

DO FEDERAL FIREARMS LAWS VIOLATE THE SECOND AMENDMENT BY DISARMING THE MILITIA?

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“O sir, we should have fine times, indeed, if, to punish tyrants, it were only sufficient to assemble the people! Your arms, wherewith you could defend yourselves, are gone. . . . Did you ever read of any revolution in a nation . . . inflicted by those who had no power at all?”¹

I. INTRODUCTION

What restrictions on the rights protected by the Second Amendment are constitutionally permissible within the Amendment’s requirement that “the right of the people to keep and bear Arms shall not be infringed”?² In particular, what does the Amendment’s Militia Clause³ say about what types of weapons deserve the Amendment’s protection? Does its reference to the necessity of a well-regulated militia indicate that military weapons suitable for militia service deserve the special protection of the Amendment? Can an avowed originalist allow policy considerations to temper the revolutionary nature of the Amendment in order to make it more palatable?⁴

A. Individual Versus Collective Right

In recent years, through the work of several noted constitutional scholars, the conclusion that the Amendment’s Framers intended to protect an individual right to possess and carry firearms, as opposed to an amorphous “states’ right” to arm state militias or the National Guard, has been widely accepted by legal academics of all stripes.⁵ Although the courts

1. Patrick Henry, Virginia Constitutional Ratifying Convention, 1788, *quoted in* THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 51 (Jonathon Elliot ed., 1907).

2. “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.

3. *Id.* (“A well regulated Militia, being necessary to the security of a free State . . .”).

4. Some readers might consider the conclusions of this note as evidence of the fatal impracticality of originalism in constitutional interpretation. This Note will accept as a premise the appropriateness of originalism. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854–56 (1989). It will not condone, however, a results-oriented “faint-hearted originalism” (which really is not originalist at all), which would bend the conclusions of an originalist interpretation to conform to potentially desirable policy objectives. Compare *id.* at 861 (confessing to a “faint-hearted originalism”) with Randy Barnett, *Scalia’s Infidelity: A Critique of Faint-Hearted Originalism*, 75 U. CIN. L. REV. (forthcoming fall 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=880112.

5. See, e.g., CLAYTON CRAMER, FOR DEFENSE OF THEMSELVES AND THE STATE 61 (1994); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF THE CONSTITUTIONAL RIGHT (1984); Sanford Levinson, *The Embarrassing Second Amendment*,

have been slow to adopt this interpretation, it seems inevitable that they will. The Department of Justice has promulgated a memorandum endorsing the individual-rights interpretation, sometimes called the “standard model,”⁶ and the Fifth Circuit is the first federal appellate court to have adopted it.⁷ Even Congress has enacted statutory language that acknowledges the individual right to keep and bear arms.⁸ Several other circuits have rejected this plain-language interpretation in favor of one that reads the Amendment as guaranteeing a collective or states’ right, relying largely on a probable misreading of the Militia Clause of the Amendment, or on erroneous extension of prior decisions. Under this reading, the Militia Clause would indicate that unlike the balance of the first eight amendments to the Constitution, all of which protect individual rights from governmental encroachment, the Second Amendment protects only the rights of states to arm their militias.⁹ The purpose of this Note is not to detail the reasons why this position is untenable. They have been amply explored elsewhere.¹⁰ It seems all but inevitable that the rest of the courts will be forced to concede this point, if not by force of reason, then by an eventual U.S. Supreme Court opinion on the matter.¹¹

99 YALE L.J. 637 (1989); Lucas Powe, *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311 (1997).

6. Whether the Second Amendment Secures an Individual Right, Op. Off. Legal Counsel 106 (2004), available at <http://www.usdoj.gov/olc/secondamendment2.pdf>.

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

8. “The Congress finds that the rights of citizens to keep and bear arms under the Second Amendment to the United States Constitution . . . require additional legislation to correct existing firearms statutes and enforcement policies.” Firearms Owners’ Protection Act (FOPA) Pub. L. 99-308 § 1(b), 100 Stat. 449 (1986) (codified in scattered sections of 18 U.S.C. § 921–929). Unfortunately, FOPA also places significant restrictions on the type of firearms which are the particular concern of this Note. See 18 U.S.C. § 922(o) (2000).

9. See, e.g., *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995) (“[T]he Second Amendment preserves a collective, rather than individual, right.”); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (“Since the Second Amendment right ‘to keep and bear Arms’ applies only to the right of the State to maintain a militia and not to the individual’s right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm.”); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999) (noting that the Second Amendment’s introductory clause “suggests” that it “inures not to the individual but to the people collectively”); *Hickman v. Block*, 81 F.3d 98, 99 (9th Cir. 1996) (“[T]he Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen.”).

10. See *supra* note 5 and accompanying text.

11. To date, the Supreme Court has declined to rule on the issue. The Court denied certiorari in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), *reh’g denied*, 328 F.3d 567

B. *Qualified Individual Right*

Some of the previous champions of the states' right interpretation now concede that the Amendment protects a right of individuals; however, they claim that the Militia Clause demonstrates that this individual right was meant to be exercised only within the context of membership in an organized militia.¹² This attempt to revive the defeated collective-rights interpretation under a different guise seems doomed to fail, for reasons that have also been well documented elsewhere.¹³ Essentially, the members of the militia whose rights the Amendment was ratified to preserve were expected to arm themselves in anticipation of militia service, whether or not they ever served actively in the militia.¹⁴ Thus the right of individuals to possess weapons suitable for militia service was the right that the Amendment was primarily intended to safeguard. Militia service was important enough among the priorities of the Framers of the Second Amendment to warrant mention in the qualifying Militia Clause, and this service was understood to include a military check against enemies of freedom both foreign and domestic.¹⁵ Still, the readiness for service in the

(2003), *cert. denied*, 540 U.S. 1046 (2003), in which the Ninth Circuit affirmed the district court's rejection of a Second Amendment challenge to California's Assault Weapons Control Act, CAL. PENAL CODE § 12275–12290 (West 2006), adopting the collective or states' rights interpretation. Rehearing en banc was denied over vigorous dissents rejecting the collective rights model in favor of the individual rights interpretation. *Silveira*, 328 F.3d at 568 (Pregerson, J., dissenting), 568 (Kozinski, J., dissenting), 570 (Kleinfeld, J., dissenting), 592 (Gould, J., dissenting).

12. See H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* 31 (2002).

13. Randy Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237 (2004); Nelson Lund, *Putting the Second Amendment to Sleep*, 8 GREEN BAG 100 (2004), available at <http://www.law.gmu.edu/pubs/GreenBagRev2dAmend.pdf>.

14. See *An Act More Effectually to Provide for the National Defence by Establishing an Uniform Militia Throughout the United States*, 1 Stat. 271 (May 1792) (requiring every member of the militia to provide himself with musket or flintlock, bayonet, and ammunition). See also *Letters From the Federal Farmer XVIII*, Jan. 25, 1788, 2 COMPLETE ANTI-FEDERALIST 342 (Herbert Storing, ed., 1981) (“[N]or does it follow from this, that all promiscuously must go into actual service in every occasion.”).

15. The Framers recognized that in a republic, sovereignty lies in the People. U.S. CONST. pmbl. Thus, the right to resort to force of arms, either in defense of community, nation, or as the final check on abuse of governmental power, must ultimately reside with the sovereign People as well. See *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776) (“[W]henever any Form of Government becomes destructive of these ends [the securing of the inalienable rights of Life, Liberty, and the pursuit of Happiness], it is the Right of the People to alter or abolish it.”).

militia that the Amendment was designed to protect was based on a right to individual ownership of arms.¹⁶

C. *Scope of This Note*

There are many great books and articles that survey a substantially similar sampling of Supreme Court dicta, legislative history, and contemporary statements from the period of the framing.¹⁷ However, this Note will not revisit that well-established line of reasoning at great length. Having ascertained the contours of the rights protected by the Second Amendment, the next logical question is, under such an interpretation, what restrictions on the right are permitted by the Amendment? While this Note does not purport to answer this question definitively, it will examine several statutory schemes in this light, namely: the 1934 National Firearms Act (NFA);¹⁸ the 1968 Gun Control Act (GCA);¹⁹ the 1986 Firearms Owners Protection Act;²⁰ the 1994 Brady Act;²¹ the now expired 1994 Assault Weapons Ban (AWB);²² the failed Gun Violence Prevention Act or “Brady Bill II,” of 1994;²³ and California’s “Assault Weapons Control Act” (CAWCA).²⁴

16. See, e.g., Fairfax County Militia Plan, in 1 GEORGE MASON, PAPERS 215–16 (1970), quoted in HALBROOK, *supra* note 5, at 61 (stating that “a well-regulated militia, composed of the Gentlemen, Freeholders, and other Freemen” was necessary to protect “our antient Laws & Liberty” from the standing army “[a]nd we do *each of us, for ourselves respectively*, promise and engage to keep a good Fire-lock in proper Order, & to furnish Ourselves as soon as possible with & always keep by us, one Pound of Gunpowder, four Pounds of Lead, one Dozen Gun Flints, & a pair of Bullet-Moulds, with a Cartouch box, or powder-horn, and Bag for Balls.”) (emphasis added).

17. One of the most thorough and concise of these is contained in *United States v. Emerson*, 270 F.3d 203, 218–60 (5th Cir. 2001).

18. Pub. L. 474, 48 Stat. 1236 (1934) (current version at 26 U.S.C. §§ 5801–5802, 5811–5812, 5821–5822, 5841–5849, 5851–5854, 5861, 5871–5872 (2000)). This Note will not consider the Federal Firearms Act of 1938, formerly 15 U.S.C. §§ 901–910, which was repealed as part of the Gun Control Act of 1968. Pub. L. 90-351, tit. IV, § 906, 82 Stat. 234 (1968).

19. Pub. L. 90-351, tit. IV, § 902, 82 Stat. 226 (1968) (codified at 18 U.S.C. § 921–928 (2000)).

20. Pub. L. 99-308, 100 Stat. 449 (1986) (codified as scattered sections of 18 U.S.C. §§ 922–930 (2000)).

21. Pub. L. 103-159, 107 Stat. 1536 (1993) (codified in scattered sections of 18 U.S.C.).

22. Pub. L. 103-322, §§ 110101–110106, 108 Stat. 1796 (1994) (codified at 18 U.S.C. § 922(v)–(w) (repealed Sept. 13, 2004 as provided by § 110105 of the Act)).

