased them before the statute's enactment, so long as the owners register the weapons with the state Department of Justice. *Id.*[181] The grandfather clause, however, imposes significant restrictions on the use of weapons that are registered pursuant to its provisions. *Id.*§ 12285(c).[182] Approximately forty models of firearms are listed in the statute as subject to its restrictions.

The specified weapons include "civilian" models of military weapons that feature slightly less firepower than the military issue versions, such as the Uzi, an Israeli-made military rifle; the AR-15, a semi-automatic version of the United States military's standard-issue machine gun, the M-16; and the AK-47, a Russian-designed and Chinese-produced military rifle. The AWCA also includes a mechanism for the Attorney General to seek a judicial declaration in certain California Superior Courts that

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another is automatically reloaded into the gun's chamber. 27 C.F.R. § 178.11 (defining semiautomatic weapons). Thus, by squeezing the trigger repeatedly and rapidly, the user can release many rounds of ammunition in a brief period of time — certainly many more than the user of a standard, manually-loaded weapon. Moreover, the semi-automatic weapons known as assault weapons contain large-capacity magazines, which require the user of the weapon to cease firing to reload relatively infrequently because the magazines contain so much ammunition. Consequently, users of such weapons can "spray-fire" multiple rounds of ammunition, with potentially devastating effects. Michael G. Lennett, *Taking A Bite Out of Violent Crime*, 20 U. DAYTON L. REV. 573, 609 (1995).

[181] An individual who lawfully obtained an assault weapon prior to the enactment of the AWCA may avoid the requirement of registering it with the state if he renders the weapon permanently inoperable, relinquishes it to a state law enforcement agency, sells it to a licensed California firearms dealer, or removes it from the State of California.

[182] A person who has registered an assault weapon may possess the weapon only at his own residence, his place of business, certain private and public clubs organized for the purpose of target shooting, certain firearms exhibitions approved by law enforcement agencies, or on specified public lands. § 12285(c)(1)-(6). Additionally, an assault weapon owner may transport his registered weapon to any of the above locations only so long as he complies with the methods of transportation prescribed in the statute. § 12285(7); § 12026.1.

weapons identical to the listed firearms are also subject to the statutory restrictions. § 12276.5(a)(1)-(2).[183]

The AWCA includes a provision that codifies the legislative findings and expresses the legislature's reasons for passing the law:

The Legislature hereby finds and declares that the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens of this state. The Legislature has restricted the assault weapons specified in [the statute] based upon finding that each firearm has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings. It is the intent of the Legislature in enacting this chapter to place restrictions on the use of assault weapons and to establish a registration and permit procedure for their lawful sale and possession. It is not, however, the intent of the Legislature by this chapter to place restrictions on the use of those weapons which are primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities. *Id.* § 12275.5.

In 1999, the legislature amended the AWCA in order to broaden its coverage and to render it more flexible in response to technological developments in the manufacture of semiautomatic weapons. The amended AWCA retains both the original list of models of restricted weapons, and the judicial declaration procedure by which models may be added to the list. The 1999 amendments to the AWCA statute add a third method of defining the class of restricted weapons: The amendments provide that a weapon constitutes a restricted assault weapon if it possesses certain generic characteristics listed in the statute. *Id.* § 12276.1.[184] Examples of the types of weapons restricted by

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[183] Unless otherwise noted, citations to statutory provisions in this opinion refer to the sections of the AWCA as codified in the California Penal Code.

[184] The reason that the legislature defined the restricted assault weapons generically, by feature, is that after the enactment of the AWCA, gun manufacturers began to produce "copycat" weapons in order to evade the statute's restrictions. These weapons varied only slightly from the models listed in the act, but were different enough

the revised AWCA include a "semiautomatic, centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds," § 12276.1(a)(2), and a semiautomatic, centerfire rifle that has the capacity to accept a detachable magazine and also features a flash suppressor, a grenade launcher, or a flare launcher. § 12276.1(a)(1)(A)-(E). The amended AWCA also restricts assault weapons equipped with "barrel shrouds," which protect the user's hands from the intense heat created by the rapid firing of the weapon, as well as semiautomatic weapons equipped with silencers. *Id.*

As originally enacted, the AWCA authorized specified law enforcement agencies to purchase and possess assault weapons, and permitted individual sworn members of those agencies to possess and use the weapons in the course of their official duties.[185] Two additional provisions relating to peace officers were added by the 1999 amendments. First, the legislature provided that the peace officers permitted to possess and use assault weapons in the discharge of their official duties were permitted to do so "for law enforcement purposes, whether on or off duty." § 12280(g). Second, the amendments added an exception for retired peace officers. The exception provides that "the sale or transfer of assault weapons by an entity [listed in note 6, *supra*,] to a person, upon retirement, who retired as a sworn officer from that entity" is permissible, and that the general restrictions on possession and use of assault weapons do not apply to a retired peace officer who receives the weapon upon retirement from his official duties. § 12280(h)-(i). In sum, then, the statute as amended may fairly be characterized as constituting a ban on the possession of assault weapons by private individuals; with a grandfather clause permitting the

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from those models that they evaded the law's restrictions. Martha L. Willman, *Davis Backs Bill to Limit Assault Gun Sale and Use Legislation*, L.A. TIMES, Apr. 27, 1999, at B2.

[185] The specified agencies include the California Department of Justice, police departments, sheriffs' departments, marshals' offices, the Youth and Adult Corrections Agency, the Department of the California Highway Patrol, district attorneys' offices, Department of Fish and Game, and Department of Parks and Recreation. § 12280(f). Also included were members of the "military or naval forces of this state or of the United States." *Id.*

retention of previously-owned weapons by their purchasers, provided the owners register them with the state; and with a statutory exception allowing the possession of assault weapons by retired peace officers who acquire them from their employers at the time of their retirement.

Plaintiffs in this case are nine individuals, some of whom lawfully acquired weapons that were subsequently classified as assault weapons under the amended AWCA.[186] They filed this action in February, 2000, one month after the 1999 AWCA amendments took effect. Plaintiffs who own assault weapons challenge the AWCA requirements that they either register, relinquish, or render inoperable their assault weapons as violative of their Second Amendment rights. Plaintiffs who seek to purchase weapons that may no longer lawfully be purchased in California also attack the ban on assault weapon sales as being contrary to their rights under that Amendment. Additionally, plaintiffs who are not active or retired California peace officers challenge on Fourteenth Amendment Equal Protection grounds two provisions of the AWCA: one that allows active peace officers to possess assault weapons while off-duty, and one that permits retired peace officers to possess assault weapons they acquire from their department at the time of their retirement. The State of California immediately moved to dismiss the action pursuant to Federal Rule of Civil Procedure 12(b)(6), contending that all the claims were barred as a matter of law. After a hearing, the district judge granted the defendants' motion in all respects, and dismissed the case. Plaintiffs appeal, and we affirm on all claims but one.

II. DISCUSSION

A. Background and Precedent.

A robust constitutional debate is currently taking place in this nation regarding the scope of the Second Amendment, a debate that has gained intensity over the last several years. Until recently, this relatively obscure constitutional provision attracted little judicial or scholarly

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[186] The nine plaintiffs include, *inter alia*, two California National Guardsmen (both combat veterans), a San Francisco police officer, an insurance agent, a chemical engineer, and a California correctional officer.

attention. As a result, however, of increasing popular concern over gun violence, the passage of legislation restricting the sale and use of firearms, the cultural significance of firearms in American society, and the political activities of pro-gun enthusiasts under the leadership of the National Rifle Association (the NRA), the disagreement over the meaning of the Second Amendment has grown particularly heated.

[1] There are three principal schools of thought that form the basis for the debate. The first, which we will refer to as the "traditional individual rights" model, holds that the Second Amendment guarantees to individual private citizens a fundamental right to possess and use firearms for any purpose at all, subject only to limited government regulation. This view, urged by the NRA and other firearms enthusiasts, as well as by a prolific cadre of fervent supporters in the legal academy, had never been adopted by any court until the recent Fifth Circuit decision in *United States v. Emerson*, 270 F.3d 203, 227 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002). The second view, a variant of the first, we will refer to as the "limited individual rights" model. Under that view, individuals maintain a constitutional right to possess firearms insofar as such possession bears a reasonable relationship to militia service.[187] The third, a wholly contrary view, commonly

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[187] In the Fifth Circuit's decision in *Emerson*, that court describes a view of the amendment that it calls the "sophisticated collective rights model." 270 F.3d at 219. That view of the amendment holds that individual members of state militia may personally use and possess firearms, but only to the extent that they do so as part of their active military service. *Id.* We conclude that a more plausible theory is that which we describe as the "limited individual right" model. Of course, one could posit a series of variations on the Second Amendment theme, including a number of potential approaches differing only in degree from each other. The Fifth Circuit's "sophisticated collective rights model," however, appears to be a strawman that can all too readily be disposed of, as the Fifth Circuit does with relatively little difficulty. Ultimately, the Fifth Circuit adopts a weapons-based theory of the amendment that permits individuals to possess firearms for personal use, regardless of the relationship of the individual or the weapon to militia service, as long as those weapons have a "legitimate use in the hands of private individuals." *Emerson*, 270 F.3d at 223

called the "collective rights" model, asserts that the Second Amendment right to "bear arms" guarantees the right of the people to maintain effective state militias, but does not provide any type of individual right to own or possess weapons. Under this theory of the amendment, the federal and state governments have the full authority to enact prohibitions and restrictions on the use and possession of firearms, subject only to generally applicable constitutional constraints, such as due process, equal protection, and the like. Long the dominant view of the Second Amendment, and widely accepted by the federal courts, the collective rights model has recently come under strong criticism from individual rights advocates. After conducting a full analysis of the amendment, its history, and its purpose, we reaffirm our conclusion in *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), that it is this collective rights model which provides the best interpretation of the Second Amendment.

Despite the increased attention by commentators and political interest groups to the question of what exactly the Second Amendment protects, with the sole exception of the Fifth Circuit's *Emerson* decision there exists no thorough judicial examination of the amendment's meaning. The Supreme Court's most extensive treatment of the amendment is a somewhat cryptic discussion in *United States v. Miller*, 307 U.S. 174 (1939). In that case, a criminal defendant brought a Second Amendment challenge to a federal gun control law that prohibited the transport of sawed-off shotguns in interstate commerce. The Court rejected the challenge to the statute. In the only and oft-quoted passage in the United States Reports to consider, albeit somewhat indirectly, whether the Second Amendment establishes an individual right to arms, the *Miller* Court concluded:

> 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 reservation or efficiency of a well regulated militia, we cannot say

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(quoting the government's brief in *United States v. Miller*, 307 U.S. 174 (1939)). We conclude, respectfully, that the Fifth Circuit's theory is contrary not only to *Miller* but to the basic purpose and effect of the Second Amendment.

> 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.

Miller, 307 U.S. at 178. The *Miller* Court also observed more generally that "[w]ith the obvious purpose to assure the continuation and render possible the effectiveness of [state militias] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." *Id.* Thus, in *Miller* the Supreme Court decided that because a weapon was not suitable for use in the militia, its possession was not protected by the Second Amendment. As a result of its phrasing of its holding in the negative, however, the *Miller* Court's opinion stands only for the proposition that the possession of certain weapons is not protected, and offers little guidance as to what rights the Second Amendment does protect. Accordingly, it has been noted, with good reason, that "[t]he Supreme Court's jurisprudence on the scope of [the Second] [A]mendment is quite limited, and not entirely illuminating." *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999). What *Miller* does strongly imply, however, is that the Supreme Court rejects the traditional individual rights view.

The only *post-Miller* reference by the Supreme Court to the scope of the amendment occurred in *Lewis v. United States*, 445 U.S. 55, 65 n. 8 (1980), in which the Court noted, in a footnote dismissing a Second Amendment challenge to a felon-in-possession conviction, that the federal gun control laws at issue did not "trench upon any constitutionally protected liberties," citing *Miller* in support of this observation. In that footnote, *Lewis* characterized the *Miller* holding as follows:

"[T]he 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.' " *Id.* (quoting *Miller*, 307 U.S. at 178). The *Lewis* Court, like the *Miller* Court, phrased its statements in terms of what is *not* protected. *Lewis* does, however, reinforce the strong implication in *Miller* that the Court rejects the traditional individual rights model.

Some thirty-odd years after *Miller*, two Justices of the Court pithily expressed their views on the question whether the Second Amendment limits the power of the federal or state governments to enact gun control laws. Justice Douglas, joined by Justice Thurgood Marshall, stated in dissent in *Adams v. Williams*, that in his view, the problem of police fearing that suspects they apprehend are armed:

> is an acute one not because of the Fourth Amendment, but because of the ease with which anyone can acquire a pistol. A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment . . . . There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted. There is no reason why pistols may not be barred from anyone with a police record. There is no reason why a State may not require a purchaser of a pistol to pass a psychiatric test. There is no reason why all pistols should not be barred to everyone except the police.

407 U.S. 143, 150 (1972) (Douglas, J., dissenting). In short, in *Adams* two then-sitting Justices made it clear that they believed that the Second Amendment did not afford an individual right — traditional, limited, or otherwise — to own or possess guns.

We also note that two of the Supreme Court's recent decisions that limit the power of the federal government to regulate activities of the states relate to firearms restrictions. *See Printz v. United States*, 521 U.S. 898 (1997) (holding that a federal requirement that state officers perform background checks on gun purchasers violates the anti-commandeering principle of the Tenth Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that Congress exceeded its authority under the Commerce Clause by enacting the Gun-Free School Zones Act). In neither case did the Court address a Second Amendment issue directly; however, in each case a currently-sitting Justice expressed his individual view of the amendment's scope, directly or indirectly, but from radically different standpoints. In his dissent in *Lopez*, Justice Stevens,

although not mentioning the Second Amendment, strongly implied that he believes that it offers no obstacles to the federal government's ability to regulate firearms:

> Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity. In my judgment, Congress' power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use . . . .

514 U.S. at 602-03 (Stevens, J., dissenting). Justice Thomas spoke to the Second Amendment issue more directly in his concurrence in *Printz*, in words that suggested that he may well support the traditional individual rights view:

> This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. If, however, the Second Amendment is read to confer a *personal* right to "keep and 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. As the parties did not raise this argument, however, we need not consider it here. Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms "has justly been considered, as the palladium of the liberties of a republic." 3 J. Story, Commentaries § 1890, p. 746 (1833).

521 U.S. at 938-39 (Thomas, J., concurring) (emphasis in original).[188]

Finally, we note that, after his retirement, Chief Justice Warren Burger uttered one of the most widely publicized comments about the Second Amendment ever made by a Justice inside or outside the context of a judicial

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[188] Justice Thomas did not explain why it was relevant that the Court had not ruled on the issue recently or why a Second Amendment decision might be of less force if it was handed down by an earlier Court.

opinion. In an interview, former Chief Justice Burger stated that the traditional individual rights view was:

> one of the greatest pieces of fraud, I repeat the word 'fraud,' on the American public by special interest groups that I've ever seen in my lifetime. The real purpose of the Second Amendment was to ensure that state armies — the militia — would be maintained for the defense of the state. The very language of the Second Amendment refutes any argument that it was intended to guarantee every citizen an unfettered right to any kind of weapon he or she desires.

