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GUN CONTROL SYMPOSIUM

FOREWORD

This issue of the University of Dayton Law Review presents a symposium of five articles focusing on the meaning of the second amendment's right to bear arms. The meaning of the second amendment is the subject of much debate between scholars, politicians and citizens, with many groups reaching dramatically different conclusions. Random violence in the nation's schoolyards, workplaces and neighborhoods has fueled the debate and increased calls for legislation to ban semi-automatic weapons.

The second amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."¹ One possible interpretation is that the amendment protects the right of state governments from federal interference with the state militia and police forces; this position is known as the "state's right theory."² Under an alternative, "individual right theory," the amendment protects the individual from federal and state government action which would prohibit the private possession or ownership of certain types of arms.³

This symposium presents the reader with both viewpoints as well as a historical perspective which may shed light on the true meaning of the amendment. The first article, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately*, written by Keith A. Ehrman and Dennis Henigan of the Center to Prevent Handgun Violence, concludes that the second amendment does not prohibit federal regulation of firearms. The article begins with an in-depth analysis of the history of the second amendment. The historical inquiry features a discussion of England's common law experience with firearms. The development of the American Bill of Rights reflects the influence of the

1. U.S. CONST. amend. II.

2. See, e.g., Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L.Rev. 204, 206 (1983).

3. *Id.*

English political environment and the English Bill of Rights. While the authors view this history as influential on the American Bill of Rights, they conclude that the English provision does not provide an absolute right to possess arms.

The authors' discussion of the formation of the second amendment centers on the states' constitutional conventions and each state's preference for a state militia instead of a national army. The article continues with an overview of the role of the militia from colonial times to the beginning of the twentieth century.

Ehrman and Henigan begin a review of judicial interpretations of the second amendment with a detailed analysis of *United States v. Miller*.⁴ In *Miller*, the United States Supreme Court upheld a congressional prohibition of interstate transportation or ownership of "sawed off shotguns."⁵ The Court stated that the purpose of the second amendment is to ensure the effectiveness of the state militia.⁶ The authors follow their discussion of *Miller* with a review of cases in which lower courts have read *Miller* as espousing the principle that federal regulations of firearms do not offend the second amendment unless they interfere with the maintenance of an organized state militia.

Robert Dowlut, an attorney for the National Rifle Association, presents a different viewpoint in the symposium's second article, *Federal and State Constitutional Guarantees to Arms*. The article begins with a discussion of English history and its influence on the American right to bear arms. The author argues that the second amendment should be interpreted according to accepted rules of construction when courts determine whether a statute violates its provision.

The author analyzes recent United States Supreme Court cases which have interpreted the second amendment. Dowlut criticizes the Court's failure to determine whether the right to arms is a collective right or belongs to the militia.

Dowlut then discusses the role of the states and their authority to enact legislation regulating firearms. In conclusion, he argues that semi-automatic weapons are suitable for personal protection and legislation restricting personal ownership of such weapons is unconstitutional.

Author Steven P. Halbrook's article, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, focuses on the historical aspects of the right to possess firearms in England and America. The text begins with a discussion of

4. 307 U.S. 174 (1939).

5. *Id.* at 178.

6. *Id.*

the political climate of eighteenth century Massachusetts. The author provides the reader with the colonists' view of England's authority, asserted through the presence of troops, appointment of English citizens to positions of authority, and an eventual ban on firearms which was followed by seizure of publicly owned gun powder.

The article's focus on the pre-revolutionary period enhances the reader's understanding of the every day, practical necessity for the colonists to carry guns for hunting and protection. From this perspective, Halbrook discusses the framers' need to include a provision regarding the right to bear arms and the debates surrounding the inclusion of the second amendment in the United States Constitution.

The fourth article in the Gun Control Symposium provides an analysis of *Kelley v. R. G. Industries*,⁷ a decision which recognized a new cause of action against manufacturers or retailers of products used in a criminal activity. The Maryland legislature subsequently enacted a statute which overruled the court's decision.⁸ Joshua M. Horwitz, legal director for the Educational Fund to End Handgun Violence, argues that manufacturers of assault weapons should be liable for injuries to innocent persons. This liability would be based on the three step criteria developed in *Kelley*.⁹

The symposium closes with an article by Professor James B. Jacobs of the New York University School of Law. Professor Jacobs' article, *The Regulation of Chemical Weapons: Some Anomalies in American Weapons Law*, focuses on personal chemical weapons such as tear gas. The article reviews federal and state regulation of chemical weapons and briefly compares these regulations with statutes which regulate firearms.

The author discusses the 1968 Gun Control Act¹⁰ which prohibits convicted felons from purchasing or possessing firearms. Professor Jacobs contends that this prohibition should not be extended to the purchase or possession of chemical weapons. The article then outlines basic firearms sentencing policy which the author suggests should not be applied to use of chemical weapons when committing a crime.

Jacobs reviews the current use of chemical weapons in law enforcement and penal institutions. The article concludes with a discussion of chemical weapons and how they do or do not fit within the

7. 304 Md. 124, 497 A.2d 1143 (1985).

8. MD. CODE ANN. (19).

9. The *Kelley* court evaluated the risk of the product to society compared to its utility, whether the manufacturer or seller could foresee that the product would be used in criminal activity and the relative degree of fault between the manufacturer or seller and the victim. 304 Md. at 157-59, 497 A.2d at 1158-59.

10. 18 U.S.C. § 921 (1988).

current framework of regulation of firearms.

It is doubtful that the controversy over the extent of an American's right to own guns will be resolved in the near future. It is our hope that this symposium will assist the reader in reaching his or her own conclusions by providing an understanding of the historical background and focus of the second amendment.