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Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?

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BRINGING FORWARD THE RIGHT TO KEEP AND BEAR ARMS: DO TEXT, HISTORY, OR PRECEDENT STAND IN THE WAY?

THOMAS B. MCAFEE* & MICHAEL J. QUINLAN**

The Second Amendment is the black sheep of the constitutional family. Paralleling the Amendment's neglect and abuse by commentators is the curious onslaught of misinformation and fear in the public arena. In this Article, Professors McAffee and Quinlan begin the process of restoring the Second Amendment to its rightful place as an individual right enjoyed by the citizenry. Reviewing singular facets of the Second Amendment debate, including the relation between the Militia and Right to Arms Clauses, the meaning of "keep and bear," the relevance of militia provisions today and the abandonment by the Supreme Court as an active participant in the Second Amendment debate, Professors McAffee and Quinlan conclude that the Second Amendment embodied a fundamental personal right to its adopters and that acceptance of their view is supported, rather than foreclosed, by the entire course of America's constitutional development over the past two hundred years.

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APPENDIX: STATE CONSTITUTIONAL RIGHT TO KEEP AND BEAR ARMS PROVISIONS

I. INTRODUCTION—FUNDAMENTAL RIGHT OR DANGEROUS ANACHRONISM?

If the Ninth Amendment is the Constitution's neglected "step child," the right to keep and bear arms guaranteed by the Second Amendment is the black sheep of the constitutional family. The reason is clear—the claim that individuals have a constitutional right to own firearms has been relied on to oppose a range of proposed gun control laws that many believe are critical to an effective effort to confront the nation's violent crime problem. The traditional response to the black sheep was to hide what was viewed as scandalous in the closet, and through the years this has been the predominant response to the right to keep and bear arms within the legal academy. As tends to be the case in such matters, this response included a heavy element of denial—less spoken about the matter the better, for the silence by itself implicitly supported the thesis that the right was innocuous because it was tied to (and limited by) the idea of collective defense. But this strategy is ultimately doomed to failure because the right does have its friends, in the form of the National

1. Sanford Levinson, Constitutional Rhetoric and the Ninth Amendment, 64 CHI.-KENT L. REV. 131, 134 (1988) (arguing that the Ninth Amendment has "remained the stepchild of the Constitution" until quite recently, but concluding that "like Cinderella, it seems on the verge of taking center stage").

2. The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.


4. When members of the legal academy have broken the silence that has engulfed the subject, they have mainly echoed, sometimes rather casually, the conventional wisdom that the Second Amendment is about state militias, not a personal right to keep and bear arms, and hence is basically irrelevant today. See David A. Strauss, The Role of a Bill of Rights, in THE BILL OF RIGHTS IN THE MODERN STATE 539, 541 (Geoffrey R. Stone et al. eds., 1992) (lending support to observation that Bill of Rights could be read as a virtual code of protections to criminal defendants with the statement that "the Second and Third Amendments have little practical significance"); Richard Lacayo, Beyond the Brady Bill, TIME, Dec. 20, 1993, at 28 (quoting Professor Laurence H. Tribe as stating that the Second Amendment "is about the right of a state to have an organized militia, in order to protect the states from being completely overrun by the Federal Government").
Rifle Association, the opinion of the unwashed masses of people, and a growing number of scholarly voices confirming that the right was viewed as a thing of beauty at its birth. While the period of denial is gradually ending in the scholarly and public debate, as will be discussed hereafter, it appears to be alive and well in the federal judiciary.

A. Denial and the Federal Judiciary

Unlike legal scholars, courts cannot simply leave the Second Amendment entirely off their agenda; litigants have some say in the issues courts address. But the federal courts have employed their own form of denial in refusing to confront, in a serious way, the issues raised by the text and history of the Second Amendment, relying instead on ill-reasoned decisions from the era prior to the incorporation of most of the Bill of Rights into the Fourteenth Amendment and the modern era of civil liberties. Consequently, the Second Amendment stands virtually alone among the major civil liberty guarantees of the Bill of Rights in not having been incorporated into the Fourteenth Amendment and applied to the states, and over

5. See infra notes 29-30 and accompanying text.


7. See Michael J. Quinlan, Is There a Neutral Justification for Refusing to Implement
the past several decades the lower federal courts have given it the narrowest possible interpretation. There is little to suggest, moreover, that this lack of judicial respect is about to end.

Despite a decade of renewed scholarly interest in the history and meaning of the right to keep and bear arms, and notwithstanding recent scholarly authority that supports the view that the Second Amendment was intended to secure a personal right to own and use firearms, in the 1995 case, *Love v. Pepersack*, the United States Supreme Court denied *certiorari* and thereby declined, once again, to consider the question whether the Amendment applies to the states through the Fourteenth Amendment or, more generally, imposes any meaningful limits on governmental authority to regulate firearms.

8. See Quinlan, supra note 7, at 682-88.


10. 47 F.3d 120 (4th Cir.), *cert. denied*, 116 S. Ct. 64 (1995). In *Love*, the Court of Appeals for the Fourth Circuit held that the Second Amendment does not apply to the states and reaffirmed the conventional holding that the Second Amendment merely preserves the right of state militias to keep and bear arms while offering no protection whatsoever to an individual's right to own a firearm. See id. at 123-24. On the incorporation issue, the court relied upon cases predating the selective incorporation era that "merely mimicked others of the same era in holding that none of the rights or freedoms enumerated in the Bill of Rights were made applicable by the Fourteenth Amendment to the states." Van Alstyne, supra note 6, at 1239 n.10. For analysis of these cases, see Quinlan, supra note 7, at 663-69. The court in *Love* based its holding as to the original meaning of the Second Amendment on a dubious line of lower federal court decisions. See id. at 682-88; infra notes 382-86 and accompanying text (discussing the lower federal court cases).

11. A more recent case, *Hickman v. Block*, 81 F.3d 98 (9th Cir.), *cert. denied*, 117 S. Ct. 276 (1996), would have provided the Court, if it so chose, with an opportunity to explore the meaning and scope of the Second Amendment, but the Court once again denied *certiorari*. The plaintiff in *Hickman* owned a security alarm company and was interested in getting into the field of "executive protection." See id. at 99. The plaintiff tried to obtain a concealed weapons permit, as provided by California state law, from the County of Los Angeles and the City of San Fernando. After being repeatedly denied a concealed weapons permit, plaintiff filed a § 1983 action in the United States District Court for the Central District of California alleging a violation of his Second Amendment right to keep and bear arms. The district court granted defendants summary judgment and plaintiff appealed. See id. The Court of Appeals for the Ninth Circuit affirmed, holding that "the
Love involved denial of an application to purchase a gun based on a discretionary police practice that lacked any warrant in applicable state law. In short, Love was hardly a case in which an important, let alone a compelling, state interest was involved. For those committed to a constitutional right to own firearms, the ruling in Love is especially distressing, not only because the weight of scholarly opinion as to the original meaning of the Second Amendment warrants a reconsideration of the ill-reasoned decisions of an earlier era, but also because the case itself presented an especially attractive occasion for acknowledging that there are limits on the power of government to infringe on the right of gun ownership.

B. The Public Gun Control Debate and the Right to Keep and Bear Arms: From Denial to Anger

Considering that claims rooted in the right to keep and bear arms have become a fixture of the long-running gun control debate in this country, advocates of gun control and their public media supporters have not been afforded the luxury of simply ignoring the Second Amendment. Unfortunately, popular debate of the issue, Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen." Id. at 101. As a result, the court concluded that plaintiff lacked standing to bring his lawsuit. See id. Finally, the Hickman court noted that, even if plaintiff had standing to sue for a violation of the Second Amendment, his suit would still fail because the Second Amendment is not incorporated against the states. See id. at 103 n.10.

12. The plaintiff in the case, April Love, was denied the right to purchase a gun because she had been arrested four times, even though the arrests had yielded only a single misdemeanor conviction. See Love, 47 F.3d at 122. It was apparently standard police practice to deny applications based on prior arrests even though the relevant statute does not list such a ground as a reason for denial. See id.; see also MD. CODE ANN. art. 27, § 442(h) (1996) (listing the grounds for the application of a firearm). It is interesting to note that the Maryland State Police are overruled in 78% of the appeals taken from permit application denials. See David B. Kopel, Independence Issue Paper, Why Gun Waiting Periods Threaten Public Safety 47 (1993) (citing testimony of Sergeant R.G. Pepersack, Maryland State Police Commander, Firearms Licensing Section, before Subcommittee on the Constitution, June 16, 1987). After obtaining an order in state court requiring approval of her application, Ms. Love filed a § 1983 action in the United States District Court for the District of Maryland alleging a violation of her Second Amendment right to keep and bear arms. See Love, 47 F.3d at 122. The Fourth Circuit case was decided on appeal from an order dismissing her cause of action. See id.

13. One of the nation's foremost constitutional law scholars, Professor William Van Alstyne, recently compared the current status of the Second Amendment to the status of the First Amendment at the beginning of this century. See Van Alstyne, supra note 6, at 1254-55. Given that the right to keep and bear arms "is at least as well anchored in the Constitution" as the First Amendment claims championed by Holmes and Brandeis seventy years ago, Van Alstyne suggests that the Supreme Court is overdue to begin the process of giving expression to the "central premise" of the Second Amendment. Id. at 1255.

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like the scholarly and judicial debates, has been characterized by a basically dismissive approach to claims of constitutional freedom. By and large, the media has uncritically reported the court decisions rejecting individual rights claims, generally concluding that the constitutional issue is definitively resolved, and repeating the standard argument that the Amendment is really about protecting state militias rather than securing a private right to arms.

It is not uncommon for media presentations to assume that the militia-centered reading of the Amendment is the correct one. Sometimes this assumption forms the basis of a description of the Second Amendment and its purposes that the reader is simply to take for granted. Even more seriously, this assumption often underlies

14. See, e.g., John Berendt, The Gun, ESQUIRE, Sept. 1993, at 39 (complaining that gun control opponents continue to cite the Second Amendment "as an argument against gun control despite repeated Supreme Court rulings that it is irrelevant"); Big New Drive for Gun Controls, U.S. NEWS & WORLD REP., Feb. 10, 1975, at 25, 27 (noting that "many legal scholars" support the view that the Amendment "is meant only to give States the right to have an armed militia of citizens," and observing that "no gun-control law has ever been challenged successfully in court on Second Amendment grounds"); New Fight for Gun Controls: The Proposals and Prospects, U.S. NEWS & WORLD REP., Nov. 10, 1975, at 51, 52 (concluding that the Supreme Court has ruled that the Second Amendment secured "States the right to maintain an armed militia" but "does not bar regulation of firearms owned by individuals"). But see Andrew D. Herz, Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility, 75 B.U. L. REV. 57, 128 (1995) (claiming that members of the media "typically adopt the NRA's interpretation uncritically," but without citing any examples); id. (claiming that "it is even harder to find any press discussion of the narrow judicial interpretation of the Second Amendment").

15. See Berendt, supra note 14, at 39 (observing that the NRA "cynically leaves off" the first clause of the Second Amendment in emphasizing the right to keep and bear arms); id. (concluding that any sixth grader could tell you that the Second Amendment was designed "to guarantee the states the right to maintain militias as a check on the power of the federal government"); Peter H. Stone, Showing Holes: The Once Mighty NRA Is Wounded—But Still Dangerous, MOTHER JONES, Jan. 1994, at 42 (observing that former Chief Justice Burger called the personal right reading a "fraud," and claiming that "legal scholars have repeatedly pointed out that the amendment contains no substantial barriers to federal, state, or local gun-control laws"). For additional citations to popular media claims that the text of the Second Amendment itself forecloses the claim of a personal right to own firearms, see infra note 71.

16. A classic example of the general media attitude toward the Second Amendment is provided by the Parade Magazine "Let Freedom Ring" photography contest, held to celebrate the 200th anniversary of the Bill of Rights. See PARADE MAGAZINE, Dec. 8, 1991, at 5. Two photographs chosen by a panel of "experts" to represent the Second Amendment depicted a paratrooper from the 82nd Airborne, and, in the second, two United States Marines. Even those who view the Second Amendment as concerned only with state militias should have been dismayed at these choices of symbols representing the Second Amendment. There is no basis to suggest that the Second Amendment is concerned with protecting a "right" of members of the American armed forces to keep and bear arms, and even most critics of the idea of a personal right to arms would agree that members of a national standing army more nearly symbolize the fears that gave rise
unsupportable claims that reflect a simple lack of research. 17

When the denial stage passes, however, there is anger. The

to the Second Amendment than the guarantee it embodies. See, e.g., Lawrence Delbert Cress, An Armed Community: The Origins and Meaning of the Right to Bear Arms, 71 J. AM. HIST. 22, 30 (1984) (referring to the founding generation's view of "the citizen militia's collective role as the protector of personal liberty and constitutional stability against ambitious tyrants and uncontrolled mobs" (footnote omitted)); Dennis A. Henigan, Arms, Anarchy and the Second Amendment, 26 VAL. U. L. REV. 107, 121 (1991) (noting that state militias were viewed by Madison "as a military counterpoint to the power of the regular standing army" that Congress had been empowered to create).

Parade did not inform its readership that the photograph contest results were hardly surprising given that among the experts were such luminaries as Dr. Joyce Brothers, former Chief Justice Warren Burger, and talk show host Sally Jessy Raphael (the judges were pictured in the story). All three have well known biases against gun ownership. See, e.g., Interview by Charlayne Hunter-Gault with Warren Burger, The MacNeil/Lehrer NewsHour, Dec. 16, 1991, available in LEXIS, News Library, Newshr File (quoting Warren Burger as stating that if he "were writing the Bill of Rights now there wouldn't be any such thing as the Second Amendment"); Claire Safran, A Tale of Two Cities—and the Difference Guns Make, GOOD HOUSEKEEPING, Nov. 1993, at 134, 216 (quoting Dr. Joyce Brothers who sees guns as both a symbol of power and a phallic symbol and blames the failure to obtain meaningful gun control on America's cowboy myth); Mary Zeiss Strange, Disarmed by Fear, AM. RIFLEMAN, Mar. 1992, at 34, 35-36 (recounting a 1990 episode of the Sally Jessy Raphael Show in which parents whose children were killed in firearm accidents "told their tragic stories while the camera scanned the anguish faces of the studio audience and Sally passed the Kleenex box" and in which Raphael "expressed horror that a woman could be a mother and a gun owner" and portrayed "guns in general and the NRA in particular in the blackest of terms").

Along similar lines was the portrayal of the Second Amendment as part of a 1990 Bill of Rights commemorative display at the District Court building in Annapolis, Maryland. The portion of the display dedicated to the Second Amendment noted America's high homicide rates and easy access to handguns, and stated that the Framers were "not concerned with the right to bear arms for personal use," but were instead seeking to ensure that "able-bodied men, and now women, could be equipped and trained to defend the Republic." See Take Shots at This, WASH. TIMES, Aug. 13, 1990, at B2.

17. An example of this more serious form of media denial was provided by National Public Radio ("NPR") reporter Nina Totenberg in 1991. Totenberg reported that NPR had contacted the National Rifle Association seeking the names of constitutional law scholars who support the individual right interpretation. Although three names were given, Totenberg stated, on the air, that "the NRA was unable to name a single professor of constitutional law who would say the Second Amendment protects an individual right." John Elvin, Questioning Nina, WASH. TIMES, Oct. 8, 1991, at A6. Had Totenberg done some basic research, she would have found plenty of distinguished scholars who have published articles in scholarly legal journals supporting the individual right interpretation of the Second Amendment. See sources cited supra note 6. Even if Totenberg wanted only constitutional law professors, surely Sanford Levinson and Akhil Amar, two of the nation's leading constitutional law scholars, would have sufficed. It should be noted, moreover, that Don Kates, a leading Second Amendment scholar, taught law at St. Louis University School of Law. Even the limited nature of her request, demanding the names of constitutional law professors, reflects a lack of care in light of the historical nature of many of the relevant questions. Among scholars who have made immensely important contributions to the Second Amendment debate, Joyce Malcolm and Robert Shalhope are well-respected historians, she at Bentley College and he at the University of Oklahoma. See MALCOLM, supra note 6; Shalhope supra note 6.
merits of the textual and historical issues aside, invocation of the right to bear arms has been viewed with alarm and frustration among many participants in the public discourse relating to gun control.\textsuperscript{18} The claim that gun ownership constitutes a fundamental right does not go together well with the general theme of twenty-five years of gun control advocacy that focuses on an alleged "epidemic" of gun violence and perceives America as "gun crazy."\textsuperscript{19} Indeed, the right to keep and bear arms has become a kind of symbol of the perceived intransigence of the gun rights lobby and its inclination to see gun

\textsuperscript{18} For an especially powerful, recent illustration of the frustration many gun control advocates feel at the invocation of the Second Amendment in the gun control debate, see Herz, \textit{supra} note 14, at 62-63, 117-18 (elaborating on view that the media, as well as the political and legal establishments, have failed in a "dialogic" duty to confront the alleged misconceptions and distortions about the status of the right to keep and bear arms that the author sees as resulting from the lobbying and public information campaign conducted by the NRA and other gun rights organizations). Not prone to understatement, Herz calls the opposing view a "constitutional fish story," \textit{id.} at 61, a "deception" that creates "constitutional falseconsciousness," \textit{id.} at 62 (emphasis omitted), a "delusional constitutional barrier," \textit{id.} at 63, a "fake" as well as a material misstatement of "the meaning of the Second Amendment," \textit{id.} at 84, a "constitutional bluff," \textit{id.}, a "sleight-of-hand" that "distorts the constitutional text itself," \textit{id.} at 103, an "intentional deception," \textit{id.} at 106, "fictional," \textit{id.} at 107, a "false 'trump' card," and a "bogus 'rights' ace deemed more powerful than any vision of the common good," \textit{id.} at 109, a "constitutional distortion," \textit{id.} at 111, a "constitutional smokescreen," \textit{id.} at 112, and a "constitutional charade." \textit{id.} at 152.

\textsuperscript{19} For samples from the vast literature lamenting America's love affair with firearms and the corresponding resistance to significant gun control efforts, see Nancy Gibbs, \textit{Up In Arms}, TIME, Dec. 20, 1993, at 18, 19-20 (recounting various horrible gun violence crimes and quoting a sociologist who notes the growing sense "that we've got to do something about all those guns"); \textit{id.} at 26 (referring to the trend of seeing guns as presenting a public health crisis); William Greider, \textit{A Pistol-Whipped Nation: Pass the Brady Bill—Then Ban Handguns}, ROLLING STONE, Sept. 30, 1993, at 31, 32 (stating a litany of gun violence statistics and summarizing Senator John Chafee's view that the gun problem is "not just about criminals," but "about everyone who owns guns"); \textit{id.} (insisting that it is time for a "brave new politics"—to ban handguns); Jon Katz, \textit{The War at Home: How the Media Miss the Story on 34,000 Gun Deaths Each Year}, ROLLING STONE, July 8-22, 1993, at 37, 38 (arguing that gun violence is largely ignored by the media because violence occurs in inner cities, but claiming that such violence "is the bloodiest story in the nation's history"); Safran, \textit{supra} note 16, at 134 (summarizing claims that different murder rates in Vancouver and Seattle reflect differing approaches to gun control); Marilyn Stasio, \textit{Gun Crazy: Are We a Country Out of Control?}, COSMOPOLITAN, Mar. 1994, at 180, 180-82 (recounting recent firearms killings and sordid crime statistics as to violent use of firearms and concluding that "[g]uns have become the most obvious and powerful symbol of the criminal violence that we fear above all other threats"); \textit{id.} at 183 (lamenting that the risk of violence has led to increased firearms purchases, especially by women, and quoting a psychiatrist's conclusion that firearms are an "essentially male obsession" used to "combat spinelessness," and that obtaining firearms increases insecurity rather than security for purchasers); Gordon Witkin et al., \textit{Kids Who Kill}, U.S. NEWS & WORLD REP., Apr. 8, 1991, at 26, 26 (surveying rise in youth firearms violence and concluding that it is "the presence of so many guns that makes the current atmosphere so volatile").
control as a "rights" issue rather than a straightforward crime control or public health issue. Along these lines, when the St. Louis Post-Dispatch published a special series commemorating the 200th anniversary of the Bill of Rights, the segment on the Second Amendment contained a substantial sidebar summarizing the anti-gun views of a woman whose brother had been shot by a criminal—a strange choice indeed in what was otherwise a celebratory treatment of the heritage of the Bill of Rights.

Not surprisingly, the right to keep and bear arms provokes similar reactions among scholars and judges. When scholars conclude that the Framers intended a personal right to keep and bear arms, this finding is viewed as "embarrassing" by civil libertarian advocates of extensive gun regulation, and when it is found that the Amendment was designed to facilitate the right of the people to resist tyrannous government, it is seen as "terrifying." Gun rights sup-

20. See, e.g., Bill Bradley, America's Efforts to Curb Violence: The Anti-Crime Bill Is Not Enough, USA TODAY, Nov. 1994 (Magazine), at 30, 33 (urging the need to "restrict the handguns used in 80% of America's gun murders," the author laments that "[w]hat is common sense to people of virtually every other country in the world becomes a constitutional crisis for Americans"); Herz, supra note 14, at 58 (lamenting the "constitutional false consciousness [that] has perpetuated a system that provides notoriously easy access to all types of high-powered weapons"); id. at 61 (stating that "Second Amendment deception represents an especially severe threat to rational policy making in a representative democracy" because it prevents us from undertaking a "rational cost-benefit analysis" as to the impact of widespread gun ownership).