23. H.R. 3932, 103d Cong. (1994); S. 1882, 103d Cong. (1994).

24. CAL. PENAL CODE § 12275 *et seq.* (West 2000 & Supp. 2006). See also *id.* §§ 12220–12251 (having similar requirements for full automatic firearms, many of which were incorporated against semi-automatic rifles by the 1989 Act).

D. *The Question of Incorporation*

One difficulty is the question of incorporation. At this time, the Supreme Court has incrementally determined that almost all of the rights protected by the first eight amendments to the Constitution are incorporated against the states, except for those protected by the Second and Third Amendments and the Seventh Amendment right to jury trial in civil cases.²⁵ In other words, with those exceptions, the rights protected by the rest of the “first eight,” may not be unduly infringed by either the federal government or the government of the several states. Although there is ample evidence that the Framers of the Fourteenth Amendment intended to incorporate the entire Bill of Rights against the states,²⁶ I will primarily examine the constitutionality of various federal laws under the proper interpretation of the Amendment. Nonetheless for illustrative purposes I will also consider one state-law regime, its constitutionality, and its effect on the arming and maintenance of the militia, assuming *arguendo* that the Second Amendment is incorporated against the states through the Fourteenth Amendment.

E. *A Hypothetical Analogy*

The rights enumerated in the other amendments have been given broad, even prophylactic protection. A few examples will help illustrate this. First Amendment rights to free speech, freedom of the press, and right of association and petition have been deemed so essential, that while we do not literally interpret

25. The Supreme Court has incorporated the following provisions of the Bill of Rights against the states through the Fourteenth Amendment: *Fiske v. Kansas*, 274 U.S. 380 (1927) (the First Amendment rights of speech, press, and religion); *Mapp v. Ohio*, 367 U.S. 643 (1961) (the Fourth Amendment rights against unreasonable searches and seizures); *Malloy v. Hogan*, 378 U.S. 1 (1964) (the Fifth Amendment right to not be compelled to self-incriminate); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (the Sixth Amendment right to jury trial); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (the Sixth Amendment right to counsel); *Klopper v. North Carolina*, 386 U.S. 213 (1967) (the Sixth Amendment right to speedy trial); *In re Oliver*, 333 U.S. 257 (1948) (the Sixth Amendment right to public trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (the Sixth Amendment right to confrontation of witnesses); *Washington v. Texas*, 388 U.S. 14 (1967) (the Sixth Amendment right to compulsory process for obtaining witnesses); *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (the Eighth Amendment); *Robinson v. California*, 370 U.S. 660, 666-667 (1962) (the Eighth Amendment).

26. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring); *Betts v. Brady*, 316 U.S. 455, 476 n.1 (1942) (Black, J., dissenting); Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1227 (1992).

the words “Congress shall make *no* law . . . abridging the freedom of speech,”²⁷ the Supreme Court will even strike down a law that does not restrict any protected speech at all, simply because of the “chilling effect” it might have on protected speech not covered under the statute, but which might, nonetheless, come close to the line between protected and unprotected.²⁸

If the Second Amendment were interpreted as broadly, the Court might strike down laws that had a “chilling effect” on the legal ownership of protected arms. For example, even if it is determined that firearms over .50 caliber were not protected by the Amendment, might not a ban on all weapons over .50 caliber have a chilling effect on protected ownership of .50 calibers? Or consider the strict regulation of shotguns with a barrel less than eighteen inches in length;²⁹ who would dare to possess a shotgun with a barrel exactly eighteen inches long, or even eighteen and one-half inches, when a mere half an inch error could put him in federal prison?³⁰ Can Congress draw such a precise line between protected and not protected, and ban everything on the wrong side? This is strictly forbidden in the First Amendment context, where it is settled that a certain amount of unprotected speech must be tolerated in order to prevent getting too close to the line between protected and

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

28. For example, see, *Broadrick v. Oklahoma*:

Litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because . . . the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression. . . . [I]t has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes.

413 U.S. 601, 612 (1973) (citations omitted).

29. See 26 U.S.C. § 5845(a)(1) (2000).

30. Or worse:

In August 1992, in northern Idaho, ATF agents staged a raid on the property of separatist Randy Weaver. They shot his dog, shot his young son in the back, and shot his unarmed wife in the head as she stood in their cabin doorway with her infant daughter in her arms. After an eleven-day standoff, Randy Weaver surrendered. The justification for the raid: In 1989, an undercover federal agent, negotiating a purchase of two shotguns, persuaded Weaver to cut the gun barrels 1/4" short of the 16" legal restriction [sic].

Malcolm Wallop, *Tyranny in America: Would Alexis De Tocqueville Recognize this Place?*, 20 J. LEGIS. 37, 50 (1994).

unprotected speech, and risking the infringement of protected speech.³¹

II. ORIGINAL UNDERSTANDING AND PUBLIC MEANING

This Note will discuss the original understanding of the Second Amendment at the time of its drafting and ratification only briefly here, as it has been explored extensively elsewhere.³² Primarily, our focus will be on which weapons were understood to be protected by the Amendment, and which restrictions on their possession and carry were considered consistent with the Amendment's command that these rights "not be infringed."

A. 1791

Our Constitution was ratified only reluctantly by several states, most notably New York and Virginia.³³ Without the support of these key states, the legal ratification by the nine others required would have been largely a dead letter.³⁴ Rhode Island and North Carolina ratified only after George Washington had already been elected our first President by the electors of ten of the first eleven ratifying states.³⁵ Opposition to the ratification came from the so-called Anti-Federalists,³⁶ who ultimately conditioned their votes for ratification on the adoption of a Bill of Rights. The Anti-Federalists were particularly concerned that the constitutional plan to grant Congress authority over the army and militia³⁷ would permit the replacement of the militia-of-the-

31. *Broadrick*, 413 U.S. at 612.

32. *See, e.g.*, *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

33. *See generally* THE FEDERALIST (Clinton Rossiter ed., 1961) (written as a successful attempt to convince reluctant New Yorkers to ratify the Constitution).

34. *See* U.S. CONST. art. VII.

35. George Washington was unanimously elected President with the sixty-nine electoral votes of ten states, taking the Oath of Office on April 30, 1789; New York failed to appoint its electors on time and thus they were not counted for electoral purposes. North Carolina and Rhode Island belatedly ratified the Constitution on November 21, 1789 and May 29, 1790 respectively. Between the Constitution's effective date and their own ratification, North Carolina and Rhode Island were still bound by the Articles of Confederation, as were the other eleven states with respect to their relations to the remaining non-ratifiers.

36. Perhaps a better name would have been "federalists," since it was the preservation of the Articles of Confederation that they advocated, while the so-called Federalists were pushing for a more centralized, distinctly less federal form of government under the new Constitution.

37. "The Congress shall have power . . . [t]o raise and support armies; . . . [t]o provide for calling forth the militia to execute the laws of the union, suppress

whole, comprised of all able-bodied free males, by a standing army or select militia, which could then oppress the people.³⁸

Five of the states that ratified the Constitution also sent demands for a Bill of Rights to Congress.³⁹ All of these demands included a right to keep and bear arms.⁴⁰ It is notable that four of the states so demanding were those least inclined toward

insurrections and repel invasions; [t]o provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States." U.S. CONST. art. I, § 8.

38. See, e.g., Letters From the Federal Farmer, Jan. 25, 1788:

A militia when properly formed, are in fact the people themselves . . . [T]he constitution ought to secure a genuine guard against a select militia by providing that the militia shall always be kept well organized, armed, and disciplined, and include, according to the past and general usage of the states, all men capable of bearing arms; and that all regulations tending to render this general militia useless and defenceless, by establishing select corps of militia . . . be avoided . . . These corps, not much unlike regular troops, will ever produce an inattention to the general militia; and the consequence . . . always must be, that the substantial men . . . will generally be without arms, without knowing the use of them, and defenseless; whereas, to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them . . .

2 THE COMPLETE ANTI-FEDERALIST, *supra* note 14, at 341–42.

39. See THE COMPLETE BILL OF RIGHTS 181–83 (Neil H. Cogan ed. 1997).

40. Note the following language:

Here, in relevant part, is their text:

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

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

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

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

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

Eugene Volokh, Sources on the Second Amendment and Rights to Keep and Bear Arms in State Constitutions, <http://www.law.ucla.edu/volokh/2amteach/sources.htm> (last visited May 22, 2006).

ratification—New York, Virginia, North Carolina, and Rhode Island. While New Hampshire's proposed amendment spoke only of the right of each citizen not to be disarmed,⁴¹ each of the other four spoke specifically about the danger of standing armies, which the anti-Federalists feared would be the national government's trump card in any contest between local and national power. All four states identified the militia that the amendment sought to protect through individual ownership of arms to be either an alternative, or at least a counterweight, to a national army. Thus, the weapons that were intended to come under the protection of the Amendment would have included (though not necessarily be limited to) those weapons with which the militia would be expected to be armed.

At that time, these weapons consisted of the musket or flintlock rifle, complete with bayonet, and an ample supply of ammunition⁴²—in other words, the standard arms of the battlefield infantryman. Although the Continental Army was armed with greater firepower in the form of artillery, at the time it was believed by proponents of both the Constitution and the Bill of Rights that a militia-of-the-whole could still provide sufficient resistance to any attempt by the National Armed Forces to oppress the population. For example, James Madison, the author of the Second Amendment wrote:

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. The highest number to which according to the best computation, a standing army can be carried in any country does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the whole number able to bear arms. This proportion would not yield, in the United States an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near a half a million citizens with arms in their hands It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the late

41. Note that absent any militia qualification, the right asserted in New Hampshire's proposed amendment is unquestionably an individual one.

42. 1 Stat. 271 (1792).

successful resistance of this country against British arms will be most inclined to deny the possibility of it.⁴³

Federal law currently divides the militia into two groups—the “organized militia,” which consists of the National Guard and the Naval Militia, and the “unorganized militia,” which consists of all able-bodied male citizens (or those who have declared their intent to become citizens) between the ages of seventeen and forty-five who are not members of the National Guard or Naval Militia.⁴⁴ While certain arguments might be raised for broadening the definition of the unorganized militia,⁴⁵ it is clear that the unorganized militia is the modern successor to the class of individuals whose rights were primarily intended to be protected by the Second Amendment.

