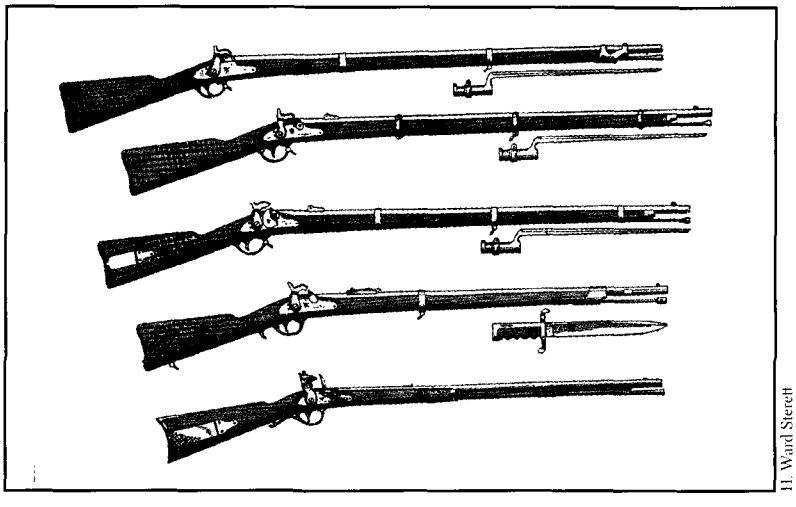
Americans' Right to Own Firearms

The Citizen *Versus* the State

by Don B. Kates



H. Ward Stereff

While it allows many controls, the Second Amendment to the Constitution guarantees to every responsible, law-abiding adult the right to own firearms.

To the political philosophers who influenced our Founding Fathers, arms possession by good people was crucial to a healthy society. Thomas Paine foreshadowed current gun-lobby slogans (*e.g.*, "When guns are outlawed, only outlaws will have guns"; "Nobody ever raped a .38") when he wrote:

> I am thus far a Quaker, that I would gladly argue with all the world to lay aside the use of arms, and settle matters by negotiation, but unless the whole will, the matter ends, and I take up my musket and thank Heaven He has put it in my power.

Our classically educated founders looked back to the Greek and Roman republics where good citizens were armed and prepared to man the walls when the tocsin signaled approaching danger. They honored Aristotle's teaching that free states depend on an armed citizenry, while tyrants "mistrust the people and therefore deprive them of their arms," and that the confiscation of the Athenians' personal arms had been instrumental to the tyrannies of the Pisistratids and the Thirty.

From Machiavelli, Harrington, Richardson, Sydney, Locke, Tench, and Coxe, the Founding Fathers took four points: First, the most fundamental right of man is self-defense, which includes the right to arms for defense of self, home, family, and liberty; second, murder, rape, robbery and other "common crimes" are to be feared not only from apolitical criminals but from political ones (as Sydney described them, "a wicked Magistrate" and his "crew of Lewd Villains"); third, in extreme cases the individual right of self-defense includes a right of citizens to resist tyrants, which the founders called "revolution," meaning the returning of government to its original and proper course; and fourth, the existence of an armed populace will usually avert any need for revolution by deterring government and rulers from their inherent tendency to oppress.

Later events demonstrated that political crime is, indeed, far more dangerous than apolitical. In the 20th century, the world saw no more than five million murders. Not counting casualties in wars, however, over 170 million civilians died in genocides—often sponsored by their own government, as R.J. Rummel points out in *Death by Government*.

Second Amendment scholarship is dominated by the view that the amendment guarantees a right of individuals to arms. Even its opponents accept this as the "standard model." The "collective right" view, one of the opposing positions, is (as pithily described by one exponent) that the guarantee applies not to individuals but "to the whole people as body politic," in the sense that individuals cannot enforce this nonexistent right either for themselves or for the whole people. To call this a "right" is oxymoronic and violates Chief Justice Marshall's basic interpretive canon that "It cannot be presumed that any clause in the Constitution is intended to be without effect."

Of course, there are real constitutional rights that may be conceived of as collective—*e.g.*, freedom of assembly, equal protection of the law. Unlike the "collective right" concept of the Second Amendment, however, these are real rights, enforceable through suits filed by individuals on their own behalf and to vindicate the rights of the entire group.

Another attack on the standard model is the claim that the Second Amendment cannot have been meant to guarantee an individual right to arms because, during the Revolution, Tories were sometimes disarmed by the patriots. In itself, this does not refute the standard model. In the philosophical tradition, the right to arms had always been understood as inapplicable to trai-

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tors, criminals, and lunatics.

