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The Right to Keep and Bear Arms in Light of *Thornton*: The People and Essential Attributes of Sovereignty

*Kevin J Worthen**

Few people think about gun control and term limits in the same way. They generally favor one or the other, but not both or neither. The thesis of this Article, however, is that the two concepts are connected—or at least that the Framers of the United States Constitution would have found a connection between the two—and that the connection between the two affects the way we should think about the subjects.

This Article asserts that the two concepts are related because both gun control and term limits can infringe on the right of the people as ultimate sovereign to control the government entities created to carry out the sovereign will—term limits, by interfering with the people's right to choose their representatives in the national lawmaking process; gun control, by interfering with the people's right to use force, if necessary, to resist efforts to wrest control of sovereign authority from the people. This Article maintains that because the two concepts are thus related, the basic theories, principles, and reasoning used to determine the constitutional legitimacy of one should be relevant to the constitutionality of the other.

Structural constitutional limitations that prevent state infringement on the sovereign right of the people to choose their representatives should also prevent infringement on the sovereign right of the people to use force to prevent tyrannical misuse of governmental authority. This Article attempts to demonstrate the validity and implication of this thesis by showing that the

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* Professor of Law, Brigham Young University, J. Reuben Clark Law School. The author expresses appreciation to Adam Kunz for his helpful research and his persistence in raising the contemporary Second Amendment issues in such an intriguing manner. This Article is based on an address given on March 22, 1997 at the Brigham Young University Federalist Society Symposium on the Second Amendment at the J. Reuben Clark Law School in Provo, Utah.

Supreme Court's decision in *U.S. Term Limits, Inc. v. Thornton*[1] concerning the constitutionality of state-imposed term limitations for congressional elections provides some interesting insights into the scope of protection that should be given to the right of the people to keep and bear arms.

Part I explains the reasoning of both the majority and dissent in *Thornton* and discusses how that reasoning is relevant to the debate concerning the right to keep and bear arms. Part II then explores how several key issues in the Second Amendment debate would be resolved if viewed in light of *Thornton*. Part II concludes that application of the majority's reasoning in *Thornton* supports the position that the Constitution protects the people's right to keep and bear arms from both federal and state infringement. Moreover, viewed in light of *Thornton*, the right to keep and bear arms is both a collective and an individual right—broader than most gun control advocates and many scholars contend, but narrower than those on the opposite end of the issue have argued. Finally, consideration of the right to keep and bear arms in light of *Thornton* suggests that more may be at stake in the recent discussion about the continued relevancy of this right in today's society than has been appreciated up until now. If, as this Article suggests, the right to keep and bear arms is an essential attribute of sovereignty, there are legal and policy arguments counseling against its wholesale abandonment that have yet to be addressed by those who advocate that position. Those arguments raise issues warranting extensive consideration and discussion in our modern society.

I. CONSTITUTIONAL PROTECTIONS FOR THE SOVEREIGNTY OF THE PEOPLE

A. U.S. Term Limits, Inc. v. Thornton: *Who Are the People of the United States and Why Does It Matter?*

Thornton involved a challenge to the constitutionality of an amendment to the Arkansas State Constitution that precluded persons who had served a certain number of terms in the United States Congress from having their names placed on the ballot for reelection to that office.[2] In essence, the issue boiled down to

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1. 514 U.S. 779 (1995).
2. *See id.* at 783-84.

the right of a state to impose qualifications that are not found in the Constitution itself[3] on those seeking election to Congress. The five-member majority of the Court, in an opinion authored by Justice Stevens, answered that inquiry in the negative.

The majority commenced its opinion by noting that twenty-six years earlier in *Powell v. McCormack*[4] the Supreme Court decided that Congress did not have the authority "to add to or alter the qualifications of its Members."[5] In light of that ruling, the only question left for the Court to decide in *Thornton* was whether the states possessed this power. In answering that question in the negative, the majority made an extended effort to demonstrate that "the text and structure of the Constitution [as well as] the relevant historical materials" justified its conclusion.[6] However, this effort was rebutted effectively enough by the dissent's equally vigorous counterarguments that one scholar concluded "[t]he majority and dissent battled fiercely over the text and history . . . to a draw."[7] Perhaps recognizing this, the majority made clear that the factor that was of "most import[ance]" to its decision was its conception of "the basic principles of our democratic system" that were at the heart of its decision in *Powell*.[8]

The key "'fundamental principle of our representative democracy'"[9] recognized in *Powell* was "'"that the people should

3. The Constitution provides age, citizenship, and residency requirements for those who want to serve in Congress. The Constitution provides the qualifications for members of the House of Representatives: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2.

The Constitution further sets forth the requirements for Senators: "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." *Id.* § 3, cl. 3.

The question before the Court in *Thornton* was whether a state could add any additional requirements to the list (specifically that the person not have served in the office sought for more than the specified time). *See Thornton*, 514 U.S. at 787 (noting that the key issue is "whether the Constitution forbids states from adding to or altering the qualifications specifically enumerated in the Constitution").

4. 395 U.S. 486 (1969).

5. 514 U.S. at 787.

6. *Id.* at 806.

7. Kathleen Sullivan, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 80 (1995).

8. 514 U.S. at 806.

9. *Id.* at 793 (quoting *Powell*, 395 U.S. at 547).

choose whom they please to govern them.'"[10] This "fundamental principle" in turn rested on two postulates, according to the majority: (1) "that sovereignty is vested in the people,"[11] and (2) that an essential attribute of sovereignty is "the right to choose freely" the representatives of the sovereign "to the National Government."[12] Starting with these basic premises, the Court went on to conclude "that state-imposed qualifications, as much as congressionally imposed qualifications, would undermine the . . . critical idea . . . that an aspect of sovereignty is the right of the people to vote for whom they wish."[13] Since any additional qualifications that did not come from the people themselves would restrict the people's choice, the Court logically concluded that "the source of the qualification is of little moment in assessing the qualification's restrictive impact."[14] Thus, even though no constitutional provision expressly prohibited the state from imposing additional qualifications on those running for Congress, the majority concluded that the "Qualifications Clauses were intended to preclude the States from exercising any such power."[15] States could obtain such power only by receiving it from the people through the process of a constitutional amendment.[16]

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10. *Id.* (quoting *Powell*, 395 U.S. at 547 (quoting 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 257 (photo. reprint 1996) (Jonathan Elliot ed., 2d ed. 1891)))).

11. *Id.* at 794.

12. *Id.*

13. *Id.* at 820.

14. *Id.* Moreover, the Court noted, there was no reason to believe that the Framers trusted the states more than Congress on this issue. *See id.* at 808. Addressing the justification for granting Congress the authority to override the states' choice with respect to the time, place, and manner of holding elections, *see* U.S. CONST. art. I, § 4, cl. 1, Hamilton asserted, "If we are in a humor to presume abuses of power, it is as fair to presume them on the part of the State governments as on the part of the general government." THE FEDERALIST NO. 59 at 363 (Alexander Hamilton) (Clinton Rossiter ed., 1961), *quoted in Thornton*, 514 U.S. at 809.

15. 514 U.S. at 806.

16. The Court said:

> [A]llowing the several States to adopt term limits for congressional service would effect a fundamental change in the constitutional framework. Any such change must come not by legislation adopted either by Congress or by an individual State, but rather—as have other important changes in the electoral process—through the amendment procedures set forth in Article V.

Id. at 837 (footnote omitted).

The *Thornton* majority's decision was based on the notion that the people, as the ultimate sovereign, have certain fundamental rights of sovereignty with which neither the federal nor state governments can interfere without express delegation from the people. Justice Thomas, speaking for the four dissenting justices, agreed with the premise that the people are the ultimate sovereign in our constitutional system. Furthermore, he did not dispute that an essential attribute of sovereignty in a representative democracy is the right to choose who will govern and the concomitant right to determine the qualifications of those representatives. The nine justices thus were in accord on these matters. The fundamental point of disagreement was about who constitutes "the people"— who are the ultimate sovereigns in our system. As Justice Kennedy made clear in his concurring opinion, the majority believed that "the whole people of the United States"—the people of the entire nation—"asserted their political identity . . . when they created the federal system."[17] The dissent, on the other hand, believed that "[t]he ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole."[18] Thus, for the dissent, "the people of the several States"—not the people of the nation—"are the only true source of power"—the true ultimate sovereign.[19]

Starting with this fundamentally different premise, the dissent logically arrived at a fundamentally different conclusion. While congressional action imposing additional qualifications on congressional candidates would interfere with the sovereign right *of the people of each state* to chose their own representatives,[20] similar action by the state itself, or in this case the people of the state, was a far different matter. According to the dissent, such action was not an interference with the right of the sovereign, but an exercise of the sovereign's right.[21]

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17. *Id.* at 838 (Kennedy, J., concurring).

18. *Id.* at 846 (Thomas, J., dissenting).

19. *Id.* at 847 (Thomas, J., dissenting).

20. The dissent agreed "with the majority that Congress has no power to prescribe qualifications for its own Members." *Id.* at 875 (Thomas, J., dissenting). However, that limitation did not exist because congressional action would interfere with the right of the people of the nation, but because "nothing in the Constitution grants Congress this power." *Id.*

21. In one sense, it did not matter under the dissent's view whether the action

To summarize, the *Thornton* majority and dissent both agreed that the people are the ultimate sovereign under the United States Constitution and that the right to choose representatives in the national lawmaking process is an aspect of sovereignty protected by the Constitution, even though these principles are not directly articulated as such in that document. Their disagreement about the makeup of this sovereign entity—the people—led them to different conclusions. The majority's belief that the people of the entire nation are sovereign logically leads to the conclusion that each member of the people possesses rights with respect to the control of the national government with which neither Congress nor the states can interfere without express constitutional delegation of authority from the entire people. While the people of one state may give up their state-created right to vote for state officers of their choice, they may not confer authority upon the state to limit their rights as a part of the national sovereign. That right ultimately belongs to the people of the entire nation, and can be exercised only by that group, not some subgroup. This conclusion applies even though no provision of the Constitution expressly prohibits either Congress or the state from acting. The limitation, while perhaps implicit in the Qualifications Clauses, is really an inherent limitation on the right of the agents of the sovereign to interfere with the sovereign's authority.[22]

By contrast, but with equal logic, the dissent's belief that ultimate sovereignty rests with the people of each state logically leads to the conclusion that while Congress may not interfere with their sovereign power to decide who will represent them, the people themselves can make that choice, either directly, as they did in Arkansas, or indirectly, by authorizing the state legislature to make that decision.