B. 1866

While the primary motivation of the Framers of the Second Amendment was keeping the federal power in check through civilian ownership of arms, the Framers of the Fourteenth

43. THE FEDERALIST NO. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961).

44. 10 U.S.C. § 311 (2000).

45. Eligibility for the unorganized militia could be extended to males in their sixties, consistent with current practice in the organized militia for officers and former servicemen, and with the definition of the militia in the colonial period. Note that eligibility for the organized militia, that is, the National Guard, is limited to those under forty-five, except for former members of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps, or for appointment as an officer, in which case, the age limit is sixty-four. 32 U.S.C. § 313 (2000). The militia during the colonial period generally consisted of males ages sixteen through sixty. *See, e.g., An Act for Regulating the Militia of this province and for the Security and Defence of the same (1755)*, reprinted in 18 COLONIAL RECORDS OF THE STATE OF GEORGIA 11 (Allen D. Candler, ed., 1910), available at <http://www.claytoncramer.com/primary/militia/GA1755 MilitiaLaw.pdf> (all males between ages of sixteen and sixty years liable to bear arms as part of the militia.); RECORDS OF THE COLONY AND PLANTATION OF NEW HAVEN, FROM 1638 TO 1649 at 131–32 (Charles J. Hoadly ed., 1857), available at <http://www.claytoncramer.com/primary/militia/NewHavenColEarly131132.jpg> (stating that “every male from 16 to 60 yeares olde within this jurisdiction be furnished forthwith, with a good gun, a sword, a pound of good powder, 4 fathom of match for a matchlock, 5 or 6 good flints fitted for every fyre lock, and 4 pound of pistol bullets, or 24 bullets fitted for every gun, and so continue furnished from time to time, under the penalty of 10s. fine for every person found faulty or defective”); ACTS AND LAWS PASSED BY THE GENERAL ASSEMBLY OF HIS MAJESTIES PROVINCE OF NEW HAMPSHIRE IN NEW ENGLAND 91 (1716) available at <http://www.claytoncramer.com/primary/militia/NH1716-91.jpg> (stating that “all Male Persons from Sixteen Years of Age to Sixty . . . shall bear Arms”); “A Pennsylvanian” (Tench Coxe), *To The People of the United States*, PA. GAZETTE, Feb. 20, 1788, at 2 reprinted in 2 DOCUMENTARY HISTORY OF THE RATIFICATION 1788–1790 (M. Jensen ed., 1976) (“[T]he Powers of the sword are in the hands of the yeomanry of America from sixteen to sixty. . . . Who are the militia? Are they not ourselves[?]”) (quoted in *United States v. Emerson*, 270 F.3d 203, 270 (2001)).

Amendment were more concerned with deprivations of rights carried out or tolerated by state governments.⁴⁶ To this end, there is strong evidence that many of the drafters of the Fourteenth Amendment intended to incorporate all of the restrictions on the federal government enshrined in the Bill of Rights against the states.⁴⁷ In particular, they considered the right of newly freed blacks to keep and bear arms as a vital lynchpin in the ability of those blacks to defend themselves and their communities from state-sponsored and sanctioned violence.⁴⁸ When considering the unorganized militia as the natural ally of the federal government against the

46. Consider, for example, the following quote:

The Constitution clearly describes that to be a republican form of government for which it was expressly framed. A government which shall "establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty"; where "no law shall be made prohibiting the free exercise of religion"; where "the right of the people to keep and bear arms shall not be infringed"; where "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated," and where "no person shall be deprived of life, liberty, or property without due process of law."

Have these rebellious States such a form of government? If they have not, it is the duty of the United States to guaranty that they have it speedily.

Representative Roswell Hart (R-NY), during the debates over the Civil Rights Act of 1866, quoted in THE RECONSTRUCTION AMENDMENTS' DEBATES 193 (Alfred Avins ed., 1967); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 346 n.182 (1991).

47. See, e.g., Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 103-04 (1993) (concluding that the Supreme Court should overrule the *Slaughter-House Cases* and that the protections of the portions of the Bill of Rights not yet incorporated under the Due Process Clause should be enforced against the states); William W. Crosskey & Charles Fairman, "Legislative History," and the *Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954). See also Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) (arguing that all privileges and immunities of citizens recognized in the Bill of Rights became applicable against the states by virtue of the Fourteenth Amendment).

48. Commenting on the necessity of protecting the right of recently freed southern slaves to keep and bear arms during the debates over the Civil Rights Act of 1866, Representative Sidney Clarke (R-KS) stated,

Who, sir, were those men? Not the present militia; but the brave black soldiers of the Union, disarmed and robbed by this wicked and despotic order. . . . Many of these brave defenders of the nation paid for their arms with which they went to battle. And I regret, sir, that justice compels me to say, to the disgrace of the Federal Government, that the "reconstructed" state authorities of Mississippi were allowed to rob and disarm our veteran soldiers. . . . Sir, the disarmed loyalists of Alabama, Mississippi, and Louisiana are powerless today, and oppressed by the pardoned and encouraged rebels of those States.

THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 46, at 209, quoted in Cottrol & Diamond, *supra* note 46, at 346 n.181.

institutionalized racism of recalcitrant former Confederate states and local governments, both the utility and the righteousness of civilian ownership of sufficient firepower seems much more apparent than when considering only armed popular resistance to the federal government itself.⁴⁹ But these are distinctions of degree, not of type. Similarly, the inability of law enforcement to prevent violent crime in today's inner cities seems to be a reasonable rationale for liberalizing private ownership of arms, to allow the citizens in these communities to function in their capacity as the militia to defend their own communities, rather than disarming the law-abiding and leaving them as victims to criminal violence.

III. STATUTES

A. *The 1934 National Firearms Act*

The 1934 National Firearms Act (NFA)⁵⁰ was the first federal firearm regulation enacted in the 143 years since the ratification of the Second Amendment. The NFA applies only to certain classes of weapons. These include shotguns with barrel length less than eighteen inches; all fully-automatic weapons (“machine guns”); all firearms over .50 caliber; grenades and other explosives; silencers; and other miscellaneous weapons.⁵¹ It is a common misconception that these weapons are outright illegal.⁵² Actually, they are only very heavily regulated by the

49. “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. In the North, by contrast, blacks exercised their right to bear arms to defend against racial mob violence.” *Silveira v. Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting from rehearing en banc) (citing Cottrol & Diamond, *supra* note 46 at 338, 341–42) (internal citations omitted).

50. Pub. L. 474, 48 Stat. 1236 (1934) (current version at 26 U.S.C. §§ 5801–5802, 5811–5812, 5821–5822, 5841–5849, 5851–5854, 5861, 5871–5872 (2000)).

51. 26 U.S.C. § 5845 (2000).

52. *See, e.g.*, Brent J. McIntosh, *The Revolutionary Second Amendment*, 51 ALA. L. REV. 673, 696, 697 (2000) (This article cites 18 U.S.C. § 922(v)(1) incorrectly for the bald assertion that “trying to buy a fully automatic rifle” is “notably, illegal.” Although the statute cited (the “Assault Weapons Ban”) has since expired of its own force, the section cited stated, “It shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon,” but said nothing about fully automatic weapons, which are heavily regulated, though not prohibited, by 26 U.S.C. §§ 5841, 5845(c). The next several sections also dealt with exceptions to the prohibitions stated in § 922(v)(1).).

NFA.⁵³ The ostensible rationale for restricting these weapons in 1934 when the NFA was passed was that they had become the choice weapons of gangsters and criminals during the era of Prohibition.⁵⁴

The Act requires: registration with the Bureau of Alcohol, Tobacco, and Firearms of each such weapon possessed;⁵⁵ maintenance of proof of registration by the possessor, to “be made available to the Secretary [of Internal Revenue] upon request”;⁵⁶ and the payment of a \$200 transfer tax upon purchase of most of the restricted weapons.⁵⁷ It also imposes even more strict requirements on the transfer itself: an application for the transfer must be approved by the Secretary of Internal Revenue in advance and may be denied without any showing of cause.⁵⁸ Also, an annual tax of either \$500 or \$1,000 must be paid by any importer, dealer, or manufacturer of such weapons.⁵⁹ The penalty for violating any of these provisions is a \$10,000 fine or ten years in prison, which is rather severe when considered that what is being licensed is the ability to exercise a constitutional right, and the violation is only of the tax code.⁶⁰ In addition, “Any firearm involved in any violation of [the NFA] shall be subject to seizure and forfeiture.”⁶¹ In other words, if you neglect to register your M16, although you are otherwise not breaking any law, and in fact are exercising your constitutional right to keep and bear arms as a member of the militia, you may be imprisoned for ten years and your gun will be seized—for a \$200 tax deficiency.

53. They are also regulated by the other statutes discussed in this Note. *See* discussion *infra* Parts III(B)–(D).

54. *See* Robert J. Cottrol, *Introduction* to GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT x, xxvi (Robert J. Cottrol ed., 1994).

55. 26 U.S.C. § 5841(a) (2000).

56. *Id.* § 5841(e).

57. *Id.* § 5811(a). While the tax is due from the transferor, the cost will undoubtedly be passed on to the purchaser, as are all transfer taxes.

58. *Id.* § 5812.

59. *Id.* § 5801.

60. *Id.* § 5871.

61. *Id.* § 5872.

B. *The 1968 Gun Control Act*

The GCA requires federal registration and licensure of any “federal firearms dealer”⁶²—defined as anyone who sells firearms “with the principle objective of livelihood or profit . . . as opposed to other intents, such as improving or liquidating a personal firearms collection”⁶³—and bans all interstate sales of firearms except between licensed dealers.⁶⁴ This has been interpreted to allow unannounced, unwarranted inspections of a dealer’s inventory and records by federal agents.⁶⁵ The statute also states that the Attorney General may authorize the importation of firearms, or components suitable to construct a firearm, which are “particularly suitable for . . . sporting purposes excluding surplus military.”⁶⁶ This Attorney General determination of whether a weapon is “particularly suitable for sporting purposes” will be granted deference by a reviewing federal court, and gives a potential importer little if any notice whether the particular weapon is legally permissible or felonious.⁶⁷

62. 18 U.S.C. § 922(a) (2000).