21. See St. Louis POST DISPATCH, Nov. 19, 1991, at C1. Discussing the right to keep and bear arms in the context of criminal misuse of a firearm, something that is clearly not the subject of constitutional protection, is analogous to discussing the First Amendment right of free speech in the context of a parent whose child was the victim of a child pornographer. In both instances, the existence of the constitutionally protected right, whether it be free speech or the right to keep and bear arms, has little, if anything, to do with the personal tragedy inflicted upon a person by a criminal who is not even arguably exercising the right under discussion.

22. See, e.g., Another Judge Takes Aim at Second Amendment, THE NEW GUN WEEK, Aug. 4, 1995, at 9 (quoting United States District Judge Lyle Strom as stating, in the context of a criminal conviction of a drive-by shooter, that the NRA "not only misread the Constitution but misrepresents it to the citizens of this country"); Herz, supra note 14, at 58 (stating that the "constitutional false consciousness" of a personal right to own firearms perpetuates a system of easy access to "high-powered weapons," with the result that "America has become the runaway world leader in gun violence"); Interview by Charlayne Hunter-Gault with Warren Burger, supra note 16 (quoting former Chief Justice Burger as stating that the Second Amendment "has been the subject of one of the greatest pieces of fraud... on the American public by special interest groups that I have ever seen in my lifetime").

23. See Levinson, supra note 3, at 642.

24. See David C. Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 YALE L.J. 551, 553 (1991); see also Henigan, supra note 16, at 110 (discussing the view that the Second Amendment is related to the right of revolu-
porters, moreover, are found guilty by association. The victims of
gun violence, it is frequently observed, are often women and African
Americans; the inference drawn, more or less explicitly, is that gun
rights advocates are basically indifferent to the rights and interests of
these groups. Because extremist political groups, especially on the
right, are almost always gun rights advocates, gun rights advocacy is
often associated with anti-government paranoia. It is, in short, an

25. See, e.g., Mary E. Becker, The Politics of Women's Wrongs and the Bill of
"Rights": A Bicentennial Perspective, in THE BILL OF RIGHTS IN THE MODERN STATE,
supra note 4, at 453, 502 (arguing that "it seems likely that the Second Amendment
reflects and reinforces the unusual levels of violence in our culture"); id. (stating that
"violence harms women and other groups more than it harms men like the founding fa-
thers"); id. (stating the Second Amendment also serves as "a countermajoritarian
impediment to women's effective use of the political system," especially given polling
data indicating that women support handgun bans at higher rates than men); Wendy
Brown, Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford
has observed that "the most routine victims of this 'right' are... urban Black men be-
tween the ages of sixteen and thirty-four, for whom homicide is the leading cause of
death, and women, one of whom is raped every six minutes, one out of three times at
gunpoint or knifepoint." Id. In addition, Brown has argued that the "republican" vision
of the Second Amendment, with its linkage to traditional doctrines of armed resistance to
tyranny, is "at best nostalgic, and at worst dangerously naive and no little bit sexist" in
arguing "as if we did not live in a nuclear era, an era of thoroughly disintegrated public
life and disintegrating social order, and an era of rampant violence within and against the
urban poor and against women of all socio-economic classes." Id.; see also Herz, supra
note 14, at 115 (purporting to detect "a lingering scent of racism in the gun lobby's
ranks"); id. (suggesting that in the assault weapons debate the "pleasure of more efficient
or pleasurable hunting and target competition weapons is seen to outweigh the hundreds
of lives (mostly of persons of color in the inner city) lost to semiautomatic gunfire").

Professor Becker does not consider the possibility that fairly held but conflicting
views about the relationship between gun rights and violent crime might explain the
commitment to Second Amendment rights. In fact, Becker's opposition to a fundamental
constitutional right is premised on a conclusory treatment of what "seems likely" to the
author about the relationship between gun rights and societal violence. Every constitu-
tional guarantee, of course, creates an impediment to "effective use of the political
system" by those opposed to the right in question; that is the whole point of securing a
right in the Constitution. The possibility, moreover, that opposition to gun rights by
women reflects a socialization that serves to reinforce their subordinate status in our cul-
ture goes unconsidered. Cf. Becker, supra, at 497-98 (suggesting that the exclusion of
women from combat reflects and reinforces "the taboo against women using force, espe-
cially lethal force," and the "socialization of girls and women... to be less physically
aggressive than boys and men" and thereby "preserves male interests... with respect to
men's power over women through physical intimidation throughout society").

26. See, e.g., Herz, supra note 14, at 113-15 (arguing that the "gun lobby's" opposition
to meaningful control serves the interests not only of criminals and terrorists, but also of
"fanatics and unstable people;" gun rights fanatics have thus engaged in violence and
threats of violence and produced an "ultra-alienated mentality" among the gun lobby's
ranks); Eric Black, The Second Amendment: Necessary Safeguard or Constitutional Fos-
oft-stated opinion that the right to keep and bear arms is a dangerous anachronism in the late twentieth century.27

The view that the right to keep and bear arms is an anachronism in the modern world almost certainly predominates among media and academic elites;29 it is the average American who appears to disagree. In a recent conversation with colleagues, several expressed the view that if the Constitution were being drafted today, the Second Amendment would not be included. But it is not clear that this is correct, at least if the voice of the people is heard. Polling data suggests that a majority of Americans believe they have an individual constitutional right to keep and bear arms.29 Moreover, surveys also indicate that the number of United States households that own fire-

27. See MALCOLM, supra note 6, at 165 (suggesting that many who acknowledge the history showing an intent to create a personal right see the Amendment as "a dangerous anachronism" today). For the view that the right is an anachronism based on the modern, militia-centered reading of the Amendment, see generally Keith A. Ehrman & Dennis A. Henigan, The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?, 15 U. DAYTON L. REV. 5 (1989).

28. See, e.g., Akhil R. Amar, Did the Fourteenth Amendment Incorporate the Bill of Rights Against the States, 19 HARV. J.L. & PUB. POL’Y 443, 444 n.8 (1996) (reporting that when asked what they think is meant by the "privileges or immunities of citizens of the United States," many non-lawyers generally include the right to keep and bear arms alongside other traditional liberties, but "[t]hey do not say this at elite law schools"). Additionally, the so-called "Model State Constitution" developed by the Legislative Drafting Research Fund of Columbia University does not contain a guarantee to keep and bear arms. See Model State Constitution, in 1 LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIV., CONSTITUTIONS OF THE UNITED STATES: NATIONAL AND STATE (Alexander H. Platt ed., 1978).

29. See, e.g., Bob Baker, The Times Poll: Nation Divided on What Law Should Allow, L.A. TIMES, Dec. 14, 1991, at A28, (documenting that 62% stated that the right to own a firearm was guaranteed by the Constitution, 12% stated that the right was guaranteed by "regular law," and only 16% stated that the right was not guaranteed at all); Ingrid Grolier, The Arming of America, PARENTS' MAG., Sept. 1990, at 28, 28 (finding that 53% believed that the right to own a firearm was guaranteed by the Second Amendment, whereas only 33% believed that the Second Amendment protected state militias and not individuals); Gordon Witkin et al., The Fight to Bear Arms, U.S. NEWS & WORLD REP., May 22, 1995, at 28 (reporting that 75% of Americans favor an individual right to bear arms); see also Grover G. Norquist, Democrats Misfire on Guns, AM. SPECTATOR, Feb. 1994, at 78, 78 ("Frank Luntz, pollster for the Perot and Giuliani campaigns, showed that 88 percent of Americans believe a citizen has the right to own a gun . . . ."); Gordon Witkin, Should You Own a Gun?, U.S. NEWS & WORLD REP., Aug. 15, 1994, at 24, 29-31 (reporting that 74% believe it is acceptable for Americans to have guns in their homes; 86% of men and 67% of women support the right of Americans to own guns; 80% of whites and 65% of blacks support gun rights).
arms ranges from forty-six percent to fifty-one percent. Most telling, however, is that forty-three states have their own right to keep and bear arms provisions, seven of which are new or amended provisions adopted in the last fifteen years. It is perhaps unsurprising, then, that much of the political advocacy concerning gun control avoids the constitutional question altogether and emphasizes the theme of reasonable regulation rather than the irrelevance of the right to arms. This is one reason to discuss whether the constitutional question is truly relevant to the gun control debate as it is developing, before more fully summarizing and assessing the claim that the right to keep and bear arms is basically an anachronism.

30. In 1959, when Gallup first asked the question “do you have a gun at home,” 49% of Americans said they did. See Brad Edmondson, Most Homes Armed, AM. DEMOGRAPHICS, Oct. 1994, at 19, 19. Since 1959, polls have consistently shown a rate of firearms ownership hovering around the 50% mark. See JAMES D. WRIGHT ET AL., UNDER THE GUN 34 (1983); see also Edmondson, supra, at 19 (finding 51% according to an October 1993 Gallup Poll); Groller, supra note 29, at 28 (finding 49% according to a national poll commissioned by Parents’ Magazine); New Fight for Gun Controls: The Proposals and Prospects, supra note 14, at 51 (finding 47% according to a 1975 Harris Poll); Susan H. Schoolfield, Can Children and Guns Coexist In the Home?, USA TODAY, Jan. 1994 (Magazine), at 40, 41 (finding 46% according to a 1991 Gallup Poll); Witkin, supra note 29, at 24, 31 (reporting that 78% of rural residents, 44% of city residents, and 43% of suburban residents own guns).

31. For the text of these state right to keep and bear arms provisions, see Appendix.

32. Delaware adopted a right to keep and bear arms amendment in 1987. See DEL. CONST. art. I, § 20. Maine amended its right to keep and bear arms provision in 1987, from one which had limited the right to “the common defense,” to one granting an individual right without limitation to the common defense. See ME. CONST. art. I, § 16. One year later, in 1988, Nebraskans adopted a constitutional amendment giving its citizens the right to keep and bear arms. See NEB. CONST. art. I, § 1. A right to keep and bear arms amendment was added to the Nevada Constitution in 1982. See NEV. CONST. art. I, § 11. North Dakota adopted a right to keep and bear arms amendment in 1984. See N.D. CONST. art. I, § 1. The Utah Constitution was amended in 1984 to explicitly grant an individual right to keep and bear arms “for security and defense of self, family, others, property, or the state, as well as for other lawful purposes.” UTAH CONST. art. I, § 6. Finally, West Virginia adopted a right to keep and bear arms guarantee in 1986. See W. VA. CONST. art. III, § 22.

33. Typical of this stance is the approach taken by President Clinton. For example, in 1993 he stated:

I live in a State where more than half the people have a hunting or fishing license or both. I believe in the right to keep and bear arms. I believe in the right to hunt. I believe in all of this. I do not believe that we’re well served by having a bunch of 14- or 15-year-old kids out there with handguns shooting each other because of blood battles between gangs or because they’re mad or because they’re high on drugs. It’s wrong. We’ve got to do something about it.

William J. Clinton, Remarks at a Town Meeting in Detroit, in 1 PUB. PAPERS 73, 76 (Feb 10, 1993).
C. The Stakes in the Constitutional Debate Relating to Gun Control: Is There a Slippery Slope Here?

As noted above, advocates of increased gun restrictions often profess a desire for merely "reasonable" or "limited" controls. Reasonableness, of course, is, like beauty, truly in the eyes of the beholder. Despite frequent complaints about the unreasonableness of the gun rights lobby, there are forceful advocates of the personal right to keep and bear arms under the Second Amendment who acknowledge that its recognition need not preclude regulation designed to prevent and punish the misuse of firearms. But if anything is clear in the gun control debate, it is that the hostility that a great many gun control advocates hold toward the idea of a constitutional right to own firearms stems from the belief that their agenda cannot be reconciled with any meaningful constitutional right to own firearms. From leaders of the anti-gun movement to their media and legislative supporters, the ultimate goal of firearm reduction if not complete eradication is increasingly being made clear. Each legislative achievement is viewed as a stepping stone to the ultimate objective: "total control of handguns in the United States."
This is why key proponents of the Brady Handgun Violence Protection Act (Brady Act) viewed it, in significant measure, as a "cornerstone" or "framework" upon which to construct additional controls. Senator Ted Stevens's prediction during the 1991 debate over the Brady Bill that the bill was "just the beginning of a flood of...
restrictions planned by gun control advocates\textsuperscript{40} has in fact been borne out by the veritable floodgate of proposed legislative restrictions that followed the bill's passage in 1993. Two bills proposed in 1994 would have enacted a wide range of restrictions on gun owners, many of which reflect the desire to reduce gun ownership through burdensome regulation.\textsuperscript{41} In addition, numerous gun control bills were introduced in the 103rd\textsuperscript{42} and 104th\textsuperscript{43} Congresses, and a federal

\textsuperscript{40} 137 CONG. REC. S8934 (daily ed. June 28, 1991) (statement of Senator Ted Stevens).

\textsuperscript{41} Gun Violence Prevention Act of 1994, H.R. 3932, 103d Cong. (1994); S. 1882, 103d Cong. (1994); Handgun Control and Violence Prevention Act of 1994, S. 2053, 103d Cong. (1994), reintroduced as S. 631, 104th Cong. (1995). These two bills contained substantially the same regulations, and would have:

1. made it illegal to purchase a handgun without a valid, "nationally uniform," state-issued handgun license;
2. required that all handgun transfers be registered with local officials;
3. limited handgun purchases to one per month;
4. increased the fee for a federal firearms license from $200 to $3,000 for a three-year license;
5. provided for the computerization of "all records of receipts and disposition of firearms" by the Bureau of Alcohol, Tobacco, and Firearms;
6. required a federal license to deal in ammunition;
7. regulated the manufacture, importation and sale of "particularly dangerous" handgun ammunition;
8. required the "proper storage" of firearms away from juveniles;
9. made it unlawful for anyone to possess more than 20 firearms or more than 1,000 rounds of ammunition unless that person obtains a "federal arsenal license" at a cost of $300 for a three-year period (with the likelihood of escalating license fees in the future);
10. required holders of a federal arsenal license to meet all "obligations and requirements" pertaining to licensed dealers;
11. banned "Saturday Night Specials"; and
12. required manufacturers to add "safety devices" to guns.

See Gun Violence Prevention Act of 1994, H.R. 3932; S. 1882; Handgun Control and Violence Prevention Act of 1994, S. 2053. James Brady characterized the House bill, which was commonly referred to as Brady II, as "‘a combination of steps that adds up to an end to America’s gun violence.’" William Neikirk, Clinton Decries Gun Violence, Weighs Tough New Measures, CHI. TRIB., Dec. 9, 1993, § 1, at 7.

\textsuperscript{42} See S. 1647, 103d Cong. (1993) (providing for a "fair process" to help eradicate from the United States those firearms that have "no legitimate purpose" and which "are so lethal that they constitute an unreasonable risk to law enforcement and the public at large," while simultaneously ensuring that law-abiding citizens have access to "firearms created for legitimate purposes"); Real Cost of Handgun Ammunition Act, S. 1616, 103d Cong. (1993) (proposing a tax increase on handgun ammunition, imposition of a "special occupational tax" and "registration requirements" on importers and manufacturers of handgun ammunition); Public Health and Safety Act of 1993, S. 892, 103d Cong. (1993) (establishing a six-month grace period during which owners of handguns would be required to turn in their guns and receive the gun's fair market value or $25, whichever is greater; after the six-month grace period, only law enforcement and military personnel, security guards, antique collectors, and target shooters belonging to a gun club could possess a handgun); H.R. 3720, 103d Cong. (1993) (regulating the manufacture, importation,
“assault weapons” ban was enacted in 1994.44

and sale of “jacketed hollow point” ammunition); H.R. 3542, 103d Cong. (1993) (regulating the manufacture, importation, and sale of “certain particularly dangerous bullets”); Public Safety and Protection Act of 1994, H.R. 3482, 103d Cong. (1993) (establishing a system for regulating the possession and transfer of handguns and handgun ammunition); Gun Safety Act of 1993, H.R. 3263, 103d Cong. (1993) (authorizing the Consumer Product Safety Commission to regulate “the risk of injury associated with firearms”); Public Health and Safety Act of 1993, H.R. 3132, 103d Cong. (1993) (banning the manufacture, importation, exportation, sale, purchase, transfer, receipt, possession, or transportation of handguns and handgun ammunition); Quinlan, supra note 7, at 645 n.23 (summarizing additional 1993 bills); see also Firearms Safety and Violence Prevention Act, H.R. 4903, 103d Cong. (1994) (expanding the powers of the Bureau of Alcohol, Tobacco, and Firearms to regulate the manufacture, distribution, and sale of firearms and ammunition, including “firearm products” and non-powder firearms); Public Safety and Licensing Act of 1994, H.R. 4591, 103d Cong. (1994) (establishing a system for regulating and licensing the distribution of firearms); H.R. 4323, 103d Cong. (1994) (requiring ammunition to bear serial numbers); Safe Public Housing Act, H.R. 4062, 103d Cong. (1994) (providing for referenda among public housing residents to determine whether firearms shall be prohibited or limited in such developments); Interstate Gun Control Enforcement Act of 1994, S. 2261, 103d Cong. (1994) (imposing a sentence of up to five years and a $5,000 fine for failure to comply with firearm purchase requirements in a new state of residence); Gun Violence Health Care Costs Prevention Act, S. 1798, 103d Cong. (1994) (increasing the manufacturer’s excise tax on handguns, “assault weapons,” and ammunition to 30%; establishing a 30% federal retail sales and transfer tax on handguns, “assault weapons,” and ammunition).


[O]ver the last three decades, the gun control movement has shifted the bad gun definition from scoped, bolt action rifles (in the 1960s in response to the Kennedy assassination and the event dubbed the “Texas School Tower Massacre”)

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Given these facts, it is difficult to discount the fears of gun owners that federal legislation like the Brady Act and the "assault weapons" ban are mainly about establishing a grounding from which to expand an ever-tighter web of restrictions on the rights of law-abiding citizens who own guns. Suggesting that opposition to additional controls is only natural "given the rancor with which controls are advocated and the purposes avowed by their more extreme advocates," Don Kates poses the telling question: "Would driver licensing and automobile registration have been adopted if they had been advocated on the basis ... that the desired end is to progressively increase regulation until cars are unavailable to all but the military and the police?"\footnote{45} In short, anti-gun forces are attempting to make good on Representative Charles Schumer's pledge to "hammer guns on the anvil of relentless legislative strategy."\footnote{46}

\footnote{to inexpensive handguns (in the 1970s and early 1980s) and now to semiautomatic rifles.}


\footnote{45. DON B. KATES, JR., PACIFIC RES. INST. FOR PUB. POL'Y, GUNS, MURDERS, AND THE CONSTITUTION: A REALISTIC ASSESSMENT OF GUN CONTROL 9 (1990). To similar effect, Professor Andrew J. McClurg notes:}

\footnote{There is no doubt that the agenda of many Brady bill proponents encompasses much more than the adoption of waiting periods and background checks. Many Brady bill supporters want to prohibit private possession of handguns altogether. This is what differentiates the Second Amendment slippery slope argument from most other arguments. Persons who believe in a civil remedy for libel are not ultimately looking to abolish newspapers. People who opposed polygamy in the 19th century did not want to outlaw the Mormon church. Most people who advocate wider search and seizure authority for the police do not want to do away with the Fourth Amendment. But many of those who support waiting periods and background checks for handgun purchases do want to completely ban handguns. McClurg, supra note 37, at 88 (footnote omitted).}

\footnote{46. Statement of Charles Schumer, \textit{Nightly News}, supra note 36.}
D. The Fundamental Question: Is the Right to Keep and Bear Arms an Anachronism?

As noted in Part I-B above, many of society’s elite decision-makers believe that the right to keep and bear arms is an anachronism—and to the extent that it serves as a barrier to effective gun control legislation, a dangerous anachronism at that. But there are variations on this basic theme. For some, of course, this conclusion rests on a highly contested interpretation of the Amendment. If the Second Amendment is really about militias, rather than about guns, and if the sort of militias to which it refers no longer exist, the provision is an anachronism because there is no longer any reason to invoke it. According to this view, the right to keep and bear arms still exists, but as with the Third Amendment right not to have soldiers quartered in your home, it has no relevance. This argument amounts to a claim that modern proponents of gun rights have either misinterpreted the Second Amendment or misrepresented it to the American public. The Amendment, under this view, has no bearing on the gun control issues being debated in legislative chambers throughout America today. The issue raised by this argument is whether its proponents have correctly interpreted the Second Amendment.

An equally standard argument insists that the constitutional status of the claimed personal right to keep and bear arms has long since been resolved and to continue to raise a long-settled issue is to rely upon an anachronism. No less than a former Solicitor General has stated that it is “perhaps the most well-settled proposition in American constitutional law” that “the Second Amendment poses no barrier to strong gun laws.” As if this language were not strong

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47. See Henigan, supra note 16, at 108-09; Herz, supra note 14, at 64-67. A variation of this argument is that the Second Amendment forbids the federal government to disarm the National Guard “against the will of state legislatures.” Roy G. Weatherup, Standing Armies and Armed Citizens: An Historical Analysis of The Second Amendment, 2 HASTINGS CONST. L.Q. 961, 1001 (1975). Either way, the right has no connection to the gun control debate that might make it relevant today.