Warren E. Burger, *The Right to Bear Arms,* PARADE MAGAZINE, Jan. 14, 1990, at 4. Although we in no way share Chief Justice Burger's view that Second Amendment enthusiasts are guilty of fraud, we do generally agree with his statements regarding the Amendment's purpose and scope.

Our court, like every other federal court of appeals to reach the issue except for the Fifth Circuit, has interpreted *Miller* as rejecting the traditional individual rights view. In *Hickman v. Block*, we held that "the Second Amendment guarantees a collective rather than an individual right." 81 F.3d at 102 (citation and quotation marks omitted).[189] Like the other courts, we reached our conclusion regarding the Second Amendment's scope largely on the basis of the rather cursory discussion in *Miller*, and touched only briefly on the merits of the debate over the force of the amendment. *See id.*[190]

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[189] In *Hickman*, we held that an individual could not bring a Second Amendment challenge to a California law which requires that a permit be obtained in order to carry a concealed weapon, and, as noted in the text, unambiguously adopted the view that the Second Amendment establishes a collective right. Nevertheless, just six days after the issuance of that decision, Judge Alex Kozinski, acknowledgedly an extremely able and dedicated jurist, appeared to cling fast to the individual rights view, despite the existence of binding circuit precedent to the contrary that may in no way be dismissed as dicta. *United States v. Gomez*, 92 F.3d 770, 774 n.7 (9th Cir. 1996). The two other judges in *Gomez*, one of whom was the author of *Hickman*, refused to join in the footnote.

[190] *See Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000); *United States v. Wright*,

Appellants contend that we misread *Miller* in *Hickman.*[191] They point out that, as we have already noted,

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117 F.3d 1265, 1273-74 (11th Cir.), *cert. denied*, 522 U.S. 1007 (1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir.), *cert. denied*, 516 U.S. 813 (1995); *United States v. Hale*, 978 F.2d 1016, 1019-20 (8th Cir. 1992), *cert. denied*, 507 U.S. 997 (1993); *Thomas v. Members of City Council*, 730 F.2d 41, 42 (1st Cir. 1984) (per curiam); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976).

Although the majority of circuit courts have, with comparatively little analysis, adopted the collective rights view, the Third and Tenth Circuits appear to have suggested the possible use of some form of intermediate model. In rejecting a criminal defendant's Second Amendment defense to a gun possession charge, the Tenth Circuit stated: "To apply the [Second] [A]mendment so as to guarantee appellant's right to keep an unregistered firearm which has not been shown to have any connection to the militia, merely because he is technically a member of the Kansas militia, would be unjustifiable in terms of either logic or policy." *Oakes*, 564 F.2d at 387. In *Rybar*, the Third Circuit concluded that: "Rybar [has not] establish[ed] that his firearm possession bears a reasonable relationship to 'the preservation or efficiency of well-regulated militia.' " 103 F.3d at 286 (quoting *Miller*, 307 U.S. at 178).

It appears that only the Second and District of Columbia Circuits have not taken a position, considered or otherwise, on the nature of the right established by the Second Amendment. *See Fraternal Order of Police v. United States*, 152 F.3d 998, 1002 (D.C. Cir. 1998) ("Despite the intriguing questions raised, we will not attempt to resolve the status of the Second Amendment right . . . .").

[191] Since *Hickman*, we have cited its holding, with little discussion, in a few criminal cases in which the defendant raised a general Second Amendment defense to various firearms convictions along with other defenses that relate more specifically to the particular offenses alleged. *See, e.g.*, *United States v. Hinostroza*, 297 F.3d 924 (9th Cir. 2002); *United States v. Mack*, 164 F.3d 464, 474 (9th Cir. 1999); *see also United States v. Hancock*, 231 F.3d 557, 566 (9th Cir. 1999) (holding that, because the Second Amendment does not create an individual right to arms, an equal protection challenge to a gun control law is reviewed "under the rational-basis standard."). In the present civil constitutional challenge to a gun control statute, unlike the criminal cases in which the Second Amendment was raised along with a number of more specific defenses, the question of the Second Amendment's scope is the

Miller, like most other cases that address the Second Amendment, fails to provide much reasoning in support of its conclusion. We agree that our determination in *Hickman* that *Miller* endorsed the collective rights position is open to serious debate. We also agree that the entire subject of the meaning of the Second Amendment deserves more consideration than we, or the Supreme Court, have thus far been able (or willing) to give it. This is particularly so because, since *Hickman* was decided, there have been a number of important developments with respect to the interpretation of the highly controversial provision: First, as we have noted, there is the recent *Emerson* decision in which the Fifth Circuit, after analyzing the opinion at length, concluded that the Supreme Court's decision in *Miller* does not resolve the issue of the Amendment's meaning. The *Emerson* court then canvassed the pertinent scholarship and historical materials, and held that the Second Amendment does establish an individual right to possess arms — the first federal court of appeals ever to have so decided.[192] Second, the current leadership of the

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principal issue before the court and has been thoroughly briefed and argued by the parties.

[192] The *Emerson* court examined the government's briefs in *Miller*, and observed that in that case the government made alternative arguments: first, that the Second Amendment does not establish an individual right to possess arms, and second, that the sawed-off shotgun at issue in *Miller* bore no reasonable relationship to militia service. 270 F.3d at 221-24. In the view of the *Emerson* court, the Supreme Court's opinion in *Miller* adopted the government's second argument, and not its first, which is not an unreasonable conclusion. That conclusion does not, however, lead to the result the Fifth Circuit then reaches. In our view, the government's second argument supports either the collective rights view or the limited individual rights view, but not the traditional individual rights doctrine that the Fifth Circuit adopts. Moreover, in an attempt to reconcile its position with *Miller*, the Fifth Circuit modifies that doctrine by asserting that certain undefined types of arms are excluded from the amendment's coverage. *Miller* suggests that the arms protected by the amendment, if any, are those related to militia service, but *Emerson* strays far from that view. While it is unclear precisely what types of arms the Fifth Circuit would deem included or excluded, *Emerson*'s conclusion that the Second Amendment protects private gun ownership so long as the weapons have "legitimate use in the hands of private individuals,"

United States Department of Justice recently reversed the decades-old position of the government on the Second Amendment, and adopted the view of the Fifth Circuit. Now, for the first time, the United States government contends that the Second Amendment establishes an individual right to possess arms.[193] The Solicitor General has advised the Supreme Court that "[t]he current position of the United States . . . is that the Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions . . . ." Opposition to Petition for Certiorari in *United States v. Emerson*, No. 01-8780, at 19 n.3. In doing so, the Solicitor General transmitted to the Court a memorandum from Attorney General John Ashcroft to all United States Attorneys adopting the Fifth Circuit's view and emphasizing that the *Emerson* court "undertook a scholarly and comprehensive review of the pertinent legal materials . . . ," although the Attorney General was as vague as the Fifth Circuit with respect both to the types of weapons that he believes to be protected by the Second Amendment, and the basis for making such determinations. *Id.*, app. A.

The reversal of position by the Justice Department has caused some turmoil in the lower courts, and has led to a number of challenges to federal statutes relating to weapons sales, transport, and possession, including a heavy volume in the district courts of this circuit. *See, e.g.*, *United States v. Stepney*, No. 01-0344, 2002 WL 1460258 (N.D. Cal. July 1, 2002); Jason Hoppin, *No Free Ride For Gun Argument*, THE RECORDER, July 25, 2002 (discussing Second Amendment defenses raised by criminal defendants in Northern District of California cases). Similar Second Amendment defenses have been raised by criminal defendants throughout the nation as a result of the Justice Department's new position on the amendment. *See* Adam

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270 F.3d at 223, represents a far different approach from that stated in *Miller*. In our view, the Fifth Circuit's decision is incompatible with the Supreme Court ruling.

[193] *See* Opposition to Petition for Certiorari in *United States v. Emerson*, No. 01-8780, at 19 n.3, *available at* www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf.

Liptak, *Revised View of Second Amendment Is Cited As Defense in Gun Cases,* N.Y. TIMES, July 23, 2002, at A1.

Given the dearth of both reasoned and definitive judicial authority, a particularly active academic debate has developed over the scope of the Second Amendment. *Compare, e.g.* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998) (advocating individual rights view) *and* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989) (same) *with* Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 294 (2000) (advocating collective rights view); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 124 (2000) (same); *and* David Yassky, *The Second Amendment: Structure, History and Constitutional Change*, 99 MICH. L. REV. 588 (2000) (same). As a result of the renewed interest in the issue, the Second Amendment has been the subject of a number of scholarly symposia. *See, e.g.*, *The Second Amendment: Fresh Looks,* 76 CHI.-KENT L. REV. 3-715 (2000); *Second Amendment Symposium*, 1998 B.Y.U. L. REV. 1-336; *A Second Amendment Symposium Issue*, 62 TENN. L. REV. 443-821 (1995). Indeed, Second Amendment scholarship has become so active that the scholarship itself has become the subject of study. *See* Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349 (2000).

In light of the United States government's recent change in position on the meaning of the amendment, the resultant flood of Second Amendment challenges in the district courts, the Fifth Circuit's extensive study and analysis of the amendment and its conclusion that *Miller* does not mean what we and other courts have assumed it to mean, the proliferation of gun control statutes both state and federal, and the active scholarly debate that is being waged across this nation, we believe it prudent to explore Appellants' Second Amendment arguments in some depth, and to address the merits of the issue, even though this circuit's position on the scope and effect of the amendment was established in *Hickman*. Having engaged in that

exploration, we determine that the conclusion we reached in *Hickman* was correct.[194]

B. Appellants Lack Standing to Challenge the Assault Weapons Control Act on Second Amendment Grounds.

[2] Appellants contend that the California Assault Weapons Control Act and its 1999 revisions violate their Second Amendment rights. We unequivocally reject this contention. We conclude that although the text and structure of the amendment, standing alone, do not conclusively resolve the question of its meaning, when we give the text its most plausible reading and consider the amendment in light of the historical context and circumstances surrounding its enactment we are compelled to reaffirm the collective rights view we adopted in *Hickman*: The amendment protects the people's right to maintain an effective state militia, and does not establish an individual right to own or possess firearms for personal or other use. This conclusion is reinforced in part by *Miller*'s implicit rejection of the traditional individual rights position.[195] Because we hold that the Second Amendment does not provide an individual right to own or possess guns or other firearms,[196] plaintiffs lack standing to challenge the AWCA.[197]

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[194] If our review had led us to a conclusion contrary to that reached in *Hickman*, we of course would not attempt to overrule that decision in this opinion. Instead, we would be required to call for en banc review. *See Morton v. De Oliveira*, 984 F.2d 289, 292 (9th Cir. 1993) ("[O]nly the court sitting en banc may overrule a prior decision of the court."). Because we reaffirm *Hickman* here, however, an en banc call by the panel is not necessary.

[195] Although *Miller* is consistent with both the limited individual rights position and the collective rights view, for reasons we explain below we continue to adhere to the collective rights view we adopted in *Hickman*.

[196] We concluded in *Hickman* that because the individual plaintiff had no legally protectable interest under the Second Amendment, he lacked constitutional standing to bring a claim under that provision. Other courts have addressed Second Amendment claims on the merits, rather than under the rubric of standing doctrine. *See, e.g., Gillespie*, 185 F.3d at 710 (offering an informed discussion not only of the standing issue but also of some of the amendment's possible applications). Although in every case we are required to examine standing issues first, *see, e.g.*, *Scott v.*

Pasadena Unified School Dist., 306 F.3d 646, 653-54 (9th Cir. 2002) ("We must establish jurisdiction before proceeding to the merits of the case."), here an examination of that question requires us as a first step to conduct a thorough analysis of the scope and purpose of the Second Amendment. Only after determining the amendment's scope and purpose can we answer the question whether individuals, specifically the plaintiffs here, have standing to sue. Thus, as a practical matter, the choice of jurisprudential approach makes little or no difference. Because we held in *Hickman* that the absence of an individually enforceable Second Amendment right resulted in a lack of standing, we follow our precedent and decide the case on that basis here.

In *Hickman*, we did not rely on our earlier decision in *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992), that the Second Amendment is not incorporated by the Fourteenth and does not constrain actions by the states, although we noted in dictum that had standing existed, *Fresno Rifle* would be applicable. We undoubtedly followed that approach in *Hickman* because, as noted above, we must decide standing issues first. *Fresno Rifle* itself relied on *United States v. Cruikshank*, 92 U.S. 542 (1876), and *Presser v. Illinois*, 116 U.S. 252 (1886), decided before the Supreme Court held that the Bill of Rights is incorporated by the Fourteenth Amendment's Due Process Clause. Following the now-rejected *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (holding that the Bill of Rights did not apply to the states), *Cruikshank* and *Presser* found that the Second Amendment restricted the activities of the federal government, but not those of the states. One point about which we are in agreement with the Fifth Circuit is that *Cruikshank* and *Presser* rest on a principle that is now thoroughly discredited. *See Emerson*, 270 F.3d at 221 n.13. Because we decide this case on the threshold issue of standing, however, we need not consider the question whether the Second Amendment presently enjoins any action on the part of the states.

[197] Our concurring colleague, Judge Magill, says that we should simply decide the case on standing as did *Hickman*. That is precisely what we do. *Hickman* first examined the scope and purpose of the Second Amendment, and adopted one of the three principal theories regarding its meaning. It did so in order to resolve the standing question. In fact, it is impossible to decide standing without undertaking the type of analysis which our colleague wishes us to avoid. Only after determining that the collective view of the Second Amendment was correct was the *Hickman* court able to conclude that the individual plaintiff had no standing. We reach the same conclusion as to the collective view after conducting a similar analysis and, by virtue of doing so, we are also able to reach the same conclusion as to standing.

1. The Text and Structure of the Second Amendment Demonstrate that the Amendment's Purpose is to Preserve Effective State Militias; That Purpose Helps Shape the Content of the Amendment.

[3] The Second Amendment states in its entirety: "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." U.S. CONST. amend. II. As commentators on all sides of the debate regarding the amendment's meaning have acknowledged, the language of the amendment alone does not conclusively resolve the question of its scope. Indeed, the Second Amendment's text has been called "puzzling,"[198] "an enigma,"[199] and "baffling"[200] by scholars of varying ideological persuasions.[201] What renders the language and structure of

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The difference between our decision and *Hickman* is twofold. Since *Hickman* was decided, there have been extensive developments in the area of Second Amendment law. We take account of these developments and, after analyzing them, conclude that the result reached in *Hickman* does not change. Second, *Hickman* based its conclusion principally on a reading of *Miller* that appears to be incorrect: *Miller* neither adopts nor rejects the collective view. Because we believe *Hickman* reached the correct result on a significant constitutional issue currently being raised with some frequency in the district courts, we think it important to ground our circuit law on more solid constitutional reasoning and analysis. Given the plaintiffs' direct challenge to *Hickman*, the importance of the issue, and the extensive continuing judicial debate on the subject, it is, contrary to our colleague's view, in no way improper for us to reconsider *Hickman* in order to decide whether to (a) simply follow it without comment, (b) reaffirm it after considering intervening developments and engaging in a fuller constitutional analysis, or (c) request en banc review of the case before us.