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was by the state legislature or the people of the state because the Tenth Amendment powers not delegated to the national government "are either delegated to the state government or retained by the people. The Federal Constitution does not specify which of these two possibilities obtains; it is up to the various state constitutions to declare which powers the people of each State have delegated to their state government." *Id.* at 847 (Thomas, J., dissenting).

22. This view is consistent with that expressed by James Madison in *The Federalist*: "The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes. . . . [T]he ultimate authority, wherever the derivative may be found, resides in the people alone . . . ." THE FEDERALIST NO. 46, *supra* note 14, at 294 (James Madison).

B. *Sword and Sovereignty: The Sovereignty-Enforcing Aspect of the Right to Keep and Bear Arms*

One may question what all this has to do with the right to keep and bear arms. Arguably, it is of enormous relevance. *Thornton* addressed the fundamental issue of who are "the people of the United States" in the context of determining who has the ultimate right as sovereign to determine the qualifications of those who represent the sovereign in the national lawmaking process. The right to make laws[23] and, in a democratic republic, the related right to choose the representatives who will engage in that process, are basic aspects of the right of sovereignty.

An equally essential aspect of sovereignty, according to many theories, is the right and ability to enforce the sovereign will through force, including military force, if necessary.[24] Indeed, the ability to enforce one's will on those who would resist is the very core of sovereignty under some theories.[25] While there may be some disagreement about the validity of this "ultimate force" theory of sovereignty,[26] there is little doubt that it is was widely shared by those who framed and adopted the Constitution and Bill of Rights. John Adams, for example, repeatedly quoted Aristotle's warning that "the commonwealth is theirs who hold the arms: the sword and sovereignty ever walk hand in hand together."[27] Other framers, influenced both by theorists

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23. The power to enact supreme laws has long been viewed as one of the core concepts of sovereignty. "'All the characteristics of sovereignty,' said [Jean] Bodin, 'are contained in this, to have power to give laws to each and everyone of his subjects, and to receive none from them.'" HAROLD J. LASKI, THE FOUNDATIONS OF SOVEREIGNTY AND OTHER ESSAYS 17 (1921) (quoting JEAN BODIN, DE LA REPUBLIQUE bk. 1, ch. 8). John Locke indicated that the nucleus of sovereignty included "a right of making laws, with penalties of death, and consequently all less penalties for the regulating and preserving of property." Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321, 334 (1991) (quoting JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT bk. 2, ch. 1, § 3 (W.S. Carpenter ed., 1924)).

24. For example, Locke observed that in addition to the right of making laws, the nucleus of sovereignty included the right "of employing the force of the community in the execution of such laws." LOCKE, *supra* note 23, at bk. 2, ch. 1, § 3.

25. For example, as Harold Laski observed, "The sovereign may be one or few or many, but unless it is an absolute power, it lacks the marks of *majestus*." LASKI, *supra* note 23, at 17.

26. *See, e.g.*, EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 153 (1988) (stating the need of force to support sovereignty is a fiction); Louise Henken, *The Mythology of Sovereignty*, AM. SOC'Y OF INT'L L. NEWSL. (ASIL) Mar.-May 1993, at 1, 7 (proclaiming the death of the "sword sovereignty" theory).

27. 3 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE

like John Locke and their recent experience with the British, also agreed.[28] After all, the colonists resorted to military force to wrest sovereignty from King George.

And that is where the right to keep and bear arms comes in. The vast majority of modern scholars agree that the central purpose of the Second Amendment was to assuage fears that the increased powers vested in the newly created central government, including the authority to maintain a standing army, would be used by ambitious tyrants to assert despotic control over the people.[29] The Framers of the Constitution and of the Second Amendment believed from both the history of Europe and their own recent experience with Great Britain that whoever possessed superior military might was the true sovereign, regardless of what any formal document might provide. The key question, then, was who was to have that military might. The answer to that question would determine who was the true sovereign. With the creation of a standing army under the control of a national Congress and Executive, which also had ultimate control over the militia, the identity of the true sovereign was very much in doubt and of great import in the minds of many persons attending the ratifying conventions.

UNITED STATES OF AMERICA 472 (photo. reprint 1971) (1787-88), *quoted in* Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1, 32 n.92 (1992).

28. As Akhil Amar observed:

> In Locke's influential *Second Treatise of Government*, the people's right to alter or abolish tyrannous government invariably required a popular appeal to arms. To Americans in 1789, this was not merely speculative theory. It was the lived experience of their age. In their lifetimes, they had seen the Lockean words of the Declaration made flesh (and blood) in a Revolution wrought by arms.

Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1163 (1991) (footnote omitted); *see also* Scott Bursor, Note, *Toward a Functional Framework for Interpreting the Second Amendment*, 74 TEX. L. REV. 1125, 1133 (1996) (citing historical evidence that Whigs believed ownership of arms would prevent domestic tyranny).

29. As David Williams recently observed, "[M]odern theorists of the Second Amendment would probably agree on only one point: fear of the central government largely inspired the Amendment." David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring With the People*, 81 CORNELL L. REV. 879, 888 (1996); *see also* Thomas B. McAffee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way*, 75 N.C. L. REV. 781, 823-24 (1997) ("[I]n general terms, commentators agree that the Second Amendment was at least a partial response to concerns about the extent of military power granted to the new government by the Constitution.").

The Second Amendment reflected the Framers' answer to that question.[30] There could be no sure defense against a national government with a standing army bent on imposing its will on the people of the United States except a more powerful military unit. The original draft of the Amendment discussed by Congress made clear that this more powerful military unit was to be "a well-regulated militia, composed of the body of the people."[31] As Eldrige Gerry explained when offering the only explanation of the meaning of the Second Amendment during the Congressional debates: "This declaration of rights, I take it, is intended to secure the people against the mal-administration of the Government; if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed."[32] In short, as one recent commen-

30. The term "reflected" is used advisedly. As noted below, *see infra* text accompanying notes 81-82, it may be the structure of the Constitution, as much as, if not more than, the Second Amendment itself that limits a state's authority to interfere with the right to keep and bear arms.

31. Congress first debated the proposal after it had been refined by a Committee of Eleven members of the House, including James Madison. The provision reported by the Select Committee provided, "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms." 1 ANNALS OF CONGRESS 749 (Joseph Gales ed., 1789).

The language for the provision was largely taken from a proposal drafted by a committee of the Virginia Ratifying Convention, which included James Madison. *See* McAffee & Quinlan, *supra* note 29, at 860. That proposed amendment read as follows: "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." *Id.* (quoting *Amendments Proposed by the Virginia Conventions, June 27, 1788, reprinted in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD OF THE FIRST FEDERAL CONGRESS 17, 19 (Helen E. Veit et al. eds., 1991)). On June 8, 1789, Madison presented his proposed bill of rights to Congress. The relevant provision omitted the reference to the "body of the people," stating: "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person." 1 ANNALS OF CONGRESS, *supra*, at 434. Madison's proposals were at that time referred to a Committee of the Whole. *Id.* at 450. Eventually, the House reconsidered this action and referred Madison's proposed constitutional amendments to the Select Committee. *See id.* at 664-65. This Select Committee made a report to the House on July 28. When the proposals came back from the Committee of Eleven, *see id.* at 704, the provision read as stated in the beginning of this note, with the phrase "composed of the body of the people," restored. It was approved by the House in that form. *See* McAffee & Quinlan, *supra* note 29, at 866 (quoting House Committee Report (July 28, 1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra*, at 29, 30). The phrase "composed of the body of the people" was subsequently deleted by the Senate. *See id.*

32. 1 ANNALS OF CONGRESS, *supra* note 31, at 749.

tator has explained, "[T]he Second Amendment's guarantee of an armed populace [is] a guarantee that was the ultimate check in the Constitution's grand design of checks and balances, a guarantee that the people would remain free, sovereigns of themselves."[33]

Thus, the central right being protected by the Second Amendment is the sovereignty of the people.[34] As the text itself suggests, the Amendment does not focus primarily on the right of individuals to protect themselves, but on the right of "the people" to maintain a "free state."[35] In that respect, it is like the Qualifications Clauses, which protect the right of "the people" to choose members of Congress.[36] This textual and conceptual link between the people's right to keep and bear arms and their right to choose members of Congress—both of which were rights they possessed in their capacity as sovereign of the United States—suggests that analysis of the two rights in tandem may be beneficial.

II. SHEDDING NEW LIGHT ON AN OLD DEBATE: THE IMPACT OF *THORNTON* ON THE DEBATE CONCERNING THE RIGHT TO KEEP AND BEAR ARMS

Because both the right at issue in *Thornton* and the right expressed in the Second Amendment involve rights possessed by the people of the United States in their sovereign capacity, con-

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33. Burser, *supra* note 28, at 1134.

34. As Thomas McAffee and Michael Quinlan have noted, "The right to arms was closely linked with the idea of popular sovereignty in many minds, as reflected in the quoted dictum that '[t]he supreme power in every country is possest by those who have arms in their hands.'" McAffee & Quinlan, *supra* note 29, at 845 (quoting ANONYMOUS, RUDIMENTS OF LAW AND GOVERNMENT DEDUCED FROM THE LAW OF NATURE 52 (1783) *reprinted in* 1 AMERICAN POLITICAL WRITING IN THE FOUNDING ERA (1760-1805) 565, 602 (Charles S. Hyneman & Donald S. Lutz eds., 1983) (quoting WILLIAM ROBERTSON, THE HISTORY OF THE REIGN OF THE EMPORER CHARLES THE FIFTH (London, 1769))).

35. This does not necessarily mean that Second Amendment protection is limited to that essential core. *See infra* notes 86-88 (discussing possibility that broader right is protected by the Second Amendment); *see also* McAffee & Quinlan, *supra* note 29, at 804 (arguing that the Second Amendment was designed "both to facilitate the natural right of self-defense and to assure an armed citizenry from which to draw a citizen militia to protect the community from foreign invasion or tyrannical leaders").