48. The Third Amendment is another Bill of Rights provision that has not been incorporated against the states, but for the obvious reason that the problem to which it is addressed has virtually never arisen. Cf. Levinson, supra note 3, at 641 & n.25 (comparing Second and Third Amendments and referring to the only Third Amendment case presented to a court).

49. See, e.g., Herz, supra note 14, at 67 (calling individual right reading “a fabrication”); id. at 103-10 (describing campaign of NRA and others as “constitutional deception” designed to hoodwink a naive public into believing there is a constitutional right to bear arms despite clear case law and troublesome text).

50. Erwin N. Griswold, Phantom Second Amendment “Rights,” WASH. POST, Nov. 4,
enough, Andrew Herz has recently complained that the gun rights lobby has generated "phantom constitutional barriers discredited by the courts." The view that the Second Amendment guarantees any significant protection to a personal right to own a firearm is, according to Herz, simply a "fabrication." While Herz supports this conclusion with a small dose of text and history, along with some reliance on the "changed social circumstances" of modern America compared to the founding period, his "fabrication" charge rests centrally on the claim that the rejected view "is not the law of the land" because the federal courts "have invariably ruled that the Second Amendment right to bear arms applies only to those individuals using firearms in connection with their service in an organized state militia."

There is, additionally, a third version of the anachronism argument. Some modern scholars acknowledge that under the Second Amendment all citizens were to hold a personal right to private arms, but they insist that the presuppositions of this right no longer exist. The concept of a general militia, comprised of virtually all adult males who make up the political communities within the states, has

1990, at C7; accord Ehrman & Henigan, supra note 27, at 40 (stating that the conclusion that the Second Amendment does not secure a personal right to arms "may be the most firmly established proposition in American constitutional law"). Such claims amount to hyperbole at the least—the doctrines of judicial review or implied powers, to use obvious examples, seem like more logical candidates for the title thus claimed for the non-individual right interpretation of the Second Amendment. For the alternative view that existing case law has not "firmly established" this reading of the Second Amendment, see infra Part IV-A.

51. Herz, supra note 14, at 61.
52. See id. at 67-68. Herz suggests that the argument for a private right to arms reflects that a "single-issue pressure group has effectively mobilized a rabidly vocal minority to drown out and shout down virtually all other voices in the constitutional conversation." Id. at 61. Consequently, "we cannot even hear the judicial voices that are supposed to be the primary arbiters of the Constitution." Id.

53. See id. at 64-66. Herz quickly clarifies, however, that he rejects adherence to the view that any constitutional provision can generate a single correct answer, see id. at 65, or that, even if it could, we should be bound by the decisions of "a small group of white property-owning males who lived in a world utterly different than our own." Id. at 66.
54. See id. at 68.
55. Id. The claim that the Second Amendment secures a private right to firearms for self-defense or other purposes is, accordingly, "simply a misstatement of the Second Amendment's operative meaning." Id. at 118. Society's elite leaders, says Herz, owe a duty to straighten the public out on the "settled case law" on the Second Amendment, lest they be charged with having "misled the public" and "marginaliz[ing] the judiciary's essential task of constitutional interpretation." Id. This is the primary ground upon which he bases his tirade of expletives at those who persist in referring to a constitutional right to keep and bear arms as though it might be relevant to modern debate over gun control legislation. See Herz, supra note 14, passim. For a critique of this sort of reliance on the relevant federal precedents, see infra Part IV-A.
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no modern counterpart. Moreover, the republican ideology that underlay the notion of a general citizen militia has given way to a liberal individualism that does not call for the sort of patriotic sacrifice upon which the general militia rested, and most modern Americans know little or nothing about the philosophy that informed the clause. Consequently, few citizens today would even understand, let alone endorse, the founding generation's idea that a militia is "necessary to the security of a free state." Thus, the central rationale for the right to keep and bear arms—that it would perpetuate a security-enhancing citizen militia—no longer exists.

The Framers also believed that an armed citizenry would provide a safeguard against governmental tyranny. But this revolutionary philosophy, which remained a potent force at the time of the adoption of the Constitution, is now largely irrelevant in the nation with the oldest constitution, and perhaps the most stable government, in the world. If the philosophy of the right of revolution itself is not dead, to many the idea that an armed citizenry might be a potent force against tyrannous government seems laughable in an era in which the United States government possesses nuclear weapons.

To the extent that ideas of personal self-defense played a role in the adoption of the Second Amendment, it has been argued that states should be able to regulate, or even prohibit, firearm ownership on the ground that widespread possession of firearms diminishes, rather than enhances, personal security. There is no question that

57. U.S. CONST. amend. II. It has been accurately observed that "the original meaning of the [Second] [A]mendment is obscured by the vast gulf of time and perspective which separates us from the Founders—and our greater distance yet from the history and historians, the philosophy and philosophers who shaped the Founders' thought." Alan M. Gottlieb, Gun Ownership: A Constitutional Right, 10 N. KY. L. REV. 113, 113 (1982).
58. See, e.g., THE FEDERALIST NO. 46, at 322 (James Madison) (Jacob E. Cooke ed., 1961) (observing that in contrast to European governments who were "afraid to trust the people with arms," in America an armed people, aided by their state governments, would be able to overthrow a federal tyranny).
59. See, e.g., Brown, supra note 25, at 664-65 (doubting whether "an armed citizenry is a viable mode of resistance" against "the arsenal of the modern state," or whether small arms are of any "serious assistance" in defending the state itself in a nuclear age). As with many aspects of the debate over firearms, their uses and abuses, it is our view that the potential contribution of firearms to resistance to tyranny is a richer question than dismissive references to modern arsenals and nuclear states would suggest. For a more moderate critique of the Framers' expectations as to the possibility of mass resistance, see Colonel Charles J. Dunlap, Jr., Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment, 62 TENN. L. REV. 643, 646-49 (1995).
60. See, e.g., Donald L. Beschle, Reconsidering the Second Amendment: Constitutional Protection for a Right of Security, 9 HAMLINE L. REV. 69, 103 (1986).
we live in an interdependent society in which we come into close proximity to our fellow citizens on a more or less constant basis. For critics of a right to own and use firearms, widespread possession and use of firearms is perceived as making our world more dangerous rather than less dangerous. Moreover, it can be argued that the social contract theory that we give up some rights to obtain the "protection" of government seems especially applicable to gun rights inasmuch as modern communal life includes well-organized police forces for the protection of citizens—a feature of modern life without any counterpart in the United States of 1787.

On one or more of these grounds, many organizations and commentators contend that, whatever the intentions of the Amendment's framers, we would be better off not attempting to bring forward the allegedly outdated Second Amendment because it would mean something far different to us than it did to its drafters and, in the long run, it would hurt the cause of promoting fidelity to the Constitution. According to this argument, the Second Amendment does not "translate" in the context of modern society, because our society's philosophical presuppositions and material conditions have changed in critically important ways since the adoption of the Bill of Rights.

While the first and second versions of the anachronism argument rest on assumptions relating to the process by which we give authoritative meaning to the Constitution over time, the third version relates to what the Second Amendment should plausibly be understood to mean in the context of modern America—or perhaps to whether we should even have a Second Amendment at all. While many proponents of the anachronism argument who would ignore the original meaning are undoubtedly non-originialists, it can be argued that the problem of "translating" 200-year-old norms to a modern culture appeals to those committed to an ideal of "fidelity" in constitutional

61. This type of argument was familiar to the Framers themselves, at least as a drafting consideration. The debate over the inclusion of specific provisions in the Constitution at the time of the founding frequently considered the extent to which they embodied principles likely to be unaffected by the changes that time would bring. A particular concern was that the inclusion of a provision that could prove anachronistic might cause disrespect for, and thus undermine, not only the provision in question, but the Constitution as a whole. As Madison wrote to Jefferson, "I am inclined to think that absolute restrictions in cases that are doubtful, or where emergencies may overrule them, ought to be avoided."
interpretation as much as it does to those who simply would not be bound by decisions made in such a distant past. All three versions of the anachronism argument present issues that Second Amendment scholars should feel compelled to address. In this Article, we discuss whether constitutional text and history, on the one hand, or case law precedent, on the other, basically moot the question of whether a personal right to keep and bear arms makes any sense in modern America. Part II of this Article analyzes various issues raised by the text of the Second Amendment. In particular, Part II-A refutes the claim that the Second Amendment's wording and syntax precludes an interpretation that recognizes a personal right to have firearms. Part II-B, in turn, develops the issues of meaning raised by the Second Amendment's language guaranteeing a right to "keep and bear" arms. Both Parts II-A and B criticize overblown claims as to the force of the Second Amendment's language by itself and argue that the critical questions raised by the text of the Amendment can only be answered by reading the text in the context of the concerns that gave rise to it. Part III analyzes the Second Amendment in light of the extrinsic evidence concerning the original intentions of those who drafted and ratified it. Part III-A examines the evidence as to the "mischief," or defect, to which the Second Amendment was addressed. We conclude that the Second Amendment arose, as did the Bill of Rights generally, from the fears generated by the omission of a number of fundamental guarantees in the Constitution as proposed to the states. In particular, the Constitution's critics feared that the right of the people to keep and bear arms, as secured originally by the 1689 English Bill of Rights and guaranteed by state constitutions in the early American republic, would be jeopardized because of the omission of such a guarantee in a Constitution of enlarged national powers. By contrast, we show that the historical evidence does not support the modern claim that the Second Amendment was a response to concerns about the extent of control over state militias granted the national government by the proposed Constitution.

62. For an interesting treatment of the sorts of problems raised even within a commitment to remaining faithful to "meaning" over time, see Lawrence Lessig, Fidelity in Translation, 71 Tex. L. Rev. 1165 (1993).

63. Because we conclude in this Article that neither the tools of originalism nor stare decisis present substantial barriers to recognizing a personal right to own firearms, a follow-up article will confront the many rich questions relating to the possibility (or the desirability) of explicating and applying a personal right to arms as we approach the end of the twentieth century.
Part III-B shows that the Second Amendment was drafted to provide an efficient "remedy" to the mischief created by the omission of the long-established guarantee of a right to keep and bear arms. The drafting history of the Amendment confirms that the Framers sought to secure a personal right to keep and bear arms, 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. The history also shows that the people's right to keep and bear arms was drafted by Madison to ensure an enforceable constitutional right, while the Amendment's statement that a "well-regulated Militia" is "necessary to the security of a free state" was drafted as a declaration of classical republican principles favoring a militia over a standing army, but not as an enforceable limitation on national power.

Next, Part III-C surveys the post-ratification statements of legal commentators, courts, and Reconstruction-era legislators confirming the pervasive understanding that the Second Amendment guarantees a personal right to have firearms. The evidence reviewed shows that the personal right understanding of the Amendment was the uniformly held reading for more than a century after the adoption of the Bill of Rights.

Finally, Part IV addresses the claim of some recent commentators that stare decisis stands as an insurmountable barrier to bringing forward the right to keep and bear arms. Part IV-A analyzes the body of federal case law on the Second Amendment and concludes that it presents no such barrier. The few cases in which the United States Supreme Court has addressed the Amendment include analysis that is far more favorable to the individual right interpretation than has often been acknowledged by commentators. Part IV-A also demonstrates that the lower federal court cases squarely rejecting an individual right understanding of the Second Amendment ignore overwhelming evidence as to the original meaning of the Amendment, as well as the wealth of materials showing that an individual right reading was the general understanding of the Amendment throughout the nineteenth century. These decisions rest on a misreading of relevant Supreme Court precedent and rely on outdated cases relating to the incorporation of the Bill of Rights into the Fourteenth Amendment's Due Process Clause.

Part IV-B suggests that, even if modern federal precedent stood as a barrier to recognition of an individual right to keep and bear arms under the Second Amendment, the Supreme Court's modern fundamental rights case law would require fresh consideration of the
right to keep and bear arms as a fundamental right of personhood. We review the modern Supreme Court’s development of an important, if controversial, line of fundamental rights decisions expounding the Due Process Clause of the Fourteenth Amendment—a body of case law that has arisen during the nearly sixty years since the Supreme Court last addressed an issue arising under the Second Amendment. We show, in turn, that an examination of the criteria for inclusion within the category of fundamental rights articulated by the Supreme Court and explicated by commentators, reveals that modern courts cannot justifiably rely on cases narrowly construing the Second Amendment as a basis for rejecting the claim that the right to keep and bear arms is fundamental to a system of ordered liberty and a fundamental right in the American tradition. We conclude that, unless the Court is willing to reconsider its fundamental rights doctrine in its entirety, the historical right of self-defense will have to be confronted to determine whether the individual right to have firearms should be recognized as among the fundamental rights of personhood guaranteed to all Americans.

Part IV-C reviews another feature of the American constitutional landscape that reveals the futility of attempting to rely on federal cases rejecting a personal right to arms to justify terminating debate on the merits of a right to keep and bear arms—the pervasive recognition of the right to keep and bear arms in many state constitutions, often recognizing a personal right to arms in express language. We show that even if the federal Second Amendment were viewed as having a meaning fixed by modern precedent, none of this case law precludes state courts from construing their state constitutional provisions to recognize a personal right to arms. Considering that the gun control debate has as much significance at the state level as it does at the federal level, the meaning of the right to keep and bear arms, and inevitably its “fit” in our modern world, will remain issues that thoughtful constitutional decision-makers will be forced to consider.

II. THE TEXT OF THE SECOND AMENDMENT

The central question in the Second Amendment debate is whether the right to “keep and bear arms” gives to individual citizens the right to own and use private firearms outside the context of service in a state-organized militia. Advocates of the more restrictive reading answer this question in the negative. They contend that the Amendment’s first clause, the Militia Clause (“A well regulated Militia, being necessary to the security of a free State”), sets forth the
limited purpose for which the right contained in the Amendment's second clause, the Right to Arms Clause ("the right of the people to keep and bear arms shall not be infringed"), is secured. Accordingly, under this line of thought, the right is limited to the public sphere of militia service, and has no implications at all for the non-militiaman. The Amendment only provides that the federal government may not dismantle the militias within the states, nor prohibit those in the militia from possessing and using weapons when they are engaged in militia service.

Those who argue that the Second Amendment recognizes an individual right to bear arms contend that the right to keep and bear arms stands on its own footing, despite the close historical connection between the ideal of a citizen-based militia defense system and the notion of an armed citizenry. The pedigree of the Second Amendment right to arms extends at least to the 1689 English Bill of Rights, which guaranteed Englishmen the right to private weapons for lawful purposes. This constitutional guarantee, in turn, assures the existence of an armed people from whom a citizen-based militia can be derived. While the right to keep and bear arms was designed to assure the existence of a body of citizens with private arms, and thereby


65. These views are often referred to as the "collective" or "states' rights" readings of the Amendment, inasmuch as they rest on the premise that the real thrust of the provision was to assure the continuation of the militia system, or perhaps the power of states to continue it. The conventional characterization of these views as exclusively "collective" or "states' rights" constructions has been questioned, however, because these readings arguably entail at least an individual right to use weapons as part of militia service. See Herz, supra note 14, at 61-62 & n.11. Accordingly, it is said that the real line of distinction is between the personal right of gun ownership for private purposes (including self-defense) and a right of access to guns only as a militia member, rather than between an "individual" and a "collective" or "states' right." See id. at 61 n.11 (citing Ralph J. Rohner, The Right to Bear Arms: A Phenomenon of Constitutional History, 16 CATH. U. L. REV. 53, 55 n.20 (1966)). However these differences of formulation are resolved, this Article will treat the central issue as whether the Amendment protects private gun rights, apart from the immediate context of militia service. In this regard, there is no need to choose between a "collective" and an "individual" rights reading; the Amendment can be read as securing both an "individual" and a "collective" right. We would emphasize, however, that the more restricted version of a so-called personal right to arms is hardly a personal right at all. What sort of "personal right" is it that can be effectively extinguished merely by changing the terms of militia service?

66. The 1689 English Bill of Rights provided: "That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law." Act Declaring the Rights and Liberties of the Subject and Seteling the Succession of the Crowne, 1689, 1 W. & M., ch. 2 (Eng.). For an examination of the English right to arms guarantee, see Halbrook, That Every Man Be Armed, supra note 6, at 43-54; Malcolm, supra note 6, at 112-34.
reinforce the viability of the militia system, the right was never limited to militias or militiamen; in fact, the right to arms grew out of the common-law and natural right of self-defense and, in turn, was viewed as lending support to that underlying right as well as to the goal of collective defense.67

Although many on both sides of this debate have agreed that the Amendment can be understood only in proper historical context, each has advanced important claims about the text that will serve to frame the issues. The text also warrants independent attention because it has become increasingly common for contributors to the public and scholarly debate to claim that the language of the Second Amendment resolves the fundamental debate as to the relevant meaning of the right to keep and bear arms.68

A number of critical questions are raised by the text of the Second Amendment: What is the relationship between the Amendment's two clauses? Does the Amendment's Militia Clause function as a limitation or qualification of the guarantee embodied in the Right to Arms Clause? Does "the people" to whom the right to arms is guaranteed refer to the entire body of citizens, whether members of the militia or not, or merely to the militia as an institutional symbol of popular involvement in public life? Does the guarantee of a right to "keep and bear" arms indicate a uniquely military context in which the right is to be exercised? The sections that follow will develop the issues raised by these questions and, at the same time, illuminate some crucial questions of method in constitutional interpretation.

A. The Relation Between the Militia and Right to Arms Clauses

Advocates of the more restrictive reading of the right to keep and bear arms contend that the Militia Clause is the key to understanding the Second Amendment. Most contend that when the right to arms guarantee is read in historical context, it essentially amounts to a claim that the people as a whole should be able to have a militia to guarantee their collective security.69 The Second Amendment, accordingly, reflects this priority in its text; the people have a right to have arms in the context of a well regulated militia. The Militia

67. See HALBROOK, THAT EVERY MAN BE ARMED, supra note 6, at 49-54.
68. See, e.g., TRIBE & DORF, supra note 64, at 11.
69. See, e.g., Cress, supra note 16, at 31 (arguing that various state constitutional provisions relating to citizen use of arms "guaranteed the sovereign citizenry, described collectively as 'the people' or 'the militia,' a role in the common defense").
Clause thus serves to "limit" or "qualify" what might otherwise be taken as a general and unrestricted popular right to arms; it confirms the militia-based historical understanding of the popular right to arms. Even so, most of the scholarly proponents of this argument about the relationship between the clauses would acknowledge that its force turns on whether the historical evidence establishes that the right to arms was generally understood as being uniquely tied to militias and militia service. If so, the text can be seen as reflecting, and perhaps reinforcing, this larger understanding of the Amendment's purpose.

But arguments can easily take on a life of their own, and it is now a common phenomenon for advocates of this interpretation in the popular media to use the placement of the Militia and Right to Arms Clauses in the Amendment as virtually a trump in the argument. These advocates contend that gun rights proponents simply

70. See Ehrman & Henigan, supra note 27, at 32 (contending that arrangement of the language was to place stress "on the militia aspect of keeping and bearing arms" and that other language would have been employed to express a "broad 'individual' right to carry arms, outside of the military context"); Herz, supra note 14, at 64 (describing standard argument for restrictive reading based in part on the structure of the provision); id. at 66 (referring to "the explicit qualification opening the Second Amendment" that "suggests a narrow focus on the militia in defining the right to bear arms").