[198] Dorf, *supra*, at 294.

[199] Stephen J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237, 238 (2000).

[200] L.A. Powe, Jr., *Guns, Words and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1360 (1997).

[201] Even the learned Professor Tribe has appeared stymied by the task of construing the Second Amendment. In the first two editions of his treatise on constitutional law, he advocated the collective rights position. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 299 n.6 (2d ed. 1988) ("[T]he sole concern

the amendment particularly striking is the existence of a prefatory clause, a syntactical device that is absent from all other provisions of the Constitution, including the nine other provisions of the Bill of Rights.[202] Our analysis thus must address not only the meaning of each of the two clauses of the amendment but the unique relationship that exists between them.

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of the [S]econd [A]mendment's framers was to prevent such federal interferences with the state militia as would permit the establishment of a standing national army and the consequent destruction of local autonomy. Thus the inapplicability of the [S]econd [A]mendment to purely private conduct . . . comports with the narrowly limited aim of the amendment as merely ancillary to other constitutional guarantees of state sovereignty."). However, in the treatise's third edition Professor Tribe tentatively concluded that the amendment provides "a right (admittedly of uncertain scope) on the part of individuals," although he left unresolved many of the more difficult questions regarding the amendment's practical effect, concluding unhelpfully that "the Second Amendment provides fertile ground in which to till the soil of federalism and to unearth its relationship with individual as well as collective notions of rights." LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 902 n.221 (Foundation Press, 3d ed. 2000). Soon after the third edition of the treatise was sent to press, Professor Tribe, in concert with another equally puzzled law school professor, appeared to equivocate even further regarding the scope of the amendment's protections. The two professors abandoned constitutional analysis almost entirely and retreated to a wholly pragmatic and political, though overly optimistic, discussion of how the two sides to the bitter Second Amendment debate could live happily ever after by reaching reasonable practical accommodations of their sharply conflicting constitutional views. Laurence H. Tribe & Akhil Reed Amar, *Well-Regulated Militias, and More*, N.Y. TIMES, Oct. 28, 1999, at A31.

[202] Professor Levinson is of the view that another constitutional provision includes a similar type of preamble. He argues that the Copyright and Patent Clause, which states that Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," U.S. CONST. art. I, § 8, has a structure analogous to that of the Second Amendment. *See* Levinson, *supra*. In our view, this is highly doubtful; the first phrase of the Copyright and Patent Clause appears to set forth the substantive power granted to Congress, not the limitation on such a power.

a. The Meaning of the Amendment's First Clause: "A Well-Regulated Militia Being Necessary to the Security of A Free State."

The first or prefatory clause of the Second Amendment sets forth the amendment's purpose and intent. An important aspect of ascertaining that purpose and intent is determining the import of the term "militia." Many advocates of the traditional individual rights model, including the Fifth Circuit, have taken the position that the term "militia" was meant to refer to all citizens, and, therefore, that the first clause simply restates the second in more specific terms. *See Emerson*, 270 F.3d at 235 ("Militia . . . was understood to be composed of the people generally possessed of arms which they knew how to use, rather than to refer to some formal military group separate and distinct from the people at large."). Relying on their definition of "militia," they conclude that the prefatory clause was intended simply to reinforce the grant of an individual right that they assert is made by the second clause. *See id.* At 236.[203] We agree with the Fifth Circuit in a very limited

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[203] Other advocates of the traditional individual rights model appear to read the first clause out of the amendment altogether. *See* Volokh, *supra*, at 807-09; *see also* Powe, Jr., *supra*, at 1336 ("[T]o some, like the National Rifle Association, the preface bears so little relevance to the right that the preface might as well have been written in invisible ink.") For instance, in an article that has attracted much comment, Professor Volokh points out that although prefatory clauses like that included in the Second Amendment are not found elsewhere in the federal constitutional text, they are commonplace in state constitutions. On the basis of the limited significance of the prefatory clauses in the state constitutions, the able professor maintains that the prefatory clause in the Second Amendment should not be read as restricting the right established in the operative clause. Volokh, *supra*, at 807-09. However, this interpretation results in the denial of any significance at all to the first part of the amendment, in violation of the well-established canon of interpretation that requires a court, wherever possible, to give force to each word in every statutory (or constitutional) provision. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955); *see Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 174 (1803). Moreover, as Professor Dorf, a leading exponent of the collective rights view, notes, the fact that preambles are common in state constitutions does not alter the fact that they are entirely

respect. We agree that the interpretation of the first clause and the extent to which that clause shapes the content of the second depends in large part on the meaning of the term "militia." If militia refers, as the Fifth Circuit suggests, to all persons in a state, rather than to the state military entity, the first clause would have one meaning — a meaning that would support the concept of traditional individual rights. If the term refers instead, as we believe, to the entity ordinarily identified by that designation, the state-created and -organized military force, it would likely be necessary to attribute a considerably different meaning to the first clause of the Second Amendment and ultimately to the amendment as a whole.

[4] We believe the answer to the definitional question is the one that most persons would expect: "militia" refers to a state military force. We reach our conclusion not only because that is the ordinary meaning of the word, but because contemporaneously enacted provisions of the Constitution that contain the word "militia" consistently use the term to refer to a state military entity, not to the people of the state as a whole. We look to such contemporaneously enacted provisions for an understanding of words used in the Second Amendment in part because this is an interpretive principle recently explicated by the Supreme Court in a case involving another word that appears in that amendment — the word "people."[204] That same interpretive

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atypical in the federal constitution. To the contrary, Professor Dorf says, the first clause of the Second Amendment ought to be attributed substantial weight, in part because it is so unusual. Dorf, *supra*, at 301. We find Professor Dorf's argument the more persuasive.

[204] Specifically, in *United States v. Verdugo-Urquidez*, the Court stated that the use of the word "people" should have the same meaning in the Second Amendment as it does throughout the Constitution:

"[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the

principle is unquestionably applicable when we construe the word "militia." "Militia" appears repeatedly in the first and second Articles of the Constitution. From its use in those sections, it is apparent that the drafters were referring in the Constitution to the second of two government-established and -controlled military forces. Those forces were, first, the national army and navy, which were subject to civilian control shared by the president and Congress,[205] and, second, the *state militias*, which were to be "essentially organized and under control of the states, but subject to regulation by Congress and to 'federalization' at the command of the president." Paul Finkelman, *"A Well Regulated Militia": The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195, 204 (2000).

Article I also provides that the militia, which is essentially a state military entity, may on occasion be federalized; Congress may "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. CONST. art. I, § 8, cl. 15. The fact that the militias may be "called forth" by the federal government only in appropriate circumstances underscores their status as state institutions. Article II also demonstrates that the militia were conceived of as state military entities; it provides that the President is to be

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Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

494 U.S. 259, 265 (1990) (citations omitted).

We note that James Madison, no minor authority on the constitutional text, noted the arbitrariness of this interpretive approach. In doing so, in Federalist 37, he observed, "no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally different ideas." THE FEDERALIST NO. 37, at 197 (Clinton Rossiter, ed., 1961). Nevertheless, we are bound by the views of the Supreme Court.

[205] U.S. CONST. art. I, § 8, cls. 12-14 (granting the power "To raise and support Armies," "To provide and maintain a Navy," and "To make Rules for the Government and Regulation of the land and naval Forces.").

"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). Like the Second Amendment, not all of the provisions in Articles I and II refer specifically to the militia as "the state militia." Nevertheless, the contexts in which the term is used demonstrate that even without the prefatory word, "militia" refers to state military organizations and not to their members or potential members throughout these two Articles.

Our conclusion that "militia" refers to a state entity, a state fighting force, is also supported by the use of that term in another of the provisions of the Bill of Rights. The Fifth Amendment, enacted by the First Congress at the same time as the Second Amendment, provides that a criminal defendant has a right to an indictment or a presentment "except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ." U.S. CONST. amend. V. The inclusion of separate references to the "land or naval forces" and "the Militia," both of which may be in "actual service" to the nation's defense, indicates that the framers conceived of two formal military forces that would be active in times of war — one being the national army and navy, and the other the federalized state militia. Certainly, the use of "militia" in this provision of the Bill of Rights is most reasonably understood as referring to a state entity, and not to the collection of individuals who may participate in it.

Not only did the drafters of the Constitution use "militia" to refer to state military entities, so too did the drafters of the Constitution's predecessor document, the Articles of Confederation. The Articles provided that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage." THE ARTICLES OF CONFEDERATION art. 6 (1777), *in* DOCUMENTS OF AMERICAN HISTORY 112 (Henry Steele Commager ed., 7th ed. 1963). The "well regulated and disciplined militia[s]" described by the Articles of Confederation were quite clearly those institutions established by the individual states. Thus,

the prevailing understanding both before and at the time of the adoption of the Constitution was that a "militia" constituted a state military force to which the able-bodied male citizens of the various states might be called to service.

To determine that "militia" in the Second Amendment is something different from the state entity referred to whenever that word is employed in the rest of the Constitution would be to apply contradictory interpretive methods to words in the same provision. The interpretation urged by those advocating the traditional individual rights view would conflict directly with *Verdugo-Urquidez*. If the term "the people" in the latter half of the Second Amendment must have the same meaning throughout the Constitution, so too must the phrase "militia."[206]

Our reading of the term "militia" as referring to a state military force is also supported by the fact that in the amendment's first clause the militia is described as "necessary to the security of a free State." This choice of language was far from accidental: Madison's first draft of the amendment stated that a well-regulated militia was "the best security of a free country." Anti-Federalist Elbridge Gerry explained that changing the language to "necessary to the security of a free State" emphasized the primacy of the state militia over the federal standing army: "A well-regulated militia being the best security of a free state, admitted an idea that a standing army was a secondary one." Yassky, *supra*, at 610 (quoting THE CONGRESSIONAL REGISTER, August 17, 1789). In any event, as we will explain *infra* at 32, 45-47, 53-55, it is clear that the drafters believed the militia that provides the best security for a free state to be the permanent state militia, not some amorphous body of the people as a whole, or whatever random and informal collection of armed individuals may from time to time appear on the scene for one purpose or another.

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[206] Professor Jack Rakove, an eminent historian, in criticizing the logic underlying the traditional individual rights position, observes that " '[p]eople' is routinely defined [by advocates of the traditional individual rights position] intratextually, by reference to use in other amendments, but 'militia' leaps beyond the proverbial four corners of the document, and is parsed [by those advocates] in terms of a historically contingent definition of what the militia has been and must presumably evermore be." Rakove, *supra*, at 124.

Finally, our definition of "militia" is supported by the inclusion of the modifier "well regulated." As an historian of the Founding Era has noted, the inclusion of that phrase "further shows that the Amendment does not apply to just anyone." Finkelman, *supra*, at 234. The Second Amendment was enacted soon after the August 1786 – February 1787 uprising of farmers in Western Massachusetts known as Shays Rebellion. What the drafters of the amendment thought "necessary to the security of a free State" was not an "unregulated" mob of armed individuals such as Shays band of farmers, the modern-day privately organized Michigan Militia, the type of extremist "militia" associated with Timothy McVeigh and other militants with similar anti-government views, groups of white supremacists or other racial or religious bigots, or indeed any other private collection of individuals. To the contrary, "well regulated" confirms that "militia" can only reasonably be construed as referring to a military force established and controlled by a governmental entity.

After examining each of the significant words or phrases in the Second Amendment's first clause, we conclude that the clause declares the importance of state militias to the security of the various free states within the confines of their newly structured constitutional relationship. With that understanding, the reason for and purpose of the Second Amendment becomes clearer.

b. The Meaning of the Amendment's Second Clause: "The Right of the People to Keep and Bear Arms, Shall Not Be Infringed."

[5] Having determined that the first clause of the Second Amendment declares the importance of state militias to the proper functioning of the new constitutional system, we now turn to the meaning of the second clause, the effect the first clause has on the second, and the meaning of the amendment as a whole. The second clause — "the right of the people to keep and bear Arms, shall not be infringed" — is not free from ambiguity. We consider it highly significant, however, that the second clause does not purport to protect the right to "possess" or "own" arms, but rather to "keep and bear" arms. This choice of words is important because the phrase "bear arms" is a phrase that customarily relates to a military function.

[6] Historical research shows that the use of the term "bear arms" generally referred to the carrying of arms in military service — not the private use of arms for personal purposes.[207] For instance, Professor Dorf, after canvassing documents from the founding era, concluded that "[o]verwhelmingly, the term had a military connotation." Dorf, *supra*, at 314. Our own review of historical documents confirms the professor's report.[208] The Tennessee Supreme Court, in the most significant judicial decision to construe the term "bear arms," concluded that it referred to the performance of a military function: "A man in pursuit of deer, elk and buffaloes might carry his rifle every day for forty years, and yet it would never be said of him that he had borne arms." *Aymette v. State*, 21 Tenn. (2 Humph.) 154

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[207] The *Emerson* court points to a few uses of the phrase "bear arms" that do not refer to military service, primarily in the Report of the Pennsylvania Minority, prepared by those members of the Pennsylvania Ratifying Convention who dissented from that state's decision to ratify the Constitution. The Pennsylvania minority report is one of the few contemporaneous documents to refer to a private right to arms. However, its view was doubly rejected: first, by the Pennsylvania convention, which chose not to recommend to the new Congress any amendment related to the regulation of arms, and second, by the First Congress, which adopted the Second Amendment rather than the individual rights proposal of the Pennsylvania minority.

[208] For instance, the Declaration of Independence cites as a grievance against the British Crown the fact that Great Britain impressed into the British Navy Americans captured on the high seas, and forced the prisoners to "bear arms" against their countrymen. THE DECLARATION OF INDEPENDENCE para. 28 (U.S. 1776). The Continental Congress frequently used the term when permitting prisoners of war to be released to Britain, conditioning their release on the prisoners' "parole not to bear arms against the United States or their allies during the war." 14 JOURNALS OF THE CONTINENTAL CONGRESS 826 (July 14, 1779). Similarly, in giving instruction to General Washington to conduct an exchange of prisoners of war with Britain, Congress instructed that the exchanged prisoners be prohibited from active service in the military: "That hostages be mutually given as a security that the Convention troops and those received in exchange for them do not bear arms prior to the first day of May next." 18 JOURNALS OF THE CONTINENTAL CONGRESS 1030 (Nov. 17, 1780).

(1840).[209] Other nineteenth-century judicial opinions evince that same understanding of the term, as it appears in the Constitution. *See English v. State*, 35 Tex. 473, 476 (1872) ("The word 'arms' in the connection we find it in the Constitution of the United States refers to the arms of a militiaman or soldier, and the word is used in its military sense."); *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891) ("[I]n regard to the kind of arms referred to in the [Second A]mendment, it must be held to refer to the weapons of warfare to be used by the militia."); *see also* Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 476 (1915) ("The single individual or the unorganized crowd, in carrying weapons, is not spoken of or thought of as 'bearing arms.' "). Further, the Oxford English Dictionary defines "to bear arms" as "to serve as a soldier, do military service, fight." 1 OXFORD ENGLISH DICTIONARY 634 (J.A. Simpson & E.S.C. Weiner, eds., 2d ed. 1989) (quoted in Yassky, *supra*, at 619). Thus, the use of the phrase "bear arms" in its second clause strongly suggests that the right that the Second Amendment seeks to protect is the right to carry arms in connection with military service. We also believe it to be significant that the first version of the amendment proposed by Madison to the House of Representatives concluded with an exemption from "bearing arms" for the "religiously scrupulous." THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 169 (Neil H. Cogan ed., 1997) [hereinafter BILL OF RIGHTS] ("[N]o person religiously scrupulous of bearing arms, shall be compelled to render military service in person."). Historians have observed that "[n]o state at the time, nor any state before, had ever compelled people to carry weapons in their private capacity."