Moreover, this theory proves far too much. Tory newspapers and meetings also were suppressed. Tories were beaten, jailed, dispossessed of property, exiled, and even murdered. So if Revolutionary War history could nullify the individual right to arms, it could also nullify the rights of free expression, assembly, due process, and jury trial. Wartime excess is not a valid criterion for deducing the meaning of constitutional guarantees.

The most common attack on the standard model claims that what the Second Amendment guarantees is not a right of people to own arms but the right of the states to arm their militias. While not absurd on its face, this view is flatly irreconcilable with the language of the amendment and the Bill of Rights as a whole. The Second Amendment guarantees a right "of the people," not of the states. If the amendment did guarantee a right of the states, it would be unique. In no other provision of the Constitution is the term "right" employed to describe an attribute of government. Rather, government powers, whether state or federal, are invariably called "powers" or "authority."

The "right of the people," a phrase that appears throughout the Bill of Rights, always denotes rights of individuals against government. To accept the states'-right or collective-right theories, we must make the following assumptions about how Congress wrote the Bill of Rights (which it enacted as one document in 1789): The First Amendment's guarantee of "the right of the people peaceably to assemble" means exactly that—a right of the people. However, 16 words later in the Second Amendment, the same phrase means a right of the states (or a meaningless "collective right"); then, 26 words later, the Fourth Amendment uses the same phrase to mean an individual right, which is how it is also used in the Ninth Amendment, while the Tenth Amendment uses "powers" to describe the prerogatives of the states.

The amendment misleads modern readers by starting out "A well regulated Militia, being necessary to the security of a free State . . . " In the 18th century, *militia* did not mean "army" or "soldiers." The colonial militia laws required almost all adults (including women) to have ready access to guns. In addition, all respectable males of military age (basically 18 to 45, depending on the colony) had to bring their own guns when called out for militia training or service. Every household had to have guns even if its residents included only women or males not subject to militia service. In short, by guaranteeing individuals the right to own guns, the amendment also guaranteed the materiel of the militia.

The Second Amendment's militia preamble can in no way narrow the effect of the main clause, the guarantee to *individuals* of the right to arms. It is an established canon for construing legislation that a narrow preamble does not limit a broad rights clause. Contemporary state constitutional rights clauses often contained specific, narrow preambles, but these have never been viewed as limiting their broader rights clauses. For instance, free-press guarantees were introduced with declarations that, excepting an abusive press, a free press is vital to a free state. If such introductions were deemed to limit the right, they might not protect Marxist publications on the ground that advocacy of forcible replacement of the government by a dictatorship of the proletariat is an abuse rather than something that preserves a free state. Of course, regardless of their introductory clauses, state as well as federal guarantees of free press do extend to Marxist books.

The very idea of the Second Amendment as a right of states rather than of individuals is an artifact of the 20th-century gun-control debate. The point is not that the founders rejected the idea of the amendment as guarantee of a right of the states but that such an idea never occurred to them. The very concept was unknown in the 18th and 19th centuries. As William Van Alstyne, one of the great figures in modern American constitutional law, has noted in the *Duke Law Journal* (1994):

> If anyone entertained [that idea] in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states [that idea].

Anti-federalists objected that the Constitution gave the federal government too much power, including power over the militia. They were well aware, however, that the Second Amendment did not affect this and complained that "the absolute command vested by [Article I, Section 8 of the Constitution] in Congress over the militia, are [*sic*] not in the least abridged by this amendment." The Antifederalists were not objecting to the amendment's guarantee of the individual right to arms, nor were they denying that this is what it is. Because the Second Amendment did not deal with their militia concerns, however, they unsuccessfully proposed different constitutional amendments to do just that.

The states'-right view remained unknown for more than 100 years. A 183-page article by David B. Kopel examining every 19th-century discussion finds not even one description of the Second Amendment as guaranteeing a right of states. The standard model "was held by [the 19th century's great commentator Judge Cooley and] every other scholar in the period who discussed the issue" ("The Second Amendment in the Nineteenth Century," *BYU Law Review*, 1998).