63. *Id.* § 921(a)(22). *See also* United States v. Kostelny, 1993 U.S. Dist. LEXIS 3959 (N.D. Ill. 1993) (holding that the sale of five firearms was enough to find that the sale had “the principle objective of livelihood or profit”).

64. 18 U.S.C. § 922(a) (2000).

65. 18 U.S.C. § 923(g)(1)(B), (C) (“The Attorney General may inspect or examine the inventory and records of a licensed importer, licensed manufacturer, or licensed dealer without such reasonable cause or warrant . . . for ensuring compliance with the record keeping requirements of this chapter . . . not more than once during any 12-month period. . . . The Attorney General may inspect the inventory and records of a licensed collector without such reasonable cause or warrant . . . for ensuring compliance with the record keeping requirements of this chapter not more than once during any twelve-month period . . .”). *See also* United States v. Biswell, 406 U.S. 311, 316 (1972) (“It is also apparent that if the [GCA] is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment. . . . [I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection.”).

66. 18 U.S.C. § 925(d)(3) (2000).

67. *Springfield, Inc. v. Buckles*, 292 F.3d 813, 816–17 (D.C. Cir. 2002) (affirming the Bureau of Alcohol, Tobacco, and Firearms’ determination that “a rifle with [the ability to accept a detachable magazine, folding/telescoping stocks, separate pistol grips, bayonet, flash suppressors, bipods, grenade launchers, and night sights] . . . failed the sporting purpose test of § 925(d)(3),” thus allowing a ban on importation of rifles possessing only *one* of the offensive characteristics listed in the statute itself, and even a determination that a rifle was not suitable for sporting purposes even though “no military would use them in combat and [they] could be used for target shooting or hunting”); *Gun South, Inc. v. Brady*, 877 F.2d 858, 865 (11th Cir. 1989) (holding that the appellate court must defer to determination by Bureau of Alcohol, Tobacco, and Firearms, as delegated by

C. The 1986 Firearms Owners Protection Act

Despite its magnanimous sounding title, and notwithstanding some of its more generous provisions, the Firearms Owners Protection Act (FOPA) also contained a Trojan Horse.⁶⁸ While the NFA severely restricted possession of fully automatic weapons, the 1986 FOPA, signed into law by President Reagan, made possession of any fully automatic firearm which was manufactured before 1986 a felony, with certain narrow exceptions.⁶⁹ Given that possession of fully automatic firearms was already heavily regulated by the NFA, the immediate impact of the FOPA was minimal. However, as 1986 fades into the past, the law has begun to manifest its twofold effect. First, it insures that even fully registered fully automatic firearms in private possession gradually become more and more obsolete. They are now twenty years old. Eventually, they will appear as quaint as the flintlocks that some faux-originalists claim are the only weapons protected under the Framers' intent.⁷⁰ Second, as older weapons are gradually decommissioned, fewer of these weapons are available for civilian ownership, reducing the collective firepower of the militia and increasing the price of those full automatics still on the market. The eventual effect of the statute will be a de facto ban on civilian possession of all full automatics, except for a few museum pieces.

The ban has survived numerous Commerce Clause challenges, particularly in the wake of the Supreme Court's decision in *United States v. Lopez*,⁷¹ though not without vigorous dissent.⁷² It

the Attorney General, unless said determination is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

68. FOPA also affirmed the right of travelers to cross state lines with firearms in their trunk (unloaded and in a locked container) if the firearms are legal in both the destination state and state of origin, even if their possession would violate state law in any of the states in between. 18 U.S.C. 926A (2000).

69. *Id.* § 922(o).

70. *Contra* *Matthews v. State*, 148 N.E.2d 334, 341 (Ind. 1958) (Emmert, C.J., dissenting) ("Nor can it be maintained that the right to bear arms only protects the use of muskets, muzzle-loading rifles, shotguns and pistols, because they were the only ones used by the Colonists at the time. It might as well be argued that only a house of the architectural vintage of the Revolution would be protected against a present unreasonable search and seizure.").

71. 514 U.S. 549 (1995).

72. *Compare, e.g.*, *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996) (upholding the ban against a Commerce Clause challenge), *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1996) (upholding the ban against a Commerce Clause challenge), *and* *United States v. Beuckelaere*, 91 F.3d 781 (6th Cir. 1996) (upholding the ban against a Commerce Clause challenge), *with* *Rybar*, 103 F.3d at 286 (Alito, J., dissenting), *Kirk*, 70 F.3d at 802

has not, however, been subjected to judicial scrutiny under the Second Amendment.

D. *The 1994 Assault Weapons Ban*

While it may seem a waste of time to analyze a statute that has since expired of its own force, the AWB is worth examining for two reasons: first, because of the fanfare that surrounded its enactment, and the consternation in anticipation of its expiration; second, because it is indicative of the type of proposals that all too frequently are suggested in our Congress, that do little to increase public safety, but go a long way to make criminals out of law-abiding citizens and disarm the militia through fear.

The AWB made it illegal to possess any “semiautomatic assault weapon.”⁷³ Before the enactment of the AWB, there was no such classification of weapon. It was simply a nasty sounding name invented by the statute’s drafters⁷⁴ that was supposed to connote that this was the type of weapon that civilians should not own. The AWB’s definition of “semiautomatic assault weapon” included certain firearms manufactured by specific companies, such as Avtomat Kalashnikovs (AKs), Uzis, Colt AR15s, or copies of these;⁷⁵ any semiautomatic rifle or pistol with a detachable

(Jones, J., dissenting), *Beuckelaere*, 91 F.3d at 787 (Suhreheinrich, J., dissenting), *United States v. Gambill*, 912 F. Supp. 287, 290 (S.D. Ohio 1996) (holding that “mere possession of a machine gun may not implicate interstate commerce”). *See also* *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003) (upholding Commerce Clause challenge to the ban), *vacated*, *United States v. Stewart*, 125 S. Ct. 2899 (2005) (remanding for reconsideration under a more expansive reading of the Commerce Clause after *Gonzales v. Raich*, 126 S. Ct. 1211 (2006)).

73. High capacity magazines were also made illegal. 18 U.S.C. § 922(v)–(w) (repealed 2004). This Note will focus only on the provisions dealing with “semiautomatic assault weapons.”

74. Or perhaps it was borrowed from existing California law. *See infra* Part F(1).

75. 18 U.S.C. § 921(a)(30)(A) defined “semiautomatic weapon” as follows:

- (A) any of the firearms, or copies or duplicates of the firearms in any caliber, known as—
 - (i) Norinco, Mitchell, and Poly Technologies Avtomat Kalashnikovs (all models);
 - (ii) Action Arms Israeli Military Industries UZI and Galil;
 - (iii) Beretta Ar70 (SC-70);
 - (iv) Colt AR-15;
 - (v) Fabrique National FN/FAL, FN/LAR, and FNC;
 - (vi) SWD M-10, M-11, M-11/9, and M-12;
 - (vii) Steyr AUG;
 - (viii) INTRATEC TEC-9, TEC-DC9 and TEC-22; and

magazine which had at least two additional characteristics that were deemed undesirable; or any semiautomatic shotgun, which also had at least two other additional characteristics that were deemed undesirable. The undesirable characteristics included a folding stock, pistol grip, bayonet mount, flash suppressor, or grenade launcher.⁷⁶ An exception was made for any semiautomatic weapon manufactured before October 1, 1993,⁷⁷ and other authorized uses such as law enforcement. Similar to the machine gun ban of the FOPA, the result of the statute was that the same exact firearm could be illegal or legal, and the only way to know the difference was by cross referencing the serial number with a register of manufacture dates corresponding to serial numbers. Similarly, two firearms could be almost exactly the same, yet one would be legal, the other illegal, because of the presence of a single bolt on the end of the barrel to which a bayonet could be mounted. Many of the

(ix) revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12.

Id.

76. Section 921(a)(30)(B)–(D) lists the undesirable categories as follows:

(B) a semiautomatic rifle that has an ability to accept a detachable magazine and has at least 2 of—

(i) a folding or telescoping stock;

(ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;

(iii) a bayonet mount;

(iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and

(v) a grenade launcher;

(C) a semiautomatic pistol that has an ability to accept a detachable magazine and has at least 2 of—

(i) an ammunition magazine that attaches to the pistol outside of the pistol grip;

(ii) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer;

(iii) a shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the nontrigger hand without being burned;

(iv) a manufactured weight of 50 ounces or more when the pistol is unloaded; and

(v) a semiautomatic version of an automatic firearm; and

(D) a semiautomatic shotgun that has at least 2 of—

(i) a folding or telescoping stock;

(ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;

(iii) a fixed magazine capacity in excess of 5 rounds; and

(iv) an ability to accept a detachable magazine.

Id.

77. *Id.* § 922(v)(2)–(3) (repealed 2004).

characteristics deemed undesirable were classified as such specifically because they had military connotations.

E. *Brady II*⁷⁸

Perhaps drunk with the success in enacting the first Brady Act⁷⁹ and the AWB, various groups lobbied Congress and in 1994 “Brady II” was originally proposed by Senators Boxer (D-CA), Bradley (D-NJ), Chafee (R-RI), Kennedy (D-MA), Lautenberg (D-NJ), and Pell (D-RI), but died in the Senate Finance Committee. The amendments to Title 18 of the U.S.C. proposed by this legislation, like the many existing provisions of that Title, are too numerous to examine in detail here. This Note will focus on a few particularly troubling sections.

Brady II proposed: setting federal requirements for state licensure of all handgun possession;⁸⁰ classifying any collection of more than twenty firearms or 1,000 rounds of ammunition as an “arsenal” requiring an “arsenal permit”;⁸¹ prohibiting the manufacture, transfer, or possession of all “silencers, short-barreled shotguns and rifles, destructive devices, semiautomatic assault weapons, Saturday-night-special handguns, nonsporting ammunition, and large-capacity ammunition feeding devices,” that is, all weapons regulated by the NFA, except for weapons legally possessed before the effective date of the bill and government uses;⁸² and raising the fees originally enacted in the 1968 GCA to levels where they would once again be prohibitory for all but a few wealthy citizens, as was of course the original tacit intent of the original GCA, as well as the NFA.⁸³ Unfortunately for those wishing to disarm the militia, inflation has rendered some of the GCA’s fees almost affordable by those of relatively modest means. It may be difficult for many to

78. The Gun Violence Protection Act of 1994, S. 1878, 103d Cong. (2d Sess. 1994).

79. The Brady Handgun Violence Prevention Act (The Brady Act), Pub. L. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. § 922(s)–(t)) and requiring the implementation of a national background check system to be used prior to all firearms purchases but is not otherwise discussed in this Note).