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[209] The Fifth Circuit dismisses the *Aymette* decision because it believed that the constitutional provision relied on by the Tennessee court granted free white men the right to "keep and bear arms for their common defense." According to the *Emerson* court, the "common defense" language, which is not present in the Second Amendment, rendered the interpretation of the *Aymette* court inapplicable here. However, the Tennessee court reached its conclusion primarily because of a different provision of the state constitution that did not include the "common defense" language. Thus, the Fifth Circuit's attempt to distinguish *Aymette* fails.

Finkelman, *supra*, at 228. Accordingly, the exemption from bearing arms for the religiously scrupulous can only be understood as an exemption from carrying arms in the service of a state militia, and not from possessing arms in a private capacity. Otherwise, Madison's insertion of the religiously-scrupulous exception in the first draft of the present amendment would have made no sense at all.[210]

[7] Finally, we address the use of the term "keep" in the second clause. The reason why that term was included in the amendment is not clear. The *Emerson* court, citing no authority, concludes that "keep" does not relate to military weapons and therefore the use of the word supports the position that the amendment grants individuals the right to keep arms for personal use. 270 F.3d at 232. There appears to be little logic or reason to that analysis. Arms can be "kept" for various purposes — military, social, or criminal. The question with respect to the Second Amendment is not whether arms may be kept, but by whom and for what purpose. If they may be kept so that the possessor is enabled to "bear arms" that are required for military service, the words would connote something entirely different than if they may be kept for any individual purpose whatsoever. In this connection, some scholars have suggested that "keep and bear" must be construed together (like "necessary and proper") as a unitary phrase that relates to the maintenance of arms for military service. *See* Dorf, *supra*, at 317. That argument appears to us to have considerable merit.

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[210] The use of "bear arms" in Madison's proposal for a conscientious objector proposal is identical to its use in a number of suggested amendments offered by the state ratifying conventions. In Virginia, for example, George Wythe suggested a proposed constitutional amendment that, like Madison's first draft of the Second Amendment, quite evidently uses "bear arms" to mean military service: "That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead." 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 659 (Jonathan Elliott ed., 2d ed. 1866) [hereinafter DEBATES]; *see also* 1 DEBATES, *supra,* at 335 (Rhode Island Ratifying Convention Proposed Amendments) ("That any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead.").

Certainly the right to keep arms is of value only if a right to use them exists. The only right to use arms specified in the Constitution is the right to "bear" them. Thus, it seems unlikely that the drafters intended the term "keep" to be broader in scope than the term "bear." Any other explanation would run into considerable logical and historical difficulty. Furthermore, historians have noted that the right of the *states* to "keep" arms was a catalyst for the Revolution — it was the British troops' attempts to capture the Massachusetts militia's arsenal that prompted Paul Revere's warning and the battles at Lexington and Concord to defend the *states'* stores of munitions. Finkelman, *supra*, at 234. Accordingly, the ability of states to "keep" arms for military use without external interference undoubtedly was prominent in the minds of many founders. In the end, however, the use of the term "keep" does not appear to assist either side in the present controversy to any measurable extent. Certainly, the use of the term does not detract from the significance of the drafters' decision to protect the right to "bear" arms rather than to "own" or "possess" them. Thus, it in no way undercuts the strong implication that the right granted by the second clause relates to the performance of a military function, and not to the indiscriminate possession of weapons for personal use.

c. The Relationship Between the Two Clauses.

Our next step is to consider the relationship between the two clauses, and the meaning of the amendment as a whole. As we have noted, and as is evident from the structure of the Second Amendment, the first clause explains the purpose of the more substantive clause that follows, or, to put it differently, it explains the reason necessitating or warranting the enactment of the substantive provision.[211] Moreover, in this case, the first clause does more than simply state the amendment's purpose or justification: it also helps shape and define the meaning of the substantive provision contained in the

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[211] As Professor John Hart Ely has observed, "here, as almost nowhere else, the framers and ratifiers apparently opted against leaving to the future the attribution of purposes, choosing instead explicitly to legislate the goal in terms of which the provision was to be interpreted." ELY, DEMOCRACY AND DISTRUST 95 (1980).

second clause, and thus of the amendment itself. This approach is consistent with that taken by the Supreme Court regarding the Preamble to the Constitution in a number of other instances. *See, e.g.*, *U.S. Term Limits v. Thornton*, 514 U.S. 779, 821 n.31 (1995) (pointing to language in the Preamble to the Constitution to determine the nature of representation established in that document). More important, it is the approach that the Supreme Court has specifically declared must be employed when seeking to determine the meaning of the Second Amendment.[212]

[8] When the second clause is read in light of the first, so as to implement the policy set forth in the preamble, we believe that the most plausible construction of the Second Amendment is that it seeks to ensure the existence of effective state militias in which the people may exercise their right to bear arms, and forbids the federal government to interfere with such exercise. This conclusion is based in part on the premise, explicitly set forth in the text of the amendment, that the maintenance of effective state militias is essential to the preservation of a free State, and in part on the historical meaning of the right that the operative clause protects — the right to bear arms. In contrast, it seems reasonably clear that any fair reading of the "bear Arms" clause with the end in view of "assuring . . . the effectiveness of" the state militias cannot lead to the conclusion that the Second Amendment guarantees an individual right to own or possess weapons for personal and other purposes. *See, e.g.*, *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710-11 (7th Cir. 1999) (adopting the collective rights theory and concluding that firearms possession related to militia service represents too attenuated a connection to the purpose and objective of the Second Amendment to support a claim of an individual right).

In the end, however, given the history and vigor of the dispute over the meaning of the Second Amendment's language, we would be reluctant to say that the text and

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[212] As we have noted, *supra* p. 14, the *Miller* Court stated: "With the obvious purpose to assure the continuation and render possible the effectiveness of [state militias] the declaration and guarantee of the Second Amendment were made. *It must be interpreted and applied with that end in view.*" 307 U.S. at 178 (emphasis added).

structure alone establish with certainty which of the various views is correct. Fortunately, we have available a number of other important sources that can help us determine whether ours is the proper understanding. These include records that reflect the historical context in which the amendment was adopted, and documents that contain significant portions of the contemporary debates relating to the adoption and ratification of the Constitution and the Bill of Rights. We now examine those sources, all of which ultimately point to the same result to which our analysis of the text leads us.

2. The Historical Context of the Second Amendment and the Debates Relevant to its Adoption Demonstrate that the Founders Sought to Protect the Survival of Free States by Ensuring the Existence of Effective State Militias, Not by Establishing An Individual Right to Possess Firearms.

An examination of the historical context surrounding the enactment of the Second Amendment leaves us with little doubt that the proper reading of the amendment is that embodied in the collective rights model. We note at the outset that the interpretation of the Second Amendment lends itself particularly to historical analysis. The content of the amendment is restricted to a narrow, specific subject that is itself defined in narrow, specific terms. Only one other provision of the Bill of Rights is similarly composed — the almost never used Third Amendment.[213] The other eight amendments all employ broad and general terms, such as "no law respecting" (the Free Exercise Clause), "unreasonable" (searches and seizures), "due process of law" (for deprivations of life, liberty, and property), "cruel and unusual" (punishments). Even the Ninth and Tenth Amendments speak vaguely of "other" rights or unenumerated "reserved" rights. The use of narrow, specific language of limited applicability renders the task of construing the Second Amendment somewhat different from that which we ordinarily undertake when we interpret the other portions of the Bill of Rights.

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[213] The Third Amendment states: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in manner prescribed by law."

What our historical inquiry reveals is that the Second Amendment was enacted in order to assuage the fears of Anti-Federalists that the new federal government would cause the state militias to atrophy by refusing to exercise its prerogative of arming the state fighting forces, and that the states would, in the absence of the amendment, be without the authority to provide them with the necessary arms. Thus, they feared, the people would be stripped of their ability to defend themselves against a powerful, over-reaching federal government. The debates of the founding era demonstrate that the second of the first ten amendments to the Constitution was included in order to preserve the efficacy of the state militias for the people's defense — not to ensure an individual right to possess weapons. Specifically, the amendment was enacted to guarantee that the people would be able to maintain an effective state fighting force — that they would have the right to bear arms in the service of the state.

a. The Problem Of Military Power in the Colonies and Confederation.

A significant motivation for the American colonists' break from Britain was a distrust of the standing army maintained by the Crown on American shores. Dorf, *supra*, at 308. Indeed, one of the principal complaints listed in the Declaration of the Independence was that King George III "has kept among us, in times of peace, Standing Armies without the Consent of our legislatures. He has affected to render the Military independent of and superior to the Civil power." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Standing armies in the colonial era were looked on with great skepticism: "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." *Miller*, 307 U.S. at 179. Even after the break with Britain, a large portion of Americans had grave reservations about establishing a permanent standing army.[214] Nevertheless, many other newly independent

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[214] A number of early state constitutions included provisions prohibiting the maintenance of standing armies by the executive branch. The Massachusetts provision is typical: "And as in time of peace armies are dangerous to liberty, they ought not to be

Americans expressed the need to strengthen the federal fighting force, even in peacetime. During the brief period in which the Articles of Confederation were in effect, from 1781-1789, relatively weak federal authority existed, particularly as related to military matters. The bulwark of the national defense was the state militias, which bodies the states could voluntarily contribute to the services of the Confederation. The states retained the sole power to arm and otherwise to maintain their respective militias. The Articles of Confederation specifically granted that power (and obligation) to the states: "[E]very state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage." THE ARTICLES OF CONFEDERATION, *supra*, art. 6. It is highly significant that prior to the enactment of the Constitution, the prevailing understanding as expressed in the governing charter then in effect was that the responsibility of arming their militias belonged to the states, not the federal government and not the individual militiamen.[215] It was this function of the

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maintained without the consent of the legislature; and the military power shall always be held in exact subordination to the civil authority, and be governed by it." MASS. CONST. pt. I, art. XVII (1780), *in* BILL OF RIGHTS, *supra*, at 183. *See also* DELAWARE DECLARATION OF RIGHTS, § 19 (1776) ("That standing armies are dangerous to liberty, and ought not to be raised or kept up without the consent of the Legislature."), *in* BILL OF RIGHTS, *supra*, at 183.

[215] Some states, particularly during the Articles of Confederation period, in turn required individual militiamen to bring their own arms for militia service. See *Miller*, 307 U.S. at 180-82 (citing statutes). As we observed in *Hickman*, however, "in practice, the command" that militiamen arm themselves "was ignored." 81 F.3d at 103 n.8. In many other states, both the official and the actual responsibility for arming the militia rested, as the Articles of Confederation contemplated, with the state governments. The Georgia statute was typical; the state was required to "Arm and Array the militia for suppressing all such insurrections, as may happen." Act of 1778, in 19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA: STATUTES COLONIAL AND REVOLUTIONARY, 1774 to 1805, at 104 (1970). Regardless of where the official responsibility rested, however, the comments of

states, albeit no longer an exclusive one after the Constitution was adopted, that the Anti-Federalists attempted to preserve, through the enactment of the Second Amendment, in order to ensure that the militias would be effective. Many leaders of the Revolution expressed concern that as the Continental Army disbanded following the cessation of hostilities with England, the various state militias were inadequate to provide for the common defense due to their poor training and equipment.[216] The establishment of a national armed force was one of the primary reasons that the Constitutional Convention in 1787 was convened. The issue pervaded the convention's debates. In Virginia Governor Edmund Randolph's opening speech at the convention — in which he suggested that the body reject the Articles of Confederation entirely in favor of a new constitution, rather than merely revise them — Randolph cited military reform as a principal reason for strengthening the federal charter: "[T]he confederation produced no security against foreign invasion . . . neither militia nor [state] draughts being fit for defence on such occasions." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 17 (Max Farrand ed., rev. ed. 1937) [hereinafter CONVENTION RECORDS]. Randolph also "observ[ed] that

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Madison, Randolph, and others, made at the Constitutional Convention, cited *infra*, reflect the common understanding that the state militias were ill-equipped.

[216] During the period that the Articles were in effect, both George Washington and Henry Knox, who was to become the nation's first Secretary of War in the Washington Administration, urged the creation of a standing national military force, to no avail. H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 411-13 (2000). Washington in particular felt that the need was acute; in 1783 he wrote a document entitled *Sentiments On A Peace Establishment*, in which he recommended establishing a national militia that would exist along with those maintained by the individual states. Subsequently, he wrote to John Adams in the wake of Shays's Rebellion that because of the lack of a unified national military force, "[w]e are fast verging to anarchy and confusion!" Letter from George Washington to James Madison (Nov. 5, 1786), *in* 29 THE WRITINGS OF GEORGE WASHINGTON, 1745-1799, at 51 (John Clement Fitzpatrick ed., 1931) (quoted in Michael A. Bellesiles, *The Second Amendment in Action*, 76 CHI.-KENT L. REV. 61, 65 (2000)).

the Militia were every where neglected by the State Legislatures, the members of which courted popularity too much to enforce a proper discipline." 2 *id.*, at 388. Other delegates to the Convention shared this view. Influential South Carolinian Charles Pinckney, for instance, maintained that a stronger federal government was necessary principally so as to maintain "a real military force." *Id.* at 332.[217] The compromise that the convention eventually reached, which granted the federal government the dominant control over the national defense, led ultimately to the enactment of the counter-balancing Second Amendment.

b. The Constitutional Convention and the Compromise of the Army and Militia Clauses

The minutes of the proceedings of the Constitutional Convention reveal that the delegates to the convention devoted substantial efforts to determining the proper balance between state and federal control of military matters. *See* Yassky, *supra*, at 599 (describing this issue as "one of the most contentious issues faced by the Philadelphia Convention."). *See also* 2 CONVENTION RECORDS, *supra*, at 380-89 (debates regarding the Militia Clauses). Despite the general view that "standing armies are dangerous to liberty," THE FEDERALIST NO. 29, at 183 (Alexander Hamilton) (Clinton Rossiter ed., 1961), and over the objection of some Anti-Federalists, the delegates to the convention agreed that a national army was "potentially dangerous" but "necessary." Yassky, *supra*, at 605. Thus, Article I of the proposed constitution granted Congress the authority to establish a "National Army," and Article II established the President as commander-in-chief of that army. The delegates at Philadelphia also provided for the strengthening of the state militias, in part to provide a check on the new national army. "As the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good Militia." 2 CONVENTION

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[217] *See also* 2 DEBATES, *supra*, at 387 (Virginia Ratifying Convention) ("Have we not found from experience, that, while the power of arming and governing has been solely vested in the state legislatures, they were neglected and rendered unfit for immediate service?") (Statement of James Madison).