71. See, e.g., Joan Biskupic, 'Right to Bear Arms' Belongs to States, Court Rulings Affirm, L.A. TIMES, June 4, 1995, at A10 (quoting former Chief Justice Burger's view that reliance on Second Amendment for individual right to own guns perpetuates a "fraud" on American public); id. (citing "widespread legal and judicial view" that the Amendment "guarantees a states' right to be armed" and focusing particularly on "the importance of the opening clause referring to a 'well-regulated militia' "); Griswold, supra note 50, at C7 (quoting full text and stating that the Amendment's purpose is uniquely and "clearly expressed in its text" and concluding from the text and modern court decisions that the right to arms is limited to organized state militias); Go Ahead NRA, Make My Day, CHI. TRIB., June 3, 1991, at 14 (criticizing NRA for emphasizing second clause as "selective editing" because first clause reflects purpose to preserve the militia); Gun Rights are a Myth, USA TODAY, Dec. 28, 1994, at 8A (calling individual right to bear arms "a fabrication, a myth" and arguing that while "[i]ts structure is tortured," the Amendment's "preamble is plain" and establishes that the right "exists only in the context of a 'well-regulated militia' " and concluding that "[n]o matter how many hairs you split, there is no other way to read the sentence"); Guns: A History Lesson, L.A. TIMES, Aug. 17, 1988, Pt. II, at 6 (contending that when the Second Amendment is read "in its entirety, it is clear that the right to bear arms is a conditional right" and that the Amendment "is really about national security"); id. (calling the NRA's reading a "twisted interpretation"); Listening to G. Gordon Liddy, BALT. SUN, June 7, 1995, at 14A (quoting former Chief Justice Burger for view that "[t]he very language of the Second Amendment refutes any argument that it was intended to guarantee every citizen an unfettered right to any kind of weapon he or she desires"); Of Guns and 2nd Amendment Myths, CHI. TRIB., Dec. 7, 1993, at 22 (quoting language of the Second Amendment and criticizing NRA for mak[ing] its argument "by conveniently ignoring the first half of the Second Amendment"); id. (arguing that reliance on second clause alone "deliberately distorts the intent of the framers of the Bill of Rights").
fail to perceive, or choose to ignore, the obvious fact that the right in the second clause is framed and limited by the language of the first clause. 72 This use of the Militia Clause as a trump has even found its way in to the scholarly literature. 73 Those who rely on the text as the key weapon make only the most general claims in support of the historical purpose supposedly embodied in this text. 74 It has been argued that the text of the Militia Clause requires constitutional interpreters to favor limits on the right to bear arms over conflicting understandings of that right derived from the "background understanding" of those who drafted and ratified the Amendment. We are told that this is true because while "history serves to illuminate the text," it is "only the text itself which is law." 75

Consider the full argument of Laurence H. Tribe and Michael C. Dorf:

72. See supra note 70.

73. See, e.g., Warren Freedman, The Privilege to Keep and Bear Arms 22 (1989) ("'A well-regulated militia' clearly negates any individual right to keep and bear arms."); Laurence H. Tribe, American constitutional law 299 n.6 (2d ed. 1988) (arguing that the "nearly unique inclusion of a purposive preamble" supports conclusion that the Framers "opted against leaving to the future the attribution of [other] purposes" to the Amendment (quoting John Hart Ely, Democracy and Distrust 95 (1980))); id. (concluding that "well regulated militia" language in the preamble makes invocation of the Amendment against state or local gun control laws "extremely problematic"); Michael K. Beard & Kristin M. Rand, The Handgun Battle, 20 Bill of RTS. J. 13, 13 (1987) (concluding that individual right idea is "a myth" perpetrated in large part because the NRA "systematically deletes the phrase 'A well regulated militia being necessary to the security of a free state'" (quoting U.S. Const. amend. II)); Herz, supra note 14, at 103-04 (arguing that gun lobby organizations "distort[] the constitutional text itself" by referring to the right to keep and bear arms without reference to the qualifying language that begins the Amendment).

74. Apart from those who use the initial clause of the Amendment as a kind of incantation, there are those who use it to bolster extremely general, and largely undefended (not to mention indefensible), historical claims. See, e.g., Harry Louis Seldon, The Militia Amendment; It Says Nothing About the Rights of Individuals, WASH. POST, Nov. 7, 1993, at C7 (referring to Second Amendment as "the militia amendment" and claiming that a "careful" reading of the text reveals the Amendment's exclusive focus on the militia); id. (asserting, without documentation or analysis of the Second Amendment's preratification history, that the Amendment was spurred by a 1780s "fear of a standing army" and commitment to militia system of defense); Edwin M. Yoder, Jr., Let the NRA Go to Court, WASH. POST, Mar. 25, 1989, at A15 (stating that although "NRA literature usually amputates or plays down [the] prefatory dependent clause," it is what "explains the historic purpose of the Second Amendment"); id. (omitting the state constitutional guarantees that anticipate the Second Amendment, but asserting that history reveals that the "historic apprehension [of standing armies] was still fresh" and that the purpose of the Second Amendment was "to ensure the survival of the state militias").

75. Tribe & Dorf, supra note 64, at 11. For useful commentary on the traditional claim that "only the text itself" is the law, see Thomas B. McAffee, Reed Dickerson's Originalism—What It Contributes to Contemporary Constitutional Debate, 16 S. ILL. U. L.J. 617, 625-30 (1992).
Unique among the provisions of the Constitution, the Second Amendment comes with its own mini-preamble, setting forth its purpose: to foster a “well-regulated Militia.” This purpose has little to do with individuals possessing weapons to be used against their neighbors; as a result, the Second Amendment has not been interpreted by the courts to prohibit regulation of private gun ownership. Nonetheless, in an essay provocatively titled “The Embarrassing Second Amendment,” Sanford Levinson of the University of Texas argues that because the enactment of the Second Amendment took place during an era that valued armed citizens as a civic republican bulwark against tyranny, it must be interpreted according to civic republican traditions. Levinson may well be right that the Second Amendment was enacted against a civic republican background that saw individual gun-ownership as part of the “right of the people to keep and bear Arms” that promotes a “well-regulated Militia.” But the Second Amendment did not enact the background understanding. The only purpose it enacted is the one contained in the text, for only its words are law. And in modern circumstances, those words most plausibly may be read to preserve a power of the state militias against abolition by the federal government, not the asserted right of individuals to possess all manner of lethal weapons.  

By its own terms, this argument proceeds along odd lines. It relies upon the text establishing the militia as the focus of the Amendment as a justification for failing to explore the probable intended meaning of the other critical language in the Amendment’s text—the express grant of a right to keep and bear arms to “the people.” Don Kates has argued powerfully that, in the context of the balance of the Bill of Rights, the Second Amendment’s recognition of a right vested in the “the people” strongly supports an individual right, rather than a state right, interpretation. Tribe and Dorf do

76. TRIBE & DORF, supra note 64, at 11 (footnotes omitted).
77. As Sanford Levinson has remarked, “[e]ven if we accept the preamble as significant, we must still try to figure out what might be suggested by guaranteeing to ‘the people the right to keep and bear arms.’” Levinson, supra note 3, at 645.
78. See Kates, supra note 6, at 218 (observing that to transform “the people” referenced in the Second Amendment to “the states,” one must assume that the phrase has a radically different meaning in the First, Fourth, Ninth, and Tenth Amendments than in the Second, and that the Framers distinguished between “the people” and “the states” in the Tenth Amendment, but used the former to mean the latter in the Second); accord Levinson, supra note 3, at 645 (claiming that “the people” refers to “sovereign citizenry collectively organized” is an argument that “founders . . . upon examination of the text of the federal Bill of Rights itself”); MALCOLM, supra note 6, at 162 (similar observation);
not address the relevance of these reinforcing texts, let alone the historical arguments that the Amendment’s reference to “the people” reflects a history relating to an individual right to have arms. What started out, then, as an argument in favor of what is “contained in the text,” as against a mere background understanding, winds up as quick justification for rewriting the balance of the text in order to privilege a preferred reading based on “modern circumstances.” Moreover, given that the right of the people to keep and bear arms had previously been guaranteed, both in the English Bill of Rights, and in several state declarations of rights, and thus had served as a popular

cf. United States v. Verdugo-Urquidez, 494 U.S. 259, 287 (1990) (Brennan, J., dissenting) (arguing in a Fourth Amendment case that “the term ‘the people’ is better understood as a rhetorical counterpart to ‘the Government,’ such that rights that were reserved to ‘the people’ were to protect all those subject to ‘the Government’ ”); id. (Brennan, J., dissenting) (equating “ ‘the people’ ” with “ ‘the governed’ ”).

79. For treatments of the English portion of that history, see HALBROOK, THAT EVERY MAN BE ARMED, supra note 6, at 43-54; MALCOLM, supra note 6, at 113-34; see also supra note 66 and accompanying text (citing 1689 English Bill of Rights which guaranteed the private right to arms). The experience of American colonists, as well as the constitutions of the states, with this same right to have arms, is treated in MALCOLM, supra note 6, at 138-50. For a treatment of the relevance of that history to the interpretation of the Second Amendment, see infra notes 163-241 and accompanying text. If this legal and constitutional history explains the choice of language in the Right to Arms Clause, it bears directly on what the language employed meant to both the adopters of the Second Amendment and the audience to whom it was communicated; this sort of history extends beyond any meaningful conception of a background understanding that might (or might not) shape the drafting or comprehension of a text. See supra notes 74-75 and accompanying text.

80. TRIBE & DORF, supra note 64, at 11. In fact, Tribe and Dorf acknowledge that the Framers may have seen “individual gun-ownership as part of the ‘right of the people to keep and bear Arms’ that promotes a ‘well regulated Militia,’ ” but view this as a background understanding because of the idea’s non-textual, “civic republican” roots. Id. But it is inconsistent to admit that, in light of widely shared assumptions, “the people” was understood to refer to individuals when that language was employed, but then to dismiss this meaning of the words as mere background understanding that can be ignored. See supra note 78. For a useful general commentary on this sort of interpretive stance, which claims fidelity to bare text while eschewing interest in how it was actually understood by its adopters and a relevant legislative audience, see Steven D. Smith, Law Without Mind, 88 MICH. L. REV. 104 passim (1989). If giving the text primacy is in furtherance of our goal to interpret, and not to write, a Constitution, as these authors suggest, see TRIBE & DORF, supra note 64, at 14, we should privilege the plain meaning of the text to those who employed it over both mere background assumptions and preferred readings based on modern circumstances.

81. See supra note 66. For treatment of the significance of the English Bill of Rights in construing the Second Amendment, see infra notes 163-99 and accompanying text.

82. See, e.g., MASS. CONST. pt. I, art. XVII (1780), reprinted in 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1888, 1892 (Francis Newton Thorpe ed., 1909) [hereinafter STATE CONSTITUTIONS] (“The people have a right to keep and to bear arms for the common defence.”). For treatment of the state constitutional provisions, see infra notes 200-41
limit on colonial and state governments, most textualist canons of construction would acknowledge that the provision ought to be read in para materia with these related provisions. The most obvious question suggested by these earlier texts is whether it seems plausible that a guarantee so obviously derived from these state counterparts would have been uniquely designed only “to preserve a power of the state militias against abolition by the federal government.” What did these analogous guarantees mean as against state governments? Particularly when conceived as a right against state government, the right to “keep and bear” arms seems to be an empty shell if it includes, for example, only the right to employ a firearm while actually serving in the militia, but not a right to hold it privately. Under such

83. The meaning and scope of these earlier guarantees are themselves the subject of heated debate in the Second Amendment literature. See infra notes 210-39 and accompanying text. No one disputes that they served as limits on colonial and state governments.


85. TRIBE & DORF, supra note 64, at 11. No thoughtful commentator questions that the guarantee and its counterparts in the Bill of Rights served originally to limit only the federal government. But Tribe and Dorf follow the lead of commentators who have suggested that it is the power of the states to maintain militias that is uniquely secured by the Amendment, rather than any meaningful right of “the people” as distinguished from the states. See, e.g., Henigan, supra note 16, at 108 (summarizing view that the Second Amendment was adopted to assure the continuation and effectiveness of the state militias and hence serves only to limit laws that interfere with the arming of state militias); id. at 112 & n.23 (stating that since an important purpose of the Amendment is “to defend the state as an entity of government,” it would be “paradoxical to apply the Amendment to limit the power of state government” via incorporation through the Fourteenth Amendment). But see Williams, supra note 24, at 577 (contending that republicans saw the militia as a check on state as well as federal governments and noting that “state constitutions, too, contained right to arms provisions” and concluding that “apart from its association with local governments” that “the militia promised virtuous control of force”).

86. As with other “states’ right” commentators, Tribe and Dorf make no attempt to confront what substantially identical language would have meant in a context in which structural issues concerning the power of the federal government vis-à-vis the states could not have been involved. The right of “the people” of Massachusetts to “keep and bear arms,” as guaranteed by their state constitution, see MASS. CONST. pt. I, art. XVII, reprinted in 3 STATE CONSTITUTIONS, supra note 82, at 1892, could hardly have been intended to secure only the right of the state to continue to operate a state militia. Against whom would the right have operated? Tribe’s and Dorf’s apparent adoption of the states’ right understanding of the Second Amendment adds a special sort of irony to their treatment. Tribe and Dorf began their analysis by claiming to privilege adopted text over unadopted background understandings. See supra notes 75-76 and accompanying text. But it is well known that the notion that the sole purpose of the Second Amendment was to protect the rights of states to maintain effective militias originated as a theory of how the Amendment grew out of the ratification-period debate over the militia provisions contained in the originally proposed constitution. See, e.g., Ehrman & Henigan, supra note 27, at 21-31. For analysis of the relevance of the debate over the Constitution’s militia provisions to the Second Amendment, see infra notes 128-48 and accompanying text.
a construction, the state might constitutionally disarm the people, and emasculate the protection to liberty that many thought the militia provided, merely by prohibiting private ownership of weapons and then choosing not to call the militia to duty. 87

If the second clause of the Second Amendment seems to cut in favor of a personal, as well as a collective, right to possess private firearms, the first clause need not be read to point the other way. As even Tribe and Dorf effectively acknowledge, 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. 88 In fact, classical republican rhetoric relating to the militia contemplates an ideal of universal service and an underlying assumption of an armed citizenry. 89

Before we conclude that the stated goal of “security of a free State” suggests a very narrow end to which the Amendment was di-

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87. Indeed, if the right is read as at most guaranteeing the right of militiamen to carry weapons as part of their official duties, cf. Herz, supra note 14, at 65-67 (construing the Second Amendment), the state could accomplish the goal of preventing popular opposition to oppression (fear of which was a core reason for valuing the militia) by simply disbanding the militia completely. After all, the Second Amendment Militia Clause by its terms merely declares a preference for militias, implicitly as contrasted to reliance upon standing armies in peacetime, but does not require government to actually sponsor a militia nor prohibit it from discontinuing the practice. A leading nineteenth-century constitutional commentator, Thomas Cooley, wrote that “if the right [to keep and bear arms] were [sic] limited to those enrolled [in the militia], the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check.” Thomas Cooley, The General Principles of Constitutional Law in the United States of America 298 (3d ed. 1898).

88. See supra note 80 (pointing to acknowledgment by Tribe and Dorf that individual gun-ownership was seen during the founding era as part of the right to arms “that promotes a ‘well regulated Militia’”). William Van Alstyne has suggested: [The] very assumption of the [Militia Clause] is that ordinary citizens (rather than merely soldiers, or merely the police) may themselves possess arms, for it is from these ordinary citizens, who as citizens have a right to keep and bear arms (as the second clause provides), that such a well regulated militia as a state may provide for, is itself to be drawn.

Van Alstyne, supra note 6, at 1242. By contrast, as Malcolm has remarked: “[I]t would seem redundant to specify that members of a militia had the right to be armed. A militia could scarcely function otherwise.” Malcolm, supra note 6, at 163.

89. See, e.g., Williams, supra note 24, at 577-79. Williams’s review of classical republican thought as favoring a universal militia, an orthodoxy that is documented in his work as influencing the adoption of the Second Amendment, demonstrates the basic irrelevance of the modern scholarly debate about the nature and composition of the state militias circa 1787. The Second Amendment reflects a commitment to the ideal of a universal militia and an armed citizenry, and this oft-articulated ideal is more relevant to understanding the original meaning of the Amendment than any body of evidence about the actual functioning of state militias at the time of the founding.
rected, we ought to be fairly sure that we know what that phrase means. Does this text suggest that the primary goal is the security of the political entities known as the states, or perhaps “the government” in general, meaning both the federal and state governments?

Or, given the provision’s location within the Bill of Rights, ought we to consider that the real emphasis was on securing a “free State,” with the corresponding implication that the end to be achieved is freedom as much as it is security or government? The emphasis belongs on freedom more than on the state, inasmuch as government itself was viewed under prevailing social contract theory as the agent of a free and sovereign people and as a tool for securing personal and collective freedom and rights.


91. See id. at 112 (concluding that “[p]resumably, the term ‘free state’ is a reference to the states as entities of governmental authority”).

92. Considering that Article I grants Congress the power to call forth the state militias, see U.S. CONST. art. I, § 8, cl. 15, and the state militia’s value was contrasted to the perceived evils of standing armies, the security of the nation as a whole was a necessary goal of the militias. Compare Ehrman & Henigan, supra note 27, at 33 n.214 (stating view that the Antifederalists who were most responsible for the Second Amendment would not have wanted it “implied that the Amendment was concerned with the defense of the nation as a whole”), with The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents (Dec. 18, 1787) [hereinafter Pennsylvania Minority Report], reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 618, 623-24 (Merrill Jensen ed., 1976) [hereinafter RATIFICATION OF THE CONSTITUTION] (showing Antifederalist minority advocating a proposed amendment providing that “the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game” (emphasis added)). Produced originally under the general editorship of Merrill Jensen, this critical multi-volume resource is now edited by John P. Kaminski and Gaspare J. Saladino.

93. See Van Alstyne, supra note 6, at 1244 (observing that the Second Amendment refers to the security of a “free State” rather than “the security of THE STATE,” in contrast to “certain national constitutions that put a privileged emphasis on the security of ‘the state’ ”); id. (stating that such provisions do not appear in a bill of rights nor include language suggesting any right to arms “apart from state service” because such a recognition “might well pose a threat to the security of ‘the state’ ”) (footnotes omitted). But cf: Henigan, supra note 16, at 112 (suggesting that the Second Amendment does not purport “to express distrust of state governmental power, and to create a right to be armed against abuses of that power,” but rather “elevate[s] the defense of state government to a constitutionally protected value” (footnote omitted)).

94. See, e.g., VA. CONST., Bill of Rights § 3 (1776), reprinted in 7 STATE CONSTITUTIONS, supra note 82, at 3812, 3813 (“That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community”); MERCY WAMEN, A COLUMBIAN PATRIOT (1788), reprinted in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 272, 278 (John P. Kaminski & Gaspare J. Saladino eds., 1986) (quoting oft-cited statement of Blackstone that “the principal aim of society is to protect individuals in the absolute rights which were vested in them by the immediate laws of nature”).
fought to preserve their liberty, would have been uninterested in any "security" that did not include security against tyranny.\footnote{Indeed, even the term "security" itself held connotations related to freedom for Americans of the founding era. See \textit{John Phillip Reid, The Concept of Liberty in the Age of the American Revolution} 68-70, 91 (1988). Americans believed that government was properly judged by a sovereign people in terms of whether it protected or threatened individual and collective security, understood broadly, and this notion was ingrained in them from their English constitutional and revolutionary heritage. See \textit{id}. John Phillip Reid observes that the rights of "free" Englishmen were traditionally defined in contrast with what was deemed the opposite condition of slavery. See \textit{id}. at 91. Another opposition to slavery was that of "security," which referred to the protection the people received when government acted fairly, and in accordance with the principles of due process, rather than arbitrarily. See \textit{id}. at 85-87. Thus, in 1775 the New York General Assembly objected to British claims of unlimited authority over the colonies on the ground that "a power of so unbounded an extent" would "totally deprive us of security, and reduce us to a state of the most abject servitude." \textit{Id}. at 85-86 (quoting Memorial from New York General Assembly to House of Lords, Mar. 25, 1775, in \textit{1 American Archives} 1316 (Peter Force ed., 1837)). To eighteenth-century Americans, the "security" of a free state would have suggested security against oppressive government as much as against foreign invaders or lawless mobs.}

If we place the focus on freedom as much as on government, we see that the text itself reflects that the militia was highly regarded not only because of its potential role in confronting external threats or widespread lawlessness (e.g., a Shay’s Rebellion), but also because of the part it might play in confronting any attempt to impose despotic government.\footnote{See \textit{3 Joseph Story, Commentaries on the Constitution of the United States} § 1890 (1833) (describing the militia as “the natural defence of a free country,” not only against “foreign invasions” and “domestic insurrections,” but also against “domestic usurpations of power by rulers”). One of the most effective advocates of the militia-grounded view of the right to arms, Lawrence Cress, refers to the founding generation’s view of “the citizen militia’s collective role as the protector of personal liberty and constitutional stability against ambitious tyrants and uncontrolled mobs.” Cress, \textit{supra} note 16, at 30. If the Second Amendment guarantees an armed citizenry to promote the viability of the militia so that it might play this role for the national government, as even Henigan seems to acknowledge, see \textit{Henigan, supra} note 16, at 121 (noting that Madison viewed state militias “as a military counterpoint to the power of the regular standing army”), it would seem apparent that the analogous guarantees of the state constitutions imply that the militia was intended to play a similar role as to the governments of the states. This, in turn, suggests that the federal provision cannot properly be construed as only a structural guarantee in favor of the states.} Further, a right to a militia as a popular guarantee of freedom would be a chimera if a tyrant’s goal could be realized by the simple expedients of requiring the storing of all militia arms in a central, government-controlled location and the prohibition of private gun ownership.\footnote{\textit{But cf.} Seldon, \textit{supra} note 74, at C7 (arguing that the Amendment had the limited purpose of assuring continuation of state militias comprised of citizens with a duty to bear arms under state militia laws; concluding, however, that now that “the state militias have become the National Guard,” and members are not required to provide their own arms,}
the right embodied in the second clause of the Second Amendment was written in favor of "the people" rather than in favor of "militiamen performing militia duties" or in favor of state governments.