36. The Constitution provides that "[t]he House of Representatives shall be . . . chosen . . . by the People of the several States." U.S. CONST., art. I, § 2, cl. 1. The Seventeenth Amendment similarly provides that Senators are to be "elected by the people" of each state. *Id.* amend. XVII. Thus, the key actors in both the provisions at issue in *Thornton* and the Second Amendment are the "people."

sideration should be given to how the rules that protect one of those rights apply to the other. The Supreme Court has in another context indicated that rules concerning one aspect of essential sovereignty apply to other aspects as well.[37] Thus, the analysis used in *Thornton* to determine the extent of constitutional protection provided to the sovereign right of the people to determine the qualifications of their representatives may be applied to determine the extent of constitutional protection provided to the sovereign right of the people to keep and bear arms.

A. *Against Whom Is the Right to Keep and Bear Arms Protected? Challenging the Conventional Wisdom*

One Second Amendment issue that has commanded considerable attention is whether the protection provided by that Amendment limits both federal and state authority or only the former.[38] Most of that debate has centered on whether the principles articulated in the Second Amendment apply to the states

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37. For example, in *Stone v. Mississippi*, 101 U.S. 814, 817-18 (1879), the Supreme Court ruled that a state could not contract away its police power. The Court later explained that this rule extended to all governmental powers "which from their very nature so concern [governmental] authority that to restrain its exercise . . . would be a renunciation of power to legislate for the preservation of society *or to secure the performance of essential governmental duties*." Contributors to the Pa. Hosp. v. City of Philadelphia, 245 U.S. 20, 23 (1917) (emphasis added). The Court thus made clear that the rule covered not only exercises of the police power, but also the power of eminent domain. *See id.* The inability of a sovereign to divest itself of essential sovereign powers through legislation is a limitation still recognized today. *See* United States Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 23, 24 nn.20-21 (1977). Its potential applicability to the debate concerning the right to keep and bear arms is discussed below. *See infra* text accompanying notes 96-98.

38. The debate on this issue, like the debate on many Second Amendment issues, is marked by a difference of opinion between the courts and legal scholars. Modern case law has uniformly held that the Second Amendment does not apply to state action. *See, e.g.*, Fresno Rifle and Pistol Club, Inc. v. Van de Kamp, 965 F.2d 723, 729-31 (9th Cir. 1992); Sklar v. Byrne, 727 F.2d 633, 637 (7th Cir. 1984); Quilici v. Village of Morton Grove, 695 F.2d 261, 269-70 (7th Cir. 1982); Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1317-18 (E.D.N.Y. 1996); White v. Town of Chapel Hill, 899 F. Supp. 1428, 1433 (M.D.N.C. 1995), *aff'd*, 70 F.3d 1264 (4th Cir. 1995); State v. Amos, 343 So. 2d 166 (La. 1977); State v. Friel, 508 A.2d 123, 125 (Me. 1986); Hardison v. State, 437 P.2d 868, 871 (Nev. 1968); Harris v. State, 432 P.2d 929, 930 (Nev. 1967); Burton v. Sills, 248 A.2d 521, 528 (N.J. 1968); Masters v. State, 685 S.W.2d 654, 655 (Tex. Crim. App. 1985). Scholars, on the other hand, have repeatedly questioned the validity of these holdings. *See, e.g.*, Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 252-257 (1983); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 651-54 (1989); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 110 (1987).

through the Fourteenth Amendment's Due Process Clause, under the doctrine of incorporation.[39] Viewing the issue through the lens of *Thornton* suggests that this focus on the incorporation doctrine is misplaced.[40]

If one considers the right to keep and bear arms as an essential attribute of sovereignty possessed by the people, the issue that divided the Supreme Court in *Thornton*—who are the people that constitute this ultimate sovereign—becomes of paramount importance in the gun control debate. For example, if the *Thornton* dissent is correct that ultimate sovereignty with respect to the right to control the national government resides in the people of each individual state and that "it is up to the various state constitutions to declare which powers the people of each State have delegated to their state government,"[41] the Second Amendment would clearly be a limitation only on the federal government, as most case law now suggests.[42] As ultimate sovereigns, the people of each state might have full capacity to delegate to their state governments the sovereign power to control all arms needed to prevent the national government from usurping the sovereignty of the people. Such an act—which might include a state constitutional ban on the private ownership of firearms—would be an exercise of the sovereign's right, not an interference with it.

Moreover, and much more controversially, the *Thornton* dissent's view suggests not only that states' authority is unaffected by the Second Amendment itself, but also that the limitations it contains cannot be applied to the states through the Fourteenth Amendment.[43] While the incorporation doctrine may limit states' ability to interfere with individual rights that are fundamental

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39. *See Fresno Rifle*, 965 F.2d at 729-31; *Quilici*, 695 F.2d at 270; *Accu-Tek*, 935 F. Supp. at 1317-18; Kates, *supra* note 38, at 252; Levinson, *supra* note 38, at 652-54; Lund, *supra* note 38, at 110.

40. While Professor Levinson examines the incorporation issue, *see* Levinson, *supra* note 38, at 652-55, he also discusses the possibility that the provision limits state authority of its own force or because it is a privilege of national citizenship, *see id.* at 651-52, an argument consistent with the conclusions reached in this Article.

41. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 847 (1995) (Thomas, J., dissenting).

42. *See supra* note 38.

43. To extend slightly a similar argument made by Professor Amar, if the right to keep and bear arms is a right of the people of the state, it would be a right of the state itself and thus "resistant to incorporation against state governments via the Fourteenth Amendment." Amar, *supra* note 28, at 1166.

to personal liberty, it has not, and perhaps cannot, be used to limit the sovereign right of the people of the state to cede a portion of their collective sovereign authority to the state. After all, the key provisions of the Fourteenth Amendment protect "persons," not "the people."[44] It would make no more sense to incorporate the Second Amendment against the state than it would to incorporate the Tenth Amendment, since both are concerned with the division of sovereign rights among the people, the states, and the national government.[45] If the right to keep and bear arms is designed to protect the sovereignty of the people of the states, a state constitutional amendment adopted by the people completely banning all private ownership of firearms in the state would, under the dissent's view, be the exercise of the sovereign's right, not an interference with the right of sovereignty. Ironically, then, it is the conservative justices in *Thornton* who provide the best support for the gun control lobby on this issue.

Equally ironic and surprising are the results suggested by the *Thornton* majority. If the *Thornton* majority is correct that the people referred to in the Constitution are the people of the entire nation, then not only is the federal government precluded from removing their arms without their consent, but no state can disarm its citizens either, even if a majority of those citizens is willing to concede their arms to the state. The people of the nation as a whole have an interest in that decision, just as they have an interest in the decision to add qualifications to the representatives of Congress from any particular state. To paraphrase *Thornton*, when some entity interferes with an aspect of the sovereign right of the people of the nation, "the source of the [infringement] is of little moment in assessing the [infringement's] restrictive impact."[46]

This assertion that the states are precluded from interfering with the right of the people to keep and bear arms, even in the absence of the Fourteenth Amendment, undoubtedly seems radical. Yet, that is the clear implication of the *Thornton* major-

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44. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws.") (emphasis added).

45. *See* Amar, *supra* note 28, at 1158 (creating and applying same argument to the Establishment Clause).

46. 514 U.S. at 820.

ity's reasoning and conclusion. If the people of the entire nation are the ultimate sovereign, as the *Thornton* majority postulates, and if the right to keep and bear arms is designed principally to protect the right of the people to maintain that sovereignty by force, if necessary, then neither Congress nor the states can interfere with that right without an express constitutional delegation of authority from the people themselves.

This conclusion is so radical that it is certain to be assailed on the grounds that it is inconsistent with standard Second Amendment jurisprudence and the well-established rule of *Barron v. Baltimore*[47]—that the Bill of Rights does not by its own force apply to the states. After all, the majority in *Thornton* at least made a valiant effort to demonstrate that its ruling was consistent with a historical understanding of the Qualifications Clauses and with prior precedent. If the underlying premise of the *Thornton* majority is to be applied to limit the states' authority to interfere with the people's right to keep and bear arms, there surely needs to be a similar effort with respect to that right. Contrary to what might appear at first blush, however, such an effort is not doomed to failure.

With respect to historical understanding, at least some of the early commentators believed that the Second Amendment limited both federal and state power. Indeed, William Rawle, who enjoyed enough of a reputation that George Washington repeatedly offered him the job of attorney general,[48] asserted that the Second Amendment would most likely be used in response to action by the state legislature.

> The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt *could only be made under some general pretense by a state legislature*. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on *both*.[49]

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47. 32 U.S. (7 Pet.) 243 (1833).

48. *See* DAVID PAUL BROWN, EULOGIUM UPON WILLIAM RAWLE 15 (1837), *cited in* Kates, *supra* note 38, at 242 n.161.

49. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125-126 (2d ed. 1829), *quoted in* JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 164 (1994) (emphasis added); *see also* Amar, *supra* note 28, at 1167-68.

Similarly, in 1846 the Georgia Supreme Court held that a state law prohibiting the bearing of certain arms violated the Second Amendment.[50] The court used language suggesting the very theory adopted by the Court in *Thornton*.

> [D]oes it follow that because the people refused to delegate to the general government the power to take from them the right to keep and bear arms,[51] that they designed to rest it in the State governments? Is this a right reserved to the *States* or to *themselves*? Is it not an unalienable right, which lies at the bottom of every free government? We do not believe that, because the people withheld this arbitrary power of disfranchisement[52] from Congress, they ever intended to confer it on the local legislatures.[53] This right is too dear to be confided to a republican legislature.
>
> . . . If a well-regulated militia is *necessary* to the *security* of the State of Georgia and of the United States, is it competent for the General Assembly to take away this security, by disarming the people? What advantage would it be to tie up the hands of the national legislature, if it were in the power of the *States* to destroy this bulwark of defence? . . .
>
> Such, I apprehend, was never the meaning of the venerated statesman who recommended, nor the people who adopted, this amendment.[54]

Thus, while the support may be far from conclusive, there is some fairly strong evidence that the right to keep and bear arms was thought by some to be protected against both federal and state incursions prior to the Fourteenth Amendment.