80. The Gun Violence Protection Act of 1994, S. 1878, 103d Cong. § 101 (2d Sess. 1994).

81. *Id.* §§ 202–203.

82. *Id.* § 401.

83. *Id.* § 303 (raising the fee for a firearms manufacturer from \$50 to \$1,000 annually, or for the manufacture of “destructive devices” from \$1,000 to \$10,000 annually).

appreciate just how prohibitive the GCA fees were back in 1968, but in 1994, when the median per capita income in this country was \$33,178,⁸⁴ a fee of \$10,000 or even \$1,000 would clearly made most Americans think more than twice about applying for such a license.

F. *The California Assault Weapons Control Act*

California's statute requiring registration of fully automatic firearms was originally enacted in 1953.⁸⁵ Its definition of "machinegun" is quite similar to the NFA's, and in fact expressly includes any machinegun as defined in the NFA,⁸⁶ and thus is essentially a ratcheted-up state-law version of that part of the federal statute. Of course, the statute also allows California to collect its own registration and licensure fees,⁸⁷ and contains many prohibitions in addition to the federal ones. For example, for several years in the 1960s, it applied to all semiautomatic firearms as well.⁸⁸

The 1989 CAWCA effectively banned a long list of weapons, many of which were later covered by the now-expired AWB, such as AKs, ARs, and Uzis.⁸⁹ California also later incorporated many of the same general definitions of the 1994 AWB, so that statute, in modified form, is essentially alive and well in California.⁹⁰ In addition, California has since amended the statute to cover certain .50 caliber weapons.⁹¹ Possession of these weapons is limited to: individuals "grandfathered" because they owned their weapon before the effective date of the statute banning it, in which case they are still required to obtain permission and a license;⁹² licensed firearms dealers;⁹³ and appropriate law

84. U.S. CENSUS BUREAU, CB96-159, INCOME AND POVERTY STATUS OF AMERICANS IMPROVE, HEALTH INSURANCE COVERAGE STABLE, CENSUS BUREAU REPORTS (1996), available at <http://www.census.gov/Press-Release/cb96-159a.html>.

85. CAL. PENAL CODE § 12200 *et seq.* (West 2000 & Supp. 2006).

86. *Id.* § 12200.

87. *Id.* § 12231.

88. 1967 Cal. Stat. 1281 § 1 (deleting "or semiautomatically" after "automatically" in section 12200).

89. CAL. PENAL CODE §§ 12276, 12280 (West 2000 & Supp. 2006).

90. *Id.* § 12276.1.

91. *Id.* §§ 12278, 12280.

92. *Id.* § 12280(b).

93. *Id.* § 12280(h)(2).

enforcement.⁹⁴ Penalties for violation of this chapter range from four to eight years in state prison.⁹⁵

The CAWCA also explicitly exempts certain “sporting weapons” by name, such as several Benellis, Hammerlis, Pardinis, and Walthers, for which its drafters found “significant public purpose in exempting” although they would otherwise be covered under its definition of an assault weapon.⁹⁶

IV. SUPREME COURT PRECEDENT

Although the Supreme Court has spoken surprisingly frequently about the Second Amendment in dicta,⁹⁷ the only Supreme Court case actually to reach a holding on a Second Amendment challenge to a federal statute is *United States v. Miller*, in which a bootlegger was convicted of unlawfully moving a short-barreled shotgun across state lines without having paid the federal tax or obtained the registration required by the NFA.⁹⁸ Miller challenged the NFA on the grounds that it violated the Second Amendment, and his claim was upheld in district court.⁹⁹ The Government took direct appeal to the U.S. Supreme Court. Neither Miller nor his counsel appeared for oral arguments or filed any brief with the Court on appeal. The Government argued that: (1) the Second Amendment does not protect an individual right; and (2) if it does, it only protects a right to possess such arms as are useful to militia service, and the

94. *Id.* § 12280(e).

95. *Id.* § 12280(a)(1).

96. *Id.* § 12276.1(b)–(c).

97. *See, e.g.,* *Printz v. United States*, 521 U.S. 898, 938–39 (1997) (Thomas, J., concurring) (stating that even if certain provisions of the Brady Act were not an over-extension of Congress’s Commerce Clause power, they might violate the Second Amendment); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (identifying “the people” whose rights to keep and bear arms are protected by the Second Amendment with “the people” whose individual rights are protected by the rest of the Bill of Rights); *Roe v. Wade*, 410 U.S. 113, 167–68 (1973) (Stewart, J., concurring) (identifying the right of the people to keep and bear arms as one point in the continuum of rights included under the concept of “Due Process”); *Duncan v. Louisiana*, 391 U.S. 145, 164–65 (1968) (Black, J., concurring) (stating that the Fourteenth Amendment incorporates against the states the prohibition on the federal government from violating the rights protected by the first eight amendments to the Constitution); *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950) (stating that German enemy combatants possess neither the Fifth nor Second Amendment rights held by U.S. citizens); *Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1856) (stating that were blacks capable of being citizens, they would be entitled to the right to keep and bear arms).

98. 307 U.S. 174, 175 (1939).

99. *United States v. Miller*, 26 F. Supp. 1002, 1002 (W.D. Ark. 1939).

weapon possessed by Miller is not such a weapon. The Court did not address the first argument, because it found the second dispositive, since it found no evidence that such a weapon had any reasonable relationship to the preservation or efficiency of a well regulated militia.¹⁰⁰ The Court did not hold that the weapon needed to be held in connection with actual militia service, only that it have “some reasonable relationship to the preservation or efficiency of a well regulated militia.”¹⁰¹ *Miller* was an extremely narrow holding, which nonetheless could be overruled—short barreled shotguns may indeed be useful in connection with militia service, and, as noted above, while militia service may have been paramount among the reasons for ratifying the Second Amendment, it was not necessarily understood as the exclusive reason for its enactment. However, *Miller* also says little specific about the other types of weapons that this Note will consider in the militia context.

It is ironic, however, that *Miller* is frequently cited incorrectly by proponents of the collective rights interpretation for having adopted the Government’s first argument; it is better read as stating that, or at least as being consistent with an interpretation that, ownership and carry of weapons which *are* suitable for militia use *is* protected by the Second Amendment from the very type of infringing regulation *Miller* challenged—that is, the 1934 NFA.

Consistent with *Miller* and the original understanding of the Second Amendment, the constitutional analysis of firearms regulation will be two pronged: (1) does the weapon or class of weapons regulated have “some reasonable relationship to the preservation or efficiency of a well regulated militia,” or is it “any part of the ordinary military equipment or that its use could contribute to the common defense,”¹⁰² in which case the individual right to possess such a weapon deserves the

100. *Miller*, 307 U.S. at 178 (“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.”). Of course, it was perhaps inevitable that the Court would reach this conclusion because the respondent did not appear before the Court and no argument was made to rebut the Government’s claim.

101. *Id.*

102. *Id.*

protection of the Second Amendment; and (2) what restrictions, if any, of the possession and carry of such weapons would not “infringe” that right in a manner that would threaten the stated objective of the Militia Clause, that is, to protect the “security of a free state” by the preservation of a “well-regulated [although unorganized] militia”?

V. ANALYSIS OF EXISTING LAWS

A. *The NFA*

Many commentators, while adhering to the individual rights interpretation, have nonetheless opined that the NFA would probably be upheld by the Supreme Court.¹⁰³ The Ninth Circuit has incorrectly read *Miller* and several other precedents to support the proposition that there is absolutely no constitutional defect in the NFA.¹⁰⁴ However, the NFA specifically targets weapons of the type that *Miller* confessed, and which the history of the Amendment can leave no doubt, that the Second Amendment was drafted to protect—that is, those practicable for usual militia service. An honest originalist interpretation of the Second Amendment would lead to the inescapable conclusion that such a weapon is not only protected by the Second Amendment, but is precisely the type of weapon—one suitable for military use, particularly regular infantry use—that the Framers of the Amendment were trying to protect. While the use of silencers and short-barreled shotguns may be particularly suitable for criminal use, there is little question that a fully automatic AR15 or M16, the standard issue to American soldiers for almost half a century, would also be the primary weapon of the modern militia, if possessing one were not so wrought with potential for criminal liability that few dare to sell or own one. Originalists and conservatives cannot wish away the implications of the Second Amendment any more than gun control

103. See, e.g., Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157, 168–69 (1999).

104. See *United States v. Tomlin*, 454 F.2d 176, 176 (9th Cir. 1972) (dismissing the contention that the NFA violates the Second Amendment without any discussion by citing *United States v. Freed*, 401 U.S. 601 (1971), which dealt with a challenge to the NFA as applied to hand grenades as in violation of the Fifth Amendment right against self-incrimination); *Sonzinsky v. United States*, 300 U.S. 506 (1936) (which dealt with a claim that the NFA exceeded Congress’s taxation power.).

advocates who claim it protects nothing at all.¹⁰⁵ The tax that was originally imposed upon such weapons was, at the time, prohibitory for a large sector of the population. In other words, while it was not written as a prohibition, that was its implicit intent as applied to the majority of the population, and its effect was to disarm or criminalize the militia such as it was at the time.

B. *The GCA*

Unlike statutes which include the phrase “in interstate commerce” as a jurisdictional hook, although their connection to interstate commerce of the conduct they regulate is tenuous at best,¹⁰⁶ many parts of the Gun Control Act of 1968 deal exclusively with actual interstate commerce in firearms. As such, absent consideration of the Second Amendment, these are certainly a valid exercise of Congress’s Commerce Clause power, even as the NFA was held to be a valid exercise of the taxation power.¹⁰⁷ However, if the Second Amendment means anything, it must, like any other provision of the Bill of Rights, prohibit what would otherwise be valid exercises of congressional power under the unamended Constitution. The question is then, does the 1968 Gun Control Act infringe the right to keep and bear arms to an extent that jeopardizes the security of the state by diminishing the viability of the well-regulated militia?