If we capture the language describing the goal as "the security of a free State" through the wider lens of the people's interest in freedom, we might also begin to see that the goal of collective security furthered by the militia and the right to arms went beyond what today we think of as military duties, with a sole focus on securing the people against external and large-scale threats. In the generations preceding the founding era, citizens had a duty to be armed to lend support to collective security through occasional militia service, as well as in ways we would recognize today as police rather than as military functions. Surprisingly enough, for many modern Americans, acts that today might be seen as protected by a privilege of self-defense or defense of others, were viewed in the founding era as the performance of duties of citizenship as much as they were the exercise of a privilege. The variety of roles served by the armed citizen militiamen, roles in which their efforts were often supplemented by citizens who were not formally eligible for militia service, reflect that the goals served by the clauses of the Second Amendment included the personal security of every member of society, for a society can be called free only to the extent that it guarantees security to each of its members. The structural argument given above indicates that the Amendment is no longer related to idea of an armed citizenry). So one of the acknowledged purposes of protecting militias themselves—securing the means of the citizenry to resist oppression—goes by the board as a result of the simple historical development of a new organizational scheme for arming the militia. Compare Seldon's minimalization of the implications of this conclusion with the fears expressed by citizens of Massachusetts as to this possibility being raised by the language proposed for a right to arms provision in their 1780 constitution. See infra note 239 and accompanying text.

98. See Kates, supra note 6, at 214-15. Kates contends that the historical militia is properly seen as "a system under which virtually every male of military age was legally required to possess his own arms for personal defense, crime prevention, and community defense." Don B. Kates, Jr., The Second Amendment: A Dialogue, 49 LAW & CONTEMP. PROBS. 143, 145 (1986) (footnote omitted). In any event, the purpose of having an armed community of citizens clearly went beyond the modern military idea of collective defense. See Joyce Lee Malcolm, The Right of the People to Keep and Bear Arms: The Common Law Tradition, 10 HASTINGS CONST. L.Q. 285, 291-92 (1983).


100. See supra notes 92-95 (describing the relationship between arms, "security," and freedom); see also Kates, supra note 99, at 93-94 (describing the classical tendency to equate arms both with the idea of a free citizen and with the development of the manly virtues of the good republican).
Second Amendment’s language can be read as guaranteeing a private right to arms even when we start with the premise that the Militia Clause functions as a “mini-preamble” that orients the Amendment to fostering a militia. But the Militia Clause need not be read as limiting the Amendment’s arms guarantee in such a fashion. Although it appears formally as an introductory clause, the Militia Clause is not described, either in the text or in any contemporaneous source, as a “mini-preamble” or a limiting clause. Moreover, neither the syntax nor the text requires that it be read as a limitation on the right to keep and bear arms. That a purpose served by the arms guarantee, even a central purpose, is to promote the perpetuation of the militia system need not imply that the militia system is the only end served by that guarantee. To conclude otherwise based on text and syntax alone is basically to rely on the reasoning underlying the common-law maxim expressio unius est exclusio alterius, which takes the naming of one thing to imply the exclusion of others. As with many common-law rules of construction, the exclusio maxim is often a useful cue to perceiving statutory design, as in the example of the enumerated powers scheme of Article I of the Constitution. At the same time, leading authorities on statutory construction agree that this doctrine is almost never self-applying and requires careful attention to the entire context of the provision in question to determine whether the exclusio inference was intended. One reason for skep-

101. As David C. Williams put it, despite the “purpose clause” of the Second Amendment, “based only on its language, the provision might ensure the right of arms for many purposes.” Williams, supra note 24, at 597 n.252 (citation omitted).

102. See DICKERSON, supra note 84, at 234-35 (describing this canon of construction).

103. See U.S. CONST. art. I, § 8. The idea that Congress is limited to the powers granted, and that all other powers are reserved, is a reasonable inference from the language of Article I, Section 8 of the Constitution, which, prior to enumerating the powers of Congress under the Constitution, states, “The Congress shall have Power ....” Id.

104. See DICKERSON, supra note 84, at 234-35 (observing that this canon is hardly a “rule” at all, as it is sometimes suggested to be, and that “this maxim is at best a description after the fact, of what the court has discovered from context”). In the example of the enumerated powers scheme of Article I, the application of the maxim receives strong confirmation from both internal and external contexts. First, the last clause of this section of the Constitution, the one we know as the Necessary and Proper Clause, further clarifies that this is indeed the correct inference, as it purports to acknowledge the existence of ancillary powers and defines the extent to which such powers may legitimately be exercised. If the listing of powers was intended merely to exemplify or illustrate what was intended to be a general set of national powers, rather than to define and limit the powers to be exercised by the nation, there would be no reason to state the power to execute the other named powers. The Necessary and Proper Clause thus states a negative restriction, namely, that if an act of Congress does not bear the stated relationship to one of the enumerated powers, Congress will have acted beyond the scope of its constitutional authority.
ticism about the usefulness of the maxim is that the mentioning of particular items in a text often reflects not a design to preclude others, but only the fact that, for a variety of possible reasons, the mentioned item was particularly before the mind of the drafters.105

Placing these two clauses into a total context requires going beyond the text itself. There are, however, textual clues suggesting that reliance upon the placement of these clauses alone would be premature, if not obviously fallacious. We are unaware, for example, of any evidence suggesting that the Second Amendment was intended to have a different meaning than the amendment proposed by the Virginia state ratifying convention, from which James Madison drafted the Second Amendment. That proposal included both clauses of what became the Second Amendment, but neither its language nor structure suggest that the two clauses lack independent force. Among other things, the two clauses are separated by semi-colons and placed in reverse order from the order found in the final text of the Amendment.106 As stated there, the Right to Arms provision

Moving beyond the text, the enumeration of powers in the Constitution followed the practice established in the Articles of Confederation, in which the exclusive powers of the national government were enumerated. See ARTICLES OF CONFEDERATION art. IX (1777), reprinted in 1 RATIFICATION OF THE CONSTITUTION, supra note 92, at 86, 89 (listing powers); id. art. II, at 86 (stating explicitly that "[e]ach state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled"). Finally, Madison and other key supporters of the Constitution clarified that this was the intended design of Article I, § 8. See, e.g., THE CONGRESSIONAL REGISTER, June 8, 1789, reprinted in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD OF THE FIRST FEDERAL CONGRESS 69, 85 (Helen E. Veit et al. eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS] (quoting Madison's view that the proposed amendment that correlates with the Tenth Amendment "may be considered as superfluous," but suggesting that "there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated").

105. See WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 349-50 (1993). Strikingly, a careful review of the drafting process and legislative history of the Second Amendment reveals that the desire to include a declaration of the value of the militia, while giving it a secondary status to the legal guarantee embodied in the right to keep and bear arms, adequately explains the drafting decision to employ the Militia Clause as an introduction to the Amendment. See infra notes 263-97 and accompanying text. This history contradicts any idea that the introductory clause was intended to serve as words of limitation on the right stated in the balance of the text.

106. See infra notes 271-74 and accompanying text. The Virginia state proposal stated in relevant part: "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." Amendments Proposed by the Virginia Convention (June 27, 1788), in CREATING THE BILL OF RIGHTS, supra note 104, at 17, 19. Notice that these quite separate clauses state the existence of a "right" and declare a principle of government without specifying a prohibition on government power. The most important
clearly is not limited to serving the end of ensuring the existence of a militia. That the clauses were thought of as independent, if closely related, provisions, is further suggested by the fact that the substance of each of the two clauses was included, without any reference at all to the other, in provisions found in predecessor state constitutional provisions. At the very least, these additional textual clues, which go unmentioned by those who, like Tribe and Dorf, place great weight on the wording and placement of the two clauses, strongly suggest the need to look more closely at both clauses and their relationship to each other, with the help of the context that the relevant historical materials might provide.

B. What Does It Mean to “Keep and Bear” Arms?

Those who claim that the Second Amendment does not guarantee any right to own and carry private arms also assert that their understanding is built into the very terminology by which the right to arms is described. A private individual might own or possess arms, she might use or employ them, but only members of a militia “keep and bear” arms, because the concept of “bearing” arms suggests a military use. Accordingly, it is argued that even the clause guaranteeing a right to arms lends support to the idea that it is only in the limited context of a “well-regulated militia” that the right obtains meaning. Critics of the right to private arms theory have thus provided multiple references to the historical use of “keep” and “bear” in military settings as well as to the choice of other language in non-military settings.

It is highly probable that the Framers of relevant constitutional provisions, including the Second Amendment, chose language that associated the right to arms with citizen militias and collective defense. This is natural enough, for government actions against the right of the people to be armed had, in their historical knowledge and

shift of emphasis between the Virginia proposal and the Second Amendment is the clarification of the Right to Arms Clause as at least a cautionary limitation on government power “that shall not be infringed”—a shift that is not duplicated in the Militia Clause. This shift may be one key to understanding the new emphasis on their connection, as well as the reversal of the order in which the clauses are presented. See infra notes 282-86 and accompanying text.

107. See infra notes 258-62 and accompanying text (treating the difference between the “militia” and “arms” provisions in the states’ constitutions).


110. See id. at 149.
experience, been targeted at preventing the people from being enabled to collectively defend their rights and liberties.\textsuperscript{111} There had never been a mass seizure of firearms in the American colonies (or practically anywhere) to prevent their employment in purely private acts of self-defense; there had been, on the other hand, seizures of stocks of weapons, as well as of privately held weapons, in the attempt to prevent effective resistance against English policies—seizures that were resisted as blatant violations of the English Bill of Rights.\textsuperscript{112} But even if the right was framed as a right to "bear" arms to reinforce that the right extended to arms to be employed in the community's collective defense, this need not imply that the term would have no application outside the actions of a formal militia. At the very least, the popular resistance engaged in by the American colonists often involved local militias, but it extended to virtually the entire population; those not serving within the militia were equally assertive of the claim of the English constitutional right to "have" arms and to carry them as security for their own defense and the defense of their communities.\textsuperscript{113}

There are, additionally, grounds to warrant careful consideration of the right to "keep and bear" arms in the total historical context of the right to arms, rather than purely by reference to evidence of usage in other settings. For one thing, the argument from the particular words chosen to describe the right appears to cut both ways. Even if the right to "bear" arms was restricted to the performance of militia duties, the purpose of assuring the existence of a militia could have been realized by guaranteeing only a right to "bear" arms; the right

\begin{footnotes}
\item 111. As Theodore Schroeder observed, the core value of the guarantee of a right to keep and bear arms is clearly security against government "because only governments have ever disarmed any considerable class of people as a means toward their enslavement." Theodore Schroeder, Free Speech for Radicals 104 (reprint ed. 1969). The Framers would have known this all too well, and in fact knew that the English right to arms was responsive to the disarming \textit{en masse} of English citizens so as to prevent resistance to royal policies. See infra notes 173-77 and accompanying text.


\item 113. For example, Malcolm observes that in 1769 a Massachusetts newspaper responded to the charge that a general call for the people to arm themselves was seditious not only by invoking the English Bill of Rights, but by pointing to local laws that had required that every household be armed, not merely those containing individuals eligible for militia service. See Malcolm, supra note 6, at 144-45. Notwithstanding the importance of the citizen militia in the ideology and rhetoric of the early Americans, the conception of the right of collective defense, which was for them an extension of each citizen's right of self-defense, extended to the entire citizenry. See infra note 167 and accompanying text.
\end{footnotes}
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. Arguably the acknowledgment of a right to "keep" arms is suggestive of itself that the right-bearer is to have a wide discretion to employ the arms for lawful purposes.

Moreover, despite the frequent linkage between "bearing" arms and military service, it is clear that the term was not invariably used as a term of art to refer solely to the employment of weapons in a military setting. An early Virginia law required that "all men that are fittinge to beare armes, shall bringe their pieces to the church uppon payne of every offence." It is important to underscore that this was not a militia law, and that laws requiring the virtually universal holding and carrying of weapons were common in the colonies. Similarly, Stephen P. Halbrook has observed that in a 1785 game bill, that was drafted by Jefferson and proposed by Madison in the Virginia Assembly, a violator of the bill's provisions was to be prohibited to "bear a gun out of his inclosed ground, unless whilst performing military duty." As Halbrook observes, this statement reflects that bearing arms was not exclusively associated with performing militia duties nor limited to a military context.

114. See, e.g., Levin, supra note 108, at 153 (acknowledging that the right to "have" arms was "an adjunct of the right of revolution" and citing Blackstone's treatment focusing on the right to protect one's fundamental rights). To the extent that proponents of the militia-grounded reading of the Amendment acknowledge that the guarantee extends a right to all militiamen and not merely to the state government that organizes them, see supra note 87, this acknowledgment would at the least call into doubt whether the right extends only to using arms during brief occasions of active militia training or service. For further commentary on the significance of the term "keep," in the context of the Massachusetts Constitution in which it was first employed, see infra notes 236-37 and accompanying text.

115. If nothing else, the infrequency with which militias engaged in any sort of formal training exercises meant that, as a practical matter, militiamen were charged with becoming proficient in the use of firearms; so the private use of a firearm also could have been seen as an act in furtherance of the individual's militia duty. For the practical connection between private ownership of firearms and citizen militias, see Cramer, supra note 6, at 21-22.

116. Malcolm, supra note 6, at 139 (quoting I The Statutes at Large; Being a Collection of All the Laws of Virginia from the First Session of the Legislature in the Year 1619, at 174 (William Waller Hening ed., 1823)).

117. See id. at 138-40.


119. See id.; see also Halbrook, That Every Man Be Armed, supra note 6, at 223 n.145 (referring to same example and concluding that "to Madison and his contemporaries, to 'bear' an arm was to carry it in one's hands or on one's person for hunting, militia
Perhaps most importantly, while the right to arms guaranteed by
the English Bill of Rights did not use either of the terms under dis-
cussion, but referred instead to the right to “have” arms,¹²⁰ it appears
that Americans viewed that provision as acknowledging a broad right
to own and use weapons for lawful purposes and perceived the state
constitutional guarantees, cast in terms of the right to “bear” or to
“keep and bear” arms, as offering them comparable protection.¹²¹ If
these historical claims are true, and if there is a continuity between
the guarantees of the state constitutions and the Second Amendment,
there is good reason to doubt that the language was employed in or-
der to describe a narrow right that extended only to arms employed
in formal militia service.¹²² We turn next to history to determine
whether the context of the adoption of the Second Amendment

¹²⁰. See supra note 66.

¹²¹. The American understanding of the relationship between state declarations of
rights and the English Bill of Rights is developed fully in Part III-A-3.
See infra notes
163-241 and accompanying text; see also PA. CONST., Decl. of Rts. art. XIII (1776), re-
printed in 5 STATE CONSTITUTIONS, supra note 82, at 3081, 3083 (recognizing that “the
people have a right to bear arms for the defence of themselves and the state”); Anthony
J. Dennis, Clearing the Smoke from the Right to Bear Arms and the Second Amendment,
29 AKRON L. REV. 57, 86 (1995) (relying on the Pennsylvania provision as evidence that
Framers believed that one could “bear” arms in connection with self-defense). That im-
portant forces in Pennsylvania both understood their own tradition in this fashion and
employed the term “bear” quite broadly, is reflected in the minority report of the Penn-
sylvania Ratifying Convention, which demanded an amendment to the Constitution
guaranteeing the people’s right “to bear arms for the defense of themselves and their own
state, or the United States, or for the purpose of killing game.” Pennsylvania Minority
Report, supra note 92, at 623-24 (emphasis added). This group of influential Antifeder-
alist spokesmen were obviously comfortable with the idea that one might “bear” arms in
connection with game hunting as well as in a military setting. For a more complete analy-
sis of related issues, see infra notes 220-26 and accompanying text.

¹²². While it is hardly a part of the formal legislative record of the Second Amend-
ment, it is at least striking in this context that a prominent Federalist, Tench Coxe, who
was closely connected to James Madison, stated in June of 1789, one week after Madison
introduced his proposed amendments in Congress, that the proposed arms guarantee
“confirmed” the people’s right “to keep and bear their private arms.” PHILADELPHIA
FED. GAZETTE, June 18, 1789. Coxe’s reference to “private arms” is suggestive that he
perceived no barrier between the language chosen to convey the right in question and the
idea that the right included a guarantee to private (and not merely militia) arms; refer-
ence to the term “bear” with purely “private arms” also suggests that he did not perceive
the term as limited to an organized military context. Such statements at the least suggest
the need for careful analysis of the historical context to determine the meaning most
probably intended by those who drafted and adopted the Second Amendment.
might shed light on the issues raised by its text.

III. THE ORIGINAL UNDERSTANDING OF THE SECOND AMENDMENT

When legal texts lend themselves to conflicting interpretations, as they often do, a time-honored technique for shedding light on the intended meaning is to consider the text in the light of what external context reveals to be the purpose for which it was enacted. As formulated in the oft-cited Heydon's Case, interpreters are to look for the "mischief" to which the provision is addressed, or the "defect" in existing law it was designed to correct, and the "remedy" that was conceived to cure the mischief or defect. Then, in turn, they are to interpret the text, if possible, so as to defeat the feared mischief and advance the contemplated remedy. Such an analysis of the Second Amendment may prove helpful to analyzing the conflicting claims about the proper interpretation of the text.

A. The "Mischief" Giving Rise to the Second Amendment

There is an unusual amount of conflict as to the precise nature of the concerns that led to the adoption of the Second Amendment. At a high level of generality, all commentators agree that the Bill of Rights in general addresses the widespread fear that the unamended Constitution established an all-powerful national government. It is also indisputable that the most compelling argument advanced against the proposed Constitution was that it failed to provide adequate security for the traditional, fundamental rights of the people in the form of a declaration or bill of rights. Also in general terms, commentators agree that the Second Amendment was at least a partial response to concerns about the extent of military power granted

123. See 76 Eng. Rep. 637, 638 (K.B. 1584); see also CHARLES B. NUTTING & REED DICKERSON, CASES AND MATERIALS ON LEGISLATION 449 (5th ed. 1978) (stating that "knowing the evil at which the statute is directed is the most important key to meaning").

124. Compare Ehrman & Henigan, supra note 27, at 30 (concluding, based on review of ratification-era debates, that the ‘right to bear arms’ concerned the ability of the states to maintain an effective militia, not an individual right to keep weapons for any purpose whatsoever’), with Van Alstyne, supra note 6, at 1245-46 (contending that ratification-era debates support the conclusion that the Second Amendment was designed to guarantee the previously established personal right to have firearms).

125. See, e.g., Ehrman & Henigan, supra note 27, at 19-20; Van Alstyne, supra note 6, at 1245-46; Weatherup, supra note 47, at 984-85

126. For comment, see MALCOLM, supra note 6, at 157-58; Hardy, supra note 6, at 598; Van Alstyne, supra note 6, at 1246-47.
to the new government by the Constitution. 127 Here commentators part company. Perhaps the most intriguing argument advanced against the notion that the Second Amendment secures a private right to arms is the assertion that the common-law and natural rights foundations for such a private right are largely irrelevant because the Amendment is so clearly the outgrowth of a ratification-period structural debate as to the division of authority between Congress and the states with respect to control of the state militias.

1. The Limited Relevance of the Militia Provisions of the Constitution

Advocates of a militia-only reading of the Second Amendment have contended that its provisions are best understood as the product of the ratification-era debate over the potential for abuse inherent in the Constitution's militia provisions128 that empowered Congress to exercise control over the militias of the states. 129 Critics of the proposed Constitution, known as Antifederalists, charged that the Constitution's militia provisions would empower Congress to harm the state militias by both neglect and abuse, including decisions to withhold arms and supplies necessary for an effective militia. 130 Despite assurances by Federalist defenders of the Constitution that states retained adequate authority with respect to their militias, including the authority to appoint militia officers,131 and concurrent authority to arm their own militias,132 Antifederalist spokesmen demanded the inclusion of constitutional safeguards on behalf of the militias and the states, including safeguards that would establish

127. See, e.g., MALCOLM, supra note 6, at 155-59 (summarizing concerns expressed in ratification-era debate, including fears expressed as to Congress's authority to establish a standing army); Cress, supra note 16, at 32-36 (discussing the debate surrounding the need to balance Congress's authority to establish an army with states' rights to maintain citizen militias).

128. See U.S. CONST. art. I, § 8, cl. 15 (providing power to call forth the militia); id. art. I, § 8, cl. 16 (involving power to organize, arm, and discipline the militia); id. (relating to the power to govern portion of militia "employed in the Service of the United States").

129. See Ehrman & Henigan, supra note 27, at 30; Weatherup, supra note 47, at 1000; see also Cress, supra note 16, at 38 (stating that the purpose was to prohibit Congress "from taking any action that might disarm or otherwise render the militia less effective").


132. See Virginia Ratifying Convention (June 14, 1788) [hereinafter Virginia Debates], in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 1, 382-83, 419 (Jonathan Elliot ed., 2d ed. 1863) [hereinafter DEBATES IN THE STATE CONVENTIONS].
greater state authority over their own militias. Seeing the Second Amendment as a unique outgrowth of this ratification-era debate as to state versus congressional power over the militias, commentators have contended that "the concern of the Second Amendment is solely the distribution of military power between the states and the federal government."  

By contrast, those who defend the private right to arms reading of the Second Amendment contend that the militia-centered ratification debate must be seen against the backdrop of the general sorts of concerns that had previously led state constitutional draftsmen to assert the classical preference for citizen-based militias as the primary defense of nations and to guarantee the right to bear arms. According to their view, the "defect" in the Constitution that led to the adoption of the Second Amendment was its failure to include these traditional rights of Englishmen as limits on a government that many believed had been granted ample powers with which to threaten those rights. To the extent that the debate over the militia provisions of the Constitution is used to establish anything more than the basis for concern that the Constitution threatened previously established constitutional principles, reliance on it is misplaced.