As for prior precedent, the case is also not as one-sided as many courts have suggested.[55] The Court's conclusion in *Barron*,

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50. *See* Nunn v. State, 1 Ga. 243 (1846).

51. As suggested in *Cruikshank* and *Presser*, and as concluded below, *see infra* text accompanying note 99, the Georgia Supreme Court assumes the right existed before the Second Amendment was adopted. The Second Amendment did not create the right, it merely made clear that the Constitution did not authorize any interference with that right.

52. The court's use of the term "disfranchisement" suggests a link between voting and keeping and bearing arms, suggesting that both are political acts of the people.

53. The court seems to assume with respect to the right to keep and bear arms that a state could legislate with respect to this right only if the people expressly authorized such legislation. This assumption is similar to the assertion in the *Thornton* majority that a state would need to receive the power to determine the qualifications of members of Congress by delegation from the people.

54. *Nunn*, 1 Ga. at 250-51.

55. *See supra* note 38.

that the Fifth Amendment prohibition on the taking of private property without just compensation did not limit state authority, is by itself not dispositive. Unlike the Second Amendment (and some other amendments) the rights articulated in the Fifth Amendment are not rights possessed by the people. Thus, in the absence of more definitive rulings, *Barron* could be limited to cases in which individual rights, not rights of sovereignty, are being asserted against the State, as suggested by some of the language from the case.[56]

However, there is subsequent Second Amendment case law that relies on *Barron*, such as *United States v. Cruikshank*,[57] and *Presser v. Illinois*.[58] These two Supreme Court cases[59] are generally cited for the proposition that the Second Amendment right to keep and bear arms does not limit state authority.[60] While there is language in the two cases that seems to render the issue moot, a close reading indicates that not only is there

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56. Noting that the Framers of the Bill of Rights could have easily expressly applied the limitations to the states, Justice Marshall stated, "Had congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments *in matters which concerned themselves alone*, they would have declared this purpose in plain and intelligible language." Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833) (emphasis added). Under the Constitution, property rights were to be determined by each state. Thus state laws affecting property were accurately characterized as involving matters that concerned only the citizens of the state involved. However, as explained above, the right of the people to keep and bear arms was arguably a right of national citizenship, a matter which concerned all national citizens.

57. 92 U.S. 542 (1876).

58. 116 U.S. 252 (1886).

59. Courts also occasionally cite the Supreme Court's decision in *Miller v. Texas*, 153 U.S. 535 (1894), for the proposition that the Second Amendment does not apply to the states. While there is language in the case to support that proposition, *see id.* at 538 ("[I]t is well settled that the restrictions of [the Second and Fourth A]mendments operate only upon the Federal power, and have no reference whatever to proceedings in state courts."), the Court ultimately held that "there is no Federal question properly presented by [this] record" because the issue was not raised at the trial or appellate level until a motion for rehearing before the appellate court and because there was no evidence that the defendant (who was convicted of murder) was denied the benefits of the constitutional provisions cited. *Id.* at 537-38. Thus, the case adds nothing to the Second Amendment law that was not already established by *Cruikshank* and *Presser*.

60. *See, e.g.*, Fresno Rifle and Pistol Club, Inc. v. Van de Kamp, 965 F.2d 723, 729-31 (9th Cir. 1992); Quilici v. Village of Morton Grove, 695 F.2d 261, 269-70 (7th Cir. 1982); Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1317-18 (E.D.N.Y. 1996); White v. Town of Chapel Hill, 899 F. Supp. 1428, 1433 (M.D.N.C. 1995); State v. Amos, 343 So. 2d 166, 168 (La. 1977); State v. Friel, 508 A.2d 123, 125 (Me. 1986); Harris v. State, 432 P.2d 929, 930 (Nev. 1967); Burton v. Sills, 248 A.2d 521, 526-27 (N.J. 1967); Masters v. State, 685 S.W.2d 654, 655 (Tex. Crim. App. 1985).

room in the rulings to accommodate the view that states may not interfere with some aspects of the right to keep and bear arms, but there is some support in those decisions for that very conclusion.

The first of these cases, *Cruikshank*, was a federal criminal proceeding brought against private individuals under the Enforcement Act of 1870,[61] a civil rights statute making it a federal crime to conspire with the intent of hindering a citizen's exercise of any rights granted or secured by federal law.[62] The federal government charged the defendants with conspiring to interfere with the rights of several African Americans to, among other things, peaceably assemble and keep and bear arms.[63] Since no state law was involved in the case, any discussion of the impact of the Second Amendment on state authority was necessarily dictum. More importantly, a full reading of the Court's opinion indicates that the problem with the indictment, which was ultimately dismissed, was as much a factual problem as a constitutional one.

To understand the Court's ruling and reasoning on the Second Amendment issue, it is necessary to examine its ruling with respect to the first count of the indictment—charging the defendants with interfering with the right of the named individuals to peaceably assemble—because the Court's reasoning on the Second Amendment issue merely refers to its reasoning on the first count. Addressing the first count, the Court noted that according to the indictment, the defendants had interfered with the victim's federally protected right to assemble "for a peaceable and lawful purpose."[64] According to the Court, that right, which was related to, but not coextensive with, the right to assemble for the purpose of petitioning the government for redress of grievances "existed long before the adoption of the Constitution of the

61. Ch. 114, 16 Stat. 140 (1870).

62. The relevant provision of the Act stated:

> That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to . . . injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States . . . such persons shall be held guilty of felony . . . .

Id. at 141.

63. *See* United States v. Cruikshank, 92 U.S. 542, 544-45 (1876).

64. *Id.* at 551.

United States."[65] Because the right to peaceably assemble for lawful purposes "always has been, one of the attributes of citizenship under a free government," the Court reasoned, "[i]t was not . . . a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection."[66] Referring to the related First Amendment right to peaceably assemble to petition the government for a redress of grievances, the Court, citing *Barron*, noted that like other provisions of the Bill of Rights, it "was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone."[67] While the First Amendment

> assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress[, t]he right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States.[68]

Thus, the right to peaceably assemble for any lawful purpose, with which the defendants allegedly interfered, was not a right granted or secured by the Constitution—at least it was not secured from interference by anyone other than Congress. Therefore, the indictment, which charged that defendants' actions interfered with this right, was insufficient.

Had the Court ended its discussion at this point, one might conclude that the right to assemble for the purpose of petitioning the government for redress of grievances (the constitutional right rather than the preexisting right to assemble for any purpose) was likewise not protected against infringement by any one other than Congress. However, the Court went on to clarify its reasoning, in language that indicates that had the facts been different, the statute would have been satisfied.

> The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for *any thing else connected with the powers or the duties of the*

65. *Id.*
66. *Id.*
67. *Id.* at 552.
68. *Id.*

> *national government*, is an attribute of *national* citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. *If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States.* Such, however, is not the case. The offence, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.[69]

In other words, while the Constitution did not protect against noncongressional interference with a citizen's right to meet with others for any lawful purpose,[70] when citizens gathered to act in their sovereign capacity to discuss the duties and powers of the national government over which they were sovereign, such action was protected not only from congressional interference but from private, and presumably state, interference as well. Unfortunately for the government in *Cruikshank*, interference with that more sovereignty-enforcing right had not occurred or at least had not been alleged in the indictment.

The Court then indicated that the counts in the indictment charging defendants with interfering with the individuals' right to keep and bear arms were "equally defective"[71] for largely the same reasons.

> The right there specified [in the indictment] is that of 'bearing arms *for a lawful purpose*.' This is not a right granted by the Constitution. Neither is it in any manner dependant upon that instrument for its existence. The Second Amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress.[72]

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69. *Id.* at 552-53 (emphasis added).

70. The Court's implication that the limitation imposed on Congress extended to this broader right provides some support for the Court's later expansion of this right into a general right of association, which after the Fourteenth Amendment limited state authority. *See* Roberts v. United States Jaycees, 468 U.S. 609 (1984).

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

72. *Id.* (emphasis added).

While the Court did not go on to elaborate, as it had with respect to the first count, it is possible that had the defendants interfered with the right of the people to keep and bear arms to protect their sovereign right to control the national government, their actions would have fallen within the statute. But that is not what the indictment alleged. It alleged interference only with the more general individual right to bear arms for any lawful purpose.

Thus, *Cruikshank* merely held that the right to keep and bear arms for *any lawful purpose* was not a right constitutionally protected against *private* interference. The Court said nothing about the right of the State to interfere with the right to keep and bear arms to prevent usurpation of the sovereignty of the people. Moreover, there is at least some indication that the right to keep and bear arms for the more specific purpose of restraining a usurper of the sovereignty of the people might well be a right of national citizenship with which no one, government or nongovernment, could interfere.

There are at least two possible objections to this latter conclusion concerning the meaning of *Cruikshank*. First, while the Court did rely on a portion of its reasoning concerning the right to peaceably assemble in discussing the right to keep and bear arms, it did not repeat its clarification concerning what kind of indictment would have been sufficient. Thus, it is possible that while the right to peaceably assemble to carry out the sovereign's business might well be protected against noncongressional interference, the Court may not have intended for that reasoning to apply to the right to keep and bear arms for that same purpose. Second, the right to peaceably assemble in a sovereign capacity might have been protected against noncongressional interference not by the First Amendment, but by the Privileges and Immunities Clause of the Fourteenth Amendment, which had been adopted prior to *Cruikshank*, and which even after its narrow interpretation in the *Slaughter-House Cases*[73] still prohibited states from interfering with privileges of national citizenship.[74]

73. 83 U.S. (16 Wall.) 36 (1873).