Provisions of the GCA that do not specifically concern interstate commerce have been upheld as “part of a general regulatory scheme” regulating interstate commerce and, thus, permitted under the Commerce Clause as well.¹⁰⁸ But this is putting the cart before the horse. It is important to examine the consequences of the Act as a whole and see if, regardless of its validity under the Commerce Clause, it can honestly and in good faith be considered not to violate the Second Amendment. If it is found to violate the Second Amendment, this moots the

105. *Cf.* Barnett, *supra* note 4.

106. For example, the re-enacted version of the Gun-free School Zones Act makes it a felony punishable by \$5,000 or 5 years imprisonment to bring any firearm “that has moved in or that otherwise affects interstate or foreign commerce” within 1000 feet of any public, parochial, or private elementary or secondary school. 18 U.S.C. § 922(q)(2)(A) (2000). *Cf.* United States v. Lopez, 514 U.S. 549 (1995).

107. *Sonzinsky*, 300 U.S. at 513–14.

108. *See supra* note 72 and accompanying text.

question of whether it is an otherwise valid exercise of the Commerce Clause.

As noted in the previous section, the NFA puts serious burdens not only on the possessor but also on the seller of automatic firearms and other heavily regulated weapons. The GCA increases these burdens and extends them to the seller of any firearm whatsoever. If we expect that the members of the unorganized militia will arm themselves appropriately, we should not make it next to impossible for them to do so. The burdens imposed by the NFA are onerous enough, but, coupled with the GCA, the deal is sealed. Even the sale of weapons not covered under the NFA is highly regulated by the GCA. Yet, whereas the NFA specifically targets the weapons with which the militia should be armed, the GCA might seem more defensible as a law of general application. However, its effect on the market for militia weapons is serious and cannot be overlooked in any analysis of its constitutionality.

Furthermore, the express prohibition on the importation of military surplus, like the NFA, specifically targets the type of weapons whose possession was determined above to be specifically intended to be protected by the Second Amendment. This provision is therefore particularly troubling under this analysis.

C. *The FOPA*

Most of what has been said above regarding the NFA and GCA applies to the suspect provisions of the FOPA, as well. However, the FOPA is, in a sense, even more problematic than the NFA because, while the NFA merely regulates ownership of fully automatic firearms to the point where almost no de facto member of the militia will bother to navigate its byzantine intricacies, the FOPA simply makes all fully automatic firearms made since 1986 absolutely illegal. As noted, this will produce a gradual obsolescence of the arms possessed by the militia and eventually its de facto disarmament as far as such arms are concerned. A finding that the NFA was unconstitutional would *a fortiori* render FOPA's prohibition of fully-automatic weapons unconstitutional as well. Even should the registration provisions of the NFA survive constitutional challenge, the FOPA prohibitions are particularly constitutionally troublesome.

D. *The AWB*

The AWB defined a “semiautomatic assault weapon” in such a convoluted way that the “chilling effect”¹⁰⁹ on ownership of protected arms is apparent to anyone who tries to determine whether a given weapon is covered by the definition or not. This is in direct contravention of the protection of the militia envisioned by the Framers of the Second Amendment.

The result of this piece of legislation coupled with the FOPA was that fully automatic weapons manufactured before 1986 could still be legally possessed, although strictly regulated by the NFA; semiautomatic weapons manufactured before 1993 were entirely legal and not subject to any registration; and certain “offensive” semiautomatic weapons manufactured after 1993 were entirely illegal and could not even be registered pursuant to the NFA. Thus, had the AWB been renewed, as the years passed, the semiautomatic rifles possessing “undesirable” (military) characteristics possessed by the militia could only be seven years newer than their gradually obsolete fully automatic cousins were permitted to be under the FOPA.

E. *Brady II*

Brady II’s proposed restriction on the amount of ammunition allowed without a permit is particularly suspect under our analysis. The very purpose of the militia is to be able to fight a sustained battle in times of local or national emergency. Limiting the number of rounds of ammunition would be a clear way to disadvantage such a force. Further, as any perennial target shooter knows, a few shooters at the range can expend 1,000 rounds of ammunition in an afternoon. Ammunition sold in bulk is also, of course, cheaper than that sold in smaller quantities. And finally, as has been seen in Australia, Canada, and England, not to mention Nazi Germany, registration of firearms and ammunition is the easiest way to ensure compliance with any future directive requiring confiscation.¹¹⁰

109. *See supra* Part I(E).

110. Western Australia has required registration of all guns since the 1930s, but most states imposed long-gun registration only in the last two decades. Australia banned and required confiscation of all semi-automatic centre fire rifles designed or adapted for military purposes, non-military style semi-automatic centre fire rifles, semi-automatic rim fire rifles, semi-automatic shotguns, and pump action shotguns in 1997. David B. Kopel, *Who Needs Guns? Lessons From Down Under*, CHRONICLES, Oct. 2003, available at

However fantastic it may seem, the expectation of the Framers that the unorganized militia might someday have to serve as a counter-force to our own armed forces suggests that ownership of weapons and ammunition sufficient to credibly rise to such a task must be allowed without excessive registration. A similar argument also applies to collections of over twenty firearms. With a large part of the unorganized militia already disarmed, it is the civic duty of the remainder to insure that the whole can be provided with ample arms and trained, at least minimally, in their use. Communities might even designate such “arsenals,” to be overseen by competent and qualified individuals, in case of emergency. However, their federal registration and licensure is both a financial disincentive to their establishment and a sure way that they will be readily targeted by either state or federal authorities at the time when, under the original understanding of the Second Amendment, they would be needed most. Each additional proposed statute of this sort is just one more nail in the coffin of the already anemic militia-of-the-whole.

F. *The CAWCA*

As noted above, the CAWCA is essentially a state-law version of the now-expired AWB, along with some of the NFA thrown in for good measure. Thus, any objections to the NFA and AWB can be leveled against California’s law as well. In addition to the restrictions on military style firearms, the statute includes exemptions for certain brands that are deemed “sporting rifles.”¹¹¹ Aside from the especial favoritism shown to certain top-

<http://www.chroniclesmagazine.org/Chronicles/October2003/1003Kopel.html>.

Canada had required registration of all handguns since the 1930s and all long guns since 2000. R.S.C. 1985, c. C-46, s. 91. Canada’s Bill C-68 prohibited possession of all small-caliber handguns. Current owners of such guns were “grandfathered,” which means the guns are to be forfeited upon death of the owner. Bill C-68, The Firearms Act, An Act Respecting Firearms and Other Weapons Statutes of Canada, 1995, c. 39, as amended 1996, c. 19, s. 76.1. In England, handguns and rifles have been required to be registered since the 1920s. Joseph E. Olson & David B. Kopel, *All the Way Down the Slippery Slope: Gun Prohibition in England and Some Lessons for Civil Liberties in America*, 22 HAMLIN L. REV. 399, 412–13 (1999). Handguns were banned in Great Britain in 1997, and proposals are now afoot in that country to ban long guns as well. *Id.* at 426–27; Firearms (Amendment) Act 1997, Ch. 5, s. 1 (Eng.). The German Weimar Republic passed a Firearm Law in 1928 requiring extensive police records on gun owners. Hitler signed a further gun control law in early 1938. In 1940, these records made the confiscation of all Jewish-owned weapons relatively easy to carry out. Stephen Halbrook, *Registration: The Nazi Paradigm*, AMERICAN RIFLEMAN, June 2001 at 52, available at http://www.stephenhalbrook.com/registration_article/registration.html.

111. CAL. PENAL CODE § 12276.1(b)–(c) (West 2000).

of-the-line manufacturers and their high-paying customers, this express preference for sporting purposes over military ones runs in direct contravention to the original understanding of the Second Amendment as applied against the states according to the original understanding of the Fourteenth Amendment.¹¹² Had California's AWCA been in force in the South in the late nineteenth century, or for that matter throughout much of the twentieth century, it is doubtful if many of the poor blacks who defended their communities against the Ku Klux Klan would have been able to afford the type of expensive "sporting arms" preferred by the Act. The CAWCA is a classist statute. Like the game laws of England that the Framers of the Second Amendment were repudiating, the "aristocracy" can retain their arms, but the lower classes, which would of course form the bulk of the militia-of-the-whole, are effectively disarmed through fear of prosecution according to complex regulations, excessive fees, or a requirement of a showing of "necessity" for obtaining a permit.

G. *Closing Comments*

Even allowing that military style weapons are specifically the sort of arms whose possession is especially deserving of protection, some may protest that a requirement of registration does not rise to the level of "infringement" barred by the text of the Amendment. There are two answers to this argument. The first is that one definition of "infringe" prevalent at the time of the framing was "to destroy or hinder."¹¹³ Whether or not one subscribes to the slippery-slope argument that any hindrance is an invalidation of a right, it is clear that hindrance was included in the definition contemplated by the Framers. As noted above, there were no federal firearms laws at the time of the framing, or for over one hundred years thereafter. The existence of state firearms laws at the time is not germane, as the Bill of Rights was not deemed to be incorporated against the states at that time either. It would seem that the Framers considered any encroachment to be an infringement of this important right.¹¹⁴

112. See Aynes, *supra* note 47, at 103–04.

113. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 541 (1847).

114. *Id.* (defining "infringement" as "encroachment").

And indeed it is. Registration is never free, and thus impacts the poor most heavily. Similarly, less educated or informed individuals are more likely to be generally unaware of the requirements of registration, and end up paying the heavy price of imprisonment prescribed for its violation. These are not small infringements. Yet there is another objection to registration, perhaps even more important. One may not believe that registration is only a first step on the way to confiscation. However, in the event that militia arms are ever actually called into service against either state or federal authorities, registration with those very authorities could prove fatal to any effort to resist state or federal oppression.

Other commentators have claimed that the general American enthusiasm for military-style weapons has waned, and that both the American faith in, and ability for altering or removing their government by force of arms has been seriously reduced since the time of the drafting and ratification of the Second Amendment.¹¹⁵ Two important responses need to be made to this contention. One response is that the content of a right protected by the Constitution is not altered by the public's enthusiasm in its exercise.¹¹⁶ The second response is that the public's ability to potentially exercise such a right has been hampered primarily by the very statutes whose constitutionality is here under consideration. It is circular to contend that the Second Amendment ceases to protect military weapons because, ever since possession of military weapons has been severely restricted by Congress, most Americans are unwilling to jump through the procedural hoops and risk the criminal penalties for non-compliance in order to exercise the right to own such weapons.¹¹⁷

115. McIntosh, *supra* note 52, at 696 ("Any thought of a fully effectuated revolutionary conception of the Second Amendment is dead, except in the hands of militant extremists.").