Based on a straightforward analysis of relevant texts alone, it seems clear that the relationship between the Second Amendment and the debate over Congress's militia powers has been greatly exaggerated by commentators anxious to limit the Amendment's scope.

133. As one example, in perhaps the classic Antifederalist work, the author of Letters from the Federal Farmer contended that the Constitution ought to secure a universal militia "and guard against a select militia, by providing that the militia shall always be kept well organized, armed, and disciplined, and include, according to the past and general usage of the states, all men capable of bearing arms." Letter from the Federal Farmer (Jan. 25, 1788) [hereinafter Federal Farmer], in 2 THE COMPLETE ANTI-FEDERALIST 339, 341 (Herbert J. Storing ed., 1981). He went on to suggest that "[a]s a farther check, it may be proper to add, that the militia of any state shall not remain in the service of the union, beyond a given period, without the express consent of the state legislature." Id. at 342; see also Cress, supra note 16, at 35 (summarizing various proposals to qualify or limit Congress's authority to regulate the state militias).

134. Henigan, supra note 16, at 109 n.12; accord Ehrman & Henigan, supra note 27, at 30 (stating that the "right to bear arms" concerned the ability of the states to maintain an effective militia, not an individual right to keep weapons for any purpose whatsoever"); Weatherup, supra note 47, at 1000 (stating that the Second Amendment was "designed solely to protect the states against the general government, not to create a personal right which either state or federal authorities are bound to respect"); cf. Cress, supra note 16, at 38 (placing less emphasis on state authority, but nevertheless stating that the purpose of the Second Amendment was to limit Congress's regulatory authority over the militia and stating that the purpose was to prohibit Congress "from taking any action that might disarm or otherwise render the militia less effective").

135. See infra notes 149-55 and accompanying text.
As previously noted, the text of the Second Amendment is drawn from language already included in several state declarations of rights.\textsuperscript{136} Advocates of a purely states' rights interpretation of the Amendment have not attempted any explanation as to why a purely structural limitation to preserve state power would have been drawn from the pre-existing constitutional provisions that served to limit state government. Ratification references to the right to arms appear most often in proposed amendments to the Constitution alongside traditional individual rights guarantees such as freedom of conscience, the press, and the guarantee of juries in civil cases.\textsuperscript{137}

Equally important, the demands that grew directly from fears about the militia provisions of Article I were embodied in proposed amendments to the Constitution, and these proposed amendments were never adopted.\textsuperscript{138} The Virginia experience is most representative, as that is where the debate over the militia provisions was most fully developed.\textsuperscript{139} The committee appointed by the state's ratifying convention to draft proposed amendments presented the convention with two distinct sets of amendments—one of which was called a "Declaration or Bill of Rights," following the tradition of establishing a separate document to state principles and to declare the rights retained by the people, and the other of which was referred to simply as "Amendments to the body of the Constitution."\textsuperscript{140} The Virginia state proposal that both refers to the militia and that guarantees the people the "right to keep and bear arms" is included within this proposed

\begin{itemize}
\item \textsuperscript{136} See \textit{supra} notes 82-84 and accompanying text.
\item \textsuperscript{137} Some opponents of the Constitution feared the loss of the right to arms because they believed that Congress's regulatory power of the militias could lead to disarmament. See, e.g., Luther Martin, Address No. 1 (Mar. 18, 1788), \textit{reprinted in 16 RATIFICATION OF THE CONSTITUTION}, \textit{supra} note 92, at 415, 419 (expressing fears that federal government would disarm the people by manipulating the militias through the regulatory powers given). But its express invocations came at the time that amendments to the Constitution were proposed within the state conventions. See \textit{infra} notes 263-81 and accompanying text (describing proposed right to arms amendments).
\item \textsuperscript{138} See, e.g., Amendments Proposed by the New York Convention (July 26, 1788), \textit{in CREATING THE BILL OF RIGHTS}, \textit{supra} note 104, at 21, 28 (proposing to limit the authority of Congress to require militia duty outside the states without state legislative consent—a guarantee that would be difficult to infer from the Second Amendment). As David C. Williams has noted, "[t]he militia is so central to republican thinking that it is surprising that the proponents of the Amendment did not secure a constitutional mandate for one." Williams, \textit{supra} note 24, at 594. Indeed, he observes that Elbridge Gerry moved that the Second Amendment proposal be revised "to mandate a federal duty to assemble a militia, but his motion failed without a second and without discussion." \textit{Id.} (citing 1 ANNALS OF CONGRESS 751 (Joseph Goles ed., 1789)).
\item \textsuperscript{139} See \textit{Ehrman & Henigan}, \textit{supra} note 27, at 27.
\item \textsuperscript{140} See Amendments Proposed by the Virginia Convention, \textit{supra} note 106, at 17-21.
\end{itemize}
bill of rights. On the other hand, an amendment proposed for the body of the Constitution granted to each state "the power to provide for organizing, arming and disciplining it's [sic] own Militia, whensoever Congress shall omit or neglect to provide for the same," and specified particular limits on Congress's power over members of the state militias.141

When James Madison, the principal author of the Bill of Rights, drafted his proposed amendments, he drew upon the language Virginia proposed for a "Bill of Rights" and simply ignored the more specific militia-related amendments it had advocated. Within his proposed framework of inserting the amendments into the body of the Constitution, Madison proposed to insert his "Second Amendment" language in Article I, Section 9, in the middle of various guarantees on behalf of traditional claims of individual rights.42 Not perceiving himself as reallocating authority from the nation to the states, or as redefining the basic terms of congressional regulatory authority, Madison did not propose to insert any modifying language into Article I, Section 8.43 When more specific militia-related proposals were offered during the deliberations in Congress, they were

141. Id. at 20. Ehrman and Henigan divide the militia-related Virginia proposals into statements of "principle" and proposed amendments that "protected these principles." Ehrman & Henigan, supra note 27, at 30. Having thus linked the Virginia proposals together, and viewing both as an outgrowth of the debate over the Constitution's militia provisions, they assure us that they were all proposed "in the context of whether the government would affirmatively provide arms for the militia." Id. at 31. But if the implication of such analysis is that "[t]he 'right to bear arms' concerned the ability of the states to maintain an effective militia," as they assert, id. at 30, it would mean that the two proposed amendments were basically identical in substance.

142. See James Madison Resolution (June 8, 1789), in CREATING THE BILL OF RIGHTS, supra note 104, at 11, 12. Madison followed the pattern established by the state proposals for amendments. Five states submitted arms guarantee proposals, the same number as freedom of the press; and only three states submitted proposals for a guarantee of free speech. See 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 983, 1167 tbl. (Bernard Schwartz ed., 1971) [hereinafter DOCUMENTARY HISTORY]. For additional analysis of Madison's proposal, see infra notes 282-90 and accompanying text.

143. See David T. Hardy, The Second Amendment and the Historiography of the Bill of Rights, 4 J.L. & POL. 1, 58 (1987). Congress eventually decided to place the amendments at the end of the original document, but even in that setting the placement of the right to keep and bear arms cuts sharply against the states' rights construction:

Were the Second Amendment a mere federalism ("States' rights") provision, as it is not, it would assuredly appear in a place appropriate to that purpose (i.e., not in the same list with the First through the Eighth Amendments, but nearby the Tenth Amendment), and it would doubtless reflect the same federalism style as the Tenth Amendment; for example, it might read: "Congress shall make no law impairing the right of each state to maintain such well regulated militia as it may deem necessary to its security as a free state."

Van Alstyne, supra note 6, at 1243 n.19.
rejected.144 Despite modern claims to the contrary, the Amendment does not by its terms guarantee that a militia will be maintained or that the national government holds a duty to maintain the universal, or general, state militias as they existed in 1787.145

Beyond the relevant texts, the general history lends support to the conclusion that the Second Amendment was not drafted to restore power to the states or to recast Congress's militia powers. To begin with, the debate over the militia provisions in the Constitution involved important substantive disagreement as to the powers that could safely be entrusted to Congress. The Federalists not only defended the power given to Congress to control the militias, but contended that national power to effectively utilize the states' militias was itself an important device for avoiding the necessity of a large standing army in peacetime—something many at all ends of the political spectrum appeared to prefer.146 While the Federalists would not have conceded that Congress's powers would extend to disarming the American people as Antifederalists feared147—they were ulti-

144. See, e.g., Roger Sherman's Proposed Committee Report (July 21-28, 1789), in CREATING THE BILL OF RIGHTS, supra note 104, at 266, 267. (proposing that militias be governed by the states subject only to uniform rules of "organization and discipline" (proposal never left House committee)); Additional Articles of Amendment (Sept. 8, 1789), in CREATING THE BILL OF RIGHTS, supra note 104, at 42, 44 (proposing to grant power to states to organize, arm, and discipline militias in event of congressional neglect and to impose some limits on congressional power over militias).

145. In fact, an Antifederalist critic of the proposed amendment observed that "this article only makes the observation that a 'well regulated militia, composed of the body of the people, is the best security of a free state;' it does not ordain, or constitutionally provide for, the establishment of one." Williams, supra note 24, at 595 n.241 (quoting Centinel, Revived, INDEPENDENT GAZETTEER, No. XXIX, Sept. 9, 1789, at 2). In fairness, it might have been debated as an original matter whether Congress holds the power to establish a select militia along the lines of the modern National Guard. According to the Federalists, moreover, the states could both assert the power to establish universal militias and supply any deficit in federal support for the militias, and these assumptions probably led Madison to conclude that a specific guarantee of state power was simply unnecessary. But the Second Amendment does not appear to speak to either question.

146. See Virginia Debates, supra note 132, at 381. The Federalist argument that preservation of the state militias would be the key to avoiding large standing armies reflected that they had deliberately granted to Congress the power to establish standing armies in peacetime. Despite their commitment to the militia system, the Constitution's supporters were not persuaded that a citizen militia could meet the defense needs of the nation as it expanded. For an overview, see MALCOLM, supra note 6, at 151-55.

147. Ironically enough, while proponents of the "states' rights" reading insist that the expressed concerns about disarming the people related solely to the states' authority to ensure arms for their militias, see supra note 85, in fact, Antifederalists often expressed the fear as moving in the opposite direction: Congress's broad regulatory power over the militias would enable it to create a select militia and then, in turn, to disarm the general citizenry, to the detriment of liberty and the idea of a popular check on government. See, e.g., 2 RATIFICATION OF THE CONSTITUTION, supra note 92, at 509 (John Smilie, Dec. 6,
mately willing to reaffirm the basic right to arms—but they would not have agreed to an amendment that they perceived as modifying Congress's authority over the state militias in any significant way, and the Second Amendment by its terms does not purport to give authority over the militias back to the states. What it does purport to do is to reaffirm the value of militias and to secure to "the people" their right to "keep and bear arms," paralleling closely the state constitutional guarantees that had been designed to secure what Americans viewed as among the fundamental rights they had held as Englishmen.

2. The Relevance of the Omission of a Bill of Rights

As suggested above, it was not the debate over Congress's militia powers that led to the adoption of the Second Amendment. Rather, 

1787, Pennsylvania Ratifying Convention) (warning that Congress would have power to "give us a select militia which will, in fact, be a standing army—or Congress, afraid of a general militia, may say there shall be no militia at all;" and, worse yet, with a select militia formed, "the people in general may be disarmed"). The irony, of course, is that while the republican-minded Antifederalists valued the universal militia precisely because of its linkage to the idea of an armed citizenry, the modern states' rights understanding of the Second Amendment reverses this priority by shifting the emphasis almost exclusively to the militia precisely to make the rights of the people to arms a dead letter.

148. The conflicting views of the Federalist proponents of the Constitution, and their Antifederalist opponents, as to Congress's powers both to create a standing army and to control the state militias, reflects a general theme of their conflict over the merits of the Constitution. The Federalists were committed to the necessity of strengthening the federal government and in general perceived that the dangers of empowering government were outweighed by the benefits to be accrued and the risks associated with failing to empower government to perform essential functions. See, e.g., Letter of George Washington to Bushrod Washington, in 8 RATIFICATION OF THE CONSTITUTION, supra note 92, at 152, 154 (Nov. 10, 1787) (stating that he had "never yet been able to discover the propriety of placing it absolutely out of the power of men to render essential Services, because a possibility remains of their doing ill"); James Iredell, Address to the North Carolina Ratifying Convention (July 28, 1788) [hereinafter N.C. Debates], in 4 DEBATES IN THE STATE CONVENTIONS, supra note 132, at 1, 95 (arguing that "[n]o power, of any kind or degree, can be given but what may be abused" and that keys are to "consider whether any particular power is absolutely necessary" and to recognize that "possible abuses [of powers] ought not to be pointed out, without at the same time considering their use"). By contrast, the Antifederalists were wary of government power, and most especially of centralized power. They believed that the Constitution's proponents were too anxious to delegate power to the national government and too little concerned with preserving local and popular rights. See, e.g., Federal Farmer, supra note 133, at 329 ("[M]any of us are quite disposed to barter [our freedom] away for what we call energy, coercion, and some other terms we use as vaguely as that of liberty."); Mentor, PETERSBURG VIRGINIA GAZETTE (Apr. 3, 1788), reprinted in 16 RATIFICATION OF THE CONSTITUTION, supra note 92, at 578, 579 (querying that given the powers granted and justifications offered, "are we not to think that our rights and liberties, our instruction and welfare, are no longer leading objects in the eyes of those we have set over us"). The decision to add amendments constituting a bill of rights did not reflect any general healing of these basic differences of perspective.
as with the other individual rights guarantees included in the first eight amendments to the Constitution, the Second Amendment stemmed from a general fear that the national government was empowered by the Constitution to invade well-established rights of importance to the people. Advocates of the states' rights reading of the Second Amendment focus their attention on the Virginia Rati-fying Convention's debate over the militia provisions of Article I. 149 But the debate in Virginia with the clearest connection to the amendments drafted by James Madison was the one concerning the necessity and propriety of setting forth a comprehensive statement of the people's rights in a bill of rights. The Antifederalists agreed with Patrick Henry that a bill of rights was critical because "all rights not expressly and unequivocally reserved to the people are impliedly and incidentally relinquished to rulers, as necessarily inseparable from the delegated powers." 150 Relying on this logic, Antifederalists concluded that all of the people's fundamental rights, except the small number already set forth in the Constitution's text, would be forfeited to the federal government unless a bill of rights was added to the Constitution.

Federalists, on the other hand, argued that the Antifederalist logic requiring a comprehensive bill of rights was applicable only to the constitutions of the states because the state legislatures held general legislative power from which any right must be carved as an exception. 151 By contrast, they argued, the national legislature created by the Constitution had been granted only enumerated powers and did not possess, as an original matter, the power to invade fundamental rights such as freedom of speech and freedom of the press. 152 One reason this debate was virtually unresolvable was that

149. See, e.g., Ehrman & Henigan, supra note 27, at 27-28. For a critique of their reliance on this Virginia debate as the precursor to the Second Amendment, see supra notes 139-45 and accompanying text.

150. Virginia Debates, supra note 132, at 445.

151. In the words of George Nicholas, responding to Patrick Henry and others, the Antifederalist logic held as to the legislatures of the states only because they possessed a "general power of legislation." Id. at 451. Nicholas's response repeated the standard answer to the Antifederalist logic. See, e.g., James Wilson, Speech at a Public Meeting in Philadelphia (Oct. 6, 1787), reprinted in 13 RATIFICATION OF THE CONSTITUTION, supra note 92, at 337, 339 (arguing that under state constitutions the people "invested their representatives with every right and authority which they did not in explicit terms reserve"); N.C. Debates, supra note 148, at 149 (contending that if the Framers "had formed a general legislature, with undefined powers, a bill of rights would not only have been proper, but necessary; and it would have then operated as an exception to the legislative authority in such particulars").

152. In Virginia, Nicholas argued that Congress held only "a special power of legisla-
the disagreement turned not only on differences in general theory, but also on differing assessments as to the probable scope of the powers actually granted to the national government.\textsuperscript{153}

There was only one way that the Virginia Convention could reach consensus on the bill of rights issue—to agree to propose amendments to the Constitution without purporting to determine in any given case whether the guarantee stated an essential limit on the powers delegated by the Constitution or was merely a cautionary provision designed to reassure those concerned about the potential reach of national power.\textsuperscript{154} This essentially "agnostic" stance as to the necessity of including apparent exceptions to federal power enabled all parties to agree to recommending amendments, while at the same time answering a Federalist objection that the inclusion of non-

\textsuperscript{153} For a more comprehensive summary of the somewhat theoretical debate over the necessity of a bill of rights as to a government of enumerated powers, see Thomas B. McAffee, \textit{The Original Meaning of the Ninth Amendment}, 90 COLUM. L. REV. 1215, 1228-33 (1990). The basic problem was that the Federalist defense of the Constitution's omission of a bill of rights rested on an analogy to the equivalent omission of a bill of rights from the Articles of Confederation, with its limited delegation of powers to the national government. \textit{See id.} at 1243. But the Constitution's critics perceived the differences between the proposed Constitution and the Articles as being critical, for the Constitution granted broadly worded new powers to the national government, powers that would operate directly on the citizenry rather than merely on the states, and omitted the Articles' express provision that all the sovereign powers and rights not granted to the nation were reserved to the states. \textit{See id.} at 1243-44.

\textsuperscript{154} In fact, the Virginia proposal's resolution of the issue was anticipated several months earlier by the perceptive Antifederalist, the Federal Farmer. In his famous work, he first argued that the Federalist claims that enumerated powers adequately substituted for a bill of rights were overstated, especially given the inclusion of limiting provisions, such as the prohibition on granting titles of nobility. But even if such a provision did not imply the existence of a power from which it was excepted, it suggested the value of another kind of provision: "But this clause was in the confederation, and is said to be introduced into the constitution from very great caution. Even a cautionary provision implies a doubt, at least, that it is necessary; and if so in this case, clearly it is also alike necessary in all similar ones." Federal Farmer, \textit{supra} note 133, at 326. The Federal Farmer suggested that any doubt ought to be resolved in favor of the inclusion of basic rights; once the parties could agree that limiting provisions might be included as a cautionary step, they could go forward with reassuring amendments without any party having to concede their original position as to whether such provisions were strictly necessary.
essential “limiting” clauses might create an inference of more expansive national powers than actually intended by the Constitution.\footnote{155} Once the parties resolved their disagreement about the necessity of setting forth the fundamental rights of the people, consensus on a number of basic rights would be the key to reaching agreement in the process of amending the Constitution.

If anything is clear in the process by which the Bill of Rights was adopted, it is that the Federalists in Congress were opposed to fundamental structural changes, but “were willing to accept amendments which protected individual liberty and minority rights or explicitly reaffirmed limitations on the national government that the federalists believed were already in the Constitution of 1787.”\footnote{156} Faithful to these Federalist commitments, Madison went to lengths to ensure, as he explained in correspondence, that “[t]he structure & stamina of the Govt. are as little touched as possible,” and that proposed amendments would be limited to those “which are important in the eyes of many and can be objectionable in those of none.”\footnote{157} In practice, this meant that Madison chose from among the state proposals the amendments that would “serve the double purpose of satisfying the minds of well meaning opponents [of the Constitution], and of providing additional guards in favour of liberty.”\footnote{158}

\footnote{155} This basic agreement among the parties was stated expressly in the Virginia Convention’s proposed amendment that, after some revisions, would become the Ninth Amendment: “That those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever, to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.” Virginia Ratifying Convention (1788), \textit{reprinted in 2 DOCUMENTARY HISTORY, supra note 142}, at 766, 844. For commentary on the significance of this proposal as a response to the overall course of debate over the necessity of a bill of rights, see McAffee, \textit{supra} note 153, at 1263-64.


\footnote{157} Letter from James Madison to Edmund Randolph (June 15, 1789), \textit{in 11 MADISON PAPERS, supra note 61}, at 219, 219.

\footnote{158} Letter from James Madison to George Eve (Jan. 2, 1789), \textit{in 11 MADISON PAPERS, supra note 61}, at 404, 404. Madison indicated to Eve that the first Congress should recommend “provisions for all essential rights.” \textit{Id.} at 405; see also Finkelman, \textit{supra} note 156, at 367 (describing Madison’s letter to Eve and the thought process behind the Bill of Rights); Donald S. Lutz, \textit{The States and the U.S. Bill of Rights}, 16 S. ILL. U. L.J. 251, 258 (1992) (reviewing state proposals and Madison’s proposed amendments). Lutz observed that Madison avoided any alteration in the institutions defined by the Constitution, largely ignored specific prohibitions on national power, and opted instead for a list of rights that would clearly connect with the preferences of state governments, but would not increase state power vis-à-vis the national government defined in the Constitution.
Paul Finkelman has described in some detail the pattern by which Madison and his Federalist counterparts in Congress systematically supported well-established individual rights guarantees while rejecting proposed amendments that "‘sounded in structure’" and were viewed as posing a threat to the powers established by the Constitution. Among his examples of structural amendments rejected by the Federalists were those that "would have truly crippled the nation's ability to conduct a military policy"—the amendments staunchly supported by Antifederalists opposing standing armies and preventing "the federal government from interfering with the state militias." Finkelman contrasts this conflict over structural limits on military powers with the guarantees now contained in the Second Amendment—guarantees accepted by Federalists and Antifederalists alike because they were viewed as protective of fundamental rights rather than as altering the structure of authority established by the Constitution. The clauses of the Second Amendment, recognizing the importance of militias and preserving the people's right to arms, fit nicely within the framework of proposing well-established fundamental rights. The limitations proposed as a result of Antifederalist fears of Congress's militia powers, on the other hand, fell into the group of amendments that Madison did not propose, and would not have proposed, and which his allies in Congress defeated. While these conclusions hardly establish that the Second Amendment includes a right to have private arms, they do suggest that the defect in the law to which the Second Amendment was addressed was simply the omission of these fundamental rights from the Constitution as originally adopted. To understand what was at stake in the adoption of the Second Amendment, it is thus essential to determine the role its two clauses played in the state constitutions of the early American

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159. Finkelman, supra note 156, at 368-78. Another historian, Joyce Malcolm, observes that Madison "deliberately proposed amendments that would not detract from federal powers, among them a right for the citizenry to be armed." MALCOLM, supra note 6, at 159.