74. In the *Slaughter-House Cases*, the Court held that the Privileges and Immunities Clause of the Fourteenth Amendment limited state interference only with privileges and immunities of national, not state, citizenship. *See id.* at 74. The Court also indicated that the list of such privileges was relatively short, consisting of "the

However, the next Supreme Court case addressing the right to keep and bear arms, *Presser v. Illinois*,[75] provides a clear response to the first objection and sheds helpful insight on a possible response to the second. Unlike *Cruikshank*, *Presser* did involve a challenge to a state law, a law making it "'[un]lawful for any body of men . . . other than the regular organized volunteer militia of this State and the troops of the United States, to . . . drill or parade with arms in any city . . . without the license of the Governor.'"[76] Presser was convicted of violating this state statute because of his participation as the leader of a private militia of about 400, which marched armed on the streets of Chicago without the requisite license.[77] Rejecting Presser's argument that the state statute violated the Second Amendment, the Court, citing *Cruikshank*, noted that "a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States."[78] Again, had the Court stopped there, it might be impossible for even the most optimistic opponent of gun control to contend that the issue was still open. But the Court did not stop there. After noting that the challenged law "only forbid[s] bodies of men to . . . drill or parade with arms in cities and towns unless authorized by law" and that such a law did "not infringe the right of the people to keep and bear arms,"[79] the Court went on, much as it did in *Cruikshank*, to

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very few express limitations which the Federal Constitution imposed upon the States" even prior to the adoption of the Fourteenth Amendment—"such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts"—and "a few other restrictions," *id.* at 77, such as the right of interstata travel and the right to be protected on the high seas. *See id.* at 79. The Court also indicated that "[t]he right to peaceably assemble" was among the rights protected. *Id.* Since the *Slaughter-House Cases*, the Court has struck down state laws that interfered with these privileges of national citizenship. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (invalidating duration residency requirement for welfare benefits as a violation of the right of interstate travel), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974).

75. 116 U.S. 252 (1886).

76. *Id.* at 253 (quoting ILL. MIL. CODE art. XI § 5 (1879)).

77. *See id.* at 254-55.

78. *Id.* at 265. The Court stated, "It was so held by this court in the case of *United States v. Cruikshank* . . . ." *Id.* As noted above, *Cruikshank's* holding had nothing to do with the power of the state since the state was not a party to the action and no state law was involved.

79. *Id.* at 264-65.

contrast this activity, which was not protected from state interference, with a more narrow, but related right, with which the state could not interfere.

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, *the States cannot*, even laying the constitutional provision in question out of view, *prohibit the people from keeping and bearing arms, so as to* deprive the United States of their rightful resource for maintaining the public security, and *disable the people from performing their duty to the general government*. But, as already stated, we think it clear that the sections under consideration do not have this effect.[80]

Thus, the portion of the reasoning with respect to the right to keep and bear arms hinted at, but not clearly expressed, in *Cruikshank* is made explicit in *Presser*. Even though the Second Amendment may limit only congressional authority to interfere with an individual's right to keep and bear arms for general purposes, the Constitution limits noncongressional action, including state action, that interferes with a more narrow right of the people to keep and bear arms in order to perform their duties as the ultimate sovereign of the national government. *Presser* therefore seems to clearly answer the first objection to my reading of *Cruikshank*.

What of the second objection? Is it possible that the Court in *Presser* was merely indicating that the more narrow right to keep and bear arms to carry out the people's duty with respect to the national government was a privilege of national citizenship protected against state infringement by the Privileges and Immunities Clause of the Fourteenth Amendment?[81] That is a possible reading because even though the Court does not mention the Fourteenth Amendment or privileges and immunities, it did

80. *Id.* at 265-66 (emphasis added).

81. Even this more limited reading would be of considerable importance because it would render largely irrelevant the ongoing debate concerning whether the Second Amendment is incorporated into the Fourteenth Amendment through the Due Process Clause. *See supra* note 38. As noted above, even after the *Slaughter-House Cases* limited its scope, the Privileges and Immunities Clause of the Fourteenth Amendment has still been held to prevent state interference with privileges of national citizenship. *See supra* note 74.

make clear that its conclusion did not rest solely on the Second Amendment. States are prohibited from interfering with this aspect of the people's right to keep and bear arms, the Court noted, "even laying the constitutional provision out of view."[82] While this may indicate that the Court's assertion rests on the Fourteenth Amendment, it may have a different meaning, a meaning completely consistent with the majority opinion in *Thornton*. The Court may be indicating that there are rights the people of the United States hold not because they are expressly protected by some constitutional provision, but because they are rights that inhere in any true sovereign.

Under this view the Second Amendment may give some textual evidence of what rights the people possess as an inherent attribute of their ultimate sovereignty. However, it is the inherent sovereignty, rather than the provision itself, that actually limits the states. Just as the Qualifications Clauses may limit state authority not so much because they expressly indicate that states have no authority to determine the qualifications of congressional candidates—which they do not do—but because they indicate that it is something the people decided to do for themselves. This line of reasoning, which finds certain limitations on state authority in the overall design or structure of the Constitution[83] rather than in particular express limitations, was clearly adopted by Justice Kennedy in *Thornton*.[84]

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82. *Presser*, 116 U.S. at 265-66.

83. The Supreme Court has in other contexts invalidated laws on the ground that they violate not some express textual provision of the Constitution, but because they are inconsistent with the structure of the Constitution. *See, e.g.*, Printz v. United States, 117 S. Ct. 2365, 2369, 2376-79 (1997).

84. The view that the structure of the Constitution limits the ability of either the federal or state government to interfere with the sovereign right of the people to keep and bear arms and other sovereign rights is further supported by statements in *The Federalist* indicating that (1) the people were the ultimate sovereign, with control over both the federal and state governments, and (2) their being armed assured that such control would not be lost.

As to the first point, Madison explained:

> Notwithstanding the different modes in which [federal and state governments] are appointed, we must consider both of them as substantially dependent on the great body of the citizens of the United States. . . . The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities

"The federal character of congressional elections flows," Justice Kennedy asserted, "from *the political reality* . . . that national citizenship has privileges and immunities protected from state abridgement *by the force of the Constitution itself*."[85] Unlike the Court in *Presser*, Justice Kennedy removed any doubt about whether these structural limits on state authority derive solely from the Privileges and Immunities Clause of the Fourteenth Amendment. "*Even before the passage of the Fourteenth Amendment*," he notes, "th[is] . . . proposition was given expression in Crandall v. Nevada," in which the Court held that states could not interfere with the passage through their territory of those citizens whose services were needed by the national government.[86] Justice Kennedy then notes that in *Cruikshank* the

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> of each other. These gentlemen must here he reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments whether either, or which of them, will he able to enlarge its sphere of jurisdiction at the expense of the other.

THE FEDERALIST NO. 46, *supra* note 14, at 294.

Hamilton expressed similar views in *Federalist* NO. 28:

> Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.

THE FEDERALIST NO. 28, *supra* note 14, at 181 (Alexander Hamilton).

As to the second point, both Madison and Hamilton indicated that the fact that the people were armed was the final fail-safe mechanism to prevent usurpation of popular sovereignty by the federal government. *See* THE FEDERALIST NO. 46, *supra* note 14, at 299 (indicating that if the federal government sought to overthrow the liberties of the people, "the State governments with the people on their side would be able to repel the danger" constituting "a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence"); *id.* (asserting that if the Europeans had "the advantage of being armed, which the Americans possess over the people of almost every other nation[,] it is not certain that with this aid alone they would not be able to shake off their yokes"); THE FEDERALIST NO. 28, *supra* note 14, at 180 (Alexander Hamilton) ("If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government, and which against the usurpations of the national rulers may be exerted with infinitely better prospect of success than against those of the rulers of an individual State.").

85. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 842 (1995) (Kennedy, J., concurring) (emphasis added).

86. *Id.* (Kennedy, J., concurring) (citing Crandall v. Nevada, 73 U.S. (6 Wall.) 35,

Court recognized the right of the people to peaceably assemble for the purpose of dealing with the federal government as a right of national citizenship "without reference to the Privileges and Immunities Clause."[87]

The citation to *Cruikshank*, an oft-cited Second Amendment case, was likely not intended by Justice Kennedy to tie *Thornton's* ruling with respect to term limitations to the right to keep and bear arms. Yet, the connection certainly seems to exist. If the Framers believed that the people possess certain rights in their capacity as the ultimate sovereign and that the states cannot interfere with these rights unless expressly authorized to do so, surely one of the rights they would have included would have been the right to keep and bear arms, because, as the Framers made clear in the text of the Second Amendment, the right to keep and bear arms was "necessary to the security of a free State."

Thus, history and precedent are less hostile than many might believe to the position logically suggested by application of the majority's ruling in *Thornton* to the Second Amendment debate. It seems at least equivocal enough to justify application of the fundamental principle that carried the day in *Thornton*. Application of that principle suggests that neither Congress nor the states can interfere with the right of the people to keep and bear arms to protect their sovereignty unless there is an express constitutional provision granting them this power. Since no such constitutional provision exists, neither entity has that power under the reasoning in *Thornton*. *Thornton* thus suggests that, contrary to standard scholarship,[88] limitations on a state's authority to limit possession of firearms depends not on the reach of the incorporation doctrine, but on the locus of popular sovereignty.

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43 (1868)).

87. *Id.* at 843 (Kennedy, J., concurring). Justice Kennedy also noted that "[t]hough the *Slaughter-House Cases* interpreted the Privileges and Immunities Clause of the Fourteenth Amendment, its view of the origins of federal citizenship was not confined to that source," and that the Court indicated "'some . . . owe their existence to the Federal government, its National character, its Constitution, or its laws.'" *Id.* (quoting Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873)). He also cited other cases that follow a similar line of reasoning. *See id.* at 843-44.

88. *See supra* note 39.

B. Collective or Individual Right? A Middle Ground Approach

Another issue that has provided considerable grist for the Second Amendment debate mill is whether the right to keep and bear arms is a collective or individual right.[89] At first glance, the conclusion that the right to keep and bear arms belongs to the people in their sovereign capacity would seem to provide support

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89. Although in 1983, one scholar concluded that "[t]he individual right view is endorsed by only a minority of legal scholars," Kates, *supra* note 38, at 206, the academic tide seems to have turned in the opposite direction since that time. In 1996, one commentator observed:

> Of the 34 law review articles published since 1980 that offer substantial discussion of the Second Amendment, only 3 endorse the states' right theory. . . .
>
> In contrast, articles endorsing the view that the Second Amendment protects an individual right have been authored by some of the major figures in constitutional law and have been published in the most prestigious law reviews.