RECORDS, *supra*, at 388 (Statement of James Madison). Under the compromise reached by the delegates, the militias were strengthened by the grant to Congress of substantial responsibility for their management, although they remained essentially state entities. On the one hand, the Constitution granted Congress the power to prescribe methods of organizing, arming and disciplining the state militias. U.S. CONST. art. I, § 8, cl. 15. On the other, the states expressly retained the power to appoint militia officers and provide the militiamen with their training, in accordance with Congressional dictates, if any. *See Perpich v. Department of Defense*, 496 U.S. 334, 340 (1990) (observing that the Militia Clauses were the result of "[t]wo conflicting themes."). The provision that most troubled the Anti-Federalists, and that prompted the most strident calls for amendment to the proposed constitution, was the one that authorized Congress to provide arms to the militias. The disagreement among the delegates arose not over whether Congress should be able to arm the militias at all, but over whether that power should be exclusive or concurrent with a state power to provide such arms — as well as over how other responsibilities for the militias should be distributed between the state and federal governments. *Id.* Federalists[218] defended the compromise that was reached, which greatly increased federal involvement in the management of the militias, in part by arguing that stronger state militias would provide an important counterbalance to the new national army.[219] In an effort to persuade the nation

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[218] We use the terms "Federalist" and "Anti-Federalist" as they were originally intended and as they plainly read, as opposed to the current paradoxical distortions of the terms. For some inexplicable reason, the term "Federalist" is currently used to refer to those who favor devolving fundamentally national functions upon the individual states, rather than to those who favor granting to the national government the powers necessary to operate effectively and to promote the social compact that underlies American democracy.

[219] *See* 3 DEBATES, *supra*, at 392 ("If you give [the power to federalize the militia] not to Congress, it may be denied by the states. If you withhold it, you render a standing army absolutely necessary; for if they have not the militia, they must have such a body of troops as will be necessary for the general defence of the

at large to ratify the proposed constitution, both Hamilton and Madison in The Federalist Papers pointed out that the state militias might even be called upon to resist the federal army should that body become oppressive. For instance, in Federalist No. 46, Madison argued:

> Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government: still it would not be going too far to say that the State governments with the people on their side would be able to repel the danger. . . . Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.

THE FEDERALIST NO. 46, at 267 (Clinton Rossiter ed., 1961).[220] *See also* THE FEDERALIST NO. 28, at 150 (Clinton Rossiter ed., 1961) (Hamilton). In sum, what the debates held at the constitutional convention make clear, as well as the compromise that resulted, is that the balance of military power between the states and the federal government, although now an anachronistic subject foreign to our mode of thinking, was, at the time of the founding, a preeminent and much-debated question.

c. Anti-Federalist Objections and the Ratification Debates

The Anti-Federalists sought to ensure that the people of the several states would enjoy the protection of effective

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Union.") (statement of George Nicholas at the Virginia Ratifying Convention).

[220] Advocates of the traditional individual rights view often quote Madison's observation that the American people have the "advantage of being armed" as conclusive evidence that the Founders intended to protect the personal ownership of firearms. *See, e.g.*, *Emerson*, 270 F.3d at 249 n.3; Don B. Kates, Jr., *Gun Control: Separating Reality From Symbolism*, 20 J. CONTEMP. L. 353, 364 (1994). However, examination of those words in context, as set forth above, suggests that Madison was referring to armed citizens in the service of state governments, i.e., militiamen.

state militias so that their new-found liberties would be preserved. To accomplish this purpose, they sought to change, or at the least, to clarify, the nature of the proposed balance of military power between the state and federal governments. Despite the arguments advanced by Hamilton, Madison, and others,[221] federal control over state militias remained one of the central objections to the new charter on the part of Anti-Federalists. In particular, if the federal Congress were permitted to "organiz[e], arm[ ], and disciplin[e]" the militia, opponents of the Constitution contended, then Congress would have the implied power to *disarm* the state militias and thus the people as well. One of the principal arguments against ratification of the new Constitution was that it would take away from the states the right to arm the members of its militias, and thus could deprive the people of an effective counterforce to the new national army. Without an armed militia, the argument went, the people would be bereft of arms. For instance, Patrick Henry, a leading Anti-Federalist at the Virginia ratifying convention, attacked the grant of power that permitted Congress to arm the militias: By this [provision], sir, you see that [congressional] control over our last and best defence is unlimited. If they neglect or refuse to discipline or arm our militia, they will be useless: the states can do neither—this power being exclusively given to Congress.

> The power of appointing officers over men not disciplined or armed is ridiculous . . . .

3 DEBATES, *supra*, at 379 (Statement of Patrick Henry). George Mason's concerns were similar; he predicted that Congress would "neglect [the militia], and let them perish, in order to have a pretence of establishing a standing army." 3 DEBATES, *supra*, at 379. *See also* North Carolina Ratification Debate, *in* BILL OF RIGHTS, *supra*, at 191 ("[Congress] can disarm the militia.") (Statement of Rep. Lenoir). The Anti-Federalists viewed the state militias as

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[221] This was in Madison's early period, when he was an ally of Hamilton's; it was not until later that he joined Jefferson in organizing the political faction that became the Republican Party and opposed the policies of the Federalists, including President Washington and, more openly, those of President John Adams. *See* DAVID MCCULLOUGH, JOHN ADAMS 436, 475 (2001).

providing the only true opportunity for the people to bear arms. Luther Martin of Maryland's alarmist rhetoric was typical of those who complained that the new Constitution jeopardized the people's freedom because it deprived them of effective state militias and thus of their means of self-defense. Martin stated:

> It was urged [at Philadelphia] that, if after having retained to the general government the great powers already granted, and among those, that of raising and keeping up regular troops without limitations, the power over the militia should be taken away from the States, and also given to the general government, it ought to be considered as the last coup de grace to the State governments; . . . and that every State in the Union ought to reject such a system with indignation, since, if the general government should attempt to oppress and enslave them, they could not have any possible means of self-defense . . . .

3 CONVENTION RECORDS, *supra*, at 209. The Anti-Federalist concern was that if Congress possessed exclusive power to arm the militia, the people would be incapable of resisting federal tyranny.[222] Although Federalists, like Madison, responded that "[t]he power [to arm the militia] is concurrent, and not exclusive," BILL OF RIGHTS, *supra*, at 195, the Anti-Federalists remained adamant. From the perspective of history, the Anti-Federalists' worries that the new national government would permit the state militia to atrophy through neglect may seem to be inconsequential,

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[222] The text of Article I does not state that Congress has *exclusive* power to arm the militia. The language indicates that the grant of power is permissive: Congress "may" arm the militia. Nothing in the Article or elsewhere in the Constitution appears to bar the states from choosing to arm their respective militias as they wish. Nevertheless, most prominent Anti-Federalists — whether motivated by sincere belief or by a desire to engage in the rhetoric at which they excelled — complained that the Militia Clauses were a dangerous extension of exclusive federal power. For instance, in a published exchange of letters with Federalist Oliver Ellsworth of Connecticut, prominent Anti Federalist Luther Martin of Maryland complained that the federal government has "the powers by which only the militia can be organized and armed, and by the neglect of which they may be rendered utterly useless and insignificant." 3 CONVENTION RECORDS, *supra*, at 285.

because we have become so accustomed to the provision of defense being essentially a federal function, and so few of us remain concerned with any right of the people to take up arms against the federal government.[223] Nevertheless, such arguments were central to the Anti-Federalist critique of the proposed new government.

Despite the Anti-Federalist arguments regarding the dangers of the distribution of powers with respect to state militias, and the effect upon the people's ability to provide for their own defense, it soon became clear that the requisite number of states would ratify the new Constitution. Once it became apparent that ratification was likely, Anti-Federalists shifted their efforts from defeating the Constitution to securing amendments, to be adopted almost simultaneously, that would render the new system more to their liking. Six of the state ratifying conventions adopted petitions urging that the newly established federal government enact a series of constitutional amendments, many of which became a part of the Bill of Rights. Four of those six state conventions included proposed amendments related to the militia power: New York, Virginia, Rhode Island, and North Carolina all proposed amendments similar in wording to the Second Amendment in its final form. BILL OF RIGHTS, *supra*, at 181-83. Ratification debates from those states demonstrate that the proposed amendments had nothing to do with an individual right to possess arms, whether for personal or other use. Indeed, the ratification debates were almost entirely — but not completely — devoid of any mention of an individual right to own weapons.[224] Rather, the proposed amendments were

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[223] The Civil War and its consequences, including the adoption of the Fourteenth Amendment, appear to have settled a number of the theoretical issues that caused the Anti-Federalists such concern; the question of a national as opposed to state-by-state military defense force would also seem somewhat academic after World War I, World War II, the Cold War, and Al Qaeda.

[224] None of the major proposals for a Bill of Rights included any provision affording individuals such a right. For instance, two of the more prominent Anti-Federalist critics of the proposed constitution, Mason and Richard Henry Lee, both of Virginia, published highly influential objections to the new Constitution. However, although these two statesmen "articulated nearly all the major principles that would eventually be written into the Bill of

the result of concerns expressed in the various ratifying conventions — similar to those expressed at the Constitutional Convention itself — regarding the "defin[ition of] the respective powers of two levels of government" over the militia, and particularly over whether states would have the authority to arm the militias. Rakove, *supra*, at 161; *see* Finkelman, *supra*, at 224-25 (citing state ratification debates from New York and Massachusetts).

One of the strongest attacks on the proposed treatment of the militia in the Constitution was delivered by George Mason at the Virginia ratifying convention:

> The militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless—by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them, &c. . . . Should the national government wish to render the militia useless, they may neglect them, and let them perish, in order to have a pretence of establishing a standing army.

3 DEBATES, *supra*, at 379 (Statement of George Mason). Mason, like other Anti-Federalists, feared that the neglect of the state militia would lead to the oppression of the people, because without an effective militia the people would be defenseless, and thus he urged that the people's right to an effective militia be secured by an amendment to the new Constitution. He, like the others, saw the people's right to selfdefense exclusively in terms of the maintenance of a strong militia. Thus, the Anti-Federalists worried that the federal government would deprive the militia of its arms, not that it would take personal weapons from individual citizens. In order to meet that concern, Mason proposed an

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Rights, [they] made no claim for a purely private right to arms." Uviller & Merkel, *supra*, at 482. Similarly, Thomas Jefferson, who was in France during the ratification period, suggested a number of changes to the new Constitution in a letter to Madison; although protection against standing armies was among his proposals, an individual right to possess arms was not. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *quoted in* Uviller & Merkel, *supra*, at 494.

amendment similar in wording to what became the Second Amendment. He believed that the amendment would guarantee the people a militia that the state would be free to arm and thus render effective. He justified it as a protection for the people against tyranny and oppression by the federal government:

> But we need not give [the federal government] power to abolish our militia. If they neglect to arm them, and prescribe proper discipline, they will be of no use. I am not acquainted with the military profession. I beg to be excused for any errors I may commit with respect to it. But I stand on the general principles of freedom, whereon I dare to meet any one. *I wish that, in case the general government should neglect to arm and discipline the militia, there should be an express declaration that the state governments might arm and discipline them. I consider and fear the natural propensity of rulers to oppress the people. I wish only to prevent them from doing evil.* By these amendments I would give necessary powers, but no unnecessary power. If the clause stands as it is now, it will take from the state legislatures what divine Providence has given to every individual—the means of self-defence. Unless it be moderated in some degree, it will ruin us . . . .

Id. at 380 (emphasis added).

In short, to the extent that the ratification debates concerned firearms at all, the discussion related to the importance of ensuring that effective state militias be maintained, such militias being considered essential to the preservation of the people's freedom. Those who deemed the Constitution inadequate for this purpose, absent some amendment, emphasized the importance of the states' being afforded the right to arm their own militias, thus ensuring the people's right to maintain a military force for their self-defense.

There were only a few isolated voices that sought to establish an individual right to possess arms, and alone among the 13 colonies, New Hampshire, by a majority vote of the delegates to its ratifying convention, recommended a proposed amendment to the Constitution explicitly establishing a personal right to possess arms: "Congress

shall never disarm any Citizen unless such as are or have been in Actual Rebellion." Proposal 12 of the New Hampshire State Convention (June 21, 1788), *in* BILL OF RIGHTS, *supra*, at 181. The New Hampshire proposal is significant not only because it was substantially different from the proposals to emerge from the various other state conventions (which in turn were quite similar to that ultimately enacted as the Second Amendment), but also because it suggests that an amendment establishing an individual right to bear arms would have been worded quite differently from the Second Amendment. In no other state did a proposal to establish an individual right to possess arms gain significant support. For instance, while one member of the Pennsylvania ratifying convention vociferously urged the inclusion of such a proposal in the recommendations made by that body to the First Congress,[225] his views, like those of another few elsewhere who called for the establishment of such a right, were soundly rejected.[226] As two commentators have observed, "the failure of Pennsylvania's one man 'minority' merely accentuates the fact that opinion favoring a personal right to arms independent of the militia remained highly marginal in state conventions outside of New Hampshire." Uviller & Merkel, *supra*, at 486.[227] In sum, a careful review of the

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[225] *See The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, 3 THE COMPLETE ANTIFEDERALIST 151 (Herbert J. Storing, ed., 1981).

[226] The Pennsylvania minority, so frequently cited by the proponents of the individual rights view, also used language markedly different from that of the Second Amendment. Its proposal for a federal constitutional amendment, which was rejected in favor of the Second Amendment, would have unambiguously established a personal right to possess arms for personal purposes: "[N]o law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals . . . ." *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents*, at 623-24 (*quoted in* Finkelman, *supra*, at 208).

[227] One other proposal for an amendment establishing an individual right to possess arms might be considered, at most, moderately significant, if only because it was advanced by prominent Massachusetts Anti-Federalist and revolutionary leader

ratification debates demonstrates beyond question that opponents of the new Constitution sought amendment of the Militia Clauses in order to preserve the people's right to maintain an effective military force for their self-defense, and not to afford individuals a constitutional right to possess weapons.[228]

d. The First Congress and the Second Amendment

By the conclusion of the process by which the Constitution was ratified, there were already countless proposals for altering the new governing charter; the Virginia convention alone offered forty. Finkelman, *supra*, at 216. Madison, who was responsible for many of the compromises reached at the Constitutional Convention, as well as for many of The Federalist Papers, represented Virginia in the First Congress, which met in New York in April, 1789. He deftly pre-empted Anti-Federalist efforts to change fundamentally the new Constitution by introducing twelve proposed amendments soon after the new legislature convened. Uviller and Merkel, *supra*, at 498-99. Madison was unenthusiastic about the idea of upsetting the delicate balances achieved by the delegates in Philadelphia by importing new concepts into the document. He sought to ensure that the amendment process left the "structure and stamina of the Govt. as little touched as possible."
Letter from James Madison to Edmund Randolph (June 15, 1789) (*quoted in* Finkelman, *supra*, at 220); *see also* Paul

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Samuel Adams. The proposal failed to attract the support of many Massachusetts delegates, and is included in the Report of the Minority which was issued at the conclusion of that state's ratifying convention. Report of the Massachusetts Minority, Feb. 6, 1788, *in* BILL OF RIGHTS, *supra*, at 181.