160. Finkelman, supra note 156, at 373.

161. See id. Finkelman's analysis should be taken as particularly compelling in light of his general agreement with the view that the Second Amendment secures a collective right to bear arms in the context of militia service, rather than a private right to own one's own arms. See id. at 363 n.46.

162. Based on a painstaking comparison of all the documents in question, the political scientist, Donald Lutz, concluded that in fact "[t]he state constitutions and their respective bills of rights, not the amendments proposed by state ratifying conventions, are the immediate source from which the U.S. Bill of Rights was derived." Lutz, supra note 158, at 261.
republic. It is these topics that the following subsections address.

3. "The Right to Keep and Bear Arms" That Was at Risk Under the Unamended Constitution

As noted above, the right to arms had been expressly secured within the texts of several state constitutions. But despite claims to the contrary, the key to understanding this right, and the state and federal constitutional provisions securing it, is found in the American heritage of English rights and the revolutionary-era commitment to natural rights. It is critical, for example, to understand that the prototype state constitutional guarantees of the right to arms were adopted in the wake of British incursions on the right to arms that the colonists viewed as both a legal and a natural right, as well as an important symbol of freedom—it was a topic, in short, that went to the very center of their revolutionary struggle.

a. The Right to Arms Held by the American Colonists

There is a long-standing tradition of associating the right to keep and bear arms with the analogous guarantee of the English Bill of Rights. The tradition seems well-grounded, given that the American colonists continually invoked their English constitutional rights during the revolutionary struggle, and the right to possess firearms was among the rights invoked. In 1769, the Boston Evening Post, a newspaper with a wide circulation, defended a general call to arms by asserting that "the privilege of possessing arms is expressly recognized by the Bill of Rights." A subsequent article asserted that "[i]t is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their defence."
On the very eve of revolution, North Carolina representatives to the Continental Congress Richard Caswell, William Hooper, and Joseph Hewes wrote to local "committees of safety" urging the people of North Carolina to prepare for resistance and to form themselves into a militia based upon "the Right of every English subject to be prepared with Weapons for his Defense." 

It is noteworthy that these examples of revolutionary-era statements asserting the right to arms are stated three different ways—in two instances the right is said to be held by "every English subject" and by "the people" respectively, and, in the third instance, "the privilege of possessing" arms is merely asserted to exist, without clarifying precisely who holds the right. These forms of expression reflect that the right was viewed as both a collective and an individual right, and that this way of conceiving the right was itself part of the English heritage. In fact, the English guarantee, which states that "[g]enubles which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law," is framed as

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OF THE COLONISTS, reprinted in 7 OLD SOUTH LEAFLETS 417, 417 (1948)). For Adams, the right to support and defend were "'deductions from the duty of self-preservation, commonly called the first law of nature.'" Id.; see also MASS. Decl. of Rts. XVII (1780) (listing right of "defending their lives and liberties" and "protecting property" as among the inalienable rights of people).

169. 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. 255, 280 (1985) (quoting Richard Caswell et al., To the Committees of the Several Towns and Counties of the Province of North Carolina, NORTH CAROLINA GAZETTE (New Bern), July 7, 1775, at 2, col. 3). Despite the reference to forming a militia, it is clear in context that this was a general call to arms. The authors subsequently urged recipients to "be in Readiness to defend yourselves against any Violence that may be exerted against your Persons and Properties." Id. (quoting Caswell et al., supra, at 2, col. 3). This representative statement is especially relevant because Richard Caswell and Joseph Hewes were subsequently appointed to the committee to frame a bill of rights and constitution for the state of North Carolina. Their understanding of the preexisting English right to arms would almost certainly have influenced their drafting and understanding of the constitutional right to arms. See id. at 282-83; see also infra note 214 (noting the role of Caswell and Hewes in the framing of North Carolina's bill of rights—one of the state bills of rights that included the right to have arms).

170. The inclination to state the right as a collective right of the people may partly have reflected the close connection between the exercise of the right to arms in preparation to resist illegal acts of oppression and the overall assertion of claims on behalf of the sovereign people of the American colonies to control their own collective destiny. Even more to our point, however, the insistence on referencing the right of "the people" almost certainly reflects both the English and American experience with the controversy that invariably arises when a collective right to have arms for the defense of popular rights against government is asserted; a right to have arms for personal self-defense was less controversial, especially in colonial America, than this sort of collective right.

171. Malcolm, supra note 98, at 307 (quoting Act Declaring the Rights and Liberties of the Subject and Seteling the Succession of the Crowne, 1689, 1 W. & M., ch. 2 (Eng.).
a grant of right to an entire class of citizens (not expressly to individuals); yet it was understood in both England and America as permitting each and every Protestant "to have Arms" for the defense of self and community.\textsuperscript{172}

The guarantee of arms in the English Bill of Rights grew directly from wholesale attempts to disarm large numbers of citizens by both Charles II and James II. Of most significance was James's efforts to disarm Protestant subjects in an effort to strengthen the Crown and the hand of Catholicism in England.\textsuperscript{173} James both strengthened his standing army and reorganized militia forces so that they would serve the Crown's interests more loyally.\textsuperscript{174} With the military secured, the Crown used the militia to embark on a massive program of disarming potentially disloyal Protestants by a variety of legal schemes and rationales.\textsuperscript{175} When the Convention of Parliament met in 1689 and drafted the Bill of Rights as part of the settlement, whereby William and Mary ascended to the Throne, one of the items on the agenda was to affirm the right of Protestant citizenry to have arms as a check against arbitrary power.\textsuperscript{176} The final form of the guarantee promised that "the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law."\textsuperscript{177}

Advocates of a militia-only reading of the Second Amendment have placed the right to arms guarantee of the English constitution in the context of the closely-related opposition to standing armies and the classical preference for citizen militias. Accordingly, they contend that the language of the provision does not refer to an "individual right" to have arms; instead, they read the provision as though it included the sort of limiting language that they take the Militia Clause of the Second Amendment to be.\textsuperscript{178} These arguments

\textsuperscript{172} See MALCOLM, supra note 6, at 134, 142-43.

\textsuperscript{173} See id. at 50-52, 94-97, 100-06. One of the most potent weapons of disarmament, ironically enough, was the Militia Act of 1662, which empowered militia officers to seize arms from any person they believed to be "dangerous to the Peace of the Kingdom." See id. at 50. Particularly, the crown placed the militia directly under its own authority, and in effect created a select militia that included only those most loyal to the crown; the militia became a tool of oppression. See id.

\textsuperscript{174} See id. at 95-99.

\textsuperscript{175} See id. at 103-06.

\textsuperscript{176} See id. at 117-20.

\textsuperscript{177} Malcolm, supra note 98, at 307 (quoting Act Declaring the Rights and Liberties of the Subject and Setting the Succession of the Crown, 1689, 1 W. & M., ch. 2 (Eng.)).

\textsuperscript{178} See, e.g., Cress, supra note 16, at 26 (contending that the provision "laid down the right of a class of citizens, Protestants, to take part in the military affairs of the realm"); Weatherup, supra note 47, at 973-74 (construing the English right as conveying "no recognition of any personal right to bear arms on the part of subjects generally," but merely
in the statements of members of the Revolutionary Convention as to their grievance associated with the right to arms.\(^{188}\) Equally important, however, is that the demand for specific references to a purpose to secure the right of private self-defense, or of any other particular use of arms, involves the fallacy of what Lon Fuller called "the pointer theory of meaning,"\(^{189}\) According to this view, the way to determine whether the right of citizens to have arms for "their defence" included purely private self-defense is to discover whether the adopters of the provision held a picture in their mind of an individual defending himself or his family against a robber or burglar. On the other hand, if the pre-adoption discussion of the right focused on collective security, including the dangers of oppression or invasion, it is supposed that the "defence" for which arms were secured was limited to these immediate objects of concern.\(^{190}\) But the meaning of words is more general than assumed by this sort of thinking, and interpreters should seek the intended general meaning of a legal text they are to construe.\(^{191}\) There is nothing in the historical context of the English guarantee to suggest that private self-defense is so far removed from the collective security concerns naturally raised by mass disarming programs, or that a right to use arms in private self-defense would have been viewed as so unacceptable, that the relevant

\(^{188}\) In the Convention debates "members expressed their outrage at the disarmament of law-abiding subjects during the reigns of Charles and James." MALCOLM, supra note 6, at 115. In particular, one member objected that individuals had been disarmed and imprisoned "under pretence" that they were "disturbing the Government." Id. at 116; see also Hardy, supra note 143, at 21-22 (describing the debate). As Don Kates has observed, much of this outrage reflected the desire for personal protection in a dangerous world. See Kates, supra note 6, at 236 ("In an age as subject to apolitical crime and violence as the seventeenth to eighteenth-century England, few people were courageous or foolhardy enough to want to live without weapons to defend themselves and their families.").


\(^{190}\) Notice that this sort of methodology involves a thinly disguised form of strict construction that in practice "fails to implement the policy established by the statute or constitution in favor of giving effect only to the specific, known intentions (read specifically intended applications) of the adopters." McAffee, supra note 75, at 647.

\(^{191}\) See discussion in sources cited supra note 189. Developing the same basic point in discussing the interpretation of powers granted by the Constitution, William Van Alstyne has observed that to discover "what the Founders believed to require the inclusion of a given power among the enumerated powers of Congress . . . is scarcely dispositive of the different question respecting the breadth of the power thus given." William Van Alstyne, A Critical Guide to Ex Parte McCardle, 15 ARIZ. L. REV. 229, 260 (1973). Put another way, "the intended meaning of a provision is not necessarily limited to its contemplated specific applications." McAffee, supra note 75, at 647.
legislative audience would have tacitly assumed that the guarantee would not extend beyond the needs of common defense.\footnote{192}

In fact, the subsequent history points in the opposite direction. During the course of the eighteenth century, the right of English subjects to own and use firearms for all lawful purposes became well established. During the American founding period, the recorder of London, the city’s legal advisor, stated in a legal opinion that it was "'clear and undeniable' " that the Protestants' right to "'have arms for their own defence' " included the right "'to use them for lawful purposes.'"\footnote{193} The Recorder emphasized that this right was related to the duty of "'all the subjects of the realm, who are able to bear arms . . . to be ready, at all times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of public peace.'"\footnote{194} Taking it as virtually a given that the right to arms is possessed "'individually,'" the recorder concluded that the right "'may, and in many cases, must, be exercised collectively,'" and that this was also established by relevant legal authority.\footnote{195} Whatever the intentions of those involved in the settlement of 1689, the historical evidence supports the view that the American colonists believed that they had a right as Englishmen to have arms for purposes of private self-defense.\footnote{196} The most pervasive influence on their thinking as to scope of the English right was almost certainly Blackstone's widely-read Commentaries on the Laws of England.\footnote{197} According to Black-
are based on a misreading of the history and a misplaced logic in explicating the text.\textsuperscript{179}

In her careful treatment, historian Joyce Malcolm observes that the English right to arms was not about securing militias. Rather, it grew in part from the use of the King's militia to confiscate firearms from Protestant citizens as a means of preventing popular resistance to royal prerogatives.\textsuperscript{180} The guarantee was thus intended as a right of all Protestants, not merely those who belonged to the militia. The drafting history, moreover, lends additional force to the conclusion that the guarantee was intended to secure an individual right. As originally drafted, the guarantee was stated as an expansive right of Protestants to "provide and keep Arms for their common Defence," with the apparent implication of a collective right of the citizenry to act in concert to gather arms for collective resistance.\textsuperscript{181} As the guarantee was revised during the process of negotiation, it evolved into a somewhat less threatening, precisely because more individualistic, right of all Protestants to "have" arms for "their Defence."\textsuperscript{182} Malcolm concludes that these language changes "seem to have marked a final shift away from private ownership of arms as a political duty and toward a right to have arms for individual defense."\textsuperscript{183} In short, the issue that caused some difficulty during the process of consideration was not whether individuals would have the right to hold arms—this was a given—but the extent to which the wording should convey the idea of a collective citizenry empowered to organize themselves for armed resistance.

Some have argued that the lack of evidence that people were

\textsuperscript{179} Referring to Weatherup's claim, see supra note 178, Malcolm observes that the militia "isn't mentioned in the English right or in later justifications of it." Malcolm, supra note 98, at 306. Nothing in the history reviewed above suggests that the events leading to the English guarantee of a right to arms raised only concerns as to the right to participate in a militia. The history surrounding the adoption of the guarantee lends further support to the individual right interpretation. See infra notes 180-83 and accompanying text. As to the claim that the militia-based reading of the English right is based on misplaced logic in explicating the text, see infra notes 184-92.

\textsuperscript{180} See Malcolm, supra note 98, at 306; see also supra note 173 (describing use of the Militia Act of 1662).

\textsuperscript{181} Malcolm, supra note 98, at 307 (quoting ANONYMOUS ACCOUNT OF THE CONVENTION PROCEEDING (Bodleian Library, Oxford, 1688)).

\textsuperscript{182} MALCOLM, supra note 6, at 117-19.

\textsuperscript{183} Id. at 119. She thus observes that at least one prominent commentator saw the revised language as "emasculat[ing]" the protection offered by the guarantee in shifting the promise from saving the state to repelling burglars. See id. (citing J.R. WESTERN, MONARCHY AND REVOLUTION: THE ENGLISH STATE IN THE 1680S, at 339 (1972)).
concerned with purely personal self-defense confirms that the English guarantee was related to militia service rather than to a purely private interest in arms. As observed above in analyzing the text of the Second Amendment, to a large extent the point seems irrelevant inasmuch as the guarantee of a private right to have arms, even when not engaged in formal militia service, would contribute to collective security interests as well as the maintenance of an effective militia system. The claim that a concern for issues of personal defense was not evident is also question-begging, because the text’s guarantee of a right to have arms to Protestants for “their defence” reads quite naturally to include private as well as collective defense—especially considering that the word “common” was eliminated in the final text of the provision. Moreover, concern about the threat posed to personal security in being forcibly disarmed seems implicit

184. See, e.g., Cress, supra note 16, at 26 (supporting the conclusion that the right to arms meant a right to participate in military affairs because “[n]owhere was an individual’s right to arm in self-defense guaranteed”). Cress also draws an inference against a private right to arms in the English Bill of Rights because the limitation was directed exclusively at the monarchy and thus was expressly limited to arms “allowed by law.” Id. But this observation has little relevance to the current debate. While Malcolm and Hardy document that the English right to arms was taken seriously by Parliament during the eighteenth century, see MALCOLM, supra note 6, at 122-34; Hardy, supra note 143, at 22-23, the more fundamental point is that Cress’s observation is equally true of most of the fundamental rights of Englishmen; indeed, the American founders contrasted their own constitutional order from that of the British precisely on the ground that the American system limited both the executive and legislative branches of government. See Statement of James Madison (June 8, 1789), in CREATING THE BILL OF RIGHTS, supra note 104, at 77, 80 (observing that England has “gone no farther than to raise a barrier against the power of the crown [while] the power of the legislature is left altogether indefinite”). Accordingly, none of the American arms guarantees, including the Second Amendment, contain any similar qualification of the right to arms. See Kates, supra note 6, at 237-38 & 237 n.144 (observing that reliance on Parliamentary discretion at the time of the settlement, or since, is to simply confound English and American constitutional systems). Kates has also observed that Henry St. George Tucker, an important founding-era Virginian and prominent legal commentator, pointedly contrasted the broad guarantee of the Second Amendment with the qualified right held by Englishmen. See id. at 237 n.144.

185. See supra notes 86-87 and accompanying text.

186. The role of an armed citizenry in collective defense is supported by evidence from the Convention that produced the English Bill of Rights. Malcolm reports that a manuscript of a speech apparently given by Thomas Erle, a veteran of several Parliaments, shows that he proposed both the establishment of a formal militia comprised of men of at least moderate means and a general arming of all established citizens of the community as a further supplement to collective defense needs. See MALCOLM, supra note 6, at 116-17. Moreover, even if collective defense concerns constituted the sole purpose for guaranteeing a right to private arms, it does not follow that the right would give no security to other lawful uses of firearms; normally if a particular use of an arm were in itself lawful, the only other question is whether the user had a right to possess the firearm in the first place; the reason the right was given hardly matters. See id. at 117.

187. See supra note 181-82 and accompanying text.
in the statements of members of the Revolutionary Convention as to their grievance associated with the right to arms.\textsuperscript{188} Equally important, however, is that the demand for specific references to a purpose to secure the right of private self-defense, or of any other particular use of arms, involves the fallacy of what Lon Fuller called "the pointer theory of meaning."\textsuperscript{189} According to this view, the way to determine whether the right of citizens to have arms for "their defence" included purely private self-defense is to discover whether the adopters of the provision held a picture in their mind of an individual defending himself or his family against a robber or burglar. On the other hand, if the pre-adoption discussion of the right focused on collective security, including the dangers of oppression or invasion, it is supposed that the "defence" for which arms were secured was limited to these immediate objects of concern.\textsuperscript{190} But the meaning of words is more general than assumed by this sort of thinking, and interpreters should seek the intended general meaning of a legal text they are to construe.\textsuperscript{191} There is nothing in the historical context of the English guarantee to suggest that private self-defense is so far removed from the collective security concerns naturally raised by mass disarming programs, or that a right to use arms in private self-defense would have been viewed as so unacceptable, that the relevant

\textsuperscript{188} In the Convention debates "members expressed their outrage at the disarming of law-abiding subjects during the reigns of Charles and James." MALCOLM, \textit{supra} note 6, at 115. In particular, one member objected that individuals had been disarmed and imprisoned "under pretence" that they were "disturbing the Government." \textit{Id.} at 116; see also Hardy, \textit{supra} note 143, at 21-22 (describing the debate). As Don Kates has observed, much of this outrage reflected the desire for personal protection in a dangerous world. See Kates, \textit{supra} note 6, at 236 ("In an age as subject to apolitical crime and violence as the seventeenth to eighteenth-century England, few people were courageous or foolhardy enough to want to live without weapons to defend themselves and their families.").


\textsuperscript{190} Notice that this sort of methodology involves a thinly disguised form of strict construction that in practice "fails to implement the policy established by the statute or constitution in favor of giving effect only to the specific, known intentions (read specifically intended applications) of the adopters." McAffee, \textit{supra} note 75, at 647.