In contrast to the complete dearth of evidence for the states'-right view, numerous examples from legislative history support the standard model. Roughly 40 pages of an article I wrote for the *Michigan Law Review* ("Handgun Prohibition and the Original Meaning of the Second Amendment") are devoted to detailing example after example. For instance, when Madison first proposed the Bill of Rights, the idea of adding them to the end of the Constitution had not yet been conceived. He wanted to interlineate them into the sections to which they related. Madison intended to insert the First, Second, Fourth, and other amendments that guarantee individual rights into Article III, which contains the original Constitution's few individual-rights guarantees (the right to a jury trial; a ban on *ex post facto* laws). Madison's scheme also called for the Tenth Amendment, dealing with state powers, to go into a new Article VII.

The only significant Supreme Court consideration of the Second Amendment is *United States* v. *Miller* (1939). The Court held that an indictment should not have been dismissed on the blanket theory that a prohibitory federal tax and registration requirement for sawed-off shotguns *ipso facto* violated the Second Amendment. Neither of the indicted defendants was, or claimed to be, a member of the militia or of any military group. Nor did the Court suggest the defendants needed to claim such a status to challenge the statute under the amendment. Instead, *Miller* held that the validity of a law regulating sawed-off shotguns depends on whether such guns are the kind

of firearms that the Second Amendment protects individuals in possessing.

Dealing with the challenge on its own merits, the Court held that only possession of military-type and/or militarily useful weapons is protected by the amendment, based on the amendment's reference to a militia (which the Court expressly recognized included virtually the whole male population). Having fixed on this military-weapon standard, the Court reversed the dismissal of the indictment because the defendants had not even made an attempt to show that a sawed-off shotgun is a military weapon. For equally obvious reasons, in abeyance of such a showing, the Court was not in a position to determine whether a sawed-off shotgun is a military weapon.

Significantly, *Miller* reflected an individual-right view of the Second Amendment, even though such a view was not argued to the Court: The matter went up from the trial court on the government's appeal; by the time it was briefed, one of the defendants had died and the other apparently did not engage counsel. The only brief filed was the government's. The states'-right collective-right theory was presented to the Court in the brief for the United States. Yet the Court did not adopt or even mention it, despite the lack of any counterargument.

The Supreme Court's brief pronouncements on the Second Amendment in over 35 cases to date have never accepted the states'-right or collective-right view. In listing the personal rights that the Bill of Rights protects against government, the Supreme Court has repeatedly cited the Second Amendment.

The earliest reference appeared in *Dred Scott*, where Chief Justice Roger Taney emphasized that, if blacks could be considered citizens, they would enjoy all the rights of citizenship. These rights include "the full liberty of speech . . . and [the right] to keep and carry arms wherever they went." Later, Taney illustrated the rights of citizenship by listing the right to arms along with freedom of speech and assembly, jury trial, and the right against self-incrimination. Compare the Court's two latest cases briefly mentioning the Second Amendment: *United States* v. *Verdugo-Urquidez* (1990) suggests the phrase "the right of the people" is to be construed *in pari materia* in the First, Second, and Fourth Amendments and in other parts of the Constitution where it always refers to rights of individuals against government; and in *Muscarello* v. *United States* (1998), both the majority and dissenting opinions invoke the phrase "bear arms" to describe a situation in which an individual "carries" a firearm.

In the gun-control debate, contentious fanaticism often trumps intellectual honesty and even common sense. That is particularly true of arguments over the Second Amendment. The arguments opposing the standard model run the gamut from the specious to the ludicrous to the mendacious. On the other side, I have often—but always vainly!—emphasized that the Amendment does not read "There shall be no gun laws of which the gun lobby disapproves." No less than other constitutional rights, the right to arms is subject to numerous qualifications and exceptions. In the last ten pages of my 1983 *Michigan Law Review* article, I outlined controls that I deem constitutional, though unwelcome to the gun lobby. Their riposte was to denounce me as a purveyor of "Orwellian Newspeak." That is because I wrote that, while responsible law-abiding adults are guaranteed freedom of choice to possess firearms, gun controls are valid, so long as they do not substantially burden or infringe that freedom of choice.

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T.V. Offensive—Iraq War

(A Picture of an Anchorette)

by Andrew Huntley

Down from your swivel throne you front your glass,
And, yes, those earrings with the necklace worked:
The stuffy brigadier (retired) had perked,
Thrusting his expertise—almost a pass!
You turn, look back, review your tailored arse—
A pity you can't stand and swirl: it irked
To watch the stupid weather-girl who smirked,
Legging the isobars (that nightly farce).
Meanwhile men die; but should *you* dye again?
Was it the Shi'ite fighting? was it Sunni?—
Your brightness lightened up that live attack:
O, cool, seducing face, blinding to pain—
Your heartless, cursèd means to make your money;
Honey, you would be cleaner on your back.