[228] Professor Rakove takes traditional individual rights advocates to task in regard to their contrary analysis of the ratification process: "If Americans had indeed been concerned with the impact of the constitution on [the private right to arms], and addressed the subject directly, the proponents of the individual right theory would not have to recycle the same handful of references to the dissenters in the Pennsylvania Ratification Convention and the protests of several Massachusetts members against their state's proposed constitution, or to rip promising snippets of quotations from the texts and speeches in which they are embedded." Rakove, *supra*, at 109.

Finkelman, *James Madison and the Bill of Rights: "A Reluctant Paternity"*, 1990 SUP. CT. REV. 301, 309 (1991). The amendments Madison proposed sought to eliminate ambiguities in the document that had been ratified, or to enumerate principles that he believed were implicit within it. *Id.*[229] The debates of the First Congress regarding Madison's proposed Second Amendment, like the debates at the Constitution's ratifying conventions, support the view that the amendment was designed to ensure that the people retained the right to maintain effective state militias, the members of which could be armed by the states as well as by the federal government. Otherwise, the anti-Federalists feared, the federal government could, by inaction, disarm the state militias (and thus deprive the people of the right to bear arms). No one in the First Congress was concerned, however, that federal marshals might go house-to-house taking away muskets and swords from the man on the street or on the farm. Notably, *there is not a single statement in the congressional debate about the proposed amendment that indicates that any congressman contemplated that it would establish an individual right to possess a weapon. See* Rakove, *supra*, at 210-11. Moreover, in other public fora, some of the framers explicitly disparaged the idea of creating an individual right to personal arms. For instance, in a highly influential treatise, John Adams ridiculed the concept of such a right, asserting that the general availability of arms would "demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man — it is a dissolution of the government." 3 JOHN ADAMS, A

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[229] For instance, Madison resisted Anti-Federalist proposals to place limits on the national army, as well as on the authority of the federal government to call the state militia into federal service. Various amendments related to the national army had been offered, such as to restrict the standing army in peacetime, to require a supermajority for congressional authorizations regarding the federal army, or to impose a numeric limit on the size of any federal army. *See* Yassky, *supra*, at 607. Madison rejected all of them. Anti-Federalists offered dire predictions, particularly regarding the federal power to call forth state militias. They predicted that this power would lead to one state's militia being turned against another's, and that the federal government would force state militias to march to far-flung corners of the nation. *Id.*

DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES 475 (1787).[230]

Equally important, almost all of the discussion in the First Congress about the proposed amendment related to the conscientious objector provision, which, as we noted earlier, was ultimately removed. *See* 5 THE FOUNDER'S CONSTITUTION 210-12 (Philip B. Kurland & Ralph Lerner, eds., 1987) (minutes of congressional debate). The fact that the overwhelming majority of the debate regarding the proposed Second Amendment related to the conscientious objector provision demonstrates that the congressmen who adopted the amendment understood that it was concerned with the subject of state militias. A right not to bear arms due to conscientious objection can *only* mean a right not to be compelled to carry arms that the government seeks to make one bear — to perform military service that one is unwilling to perform. There is no possible relevance of the term "conscientious objection" to a constitutional amendment guaranteeing a private right to possess firearms. Thus, if the Second Amendment was in fact designed to establish an individual right, the debate over the conscientious objector provision would have been entirely purposeless.[231]

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[230] We differ with the Fifth Circuit's reading of the historical record in this respect. The *Emerson* court cites a number of general statements, both in the congressional record and outside of it, by "prominent Americans" that the first twelve proposed amendments, ten of which were ratified as the Bill of Rights, relate to individual rights. 270 F.3d at 245-55. It is of course true that the amendments primarily establish individual rights; however, it cannot be disputed that certain portions of the proposed amendments related to other matters. The Tenth Amendment, for instance, relates primarily to the balance of power between the state and federal governments. Additionally, the provision that was recently ratified as the Twenty-Seventh Amendment, but was originally promulgated with the original twelve amendments, relates to Congressional compensation, not individual rights. Thus, we find unconvincing the argument that because some legislators and public figures generally discussed the group of proposed amendments, as establishing individual rights, the Second Amendment establishes a private right to own or possess firearms.

[231] Comments of individual delegates also reveal that those who supported the Second Amendment did so because they sought to protect the people from federal hegemony. For instance, Anti-

[9] In sum, our review of the historical record regarding the enactment of the Second Amendment reveals that the amendment was adopted to ensure that effective state militias would be maintained, thus preserving the people's right to bear arms. The militias, in turn, were viewed as critical to preserving the integrity of the states within the newly structured national government as well as to ensuring the freedom of the people from federal tyranny. Properly read, the historical record relating to the Second Amendment leaves little doubt as to its intended scope and effect.

3. Text, History, and Precedent All Support the Collective Rights View of the Amendment.

We reaffirm our earlier adherence to the collective rights interpretation of the Second Amendment, although for reasons somewhat different from those we stated in *Hickman*. *Hickman* rested on a canvass of our sister circuits and a summary evaluation of *Miller*. *Miller* did not, however, definitively resolve the nature of the right that the Second Amendment establishes. As we observed earlier, the relevant statements in *Miller* are all expressed in negative terms. Although those negative statements rule out the traditional individual rights model, the Court took no specific affirmative position as to what rights the amendment does protect. Thus, our decision regarding the nature of the rights guaranteed by the Second Amendment must be guided by additional factors — the text and structure of the amendment, an examination of the materials reflecting the historical context in which it was adopted, and a review of

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Federalist Elbridge Gerry of Massachusetts sought elimination of the conscientious objector provision because he was concerned that if it were included in the federal constitution, then Congress, rather than the state legislatures, would define what constituted conscientious objection, and that Congress would thereby have excessive authority over the management of the state militia. Gerry concluded, "if we give a discretionary power [to the federal government] to exclude those from militia duty who have religious scruples, we may as well make no provision on this head." BILL OF RIGHTS, *supra*, at 185. Thus, in Gerry's view, if Congress, through the conscientious objector provision, could control membership in the militia, then there was little point to the Second Amendment at all. *Id.*

the deliberations that preceded the enactment of the amendment — considered in a manner that comports with the rationale of *Miller*.

[10] After conducting our analysis of the meaning of the words employed in the amendment's two clauses, and the effect of their relationship to each other, we concluded that the language and structure of the amendment strongly support the collective rights view. The preamble establishes that the amendment's purpose was to ensure the maintenance of effective state militias, and the amendment's operative clause establishes that this objective was to be attained by preserving the right of the people to "bear arms" — to carry weapons in conjunction with their service in the militia. To resolve any remaining uncertainty, we carefully examined the historical circumstances surrounding the adoption of the amendment. Our review of the debates during the Constitutional Convention, the state ratifying conventions, and the First Congress, as well as the other historical materials we have discussed, confirmed what the text strongly suggested: that the amendment was adopted in order to protect the people from the threat of federal tyranny by preserving the right of the states to arm their militias. The proponents of the Second Amendment believed that only if the states retained that power could the existence of effective state militias — in which the people could exercise their right to "bear arms" — be ensured. The historical record makes it equally plain that the amendment was not adopted in order to afford rights to individuals with respect to private gun ownership or possession. Accordingly, we are persuaded that we were correct in *Hickman* that the collective rights view, rather than the individual rights models, reflects the proper interpretation of the Second Amendment. Thus, we hold that the Second Amendment imposes no limitation on California's ability to enact legislation regulating or prohibiting the possession or use of firearms, including dangerous weapons such as assault weapons. Plaintiffs lack standing to assert a Second Amendment claim, and their challenge to the Assault Weapons Control Act fails.

C. The AWCA's Provisions Regarding Off-Duty Police Officers Do Not Offend The Fourteenth Amendment; However, There Is No Rational Basis For the Retired Officer Exemption.

Plaintiffs contend that the privileges that are afforded to off-duty and retired peace officers under the AWCA violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution. Specifically, they contend that the pertinent provisions afford benefits to off-duty and retired officers that are unavailable to the plaintiffs, and that there is no rational reason that they and other law-abiding citizens should be treated differently than off-duty and retired peace officers.[232] The district court held that both the off-duty provision and the retired officers exception comport with the requirements of the Equal Protection Clause. We affirm the district court's decision with respect to the off-duty provision, but reverse as to the exception for retired peace officers.

1. The Applicable Standard of Equal Protection Review

When a state statute burdens a fundamental right or targets a suspect class, that statute receives heightened scrutiny under the Fourteenth Amendment's Equal Protection Clause. *Romer v. Evans*, 517 U.S. 620, 631 (1996). Statutes that treat individuals differently based on their race, alienage, or national origin "are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1986). Statutes infringing on fundamental rights are subject to the same searching review. *See, e.g.*, *Zablocki v. Redhail*, 434

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[232] Plaintiffs have standing to bring these claims because they allege that the challenged provisions to the AWCA afford a benefit to some persons and not to others based on grounds that cannot survive Equal Protection scrutiny. If their arguments are correct, plaintiffs would suffer an equal protection injury. As the Supreme Court has explained:

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 666 (1993).

U.S. 374 (1978) (right to marry); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to interstate travel). However, if a legislative act neither affects the exercise of a fundamental right, nor classifies persons based on protected characteristics, then that statute will be upheld "if the classification drawn by the statute is rationally related to a legitimate state interest." *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). Here, plaintiffs assert that because their Second Amendment rights are fundamental, any statute allowing some persons to exercise those rights differently from others should be subject to strict scrutiny. Because we conclude in Section B, *supra*, that plaintiffs have no constitutional right to own or possess weapons, heightened scrutiny does not apply. Thus, we apply rational-basis review to plaintiffs' claims that the AWCA provisions violate the Equal Protection Clause.

2. General Principles of Rational-Basis Review.

The Supreme Court has observed that the rational-basis test is "a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions" is primarily a task for legislatures. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976). Nevertheless, several general principles may be distilled from the several (and sometimes contradictory) cases in which the Supreme Court has applied the test.

First, in order for a state action to trigger equal protection review at all, that action must treat similarly situated persons disparately. *City of Cleburne*, 473 U.S. at 439; *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause . . . keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike."); *Dillingham v. INS*, 267 F.3d 996, 1007 (9th Cir. 2001).

Second, when assessing the validity of legislation under the rational-basis test, "the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne*, 473 U.S. at 439; *see also Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

Third, there must exist some rational connection between the state's objective for its legislative classification and the means by which it classifies its citizens. Although rational basis review is undoubtedly deferential — indeed, a "paradigm of judicial restraint," *FCC v. Beach Communications*, 508 U.S. 307, 314 (1993) — it is nevertheless our duty to scrutinize the connection, if any, between the goal of a legislative act and the way in which individuals are classified in order to achieve that goal. "The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass . . . ." *Romer*, 517 U.S. at 632; *see also Nordlinger*, 505 U.S. 1, 31 (1992) (Stevens, J., dissenting) ("[D]eference is not abdication and "rational-basis scrutiny" is still scrutiny."); *Peoples' Rights Org. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998) ("Rational-basis review, while deferential, is not 'toothless.' " (quoting *Matthews v. Lucas*, 427 U.S. 495, 510 (1976)).

Finally, the burden falls upon the party attacking a legislative classification reviewed under the rational-basis standard to demonstrate that there is no reasonable basis for the challenged distinction. When a statute is reviewed under the rational-basis test, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citation and quotation marks omitted); *see also Lucas*, 427 U.S. at 510. The legislative record need not contain empirical evidence to support the classification so long as the legislative choice is a reasonable one. *Beach Communications*, 508 U.S. at 315; *Nordlinger*, 505 U.S. at 15 ("[T]he Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decision-maker actually articulate at any time the purpose or rationale supporting its classification.") (citation omitted). Although the government is relieved of providing a justification for a statute challenged under the rational-basis test, such a justification must nevertheless exist, or the standard of review would have no meaning at all. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be

attained." *Romer*, 517 U.S. at 632. With these general principles in mind, we turn to the two provisions that plaintiffs challenge under the Equal Protection Clause.

3. The Validity of the Two AWCA Provisions

a. The Off-duty Officer Provision

The appellants' attack on the AWCA provision applicable to off-duty peace officers is easily resolved. It is manifestly rational for at least most categories of peace officers to possess and use firearms more potent than those available to the rest of the populace in order to maintain public safety. The off-duty officer exception provides that an off-duty officer permitted to possess and use the assault weapons must do so only for "law enforcement purposes." § 12280(g). We presume that off-duty officers may find themselves compelled to perform law enforcement functions in various circumstances, and that in addition it may be necessary that they have their weapons readily available. Thus, the provision is designed to further the very objective of preserving the public safety that underlies the AWCA. Consequently, there is a rational basis for the provision, and it comports with the requirements of the Fourteenth Amendment.[233]

b. The Retired Officer Exception

In contrast, the retired officer exception has no such clearly rational basis. The amendments to the AWCA provide that the California agencies listed at note 6, *supra*, may sell or transfer assault weapons to a sworn peace officer upon the retirement of that officer. § 12280(h). The exception does *not* require that the transfer be for law enforcement purposes, and the possession and use of the weapons is not

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[233] One could question the wisdom of arming certain government officials categorized as "peace officers" by the AWCA — particularly park rangers and employees of the district attorney's office — with highpowered military-style weapons. However, that is not the basis for plaintiffs' challenge to this provision of the AWCA. The question is whether those officers furnished such weapons may use them for law enforcement purposes when off duty. As set forth in the text, inclusion of the limitation that the assault weapons are to be used for law enforcement purposes only renders the provision a rational one.

so limited.[234] Initially, we observe that allowing residents of California to obtain assault weapons for purposes unrelated to law enforcement is wholly contrary to the legislature's stated reasons for enacting restrictions on assault weapons. As set forth more fully above, the legislature found that "the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens in this state."[235] When the legislature first passed the AWCA, the entire Assembly, sitting as the Committee of the Whole, heard testimony from the California Attorney General, the chiefs of police of several local jurisdictions, public health experts, and the relatives of crime victims about the devastating effects of assault weapons on California communities. *See* 1 CAL. ASSEMBLY J., at 435-59 (Feb. 13, 1989). In light of the unequivocal nature of the legislative findings, and the content of the legislative record, there is little doubt that any exception to the AWCA unrelated to effective law enforcement is directly contrary to the act's basic purpose of eliminating the availability of high-powered, military-style weapons and thereby protecting the people of California from the scourge of gun violence.[236] *See United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("The challenged statutory classification . . . is clearly

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[234] It would appear from the wording of § 12285 that retired peace officers who obtain assault weapons for personal use upon retirement from government service are exempt from the registration and use restrictions of the AWCA. Whether or not they are, however, our conclusion is the same.

[235] California Governor Gray Davis, who signed the 1999 amendments to the AWCA including the retired officer exception, evinced a similar intent through his public statements. In announcing, with great fanfare, his support for the 1999 amendments to the AWCA, he proclaimed that "[t]here is no justification whatsoever for [assault weapons] on the streets of a civilized society." Martha L. Willman, *Davis Backs Bill to Limit Assault Gun Sale and Use Legislation*, L.A. TIMES, Apr. 27, 1999, at B2.