Burser, *supra* note 28, at 1126 n.13. While the academic debate has produced proponents of both views, courts that have directly addressed the issue have uniformly adopted the states' rights or collective right theory. *See, e.g.*, Hickman v. Block, 81 F.3d 98, 102 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 276 (1996); Thomas v. Members of City Council of Portland, 730 F.2d 41, 42 (1st Cir. 1984); United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976). One judge has indicated that the Amendment might protect the individual right to use arms to "defend oneself and one's home against personal attack." United States v. Gomez, 92 F.3d 770, 774 n.7 (9th Cir. 1996). However, the other two judges on the panel expressly refused to join that observation, *see id.* at 778-79, and a subsequent panel dismissed the observation as "dicta" of "no precedential value," reflecting the views "of only one judge." San Diego County Gun Rights Committee v. Reno, 98 F.3d 1121, 1124 n.1 (9th Cir. 1996). Courts rejecting the individual rights theory have often hinted that the Supreme Court decided the issue in *United States v. Miller*, 307 U.S. 174 (1939). *See, e.g., Hickman*, 81 F.3d at 102 ("Following *Miller*, '[i]t is clear that the Second Amendment guarantees a collective rather than an individual right.'" (quoting *Warin*, 503 F.2d at 106)). However, while *Miller* clearly indicated that the "obvious purpose" of the Second Amendment was "to assure the continuation and render possible the effectiveness of" militias, 307 U.S. at 178, in discussing what constituted a militia, the Court referred to the historical understanding as a body composed of "all males physically capable of acting in concert for the common defense" who were "expected to appear bearing arms supplied by themselves," *id.* at 179, or a group consisting of "every able-bodied Male Person, being a Citizen of this State, or of any of the United States, and residing in this State . . . and who are of the Age of Sixteen, and under the Age of Forty-five Years," each of whom was to "provide himself, at his own Expense, with a good Musket or Firelock," *id.* at 180-81. Thus, it is far from clear that the Court concluded that there was no individual component to the right to keep and bear arms. That Miller produced no evidence that his activities in transporting a sawed-off shot gun in interstate commerce were in any way related to the preservation of such a militia does not foreclose the possibility that possession of a firearm for such purposes is protected by the Amendment. Thus, *Miller* has been cited by supporters of both the individual and collective right readings of the Second Amendment. *See* Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53, 100-02 & n.209 (1992) (citing examples).

for those advocating the collective nature of the right. However, viewing the issue in light of the reasoning used in *Thornton* reveals that such an analysis is somewhat misdirected.

Considering the right to keep and bear arms as analogous to the sovereign right to choose national representatives, one can see that the argument that the right to keep and bear arms has no individual aspect is similar to contending that the right of the people to chose their national representatives is a collective right that has no application to individuals. However, it is clear that although the right to choose representatives is ultimately a collective right of the people, it can be meaningfully exercised only when each individual member of the people has the right to vote. Similarly, while the right to keep and bear arms may ultimately be a collective right of the people to resist usurpation by force, if necessary, it seems that it can meaningfully be exercised only if each individual has the right to keep and bear arms.[90] If anyone else has control over all the arms, the people are not sovereign. Thus, the reasoning of *Thornton* suggests that the right to keep and bear arms has some individual component to it.[91]

However, that same analysis indicates that the right is not as broad as many—particularly the increasing number of private militia groups—would contend. As noted above, the right that is protected from both federal and state action is a right to keep and bear arms for purposes of preventing entities other than the people from usurping the right of ultimate sovereignty. It is the right to have the means to resist the usurpers by force in order to protect the sovereignty of the people. Thus, while there may be an individual right to possess the *means* to *imple-*

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90. *See* McAfee & Quinlan, *supra* note 29, at 820-21 ("The right to 'keep' arms would seem to include at least a personal right to *have* in one's control, as well as in one's home, the weapons one might 'bear' in support of the common defense.").

91. As Thomas McAffee and Michael Quinlan have noted, even those who argue that the Second Amendment protects only the right of the states to maintain control over their militias concede that "the existence of an armed people from which to draw the militia, a people guaranteed the right to hold private arms, could have been seen as a key to fostering the militia envisioned by the Militia Clause." McAffee & Quinlan, *supra* note 29, at 813 (citing LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 11 (1991)). The "collective" right of the people to bear arms to resist tyranny is not of much use if the weapons are controlled by those with the power to impose tyrannical rule on the people rather than by individual members of the collective people.

ment the "revolution"[92] against the usurpers *once such an action is authorized by the people*, there is no individual right to *declare* that the time for revolution has arrived.[93] That right—which must precede any use of arms—is a collective right belonging to

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92. The proper terminology for such an action is somewhat problematic because of the potentially misleading implications that can be drawn from the various terms that could be used. As the text makes clear, the action contemplated by my view of the Second Amendment is largely a political act of a sovereign people, who decide they can defend their sovereignty as a people only by the use of force. I use the term "revolution" to describe that action because it is the term most often used to describe the forceful overthrow of the British Crown's claim to sovereignty in America, the most analogous action on the minds of the Framers of the Second Amendment. Others have used the more pejorative term "insurrection." *See, e.g.*, Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107, 110-29 (1991) (criticizing "insurrectionist theory" of the Second Amendment). Often the difference between an "insurrection" and a "revolution" is the outcome of the endeavor—the latter term being used to describe those that succeed, the former those that fail.

Which term is chosen involves more than semantics, however, because choice of the wrong term may confuse the issue. Thus, Henigan challenges the "insurrectionist theory" on the ground that under the Militia Clauses of the Constitution, *see* U.S. CONST. art. I, § 8, cls. 15-16, the militia is an instrument of federal governmental authority, while under the "insurrectionist theory," the militia is a check on the power of the federal government (something outside the government). He then asserts that "[t]he Constitution cannot view the militia *both* as a means by which government can suppress insurrection *and* as an instrument for insurrection against the government. It must be one or the other." Henigan, *supra*, at 115. Henigan's view is correct only if one views the federal government as the ultimate sovereign in our government. Like many critics of the Constitution, Henigan has lost sight of the fact that "[t]he federal and Stata governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes." THE FEDERALIST No. 46, *supra* note 14, at 294. Like those early critics, Henigan "must here be reminded of [his] error. [He] must be told that the ultimate authority, wherever the derivative may he found, resides in the people alone." *Id.* Thus, the action that the Second Amendment makes possible is not an "insurrection" against the true sovereign, but rather the forceful resistance of the sovereign against attempts by its agents to usurp that authority. The authority of the sovereign people (through their federal "agents") to use militias to put down true insurrections (military rebellions not authorized by the people) is not at all inconsistent with their authority to use the same group to control those same federal "agents" if the agents themselves threaten to usurp the ultimate power of sovereignty. In that situation, it would be the federal "agents," not the sovereign people, who would be engaged in "insurrection."

93. John Adams, who drafted the Massachusette state constitutional provision protecting the right to keep and bear arms, *see* McAffee & Quinlan, *supra* note 29, at 850, and linked the possession of such arms to the maintenance of sovereignty, *see id.*, "refused to countenance the use of arms without popular support to dissolve the government." Stephen P. Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, 10 VT. L. REV. 254, 307 (1985); *see also* McAffee & Quinlan, *supra* note 29, at 851-52 (citing 3 ADAMS, *supra* note 27, at 475) (maintaining that Adams believed that "[w]hile every individual held a right to own firearms, both for private self-defense and for service in the militia in defense of the community, there was no fundamental right to create private armies to serve private ends").

the people as a group. The sovereign right to keep and bear arms may include the right of each individual member of the sovereign people to possess arms, just as the sovereign right to control the political process necessarily includes the right of each individual member of the sovereign people to vote. However, the individual right to have the means to implement the decision of the people does not include the individual right to control the decision of the people, any more than the individual right to vote includes the individual right to declare the winner of the election or decide what laws the winners will enact.

Thus, individuals and private militia groups have no more right to use arms for violent attacks on government officials or others than they do to determine the outcome of the presidential election or change the tax laws on their own. When individuals or groups attempt to use violence to change the present government without authorization from the people, they are themselves usurpers, and the sovereign people have a right to deal with them through either their state or federal government agents.

Moreover, because the right at its core is the constitutional right to keep and bear arms for a specific purpose—to protect the sovereignty of the people—there is not necessarily a constitutional right to use or possess them for any other purpose, as both *Cruikshank* and *Presser* make clear. Thus, if the state, or even possibly the federal, government,[94] acting pursuant to authority granted it by the sovereign people, can establish that arms are being stored or used for other purposes, it can remove the arms without violating the Constitution.

Furthermore, no individual or group can stockpile weapons in such quantity or quality (e.g. nuclear weapons) that they have the power to resist the people acting through their authorized agents. Such action would be just as much a threat to the ultimate sovereignty of the people as unauthorized action by the military.

Finally, laws that require individuals to pass a background check to ensure that they have not lost their right to participate in this aspect of the right of sovereignty due to criminal activity,

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94. The language in *Presser* and *Cruikshank* about the broader scope of the right protected against federal infringement casts some doubt on the extent to which the federal government can engage in such actions.

mental incompetency, or other "disenfranchising" characteristics,[95] do not necessarily violate the core right, just as similar restrictions on the right to vote are not unconstitutional.[96] Thus, the right that is protected against federal and state infringement is much narrower than might appear at first blush. While it may include an individual right to possess firearms for certain purposes, its ultimate purpose is to effectuate a collective decision that only the people as a whole are authorized to make.[97]

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95. *See, e.g.*, 18 U.S.C. § 922(g) (1995) (prohibiting several categories of persons, including illegal aliens, convicted felons, and those adjudged to be mentally incompetent, from possessing firearms). These groups are routinely prohibited from voting. *See infra* note 96.

96. States routinely deny the right to vote to those who are mentally incompetent, convicted felons, or noncitizens. *See, e.g.*, TEX. ELEC. CODE ANN. § 16.031(a)(3) (West 1986 & Supp. 1997); UTAH CONST. art. IV, § 6. The constitutionality of excluding the latter two groups from the franchise is well established. *See* Foley v. Connelie, 435 U.S. 291, 296 (1978) ("[I]t is clear that a State may deny aliens the right to vote."); Richardson v. Ramirez, 418 U.S. 24 (1974) (upholding state law denying ex-felons the right to vote).