116. See Lund *supra* note 13, at 103 (stating that such an argument basing the continuing viability of the Second Amendment on the current status of the militia "hinges on a non sequitur, namely that if a right protected by the Constitution does not fully accomplish what was foremost among the hopes of those who adopted it, the right must not exist").

117. "The illogic of [such an] argument is particularly striking when one stops to consider that it is the federal government itself that has failed to preserve the institution [(the militia)] that . . . is the essential precondition for the exercise of the right that the Constitution sought to secure against infringement by the federal government." *Id.* at 103-04.

The phenomenon observed above, that only a few Americans now own such weapons, is a clear demonstration that the arming of the well-regulated militia has been jeopardized by the infringement of the right of the people to keep and bear the very weapons most appropriate for such service.

The unlikelihood of armed resistance to federal power is irrelevant because this was among the primary capabilities that the ratifiers of the Second Amendment were interested in preserving. In addition, the American public's current inability or unwillingness to pursue such a course of action should be irrelevant to our interpretation of the Amendment.¹¹⁸ Indeed, the unorganized militia's current inability to provide a significant counterweight to the national Armed Forces stems in large part from the effect of the statutes here under consideration.¹¹⁹

The Second Amendment was enacted in large part out of a distrust of standing armies.¹²⁰ Given that the National Guard has now been completely federalized and consists of precisely the type of "select militia" that the ratifiers of the Second Amendment were worried about, the retention of popular sovereignty they hoped the Amendment would preserve exists today, if at all, in the unorganized militia.

Lower courts have extended the common misreading of *Miller* to the point that many modern circuit courts hold that not only does the Second Amendment not protect weapons not suitable for military use, it also does not protect weapons which are suitable for military use.¹²¹ The obvious conclusion of such a position, that the Second Amendment protects nothing at all, should collapse under the rule of construction avoiding any interpretation which renders a statutory or constitutional provision as surplusage.

118. *Id.* at 103.

119. *Id.* at 103–04.

120. *See supra* Part II(A) and accompanying notes.

121. *See, e.g.,* *Cases v. United States*, 131 F.2d 916, 922–23 (1st Cir. 1942) (holding that while the holding of *Miller* rested on "the absence of any evidence tending to show that possession or use of" appellee's weapon had "some reasonable relationship to the preservation or efficiency of a well regulated militia," that would not mean that possession of a weapon which did have such a reasonable militia relationship would be protected).

VI. POLICY ARGUMENTS

Today's military is armed with weapons that, like the heavy artillery maintained by the Continental Army in the late eighteenth century, would probably not be considered "militia weaponry," such as fighter jets and nuclear missiles. Yet today every soldier is also expected to be proficient in the use of the M203 shoulder-fired grenade launcher, the M67 fragmentation grenade, and the M18A1 antipersonnel mine, each of which can be carried and operated by a single soldier.¹²² Advances in technology have brought about weapons of such destructive power that it may be difficult to imagine or condone widespread private ownership of such weapons. An individual in possession of such weapons could cause far more harm than an eighteenth century militiaman armed with a musket and bayonet. However, the same argument could have been made at the time of the framing by those who favored strict limitations on ownership of firearms—the firearms of the day were more deadly than the knives and clubs that citizen-subjects would have been armed with if their right to bear arms had been limited as it had been back in England.¹²³

If one disagrees with the military connotations of an honest originalist interpretation of the Second Amendment, the proper course of action would be to repeal it by amendment to the Constitution. Both conservative and liberal commentators have advocated this course of action, though it is unlikely it could

122. See Department of the Army, *Soldiers Manual of Common Tasks: Skill Level 1*, 3-581 to 3-595, 3-306, 3-312 (2005).

123. Although the right of Englishmen to be armed was protected in theory by the English Bill of Rights of 1689 ("[T]he subjects which are protestants may have arms for their defence suitable to their conditions and as allowed by law"), the game laws had the practical effect of all but disarming all but the aristocracy:

In England, the people have been disarmed, generally, under the specious pretext of preserving the game: a never failing lure to bring over the landed aristocracy to support any measure, under that mask, though calculated for very different purposes. True it is, their bill of rights seems at first view to counteract this policy: but the right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorise the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game.

1 ST. GEORGE TUCKER'S BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 143, 300 (Appendix) (1803), available at <http://www.law.ucla.edu/volokh/2amteach/sources.htm#TOC7>.

even gather any political steam.¹²⁴ However, the specifics of the limits on the armament of today's militia are something that can be left for consideration after examination of something less potentially threatening than private ownership of grenade launchers: the conditions of civilian ownership of the M16 and AR15 fully automatic rifles that are the likely analogy of the musket and flintlock that the militiamen of the founders' time would be readily capable of personally affording, maintaining, and bearing if called to arms.

In Switzerland, fourteen percent of families have a similar rifle at home, on commission from the Swiss federal government.¹²⁵ Similarly, in Israel, teenage conscripts freely walk the streets and frequent nightclubs bearing fully automatic rifles during their military service.¹²⁶ While our militia is based neither on commission nor conscription, and the weapons with which its members are expected to arm themselves are privately owned, why should the idea of fourteen million American households with an M16 or two in the closet, or American teens taking their AR15s out with them on a camping or hunting trip for the weekend be seen as a safety risk rather than an asset?

Even if the militia possessed significantly less firepower than the National Armed Forces, it not only could provide a useful national security supplement, but would be quite capable of functioning as a significant deterrent to any attempt to use the

124. See ANDREW CARLSON, *THE ANTIQUATED RIGHT: AN ARGUMENT FOR THE REPEAL OF THE SECOND AMENDMENT* (2002) (advocating repeal of the Second Amendment); George Will, *Oh That Annoying Second Amendment: It Shows No Signs of Going Away*, PHILA. INQUIRER, Mar. 22, 1991 (advocating repeal of the Second Amendment).

125. More precisely, they have an M57 automatic rifle. In Switzerland, civilian ownership of howitzers and anti-aircraft guns is also allowed, although these weapons are registered. There is absolutely no criminal misuse of these weapons in Switzerland. A Swiss Military Department spokesperson said, "It is an old Swiss tradition that only an armed man can have political rights." This policy is based on the understanding that only those who bear the burden of keeping Switzerland free are entitled to fully enjoy the benefits of freedom. David B. Kopel & Stephen D'Andrilli, *What America Can Learn from Switzerland Is That the Best Way to Reduce Gun Misuse Is to Promote Responsible Gun Ownership*, AMERICAN RIFLEMAN, Feb. 1990, available at <http://guncite.com/swissgun-kopel.html>.

126. The author has personally witnessed this rather commonplace phenomenon in Israel. See, e.g., Sara Yoheved Rigler, *The True Face of Israeli Youth*, JEWISH WORLD, May 12, 2006 available at http://www.aish.com/jewishissues/jewishsociety/The_True_Face_of_Israeli_Youth.asp. ("Army regulations require soldiers to carry their weapons at all times, including when they are off duty and when they go to sleep. . . . Yet the number of armed robberies and other crimes committed with these guns is minuscule."). See also Buying Ice Cream, <http://www.math.toronto.edu/~drorbn/Gallery/Jerusalem/BuyingIceCream.html> (last visited May 25, 2006).

military against the civilian population.¹²⁷ Indeed, this is probably true even at our present level of civilian armament. Yet our concern here is specifically with statutes that have the direct effect of reducing the firepower of the unorganized militia to levels where its effectiveness in any capacity is seriously drawn into question.

In 2006 the enlisted Armed Services of the United States comprise approximately two million troops.¹²⁸ Meanwhile, in 2004, the unorganized militia (that is, men ages seventeen to forty-five) numbered over fifty million.¹²⁹ These proportions are on a par with those cited by Madison in 1787. Well armed, the latter could undeniably provide valuable supplementary service to the former in keeping order in an emergency or repelling a foreign invasion.¹³⁰ They could also put up significant resistance to any attempt by the National Armed Forces to subjugate the general population under martial law.

Criminal abuse of military weapons remains rare today.¹³¹ Although a claim could be made that this is due to the registration required by the NFA, the evidence refutes such a claim. Criminal abuse of so-called “assault weapons” was also rare before the enactment of the 1994 AWB, and ten years of their virtual prohibition has had as little of an effect on such

127. Compare the well-armed Afghan militias that ultimately prompted the Soviet withdrawal from Afghanistan, or the armed inhabitants of Vietnam that contributed to American military defeat in that country, with the disarmed victims of Nazi Germany, Stalin’s purges, and Pol Pot’s massacres. See also David Kopel, *Firearms Possession by “Non-State Actors”*: *The Question of Sovereignty* 8 TEX. REV. L. & POL. 373, 382 (Cambodia), 384 (China), 386 (East Timor), 394 (Bougainville), 403 (Niger), 404 (Angola), 405 (Zimbabwe), 413 (Uganda), 422 (Afghanistan), 425 (Romania), 426 (Bosnia) (2004).

128. This includes 1.2 million active and 800,000 reserve. See Armed Forces Strength Figures for Feb. 28, 2006, <http://www.dior.whs.mil/mmid/military/ms0.pdf>.

129. See U.S. Census Bureau, 2004 American Community Survey, http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2004_EST_G00_S0101&-ds_name=ACS_2004_EST_G00_ (last visited May 25, 2006).

130. During the Second World War, when the National Guard had been mobilized into the army, impromptu home defense units patrolled beach areas and likely sabotage sights. The individuals who performed this service were usually equipped with their own weapons. See Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 272 n.284 (1983).

131. See David T. Hardy, *The Firearms Owners’ Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 673 n.474 (1987) (citing statement by Director of the Bureau of Alcohol, Tobacco and Firearms that “[r]egistered machine guns which are involved in crimes are so minimal so as not to be considered a law enforcement problem”).

criminal uses as the repeal of the AWB in 2004.¹³² Banning “weapons of war” is not so much effective legislation, as it is a “feel good” response to a few very rare, particularly heinous crimes, or worse yet, the knee-jerk reaction of politicians and lobbyists who simply hope the public will be more sympathetic to their hatred of guns in general if they attack more threatening looking ones.