[236] While the grandfather clause may also appear to be inconsistent with this legislative intent, that clause is not challenged here. Equally important, the argument that a rational basis for the grandfather clause exists is entirely different from, and likely more substantial than, those put forward to justify the off-duty exception.

irrelevant to the stated purpose of the Act."). However, our inquiry cannot end here. We must attempt to identify *any* hypothetical rational basis for the exception, whether or not that reason is in the legislative record. *See id.* In response to a request from this court for supplemental briefing on the question of whether there is a rational basis for the retired officer exception, the state offered three justifications for the exception. None is in any way persuasive.

First, the state argues that because a similar exception exists in the federal assault weapons law enacted in 1994, the provision "ostensibly withstood the rational basis test federally." However, the mere existence of the same distinction in a federal statute is not probative evidence that the provision is rational. Although we must presume that the legislative classification challenged in this case has a rational basis, *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981), that presumption cannot be bolstered by the fact that the same classification exists in another jurisdiction's statute. An unconstitutional statute adopted by a dozen jurisdictions is no less unconstitutional by virtue of its popularity.

Second, the state argues that because some peace officers receive more extensive training regarding the use of firearms than do members of the public, allowing any retired officer to possess assault weapons for non-law enforcement purposes is reasonable. This justification is basically inconsistent with the legislative purpose of the AWCA; it bears no reasonable relationship to the stated legislative purpose of banning the possession and use of assault weapons in California, except for certain law enforcement purposes. The object of the statute is not to ensure that assault weapons are owned by those most skilled in their use; rather, it is to eliminate the availability of the weapons generally. Not only is the retired officers exception contrary to the purpose of the AWCA, its relationship to *any* legitimate state goal "is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446.

The state's third argument fails also. The state contends that the retired officers exception is rational because it allows retiring peace officers to keep their duty weapons, which in some cases the officer may have

purchased with his own funds. However, the retired officer provision contains no such limitation; indeed, on its face the statute would permit the transfer of any number of assault weapons to *any* peace officer, regardless of whether that officer had ever come into contact with the weapons being acquired. Indeed, in contrast to the off-duty officer provision, under the retired officers' exception the retiree may possess and use assault weapons for any purpose whatsoever.[237]

We may not complete our evaluation of the statute's validity merely by examining the state's proffered justifications for the law. Rather, we must determine whether *any* reasonable theory could support the legislative classification. *Heller*, 509 U.S. at 320. An exception to the assault weapons law for retired officers might arguably be rational if California required its retired peace officers to participate as reserves in the event of an emergency. However, there is no such requirement in California. Moreover, even if there were such a requirement, a statute that permitted retired peace officers — at their discretion — to obtain assault weapons and use them for unlimited purposes, and in an unregulated manner, would not reasonably advance the objective of establishing a reserve force of retired officers prepared to act in emergencies.

We thus can discern no legitimate state interest in permitting retired peace officers to possess and use for their personal pleasure military-style weapons. Rather, the retired officers exception arbitrarily and unreasonably affords a privilege to one group of individuals that is denied to others, including plaintiffs.

In sum, not only is the retired officers' exception contrary to the legislative goals of the AWCA, it is wholly unconnected to any legitimate state interest. A statutory exemption that bears no logical relationship to a valid state interest fails constitutional scrutiny. The 1999 AWCA amendments include, however, a severability provision providing that should any portion of the statute be found invalid, the balance of the provisions shall remain in force. Accordingly, because the retired officers' exception is an

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[237] We need not consider here whether any officers who may have purchased weapons prior to the adoption of the AWCA are covered by its grandfather clause. That issue is not before us.

arbitrary classification in violation of the Fourteenth Amendment, we sever that provision, § 12280(h)-(i), from the AWCA.

III. ADDITIONAL CONSTITUTIONAL CLAIMS

Plaintiffs assert three additional constitutional claims that we can dispose of readily. First, Plaintiffs who own assault weapons contend that the AWCA violates the takings clause of the Fifth Amendment because it reduces the value of those weapons. It is well-established, however, that a government may enact regulations pursuant to its broad powers to promote the general welfare that diminish the value of private property, yet do not constitute a taking requiring compensation, so long as a reasonable use of the regulated property exists. *Am. Sav. & Loan Ass'n v. County of Marin*, 653 F.2d 354, 368 (9th Cir. 1981) ("If the regulation is a valid exercise of the police power, it is not a taking if a reasonable use of the property remains."); *see Andrus v. Allard*, 444 U.S. 51, 66 (1979)("A reduction in the value of property is not necessarily a taking."). Here, plaintiffs who owned assault weapons prior to the enactment of the AWCA are protected by a grandfather clause that permits them to use the weapons in a number of reasonable ways so long as they register them with the state. In light of the substantial safety risk posed by assault weapons that prompted the passage of the AWCA, any incidental decrease in their value caused by the effect of that act does not constitute a compensable taking. *Am. Sav. & Loan Ass'n*, 653 F.2d at 368.

Second, plaintiffs challenge the registration provisions of the AWCA as violative of their informational privacy rights. Although there does exist an "individual interest in avoiding[government] disclosure of personal matters," *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977), that right "is not absolute; rather, it is a conditional right which may be infringed upon a showing of proper governmental interest." *Crawford v. United States Tr.*, 194 F.3d 954, 959 (9th Cir. 1999) (citing *Doe v. Attorney Gen.*, 941 F.2d 780, 796 (9th Cir. 1991)). Here, applying the factors set forth in *Doe*, we conclude that the government's goal in establishing a public registry of those who possess assault weapons is a proper governmental interest, and the plaintiffs' interests in

maintaining confidential the fact of their assault weapon ownership are minimal. Accordingly, we affirm the dismissal of this claim.

Finally, plaintiffs contend that the retired and off-duty officer provisions of the statute require association with law enforcement officers in order to obtain the benefits of the provisions. Thus, plaintiffs argue, the statute violates their First Amendment rights. This claim has no merit; even aside from the fact that we have directed that the retired officer provision be severed, the statute plainly requires no person to associate with any other person. The district court therefore correctly dismissed this claim as well.

IV. CONCLUSION

[11] Because the Second Amendment affords only a collective right to own or possess guns or other firearms, the district court's dismissal of plaintiffs' Second Amendment claims is AFFIRMED. Because the off-duty officer provision is supported by a rational basis, the district court's dismissal of plaintiffs' equal protection claim challenging that provision is also AFFIRMED. However, because no rational basis exists for the retired officers exception, we REVERSE the district court's dismissal of that claim and direct that judgment be entered for the plaintiffs in that regard. The constitutional challenges to the validity of the California Assault Weapons Control Act are all rejected, with the exception of the claim relating to the retired officers provision.

AFFIRMED in part, REVERSED in part, and REMANDED.

MAGILL, Circuit Judge, Special Concurrence:

I join parts I, II-C, and III of the court's opinion. Respectfully, I cannot join parts II-A and II-B, but I do concur in the judgment. Parts II-A and II-B consist of a long analysis involving the merits of the Second Amendment claims and the Ninth Circuit's adoption of the collective rights theory of the Second Amendment. As discussed below, this analysis seems unnecessary.

Article III of the Constitution requires that federal courts adjudicate only actual "cases" or "controversies." *E.g., Allen v. Wright*, 468 U.S. 737, 750 (1984). This requirement "defines with respect to the Judicial Branch the idea of

separation of powers on which the Federal Government is founded." *Id.* Among the doctrines that ensure federal courts only resolve "cases" or "controversies," Article III standing "is perhaps the most important." *Id.* The requirement of Article III standing "aids the federal judiciary to avoid intruding impermissibly upon the powers vested in the executive and legislative branches, by preventing courts from issuing advisory opinions not founded upon the facts of a controversy between truly adverse parties." *Scott v. Pasadena Unified Sch. Dist.*, ___ F.3d ___, ___ (9th Cir. 2002) (citing *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89-90 (1947)). "Article III standing is a jurisdictional prerequisite." *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

It is well established that, as a threshold matter, this court must determine whether the plaintiffs have standing to assert their claim. *E.g., Scott*, ___ F.3d at ___, ___ (stating that "[w]e must establish jurisdiction before proceeding to the merits of the case"); *Bird v. Lewis & Clark Coll.*, ___ F.3d ___, ___ (9th Cir. 2002) (recognizing that before reaching the merits of the case, the court must determine the threshold issue of standing); *Hickman*, 81 F.3d at 101 (discussing that the court is "bound to address the standing issue at the threshold of the case"). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of the particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The plaintiffs in this case are simply not entitled to standing and thus I cannot join the court's discussion of the merits of their Second Amendment claims.

Here, the court claims that "[a]lthough in every case we are required to examine standing issues first, . . . here an examination of that question requires us as a first step to conduct a thorough analysis of the scope and purpose of the Second Amendment. Only after determining the amendment's scope and purpose can we answer the question whether individuals, specifically the plaintiffs here, have standing to sue." Maj. Op. at 23-24 n.17 (internal

citation omitted). Respectfully, I disagree. Previously, this court decided the scope and purpose of the Second Amendment. We are bound by that precedent.

In *Hickman*, this court announced that the Second Amendment guarantees a collective right, not an individual right. 81 F.3d at 102. As such, this court held that an individual plaintiff lacks standing to enforce the right to keep and bear arms because "the states alone stand in the position to show legal injury when this right is infringed." *Id.* As recognized by my colleague Judge Reinhardt, we have no power to overrule *Hickman*; only an en banc panel may do so. *See* Maj. Op. at 22 n.15 (citing *Morton v. De Oliveira*, 984 F.2d 289, 292 (9th Cir. 1993)). Thus, we are bound by the *Hickman* decision, and resolution of the Second Amendment issue before the court today is simple: plaintiffs lack standing to sue for Second Amendment violations because the Second Amendment guarantees a collective, not an individual, right and thus plaintiffs are unable to establish injury in fact. *See Scott*, ___ F.3d at __ ("In order to establish standing, a plaintiff must first show that she has suffered an 'injury in fact.' " (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted))). Precedent mandates that we affirm the district court's dismissal of these claims for lack of standing. Accordingly, it is unnecessary and improper to reach the merits of the Second Amendment claims or to explore the contours of the Second Amendment debate.

Consequently, I join parts I, II-C, and III of the court's opinion and concur in its judgment that plaintiffs lack standing to challenge the AWCA.

DECISION OF DISTRICT COURT

FILED DEC 13, 2000 CLERK, U.S. DISTRICT COURT
Eastern District of California DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SEAN SILVEIRA; et al., *Plaintiffs*,
v.

BILL LOCKYER, Attorney General, State of California;
GRAY DAVIS, Governor, State of California, *Defendants*.

NO. CIV. S-00-0411 WBS/JFM
MEMORANDUM AND ORDER

Defendants, Bill Lockyer and Gray Davis move to dismiss plaintiffs' first, third, fourth, sixth, seventh and eighth claims for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), and plaintiffs' second and fifth claims for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

I. Facts

On January 1, 2000, Senate Bill 23 became state law as part of California Penal Code section 12280. Pursuant to section 12280, members of the public who, on or before December 31, 1999, lawfully possessed assault weapons, as they are now defined in California Penal Code section 12276.1, have until December 31, 2000, to register their assault weapons with the California Department of Justice, or remove the characteristics which make the firearm an assault weapon. Section 12280 was intended to expand the definition of assault weapons and to place restrictions on the manufacture, sale, possession, and use of the firearms described in the legislation. Section 12280 also bans the sale of large capacity magazines, defined as "any ammunition feeding device" capable of holding more than ten rounds of ammunition, but does not ban the possession of them. Plaintiffs filed this action for three stated purposes, only two of which are relevant to this motion. "First, it is a specific challenge to the current state of the law in the Ninth Circuit holdings. Second, it challenges the constitutionality of the current State of California gun laws." (Opp'n at 4:16—17).

II. Discussion

A. Standards for 12(b) (1) and 12(b) (6)

Where a jurisdictional issue is separable from the merits of a case, the court may determine jurisdiction under rule 12(b)(1). Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987). However, where the jurisdiction issue is "dependent on the resolution of factual issues going to the merits," the court may not resolve such disputes before trial.

Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983). Instead, the court must assume that the allegations in the complaint are true, unless controverted by undisputed facts in the record. Roberts, 812 F.2d at 1177.

A district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b) (6). In ruling on a 12(b) (6) motion, the court must view all allegations and draw all inferences in the light most favorable to the non-moving party. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). "A complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

B. Plaintiffs' First Cause of Action

In their first cause of action plaintiffs allege that section 2280 violates their Second Amendment right to bear arms "by virtue of its incorporation into the State Constitution and by virtue of the Fourteenth Amendment." Plaintiffs' claim fails for two reasons. First, the Ninth Circuit has clearly held that the Second Amendment does not constrain the states by virtue of the Fourteenth Amendment. See Fresno Rifle & Pistol Club, Inc. v. Van De Ramp, 965 F.2d 723, 729—31 (9th dr. 1992); see also Hickman v. Block, 81 F.3d 98, 103, n.10 (9th Cir. 1996).

Second, following precedent from the United States Supreme Court in United States v. Miller, 307 U.S. 174 (1939), the Ninth Circuit has also clearly held that the Second Amendment guarantees a collective right of the states to maintain armed militia rather than an individual right. Hickman, 81 F.3d at 102.

Accordingly, plaintiffs cannot prove any set of facts whereby they can sustain a claim for relief, and their first cause of action must be dismissed.

C. Plaintiffs' Second Cause of Action

Plaintiffs allege in their second cause of action that "their property is now devalued since they are unable to obtain the highest value that their property would be worth in an open and free market." (Am. Compl. 91 85). The amended complaint further alleges that the plaintiffs' property has "now been rendered worthless." (Id.) Plaintiffs claim this is a

deprivation of the use and enjoyment of their property without due process of law, in violation of their rights under the Fifth and Fourteenth Amendments. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

The Ninth Circuit addressed the converse of this argument in San Diego County Gun Rights Committee v. Reno, 98 F.3d 1121 (9th Cir. 1996). The plaintiffs in that case, who claimed to be potential purchasers of firearms, argued that the price of banned firearms increased as much as 100% when the federal government enacted the Crime Control Act. at 1130. Plaintiffs here, presumably potential sellers, argue that their weapons have been "rendered worthless." However, the standing analysis is the same: failure to prove an economic injury that is traceable to the government's action results in a lack of standing. See Lujan v. Defenders of Wildlife, 504 U.S. 555, (1992).

Because plaintiffs' alleged economic injury occurred in a market environment, they cannot trace their injury to any action taken by the government. See San Diego County, 98 F.3d at 1130, citing Common Cause v. Department of Energy, 702 F.2d 245, 251 (D.C. Cir. 1983) ("{W]here injury is alleged to occur within a market context, the concepts of causation and redressability become particularly nebulous and subject to contradictory, and frequently unprovable analyses."). Furthermore, any decrease in the value of the identified assault weapons will be the result of third party action by dealers or manufacturers. San Diego County, 98 F.3d at 1130.

Accordingly, because plaintiffs do not have Article III standing, this court lacks subject matter jurisdiction and their second claim must be dismissed. Id.; see also Lujan, 504 U.S. at 560.