97. Just what form such a decision could legitimately take is far from clear and beyond the scope of this Article. It may well be that the agents of tha people, the Congress, or the state legislatures could issue a call to arms in extreme circumstances. Moreover, the people themselves might spontaneously rise up, as they did in 1776, although that seems much less likely now. Such an act is clearly so extraordinary that there may be no way to determine in advance the kinds of circumstances that would prompt the action or the form the action would take.

The fact that more thought has not been given to the issue may indicate that Americans have never been too close to a situation in which such action would be necessary. This, in turn, may indicate that the original constitutional framework—which clearly contemplated that such violent action would be necessary only when the ordinary political processes had completely broken down, *see, e.g.*, THE FEDERALIST NO. 46, *supra* note 14, at 298-99 (noting that armed battle with a corrupt federal government would be necessary only in the unlikely event "[t]hat the people and the States should, for a sufficient period of time, elect an uninterrupted succession of men ready to betray both; that the traitors should, throughout this period, uniformly and systematically pursue some fixed plan for the extension of the military establishment; that the governments and the people of the States should silently and patiently behold the gathering storm and continue to supply the materials until it should be prepared to burst upon their own heads")—has worked extremely well for the past two hundred years. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1500 (1987) ("[P]erhaps the strongest evidence of the effectiveness of the framers' system of military checks [which includes the Second Amendment] is two centuries of civilian supremacy that have made a military coup almost unthinkable."). It may also suggest that the system will continue to operate without the need for such drastic correction for centuries to come. That does not necessarily mean, however, that this ultimate fail-safe mechanism has been, or should be, abandoned.

C. *The Relevance of the Right to Keep and Bear Arms in Modern America: Is the King Dead?*

Recently, several scholars have suggested that even though there is more historical support than previously thought for judicial enforcement of a constitutional right to keep and bear arms, circumstances have changed sufficiently over the past two hundred years so that the right is now an irrelevant, if not dangerous, anachronism, given the extent of violent crime in our society.[98] Once again, however, when the issue is viewed in light of the *Thornton* analysis, the debate takes a new direction.

If, as *Thornton* suggests (and Justice Kennedy expressly postulates), there are certain attributes of sovereignty that are so fundamental to the working of our governmental system that they are constitutionally protected from interference even in the absence of a clear textual prohibition against state and federal interference, and if, as this Article suggests, the Framers would have certainly included the right to keep and bear arms in that category, abandonment may have more far-reaching consequences than may have been appreciated by those who advocate such action. Moreover, abandonment of such a fundamental right of sovereignty raises legal and policy issues that would have to be addressed.

First, one must ask whether such a right can be abandoned by the people without restructuring the entire constitutional foundation of popular sovereignty. The Supreme Court has repeatedly indicated that there are some attributes of sovereignty that a government simply cannot relinquish, even if it tries to do so in the clearest of terms.[99] Some aspects of sovereignty—such

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98. *See, e.g.*, Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 64-67 (1995); Williams, *supra* note 29, at 947-52 (arguing that the Second Amendment is a "constitutional anachronism").

99. For example, in rejecting a Contract Clause challenge to a state constitutional amendment outlawing lotteries adopted one year after the legislature granted plaintiff a 25-year charter to maintain a lottery, the Court observed, "All agree that the legislature cannot bargain away the police power." Stone v. Mississippi, 101 U.S. 814, 817 (1879). It then explained that "[n]o legislature can bargain away the public health or the public morals" because "[g]overnment is organized with a view to their preservation, and cannot divest itself of the power to provide for them." *Id.* at 819. The Court has made similar rulings in numerous cases both before and after *Stone*. *See, e.g.*, Contributors to the Pa. Hosp. v. City of Philadelphia, 245 U.S. 20, 23-24 (1917); Texas & New Orleans R.R. Co. v. Miller, 221 U.S. 408 (1911); Manigualt v. Springs, 199 U.S. 473 (1905); Douglas v. Kentucky, 168 U.S. 488 (1897); Butchers' Union Co. v. Crescent

as the states' powers to regulate health and morals—cannot be waived because "[g]overnment is organized with a view to . . . [the] preservation" of public health and morals.[100] If such powers are eliminated, government would cease to be a government. These attributes of sovereignty are so essential to the concept of government in our system, that the Court has indicated that the people themselves cannot give up such power.[101]

While the Supreme Court has never addressed the issue in the context of the right to keep and bear arms, at least one nineteenth-century court indicated that the right is "an unalienable right, which lies at the bottom of every free government."[102] Therefore, some doubt exists as to whether the people can give up this right in a system founded on the sovereignty of the people without restructuring the entire system itself.

Moreover, even if the people could surrender this sovereign right without completely overhauling the system, it is unlikely that they could do so by inaction or even by legislation. As the *Thornton* Court indicated with respect to term limits legislation, legislation eliminating the right to keep and bear arms would seem to effect the kind of "fundamental change in the constitutional framework" that "must come not by legislation adopted either by Congress or by an individual State, but rather—as have other important changes in the electoral process—through the amendment procedures set forth in Article V."[103]

Finally, and perhaps of most importance, even if the sovereign people could abandon their right to keep and bear arms without simultaneously relinquishing their sovereignty, and even if they could do so by some means other than formal amendment of the Constitution, it is still far from clear that they have done so, or that they are currently willing to do so. The argument that the sovereign people have already relinquished the right to keep and bear arms has to establish, at a minimum, that the underlying premises of the Second Amend-

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City Co., 111 U.S. 746 (1884); Boston Beer Co. v. Massachusetts, 97 U.S. 25 (1878). Although the vast majority of these rulings are more than 80 years old, the continuing validity of the rule is evidenced by its recognition in more recent decisions. *See* United States Trust Co. of N.Y. v. New Jersey, 431 U.S. 1 (1977).

100. *Stone*, 101 U.S. at 819.

101. "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants." *Stone*, 101 U.S. at 819.

102. Nunn v. State, 1 Ga. 243, 250 (1846).

103. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 837 (1995).

ment are no longer supported by the majority of the sovereign people.

The text of the Second Amendment suggests at least two fundamental premises that may have changed to such an extent that enforcement of the right is no longer possible or desirable: (1) that a well-regulated militia is necessary to the security of a free state, and (2) that the American polity constitutes a people capable of exercising the right.

At first glance, the first premise no longer seems operative. Most contemporary Americans probably no longer think that a militia is necessary to the security of a free state. Indeed, most would probably think that the private militias with which we are familiar today are more of a threat to freedom than a bulwark of liberty. No doubt our understanding of what a militia is has changed considerably in the last two hundred years. We no longer think of the militia as a military body composed of all able-bodied citizen sovereigns engaged in what ultimately is a political act.[104] They are more likely viewed as small groups of extremists whose views are well-removed from those of most citizens (in the case of private militias),[105] or part-time members of the U.S. armed forces (in the case of the National Guard, which many believe are the modern successors to the 18th century militias).[106] This rather fundamental change in the way

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104. *See* Edward R. Becker, *The Second Amendment and Other Federal Constitutional Rights of the Private Milita*, 58 MONT. L. REV. 7, 13 (1997) ("The essential function of the militia through English and American history was to serve the state while permitting private citizens to participate in government."); James Biser Whisker, *The Citizen Soldier Under Federal and State Law*, 94 W. VA. L. REV. 947, 950-51 (1992) (describing citizen soldier focus of eighteenth-century defintions of militia).

105. *See* Becker, *supra* note 104, at 14 (noting that in modern times many members of private militias "are bitter, violent extremists, haters of government and minorities"); Brannon P. Denning, *Palladium of Liberty? Causes and Consequences of the Federalization of State Militias in the Twentieth Century*, 21 OKLA. CITY U. L. REV. 191, 228 (1996) (noting that many modern private militias "share the same fears: federal gun control, erosion of national sovereignty, emergence of a United Nations led 'one world government,' and the invasion of the United States by shadowy socialist forces").

106. *See* United States v. Hale, 978 F.2d 1016, 1019 (8th Cir. 1992) (describing evolution of militias from groups "comprised of ordinary citizens" into "the national guard structure"); Sam Ruby, *"Don't Ask, Don't Tell" and the National Guard: Federal Policies on Homosexuality in the Military vs. The Militia Clauses of the Constitution*, 85 CAL. L. REV. 955, 963-64 (1997) (same); *see also* Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1317 (E.D.N.Y. 1996) (Second Amendment applies to "the colonial analogues of our National Guard").

Americans think about the militia may suggest the need for a reconsideration of an amendment that rests so heavily upon it.

However, it is arguable that the true underlying premise of the first clause of the Second Amendment is not that militias must exist, but that military force is the ultimate sine qua non of sovereignty, and that whoever possesses that force is the ultimate sovereign. But even this view, so readily accepted by the Framers, may no longer be part of our American psyche. There are, after all, ways of maintaining power that do not rely on ultimate force. Many small independent countries maintain their sovereignty despite the fact that they have no military force to speak of, and the President of the American Society of International Law has "proclaimed the death of the 'Sword' sovereignty."[107] However, the relevant question is probably not what leading international law theorists think, but what the People of the United States—those who possess the sovereign power—believe. Do most Americans subscribe in some form to Mao's theory that ultimately "[p]olitical power grows out of the barrel of a gun?"[108] While there is no clear data on that issue, there are indications that they do. The percentage of our national budget that goes for arms and other military expenditures, while declining over the past few decades, is still high enough to indicate that our society is not yet trusting enough of our ability as a nation to protect our sovereignty by means other than force.[109] At a more local level, most Americans are unwilling to simply outlaw all private guns and rely on means other than force for law enforcement.[110] The Framers' mistrust of hu-

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107. Gary L. Scott et al., *Success and Failure Components of Global Environmental Cooperation: The Making of International Environmental Law*, 2 ILSA J. INT'L & COMP. L. 23, 29 (quoting Louis Henkin, *The Mythology of Sovereignty*, AM. SOC'Y OF INT'L L. NEWSL. (ASIL) Mar.-May 1993, at 1, 7).