Statutory regimes like the NFA, GCA, FOPA, and AWB have had a minimal effect on crime. Their most notable effect has been the gradual disarmament of the unorganized militia. Regardless of their constitutional soundness, it would be good policy to repeal them all. The lack of any negative consequence following the expiration of the AWB is a precedent that indicates that similarly, little negative consequence would result from an immediate repeal of the GCA, FOPA, and NFA. The long-term positive result would be the re-arming of the sovereign people of the republic.

VII. CONCLUSIONS

While the Militia Clause does not limit the Second Amendment, it is equivalent to a congressional finding of fact that “[a] well-regulated militia [is] necessary to the security of a free state.” The First Congress justified the Amendment based upon this finding; as even proponents of the collective-rights interpretation admit, this was the primary reason that a right to keep and bear arms was called for by the anti-Federalists in the five states that conditioned ratification of the Constitution on its amendment by a Bill of Rights. Thus, one of the primary purposes of the Amendment was to protect the sort of weapons that the members of the militia would be expected to “keep and bear.”

The public understanding at the time of the ratification of the Second Amendment was that the militia referred to by the Amendment should be a specific counterweight as well as a necessary supplement to the standing army and the organized militia the Constitution authorized Congress to raise.¹³³ Current

132. John Lott, *Wrong Aim*, NAT'L REV., May 14, 2003, available at <http://www.nationalreview.com/comment/comment-lott051403.asp>.

133. “The Congress shall have power . . . To raise and support Armies; . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for

federal law codifies this understanding by defining the unorganized militia as composed of all able-bodied male citizens (or those who have declared their intent to become citizens) between the ages of seventeen and forty-five who are not members of the organized militia.¹³⁴ This militia is the successor to the “well-regulated militia” which the Amendment sought to preserve. Thus the weapons most deserving of the Amendment’s protection are those with which such a force would be armed. In the modern age, these would consist of the regular materiel of the standard infantryman. These include a fully automatic rifle such as an M16 or AR15.

The NFA places such a substantial burden upon the ownership of the weapons it regulates that most potential possessors of such weapons are unlikely to exercise the right to own them. American citizens should be capable of exercising their right to own the weapons necessary for use in the unorganized militia without the fear of imprisonment for failure to maintain proper registration. For that matter, they should be able to exercise the very core of this constitutional right without having to register to do so whatsoever. Consistent with *Miller*, *Emerson*, and the original understanding of the Second Amendment, the constitutionality of the NFA is highly suspect, particularly with respect to fully automatic firearms, as these are typical infantry weapons, without which the unorganized militia is rendered significantly less worthy of the name bestowed upon it by federal law, and its protection under the Second Amendment becomes reduced to mere lip service.

Silencers and heavy explosives are more questionable and their regulation less controversial according to our analysis. While a member of the militia may have some use for such weapons, they are not part of an infantryman’s usual equipment, and probably are not necessary for service in the unorganized militia. Since the sole purpose of a silencer is to conceal the fact that discharge of a firearm has occurred, such a device serves a criminal or at best clandestine purpose almost to the exclusion of a legitimate one.¹³⁵ Heavy explosives, as well as artillery, would

governing such Part of them as may be employed in the Service of the United States.” U.S. CONST. art. I, § 8.

134. 10 U.S.C. § 311 (2000).

135. Of course, silencers may have some use in guerilla warfare, which would be the primary way the unorganized militia would be expected to combat the regular army. But

generally be kept in armories, not in the individual possession of individual militiamen, and thus individual possession of such weapons probably does not fall within the Amendment's protection either.

However, possession of the grenade, the classic twentieth century infantryman's weapon, arguably should also be unhampered by NFA restrictions. More unclear is the question of the regulation of shoulder fired grenade launchers and antitank weapons, which, while they are personal weapons, are more a form of artillery. Especially in the era of terrorist attacks against commercial airliners, it is understandable why strict regulation of such weapons may seem prudent. However, this seems to be a policy question that someone with more expertise of the makeup of both the National Guard and the early militia would have to examine. Yet the constitutionality of regulation of such weapons is by no means a foregone conclusion.

The GCA may not exceed the Commerce Clause intrinsically, but the power bestowed upon Congress by that Clause is limited by the Second Amendment. As the NFA makes militia weapons difficult, even dangerous (legally) to own, the GCA, in conjunction with the NFA, makes the sale of these weapons even more difficult. The disincentives to dealing such weapons produce an effect which is tantamount to effectively disarming the unorganized militia. Large manufacturers can make ample profit by selling fully automatic weapons only to the military and law enforcement, and somewhat less powerful weapons (e.g., semi-automatic, no more than .50 caliber) to the general public, further exacerbating the natural imbalance of firepower between the national army and the unorganized militia. The best source for fully automatic firearms and other militia weapons for the general public are small, local collectors such as those that frequent gun shows. But such individuals have been demonized with an undeserved criminal reputation almost to the point of extinction,¹³⁶ and compliance with the GCA is as

we ought to balance the legitimate, even revolutionary military uses of the weapons under consideration with their potential for criminal use.

136. See S. 890 107th Cong. (2001) ("A bill to require criminal background checks on all firearms transactions occurring at events that provide a venue for the sale, offer for sale, transfer, or exchange of firearms, and to provide additional resources for gun crime enforcement."). This bill was sponsored by Senators John McCain (R-AZ), Thomas Carper (D-DE), Mike Dewine (R-OH), Joseph Lieberman (D-CT), and Charles Schumer (D-NY).

difficult as enforcement is arbitrary. As the net effect of the provisions of the GCA dealing with commerce in weapons is to effectively disarm the unorganized militia, notwithstanding decisions upholding these provisions in the face of Commerce Clause challenges, they are highly constitutionally suspect when examined in light of the guarantees of the Second Amendment.

The FOPA is particularly insidious, because the immediate effect of its enactment was negligible. Regardless of how gradually it will be accomplished, however, the ultimate effect of this ban on all full automatics manufactured after 1986 will be a de facto ban on private ownership of all full automatics except for arcane collectors' objects. Thus, if the silver lining of the NFA is that it doesn't actually ban full automatics (although its intent was to limit their possession to a very select few), the FOPA will gradually accomplish this highly constitutionally suspect goal.

The now-expired AWB was primarily cosmetic and highly suspect as it affected even "civilian versions" of the military weapons which should be protected by the Amendment (as mentioned above), branded them with the label "assault" or "military style," and shrouded their possession in such a web of regulation that the same weapon could be completely legal or constitute a felony depending on its serial number. The only saving grace of this law was the fact that it expired after ten years. Proposals for its renewal were misguided as this statute plainly violated the Second Amendment's protection of militia weapons. While the weapons that the AWB banned were not ideal militia weapons, they remain the next best substitute for individuals unwilling to brave the morass of registration that is the NFA, and thus their relatively unregulated possession should be a norm that we seek to extend to the even more appropriate weapons regulated by the NFA, rather than further disarming the unorganized militia.

Brady II would have defined many private collections as arsenals. It would have turned the strict regulation of the NFA into outright prohibition, with exceptions for "sporting purposes." And it would have required federal standards for licensure of all handguns. Any skepticism about the constitutionality of the NFA or the AWB is multiplied several-fold when applied to this statute. Like many of the other statutes criticized above, Brady II is constitutionally suspect primarily

because of its strict regulation or outright prohibition of arsenals, assault-rifles, and fully automatic weapons, all of which, as incident to normal militia service, should be expressly protected by the Second Amendment as understood at the time of its ratification.

The CAWCA imposes severe restrictions on the ownership of all militia-type weapons. It also expressly favors potential “sporting” over military uses, in direct contravention of the original purpose of the Second Amendment. This Act was upheld against a Second Amendment challenge in the Ninth Circuit, and the Supreme Court denied certiorari.¹³⁷ However, assuming that the right to keep and bear arms, like the rest of the Bill of Rights, should be incorporated against the states, the CAWCA seems highly vulnerable to constitutional challenge.

It has been rightfully said that the Constitution is not a suicide pact.¹³⁸ Yet we as a nation have not yet committed collective suicide, although we have given constitutional protection to advocacy of the illegal use of violence for political reasons,¹³⁹ virtual child pornography,¹⁴⁰ and topless dancing.¹⁴¹ However, neither is the Militia Clause of the Second Amendment a suicide pact, which would guarantee the right to keep and bear arms only to the militia, and then allow laws which effectively disarm the very militia it aims to protect. The Second Amendment may not be only about the militia; it may protect personal use of arms for self-defense and hunting as well. But its Militia Clause, if anything, is a floor, not a low ceiling, on the rights it protects. Without recognition of the importance of preserving a well-regulated militia, the other rights guaranteed by the Amendment are in as great a danger as those protected by the rest of the Bill of Rights. In the spirit, and as the ultimate line of defense, of the entire Bill of Rights, the Second Amendment was ratified to preserve the right of the people to possess arms for the purpose of organizing themselves, as needed, into a fighting force which could preserve order or stave off tyranny and oppression, whether from enemies foreign or domestic.

137. *Silveira v. Lockyear*, 312 F.3d 1052 (9th Cir. 2002), *cert. denied*, 540 U.S. 1046 (2003).

138. *See, e.g., Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

139. *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

140. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

141. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).

Originalists and conservatives cannot in good conscience simply wish away this fundamental premise behind the foremost of liberties that the Framers saw fit to preserve. Federal regulations of the firearms necessary to the very existence of the militia the Second Amendment seeks to preserve have increased to such an extent, and the penalties for violating them are so draconian, that few individuals dare hold themselves out as licensed federal firearms dealers. Few more will dare navigate the required morass of red tape in order to simply possess the weapon which ought to be not only their right, but their duty, to keep and bear. As a result, the well-regulated militia is in danger of extinction. Is this a silent death in which we wish to acquiesce, whether it has been accomplished by stealth, or by apathy, but in any case, by unconstitutional means? In the words of Judge Kozinski of the Ninth Circuit:

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.¹⁴²

142. *Silveira*, 328 F.3d at 570 (Kozinski, J., dissenting from denial of rehearing en banc).