D. Plaintiffs' Third Cause of Action

Plaintiffs allege in their third cause of action that section 12280 violates their substantive due process rights under the Fourteenth Amendment because it infringes on their individual right to possess firearms. (Am. Compl. ¶ 91). Plaintiffs claim their individual right to possess firearms is a "liberty interest imbedded in both the Second Amendment and Fourteenth Amendment . . . ." Id. Plaintiffs further claim that section 12280 infringes on that interest because the "highly technical" and obscure statute criminalizes

> conduct that is not "inherently evil," thus creating the possibility that individuals will be held accountable for unknowingly violating the law. (Am. Compl. ¶¶ 91—97).
>
> Liberty interests protected by the Due Process Clause are limited to the specific freedoms found in the Bill of Rights and those precisely described by the Supreme Court. See Washington v. Glucksberg, 521 U.S. 702, 719—20 (1997) Therefore, in order to allege a protected liberty interest, the plaintiffs must be able to point to either a freedom identified in the Bill of Rights or one of the liberty interests identified by the Supreme Court. Id. At 720—22.
>
> Plaintiffs specify the Second Amendment as the basis for their alleged liberty interest in individually possessing firearms. As discussed above, the Second Amendment contains no such guarantee. See Hickman, 81 F.3d at 101. Not surprisingly, neither has the Supreme Court ever identified an individual's right to possess firearms as a protected liberty interest under the Fourteenth Amendment. It is not for this court to expand the definition of "liberty" to include a right which is found neither in the Bill of Rights nor in the concrete examples deliberately supplied by the Supreme Court. See Glucksberg, 521 U.S. at 722.[238]

Accordingly, plaintiffs cannot prove any set of facts whereby relief

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[238] Even if plaintiffs had alleged a protected liberty interest, their third cause of action would still fail. Plaintiffs seem to suggest that the holding in Lambert v. California, 355 U.S. 225 (1997), should be read as a determination by the Supreme Court that statutes prohibiting otherwise lawful conduct are unconstitutional because individuals will not be "on notice" that they are breaking the law. (Am. Compl. ¶91 91-97). Plaintiffs' reliance on Lambert is misguided. The Supreme Court found the statute in Lambert unconstitutional because it did not contain an element of intent. See Lambert, 355 U.S. at 226. Section 12280, as interpreted by the California Supreme Court, does contain an element of intent. See In re Jorge N., 23 Cal. 4th 866 (2000) ("... the People must prove, that is, that a defendant charged with possessing an unregistered assault weapon knew or reasonably should have known the characteristics of the weapon bringing it within the registration requirements ...." Therefore, the narrow holding of Lambert is inapposite. Furthermore, the Supreme Court has carefully limited the application of Lambert. See Texaco v. Short, 454 U.S. 516, 537 n.33 (1982). The Fifth Circuit has noted the Supreme Court's reticence to read Lambert too broadly, for fear the unique case would "swallow the general rule that ignorance of the law is no excuse." United States v. Giles, 640 F.2d 621, 628 (5th Cir. Unit A, 1981).

can be granted, and their third cause of action must be dismissed.

E. Plaintiffs' Fourth Cause of Action

Plaintiffs' fourth cause of action alleges that section 12280 violates the Equal Protection Clause of the Fourteenth Amendment because it allows peace officers, whether on duty, off duty, or retired, to possess assault weapons.[239] (Am. Compl. 9191 103-106.)

Section 12280 contains a classification on its face because it provides an exemption for law enforcement officials.[240] However, the exemption is not based on an inherently suspect classification such as race or national origin, nor does it involve a fundamental right. See Hickman, 81 E.3d at 101 (finding that the Second Amendment "does not protect the possession of a weapon by a private citizen"); see also San Diego County, 98 F.3d at 1125 (finding that the Ninth Amendment does not encompass "a fundamental, individual right to bear firearms"). Thus, to prevail on their equal protection claim, plaintiffs must show that section 12280 is not rationally related to a legitimate government purpose. See National Association for the Advancement of Psychoanalysis v. California 3d. of Psychology, 228 F.3d 1043, 1049 (9th dir. 2000) (the court applies rational basis review unless the statute involves an inherently suspect classification or interferes with a fundamental right).

The court may properly consider the rational basis of a

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[239] The fourth cause of action also appears to allege a claim based on the Privileges and Immunities Clause of "Article I, Section 8 of the California Constitution." (Am. Compl. 91 21 106). However, "[t]o state a claim for relief in an action brought under § 1983, [plaintiffs] must establish that they were deprived of a right secured by the Constitution or laws of the United States." American Mfrs. Nut. Ins. Co., v. Sullivan, 526 U.S. 40, 49 (1999).

[240] Section 12280(f) states: "Subdivisions (a) and (b) shall not apply to the sale to, purchase by, or possession of assault weapons by the Department of Justice, police departments, sheriffs' offices, marshals' offices, the Youth and Adult Corrections Agency, the Department of the California Highway Patrol, district attorneys' offices, Department of Fish and Came, Department of Parks and Recreation, or the military or naval forces of this state or of the United States for use in the discharge of their official duties." Cal. Penal Code § 12280(f).

challenged statute on a motion to dismiss pursuant to Rule 12(b)(6). Aleman v. Glickman, 217 F.3d 1191, 1200 (9th Cir. 2000) (applying rational basis test in reviewing and affirming dismissal for failure to state a claim). In reviewing a statute to determine whether it has a rational basis, the court examines whether the statute is "rationally related to a legitimate state interest." California 3d. of Psychology, 228 F.3d at 1049. "[A] statutory classification . . . must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Id. at 1201 (quoting F.C.C. v. Beach Communications, Inc., 508 U.S. 307 (1993).). The law does not "require that the government's action actually advance its stated purposes, but merely [looks] to see whether the government could have had a legitimate reason for acting as it did." Id. (quoting Dittman v. California, 191 F.3d 1020, 1031 (9th Cir. 1999).

The regulation of firearms under section 12280 is within the State's police power, which is "one of the most essential[,] . . . and always one of the least limitable of the powers of government." District of Columbia v. Alice Brooke, 214 U.S. 138, 149 (1909); see United States v. Lopez, 5l4 U.S. 548, 567 (1995) (concluding that to allow federal regulation of firearms possession in local school zones would be "to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"). In accordance with this power, a State has a legitimate interest in restricting the possession of certain assault weapons. See Cal. Penal Code §12276 (defining assault weapons as "semiautomatic firearms" and providing a list of restricted weapons). Conversely, the State must insure that its peace officers are sufficiently armed to enforce the law. Thus, it is not merely "conceivable," but undeniable that the exemptions for law enforcement officers in section 12280 are rationally related to the government's duty to preserve the peace.

Plaintiffs argue that the exemption is over-inclusive because it includes off—duty and retired peace officers. However, it is not inconceivable that off duty police officers, or even retired ones, may be called upon to perform law enforcement functions which ordinary citizens may not be expected to perform. In performing those kinds of functions, it is not

unreasonable for the legislature to allow those off duty or retired officers access to weapons which they would not want in the hands of the general civilian populace. "[L]egislatures are given leeway under rational-basis review to engage in such line drawing." Taylor v. Rancho Santa Barbara, 206 F.3d 932, 936 (9th Cir. 2000). This court cannot conclude that the Legislature's decision to categorically exempt "sworn peace [officers]" from the prohibitions of section 12280 was irrational. Cal. Penal Code § 12280(f)—(i); cf. Autotronic Systems, Inc. v. City of C'Oeur D'Alene, 527 F.2d 106 at 108 (9th Cir. 1975) (declining to second guess the Legislature's actions).

Accordingly, plaintiffs cannot prove any set of facts whereby they could sustain a claim for relief, and their fourth cause of action must be dismissed.

F. Plaintiffs' Fifth Cause of Action

Plaintiffs' fifth cause of action alleges a violation of equal protection on the ground that "Sheriffs and State Law Enforcement officials are currently issuing concealed weapons permits on a discriminatory basis." (Am. Compl. 91 112). In addition, plaintiffs appear to allege that a separate statute, California Penal Code section 12031(b), violates equal protection because it exempts law enforcement officials from restrictions against the carrying of loaded firearms and allows them to obtain Carry Concealed Weapon permits ("CCW") without showing "good cause."[241] The court lacks subject matter jurisdiction over the fifth cause of action because there are no facts that would lead one to

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[241] Plaintiffs specifically allege that section 12031 allows law enforcement officials to obtain concealed weapons permits without showing good cause, while civilians must show good cause to obtain a permit under section 12050. Section 12050 provides that persons applying for a license to carry a concealed weapon must show "good moral character" and "good cause." Cal. Penal Code § 12050(a).

The language of Penal Code section 12031 provides: "(a)(1) A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street Cal. Penal Code § 12031 (a) (1). Section 12031(b) states that subdivision (a) shall not apply to peace officers, whether active or honorably retired. Cal. Penal Code § 12031(b).

believe that plaintiffs have tried and failed to obtain a CCW. Moreover, defendants are not even the persons authorized to issue CCWs. See Cal. Penal Code § 12050 (a) (1) (A)-(B) (providing that the county sheriff or the chief of a municipal police department may issue a CCW).To meet the case-or-controversy requirement of Article III of the United States Constitution, "a litigant must have 'standing' to invoke the power of a federal court." Hickman, 81 F.3d at 101 (9th Cir. 1996) ("Article III standing is a jurisdictional prerequisite."). A plaintiff has standing under Article III if (1) he has suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely that the injury will be redressed by a favorable decision. See Lujan, 504 U.S. at 560-561. "The party invoking federal jurisdiction bears the burden of establishing these elements." Id. at 560. In their fifth cause of action, plaintiffs generally allege injury as a result of "the loss of use and enjoyment of constitutional rights." (Am. Compl. ¶ 122). However, plaintiffs allege no facts suggesting either a present or imminent injury as a result of conduct by defendants. As a result, plaintiffs do not have standing to raise an equal protection claim against defendants for the alleged discriminatory issuance of CCWs or to challenge the statutory requirements for obtaining a CCW. Accordingly, plaintiffs cannot prove any set of facts whereby they can sustain a claim for relief, and their fifth cause of action must be dismissed.

C. Plaintiffs' Sixth Cause of Action

Plaintiffs allege in their sixth cause of action that section 12280 violates their right to privacy under the United States and California constitutions because the mandatory registration provision will allow the general public access to their private information,[242] and it will allow the government to "spy on them." (Am. Compl. ¶¶ 165-166).

There is no express right of privacy found in the United

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[242] Plaintiffs cite Gov't Code Section 6250 et seq., which provides that members of the public may access information contained within the Department of Justice. Therefore, because section 12280 mandates registration of assault weapons with the Department of Justice, the public will have access to the information that these individuals own assault weapons.

States Constitution. Rather, the constitutional right to privacy has been identified by the Supreme Court in discrete areas of conduct, falling within the "penumbra" of privacy rights that radiate from the Fourteenth Amendment. See Griswold v. Connecticut, 381 U.S. 479 (1965). The Ninth Circuit recognizes two distinct kinds of constitutionally protected privacy interests in Supreme Court precedent: (1) "... the individual interest in avoiding disclosure of personal matters," (2) "the interest in independence in making certain kinds of important decisions." Crawford v. United States Trustee, 194 F.3d 954, 958 (9th Cir. 1999).

Plaintiffs appear to argue that the mandatory registration of firearms violates the first type of constitutionally protected privacy interest, "informational privacy." Because the right to informational privacy is not an absolute right, plaintiffs must establish that their interest in keeping private their possession of assault weapons outweighs the government's interest in maintaining and properly disclosing information regarding the same. See Id.

The court considers the following factors, among others, when weighing plaintiffs' interest in keeping private the information that plaintiffs own assault weapons, against the government's interest in regulating firearms:

the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there's an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

Crawford, 194 F.3d at 959 (citing Doe v. Attorney General, 941 F.2d 780, 796 (9th Cir. 1991).

The Ninth Circuit found the government's prevention of fraud through dissemination of individual social security numbers, names and addresses, was not outweighed by an individual's right to keep that information private. Crawford, 194 F.3d at 960. The court found the government's interest in preventing crime outweighed the potential for identity fraud alleged by the plaintiffs. Id. Certainly ownership of an assault weapon is not more personal than an individual's social security number, name and address.

Plaintiffs cite no authority to support their proposition that public access to information regarding their ownership of assault weapons will violate their constitutional right to informational privacy. Further, plaintiffs have not alleged any facts to suggest a potential for harm, should the public obtain the information contained in the registry. On the other hand, the government has a recognized and legitimate interest in regulating firearms.

Accordingly, plaintiffs cannot prove any set of facts whereby they can sustain a claim for relief, and their sixth cause of action must be dismissed.[243]

H. Plaintiffs' Seventh Cause of Action

Plaintiffs allege in their seventh cause of action that section 12280 violates their First Amendment right to freedom of association because it forces plaintiffs "to become associated with a group of individuals employed by the government if they want to receive the same perks and advantages as others so situated." (Opp'n at 35:20—21)

In Besig v. Dolphin Boating & Swimming Club, 683 F.2d 1271, 1276 (9th dir. 1982), the Ninth Circuit held that a statute, which by its express language neither forbids nor mandates association with any individual or group does not violate the First Amendment right to freedom of association nor its correlative right not to associate. Plaintiffs' assertion in this case that they will be "forced" to associate with peace officers is not based on express, mandatory language in the statute.

Accordingly, plaintiffs cannot prove any set of facts whereby they can sustain a claim for relief, and their seventh cause of action must be dismissed.

I. Plaintiffs' Eighth Cause of Action

In their eighth cause of action, plaintiffs allege that section 12280 violates their natural right to keep and bear arms pursuant to the Ninth and Fourteenth Amendments. Again,

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[243] Assuming this court had jurisdiction to determine their challenges to the state constitution, plaintiffs' additional allegation that section 12280 violates their right to privacy under the California Constitution also fails. The California Supreme Court has clearly identified the regulation of firearms, including their registration, to be a proper police function. Galvan v. Superior Court, 70 Cal.2d 851, 866 (1969).

plaintiffs are advancing an argument that the Ninth Circuit has already summarily rejected.

First, the Ninth Amendment is not an independent source of constitutional rights. Schowengerdt v. United States, 944 F.2d 483, 490 (9th Cir. 1991). The Ninth Amendment has been interpreted to contain no rights at all, but to be simply a guide for reading the Constitution. Id. (citing Laurence H. Tribe, American Constitutional Law 776 n.14 (2d ed. 1988).).

Second, the Ninth Circuit has unequivocally held that the Ninth Amendment "does not encompass an unenumerated, fundamental, individual right" to possess a firearm. San Diego County, 98 F.3d at 1125. Consequently, plaintiffs have no legal basis for their claim.

Accordingly, plaintiffs cannot prove any set of facts whereby they can sustain a claim for relief, and their eighth cause of action must be dismissed.

IT IS THEREFORE ORDERED defendants' motion be, and the same hereby is, GRANTED. Plaintiff's first, second, third, fourth, fifth, sixth, seventh and eighth claims are hereby DISMISSED without leave to amend. DATED: December 12, 2000.

WILLIAM B. SHUBB - UNITED STATES DISTRICT JUDGE