108. 2 MAO TSE-TUNG, SELECTED WORKS OF MAO TSE-TUNG 224 (1965).

109. While the percentage of the federal budget spent on national defense declined by 32 points from 1962 to 1996, it still represented 17% of the federal budget in 1996. *See* 1997 OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 1998: HISTORICAL TABLES 111. In 1995, when national defense appropriations constituted 18% of the federal budget, *see id.*, the federal government spent $272 billion on national defense. *See* 1996 OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 1997: ANALYTICAL PERSPECTIVES 357 (1996).

110. *See, e.g.*, Gordon Witkin et al., *The Fight to Bear Arms*, U.S. NEWS & WORLD REP., May 22, 1995, at 29 (noting 75% of Americans favor an individual right to bear arms); Gordon Witkin, *Should You Own a Gun*, U.S. NEWS & WORLD REP., Aug. 15, 1994, at 24, 29-31 (stating that 74% believe it is acceptable to have guns at home; 86% of men and 67% of women support the right to own guns). Further evidence of

man nature and their belief that if all else fails force may be necessary are likely still a part of our social fabric. At a minimum, the question is close enough that we cannot simply throw the Second Amendment out without further conclusive evidence on the point.

Thus, much may depend on the second premise—that the American polity constitutes a people capable of exercising their Second Amendment right. Has that changed so much that we can now ignore the Second Amendment? Professor David Williams is among those who have eloquently argued that it has. As Professor Williams has noted, at the time the Constitution was adopted, "American citizens were a republican People—homogenous, virtuous, and committed to the common good."[111] However, "over the last 200 years, diversity has become a permanent and accepted part of the American political landscape."[112] Thus, Williams asserts we are probably no longer a people capable of engaging in a revolution. It is one thing for the Framers to believe, or at least aspire to, the idea that the approximately one-half million largely white male Protestants who constituted the people in 1789 shared enough in common that when true tyranny raised its head, all would recognize it and respond with force in a cohesive and united manner. We are now so diverse demographically and ideologically, as well as so unfamiliar with genuine political discourse and so far removed from the power of government itself, Williams argnes, that "[s]uch a revolution would be possible only if, by happenstance, millions of different people living under different circumstances with different values, beliefs, and perceptions, were suddenly seized by the same spirit of resistance at the same moment."[113] Thus, Williams argues we are no longer a "revolutionary people"—for purposes of the Second Amendment[114]—and we should now focus

Americans' unwillingness to ban all guns is demonstrated by data suggesting that most Americans believe the right to own firearms is protected by the U.S. Constitution and that more than 45% in fact keep a gun at home. *See* McAffee & Quinlan, *supra* note 29, at 792-93 & nn.29-30 (citing extensive polling data).

111. Williams, *supra* note 29, at 949.

112. *Id.* at 950.

113. *Id.* at 884.

114. *See id.* at 951. Williams explains:

> [T]he citizenry forfeited its effective right to armed revolution some time ago, not through the decision of a court, but through historical changes. Even if the Supreme Court guaranteed each individual the right to arms tomorrow,

our efforts on improving our ability to take collective action in the other way contemplated by the Framers, by using "the ordinary method of government through politics and law," the method of collective sovereign action with which we are still familiar and still capable of performing.[115] Williams is somewhat troubled by that conclusion but fully convinced that we have reached the point at which we can no longer seriously entertain any other.[116] Thus, he contends, the concept of "the People" for Second Amendment purposes is now "a constitutional anachronism."[117]

Williams' analysis is thoughtful and thorough. However, it somewhat overstates the case, and more importantly carries with it some troubling implications. Williams overstates the case by postulating that a right of revolution is meaningful only if all of the people of the United States can agree on most fundamental political matters. Yet the right of "revolution" contemplated by the Second Amendment does not require such unanimity or homogeneity, as even the American Revolution of 1776 demonstrated. Clearly not everyone in the American colonies thought that the Revolution of 1776 was a good idea.[118] Moreover, even among those who did, there were pointed differences of opinion on other fundamental matters, such as whether slavery should continue to exist,[119] or whether the states or national government should be supreme.[120] Thus, Americans do not all

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> even if Congress supplied each home with an assault weapon, citizens still could not exercise a right to revolution, because they are not a revolutionary people. All they could do is kill each other.

Id. at 950-51.

115. *Id.* at 947, 951.

116. "It is terrifying to have to trust ordinary politics, to have to give up the ultimate sanction of armed revolt, but America has already reached that point." *Id.* at 951.

117. *Id.* at 952.

118. *See, e.g.*, Robert M. Calhoon, *"Unhinging Former Intimacies": Robert Beverley's Perception of the Pre-Revolutionary Controversy*, 68 S. ATLANTIC Q. 246 (1969) (describing feelings of Americans who were uncertain as to the looming revolution).

119. *See, e.g.*, Richard K. MacMaster, *Arthur Lee's "Address on Slavery": An Aspect of Virginia's Struggle to End the Slave Trade*, 80 VIR. MAG. HIS. & BIOG. 141 (1972) (reviewing the colonial-wide controversy over the slave trade prior to the revolution). The extent of the disagreement on the subject among the Framers of the Constitution is demonstrated by the adoption of the clause prohibiting Congress from directly dealing with the issue until at least 1808. *See* U.S. CONST. art. I, § 9, cl. 1.

120. The vigor of the ratification debates between the Federalists and the Antifederalists is perhaps the best evidence of the depth and extent of divergent views on this issue.

need to agree on most fundamental matters in order to be a "People" for purposes of the Second Amendment. All that is necessary is that there be a possibility of clear consensus that complete overthrow of the government is warranted (that is, that the existing government is so unresponsive to the will of the sovereign people and so tyrannical that it is worth shedding our own blood to get rid of it). In other words, all we need to have a consensus on is the desire to be free in a most fundamental and abstract sense.

For example, if tomorrow the head of the Joint Chiefs of Staff announced that he had killed the President, arrested members of Congress, and was now going to impose martial law to implement his vision of what America should be, would a clear consensus arise among the people of the nation as a whole that this was intolerable and that it must be changed even if we had to put our lives on the line in order to change it? While the answer to that question may not be entirely free from doubt (although I think, and hope, the answer would be yes), that is the right question.[121]

If the answer to the question is no (as Williams implies)—if Americans cannot reach consensus even on that kind of issue—one must wonder about the future of the nation. Williams concludes that we can survive as a people by using the normal political methods even if we can no longer achieve consensus about when a revolution should occur. However, the conclusion that we are now incapable of exercising what the Framers felt was one of the fundamental attributes of sovereignty is in many ways almost as troubling as the prospect of anarchy that Williams seeks to avoid. If we, as a polity, cannot agree that freedom is worth fighting for under the most extreme repression, can we ultimately hope to find enough common ground to resolve the more mundane, but equally charged, debates through the "normal" political process? If we are no longer capable of achieving consensus with respect to when the radical political

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121. While many might view this as an extreme example, it should be an extreme situation that triggers a revolution. Neither we nor the Framers would advocate revolution because of disagreement about the marginal rates of income taxes. As Akhil Amar has noted, *Federalist* No. 28 makes clear that under ordinary circumstances tyranny will be prevented by use of the normal political processes. It is only in extraordinary circumstances that resort to arms is justified. *See* Amar, *supra* note 97, 1499.

act of revolution is justified, we may lack the kind of common vision that will allow us to resolve other political differences. Thus, much more may be at stake in the Second Amendment debate than most Americans realize.

I believe we are still a people, capable of restraining ourselves even when we are armed. If we are not capable of that kind of self-restraint even under extreme circumstances, mere political processes may not be sufficient to prevent us from killing each other over less important issues. There are some indications that we may not be a "People" any more, but the question is worth considering seriously because ultimately more may be riding on it than just the right to own guns. If we simply dismiss the right to keep and bear arms as a constitutional anachronism, we may not address that question and its implications until we are so divided that violence is the only remedy.

Thus, examination of the Second Amendment in light of *Thornton* ultimately highlights a reconsideration of what it means to be a sovereign "people," how we can maintain our "peopleness," our cohesion, and our sense of community in America. The Framers of the Second Amendment relied, in part, on the militia to perform that function. As modern scholars have pointed out, participation in the militia was a right and a responsibility of citizenship, much like voting.[122] Moreover, the militia performed functions other than pure military training. It was also designed to train the citizenry concerning civic virtue.[123] In the words of Professor Akhil Amar, "the militia was a local institution, bringing together representative Citizens to preserve popular values of their society."[124] As one historian explained:

> On the training days, a town's militia company generally assembled on public grounds, held roll call and prayer, practiced the manual of arms and close order drill, and passed under review and inspection by the militia officers and other public officials. There might also be target practice and sham battles

122. *See* Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465, 467 (1995) ("Political rights . . . are quintessentially the rights to vote, hold office, serve on a jury, and serve in a militia.").

123. *See* David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 581 (1991).

124. Amar, *supra* note 28, at 1171.

> followed in the afternoon—when times were not too perilous—by refreshments, games, and socializing.[125]

It is clear that this universal gathering is no longer what most Americans think of when they think of a militia. That kind of militia is now gone. While we may not be able to revive them, we should do all we can to promote and protect other intermediate associations like religions, families, civic groups, and perhaps even local governments like schools, that can perform the same kinds of functions.[126]

The Framers may have been right in a way that neither they, nor we, have appreciated when they said that a well-regulated militia is necessary to the security of a free state. The statement may be true not because militias are essential to the control of arms, but because such institutions are essential to developing the ability to control ourselves, which at its core may be the real key to a free democratic system in which the people are sovereign. Applying *Thornton* to the Second Amendment may cause us to rethink such critical issues in ways that may ultimately be revolutionary and productive enough to maintain the sovereignty of the people through another two hundred years.

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125. RUSSELL F. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 6 (1967), *quoted in* Amar, *supra* note 28, at 1170 n.180.

126. *See* Kevin J Worthen, *One Small Step for Courts, One Giant Leap for Group Rights: Accommodating the Associational Role of "Intimate" Government Entities*, 71 N.C. L. REV. 595 (1993).