\textsuperscript{191} \textit{See} discussion in sources cited \textit{supra} note 189. Developing the same basic point in discussing the interpretation of powers granted by the Constitution, William Van Alstyne has observed that to discover "what the Founders believed to require the inclusion of a given power among the enumerated powers of Congress ... is scarcely dispositive of the different question respecting the breadth of the power thus given." William Van Alstyne, \textit{A Critical Guide to Ex Parte} McCardle, 15 ARIZ. L. REV. 229, 260 (1973). Put another way, "the intended meaning of a provision is not necessarily limited to its contemplated specific applications." McAffee, \textit{supra} note 75, at 647.
legislative audience would have tacitly assumed that the guarantee would not extend beyond the needs of common defense.\textsuperscript{192}

In fact, the subsequent history points in the opposite direction. During the course of the eighteenth century, the right of English subjects to own and use firearms for all lawful purposes became well established. During the American founding period, the recorder of London, the city's legal advisor, stated in a legal opinion that it was "'clear and undeniable’” that the Protestants' right to "'have arms for their own defence’” included the right "'to use them for lawful purposes.'”\textsuperscript{193} The Recorder emphasized that this right was related to the duty of "'all the subjects of the realm, who are able to bear arms ... to be ready, at all times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of public peace.'”\textsuperscript{194} Taking it as virtually a given that the right to arms is possessed "'individually,'” the recorder concluded that the right "'may, and in many cases, must, be exercised collectively,'” and that this was also established by relevant legal authority.\textsuperscript{195} Whatever the intentions of those involved in the settlement of 1689, the historical evidence supports the view that the American colonists believed that they had a right as Englishmen to have arms for purposes of private self-defense.\textsuperscript{196} The most pervasive influence on their thinking as to scope of the English right was almost certainly Blackstone's widely-read \textit{Commentaries on the Laws of England}.\textsuperscript{197} According to Black-

\begin{itemize}
\item \textsuperscript{192} It is often recognized that “context conditions meaning, and context often serves to cut down an otherwise overbroad literal meaning because the shared commitments of the speaker and the intended audience make it possible to conclude that the legislature could not have intended the broad statutory language to apply to X.” Kelley, \textit{supra} note 189, at 606. In this case, however, we know that the “common defense” at issue was viewed by most thoughtful people as a mere extension of the general right of self-defense held by each individual citizen. \textit{See} Kates, \textit{supra} note 99, at 89-93 (documenting views of Montesquieu, Locke, and other seventeenth- and eighteenth-century thinkers on the fundamental nature of the right of self-defense). Furthermore, the Framers of the Bill of Rights provision omitted the word “common” that might have suggested a collective defense purpose. \textit{See supra} notes 182-83 and accompanying text.
\item \textsuperscript{193} \textit{MALCOLM, supra} note 6, at 134 (quoting \textit{WILLIAM BLIZZARD, DESULTORY REFLECTION ON POLICE: WITH AN ESSAY ON THE MEANS OF PREVENTING CRIMES AND AMENDING CRIMINALS} 59-60 (1785)).
\item \textsuperscript{194} \textit{Id.} (quoting \textit{BLIZZARD, supra} note 193, at 59-60).
\item \textsuperscript{195} \textit{Id.} (quoting \textit{BLIZZARD, supra} note 193, at 59-60).
\item \textsuperscript{196} \textit{See supra} note 166-69. Don Kates points out that if the English guarantee is related to American law, it undermines the notion of a states' rights understanding of the Second Amendment: “There were no states in England to be protected against disarmament. So what Parliament was complaining of could only have been the seizure of arms from \textit{individual} citizens in violation of their common law rights.” Kates, \textit{supra} note 6, at 238.
\item \textsuperscript{197} 1 \textit{WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND} (1765).
\end{itemize}
stone, the Bill of Rights guarantee was among the "auxiliary subordinate rights" that serve "to protect and maintain inviolate the three great and primary rights of personal security, personal liberty, and private property." Accordingly, the Bill of Rights guaranteed to the subjects of England "the right of having and using arms for self-preservation and defence."

b. The Right to Arms in the Early American Republic

There is every reason to think that the colonial understanding of the natural and English right to have arms for private and collective defense carried over to the state constitutions that explicitly recognized the right to arms. The first American constitutions were adopted in the wake of the decision to declare independence, and the

On the influence of Blackstone on American thinking about the right to arms, see MALCOLM, supra note 6, at 145 (citing N.Y. J. SUPP., April 13, 1769) (relying on Blackstone in support of right of all Americans to hold arms for their defense); 1 TUCKER, supra note 166, at 143 (linking the Second Amendment to the English guarantee of arms as explicated by Blackstone). On the importance of Blackstone in American legal and constitutional thought in general, see Robert J. Cottrol, The Second Amendment: Invitation to a Multi-Dimensional Debate, in 1 GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT xi, xiii-xiv (Robert J. Cottrol ed., 1994); Donald S. Lutz, The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought, 78 AM. POL. SCI. REV. 189, 194 (1984) (finding that Blackstone was the most cited English writer by major American political writers during the period from 1760 to 1805).

198. See 1 TUCKER, supra note 166, at 140. Blackstone's formulation has the ring of liberal individualism in it; it is not rooted in classical republican sentiment. Cf. Cress, supra note 16, at 23-24 (linking right to arms exclusively to notion of "citizenship, which was defined in part by militia service, [that] connoted civic virtue and commitment to the greater public good" in this context, a "well regulated militia drawn from a community's propertied yeoman and led by its most prominent citizens preserved liberty; armed individuals threatened it").

199. See 1 TUCKER, supra note 166, at 144. For Blackstone, the English guarantee thus had implications both for individual liberty and the collective action of the people: It was the embodiment of "the natural right of resistance and self-preservation," and could be employed "when the sanctions of society and laws are found insufficient to restrain the violence of oppression." 1 id. at 143. Strikingly, despite the importance of Blackstone's influence in the colonies, his treatment of the English right to arms is not addressed in leading works favoring the narrowest readings of the Second Amendment. See Cress, supra note 16, at 26-29 (treating English right and revolutionary period without mentioning Blackstone's construction of the English right or his work's influence in America); Weatherup, supra note 47, at 974-79 (same). In another work, Blackstone is cited, but the only point emphasized is that his treatment incorporated the language limiting the right to arms to holdings "allowed by law." Ehrman & Henigan, supra note 27, at 10. But see supra notes 91-95 (explaining the irrelevance of qualifying language in English provision for understanding the Second Amendment, given American assumptions against legislative sovereignty). By contrast, the authors ignore that Blackstone's treatment viewed the right to arms as an important right that secured fundamental natural rights, as well as the reliance of the American colonists on Blackstone's broad construction of the English right to arms. See Ehrman & Henigan, supra note 27, at 10.
Americans’ recent experiences with British confiscation of arms gave them every reason to value the right as it had come to be understood. But their commitment to the right to arms went beyond English legal tradition and included the right as derived from the natural right of self-defense. As the conflict heightened, Parliament revoked colonial charters under which the colonists had claimed the rights of Englishmen, and reliance on English rights became more and more difficult. While the Americans contended that these grants of rights to them as Englishmen were irrevocable, they also invoked the doctrine of natural rights that “common law might propound but did not create and could not revoke.”

During the early years of the republic, four states included explicit right to arms guarantees in their declarations of rights, while four state constitutions contained an explicit provision stating the commitment to the citizen militia as the best form of defense.

200. For an account of the most dramatic instances of arms seizures, see MALCOLM, supra note 6, at 145-46. While some of the most important of these arms seizures involved confiscations of stored military supplies, the arms were in the control of alternative “militias” that were viewed by the British as nothing less than lawless groups; they were, in short, popularly-led citizen armies, not the formally organized militias of any governmental structure. See generally Halbrook, supra note 112, passim (describing various English provocations relating to arms-holding that reinforced colonial resolve to preserve their natural and traditional right to arms). For the Americans, of course, there was a clear distinction between their citizen militias and a lawless mob or insurrectionary group; their militias represented the people as a whole and were led by key figures in the colonial governments. See Cress, supra note 16, at 23-24.

201. See Malcolm, supra note 98, at 314. In fact, speaking from a tradition that is as much republican as liberal, many advocates of this period referred to a duty of self-preservation as warranting armed resistance, as much as a right of self-defense. See, e.g., Simeon Howard, A Sermon Preached to the Ancient and Honorable Artillery Company in Boston (1773), in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA (1760-1805), at 185, 197, 201 (Charles S. Hyneman & Donald S. Lutz eds., 1983) [hereinafter AMERICAN POLITICAL WRITING] (enjoining the people to “furnish themselves with weapons proper for their defense and learn the use of them”); id. at 201 (arguing that “[m]en are bound to preserve their own lives," and refusal to act on this duty is “criminal in the sight of God”).

202. MALCOLM, supra note 6, at 145.

203. These states were Pennsylvania, Vermont, North Carolina, and Massachusetts. See MASS. CONST. pt. I, art. XVII (1780), supra note 82 at 1892; N.C. CONST., Decl. of Rts. art. XVII (1776), reprinted in 5 STATE CONSTITUTIONS, supra note 82, at 2787, 2788; PA. CONST., Decl. of Rts. art. XIII (1776), supra note 121, at 3083; VT. CONST. ch. I, § XV (1777), reprinted in 6 STATE CONSTITUTIONS, supra, note 82, at 3737, 3741.

204. In the order of their adoption of such provisions, these states provisions are: VA. CONST., Bill of Rights § 13 (1776), supra note 94, at 3814; MD. CONST., Decl. of Rts. art. XXV (1776), reprinted in 3 STATE CONSTITUTIONS, supra note 82, at 1686, 1688; N.H. CONST., Bill of Rights art. XXIV (1784), reprinted in 4 STATE CONSTITUTIONS, supra note 82, at 2453, 2456. The New York Constitution also included a militia provision in the body of the constitution. N.Y. CONST. art. XL (1777), reprinted in 5 STATE CONSTITUTIONS, supra note 82, at 3737, 3741.
Pennsylvania’s 1776 Declaration of Rights included the first provision guaranteeing a popular right to arms, and its language established the pattern for the analogous guarantees subsequently included in other state constitutions. The Pennsylvania guarantee stated: “That the people have a right to bear arms for the defence of themselves and the state.” The similarity of this guarantee to the English Bill of Rights provision is clear and striking. The provision is in some respects obviously broader than its English counterpart: it substitutes “the people” for “subjects which are Protestants,” consistent with America’s commitment to broad-based popular rights, and eliminates the language that arguably limits only the executive branch. Perhaps most important for interpretive purposes, the Pennsylvania provision tracks the English guarantee’s indication that the people’s arms were for “their defence” by stating that the arms would be for “defense of themselves.” In addition, the Pennsylvania provision is clearer than its English counterpart that the goal of defense against external threat (“the defense of . . . the state”) is also an end for which the people have a right to be armed.

Considering that the American colonists had staked their claim that every citizen held a right to arms on the English guarantee of arms to “subjects which are Protestants,” a reasonable inference is that the Pennsylvania provision’s reference to the people’s right to arms was also understood to convey a right to every citizen. Despite this history, proponents of a militia-only understanding of the right have claimed that the collective reference to the right-holder (“the people”) lends support to their position. It has also been contended

TUTIONS, supra note 82, at 2623, 2637.

205. See Ehrman & Henigan, supra note 27, at 17 (Virginia and Pennsylvania articles “were the models for almost every other state”). In fact, the Vermont right to arms provision used language identical to the Pennsylvania model. See VT. CONST. ch. I, § XV (1777), supra note 203, at 3741.

206. PA. CONST., Decl. of Rts. art. XIII (1776), supra note 121, at 3083.

207. The 1689 English Bill of Rights provided: “That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law.” Act Declaring the Rights and Liberties of the Subject and Seteling the Succession of the Crowne, 1689, 1 W. & M., ch. 2 (Eng.).

208. See Appendix infra.

209. If Malcolm’s analysis of the English right is sound, it was intended for this collective defense purpose as well, but the language was softened because the original version provoked fears that a right to prepare for insurrection could be inferred. See supra notes 180-83 and accompanying text.

210. See, e.g., Cress, supra note 16, at 29 (equating Pennsylvania arms guarantee with declarations in favor of militias in Virginia and other constitutions; concluding that defense of liberties for “themselves” is limited to militia); id. at 31 (contending that state provisions relating to citizen use of arms “guaranteed the sovereign citizenry, described
that a purely collective right lodged in the militia is properly inferred because of the contrasting language of personal right guarantees; in the state constitutions, we are told, "the expression 'man' or 'person' is used to describe individual rights such as freedom of conscience." But there is no uniform pattern in the early state constitutions in stating rights guarantees; purely individual rights are often stated as the rights of "the people." The North Carolina declaration is especially instruc-


212. MD. CONST., Decl. of Rts. art. XVIII (1776), supra note 204, at 1688 (stating that "the trial of facts where they arise, is one of the great[est] securities of the lives, liberties and estates of the people"; contrasting with numerous rights provisions stated in more individualist terms); N.C. CONST., Decl. of Rts. art. XIV (1776), supra note 203, at 2788 (containing substantially similar civil jury provision); PA. CONST., Decl. of Rts. art. X (1776), supra note 121, at 3083 (providing that "the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure"); id. art. XII ("the people have a right to freedom of speech"); VT. CONST., Decl. of Rts. ch. I, § XI (1777), supra note 121, at 3741 (providing a search and seizure guarantee in favor of "the people"); id. ch. I, § XIV (creating a freedom of speech guarantee in favor of "the people"); id. ch. I, § XVII (stating that "all people" have a right to emigrate).

Even when "the people" is not used, individual rights provisions of the state and federal bills of rights use both the plural form ("all men" or "all freemen") as well as the singular ("any man" or "every member of society"). It seems clear that the right to arms could just as well have been stated in the singular, as was the case with a provision that Jefferson proposed for the Virginia Declaration of Rights: "No freeman shall ever be debarred the use of arms." 1 PAPERS OF THOMAS JEFFERSON 344 (J. Boyd ed., 1950).

While it might be contended that Jefferson's proposed language sheds little light, especially because it was not included in the Virginia Constitution, the language of his proposal comports with the general American understanding of the English right. Without any extrinsic evidence supporting the view that there was actually division among Americans as to whether the right to arms extended to individuals, as Jefferson assumed, the lack of a clear pattern in the language of the state constitutions' rights reinforces the likelihood that there was no essential conflict on this point.

213. See, e.g., N.H. CONST., Bill of Rights art. XXXII (1784), supra note 204, at 2457 ("The people have a right in an orderly and peaceable manner, to assemble and consult upon the common good, give instructions to their representatives; and to request of the legislative body, by way of petition and remonstrance, redress of the wrongs done them, and of the grievances they suffer."); N.C. CONST., Decl. of Rts. art. XVIII (1776), supra note 203, at 2788 (stating that "the people" have rights of assemblage, consultation, instruction, and petition); PA. CONST., Decl. of Rts. art. XVI (1776), supra note 121, at 3084 (providing that "the people" have right of assemblage, consultation, instruction, and various forms of petition); VT. CONST., Decl. of Rts. ch. I, § VII (1777), supra note 203, at 3740 (providing that "the people have a right, at such periods as they may think proper, to
tive: after stating a series of procedural guarantees as being held by "every man," or indicating what "no freeman" may be subjected to, the declaration states guarantees in favor of "the people" (or, in one case, "all men") relating to civil jury, taxation without consent, bearing arms, petition and assemblage, and freedom of religion.214 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 posset by those who have arms in their hands."215

Advocates of a purely collective reading of the Pennsylvania right to bear arms also observe that the right is combined with an injunction against standing armies and a provision for civil authority over the military.216 This general theme that the right to arms fits within a general framework uniquely relating to the military is thought to be further reinforced by the couching of the right as a right to "bear" arms, with its apparently military connotation.217 The problem with these arguments is that no one denies that the right of the citizenry to be armed involves, at least in part, a collective interest in preserving a militia as an alternative to a liberty-endangering standing army, and that this theme would also link up with the principle of civilian control over the military. Pennsylvanians undoubtedly wished to preserve their collective right to arms both to facilitate a security-enhancing militia and as a continuing check against arbitrary power. But the association of the right to arms with collective defense issues does not tell us that it has no connection to
the individual right to self-defense or that the right vests only in the sovereign people as a whole. 218 The American colonists, after all, had tracked Blackstone in identifying the English right to arms as growing out of a natural right to self-defense that was equally the foundation of the collective citizenry's right to arm themselves to defend their liberties. 219

If the Pennsylvania provision's text itself leaves room for doubt, despite its obvious connection to the English right invoked by Americans generally, those doubts should be resolved by the history related to the federal Bill of Rights. The "constitutionalists" who brought the Pennsylvania Constitution into being, and then defended it for more than a decade, were by and large the same people who are known to us as the Antifederalists who opposed the federal Constitution. 220 One of their members, Robert Whitehill, relied upon the omission of a bill of rights as a ground for opposing the Constitution and presented a proposed bill of rights to the Pennsylvania Ratifying Convention on December 12, 1787. 221 Whitehill's proposed bill of rights was subsequently incorporated into the minority report of the Convention, which was signed by Antifederalists who had played prominent roles in adopting and defending the Pennsylvania Constitution. 222 This Antifederalist bill of rights includes the following provision guaranteeing the right to arms:

That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for

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218. For discussion as to how an individual right to arms would have been perceived as contributing to collective defense, and in fact to the viability of the militia system, see supra notes 86-89 and accompanying text.

219. The perfect illustration of the connection perceived between individual and collective defense was the counsel given to the people of North Carolina to arm themselves in order to "be in Readiness to defend yourselves against any Violence that may be exerted against your Persons and Properties." Halbrook, supra note 169, at 280 (quoting Caswell et al., supra note 169, at 2, col. 3); see also supra note 169 and accompanying text.

220. George Bryan, an important Pennsylvania Antifederalist, played a central role in the drafting of the 1776 Pennsylvania Constitution. See J. PAUL SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY 150-51 (1936) (describing Bryan as principal author); Halbrook, supra note 169, at 267 (seeing Bryan as "influential" but attributing "phraseology of the document" to James Cannon). Robert Whitehill, John Smilie, and William Findley, all strong opponents of the federal Constitution, were prominent "constitutionalists" who defended the state constitution. See SELSAM, supra, at 248. Whitehill had also been significantly involved in its formation. See id. at 161 n.94.


222. Among the report's signatories are John Smilie, Robert Whitehill, and William Findley. See Pennsylvania Minority Report, supra note 92, at 639.
the purpose of killing game; and no law shall be passed for
disarming the people or any of them, unless for crimes
committed, or real danger of public injury from individuals;
and as standing armies in the time of peace are dangerous to
liberty, they ought not to be kept up; and that the military
should be kept under strict subordination to and be gov-
erned by the civil powers.223

This Pennsylvania minority proposal not only confirms what
would have been the general understanding of the Pennsylvania right
to arms provision, but also undercuts completely the idea that the
connection between the right to arms and military issues stands as a
barrier to the individual rights understanding of the right to bear
arms. This provision uses the term "bear" to describe carrying weap-
ons for a variety of purposes, including collective and self-defense as
well as hunting, and specifically prohibits laws that would disarm "the
people or any of them" unless for compelling reasons.224 Equally im-
portant, this indisputably individual rights guarantee is included
along with the standard provisions condemning standing armies and
providing for civilian control of the military.225 Finally, the guarantee
immediately before the right to arms in the minority proposed bill of
rights guarantees the freedom of speech and press to "the people."226

The right to arms provision next adopted, North Carolina’s, pro-
vided that “the people have a right to bear arms, for the defence of
the state.”227 As with the Pennsylvania provision, this guarantee
tracks the English Bill of Rights guarantee in granting the right to
"the people"; language suggesting a private right to arms. This
reading receives strong confirmation as well from the invocation of a

223. Id. at 623-24.
224. But cf. Cress, supra note 16, at 34 (stating that even this proposal did not move
far, if at all, “beyond the eighteenth-century notion that bearing arms meant militia serv-
ice”); id. (arguing that this conclusion is reinforced because of the careful qualifications of
the “individual’s right to arms”). But the cited evidence lends practically no support to
the proffered conclusion; after all, the NRA would be quite comfortable with the limited
qualifications of the right found in this provision. See CRAMER, supra note 6, at 35
(observing that in fact what is “carefully qualified” in this proposal are the conditions
under which the individual right to arms could be restricted). At the least, this proposed
language strongly confirms that the eighteenth-century concept of a right to bear arms did
not mean militia service (though it may have included such service).
225. See The Pennsylvania Convention (Dec. 12, 1787), supra note 221, at 597-98.
Several of the state right to arms provisions were combined with other provisions relating
to the military, and the Pennsylvania minority’s proposal shows generally that the obvious
connection between the right to arms, militia provisions, and collective defense does not
preclude that the right to arms also guaranteed a personal right.
227. N.C. CONST., Decl. of Rts. art. XVII (1776), supra note 203, at 2788.
private right to arms during the revolutionary struggle in North Carolina. While some have attempted to read an exclusively militia-based right from the language indicating that this was a right to bear arms "for the defense of the state," the provision's focus on collective defense is hardly surprising given that it was the right to have arms for the purpose of resisting English tyranny imposed on the people of North Carolina that had been immediately under threat, and it was this collective right of self-defense that had been the target of disarmament schemes historically. While it is difficult to build a case that this provision itself specifically guaranteed arms for private self-defense, given the limited scope of its language, it

228. An important voice on the committee that drafted the North Carolina Declaration of Rights was Richard Caswell, one of the individuals who in 1775 called the people of North Carolina to avail themselves of the right “of every English subject” to prepare arms “for his defense.” See HALBROOK, THAT EVERY MAN BE ARMED, supra note 6, at 283. For the relevant portion of Caswell’s statement, see supra note 169 and accompanying text. Caswell would be an unlikely candidate to agree to a narrow right in favor of a purely collective interest in having a militia.


230. See supra notes 95-96. Some might even attempt to infer that the North Carolina right’s reference to “defense of the state” meant that the right included only a right to arms with which to defend the government of that state, but not to arms to be employed to preserve liberty against a threat of tyranny presented by the state itself. While the language probably reflects confidence in the republican legitimacy of the state’s government, and can be read partly as a reference to the ongoing conflict against the oppression of England, it is unlikely that the same people who invoked their right to arms to resist the tyranny presented by a government in which they had once sworn allegiance would now be intending to limit their right to arms only for the purpose of defending government, however oppressive or corrupt. See supra notes 90-94 and accompanying text (explicating the emphasis on the security of a “free state” in the Second Amendment analysis that seems equally applicable to the unqualified text here).

231. For an attempt to argue that the seemingly more restrictive language of the North Carolina provision was actually an expansion of the traditional arms guarantee, see Halbrook, supra note 169, at 284 (arguing that “[w]hile the right to bear arms for self-defense and other uses was encompassed in this provision, the arms guarantee expanded that right by explicitly recognizing the right to bear arms “for the Defense of the State””). Halbrook’s argument presumes that if the popular right to arms extends to individuals, consistent with the English right, this of itself establishes that ownership for private self-defense is part of the right. But this conclusion rests on the same assumption that opponents of a personal right have sometimes used to try to defeat the idea of a personal right to arms. But a constitutionally protected personal right to arms does not logically entail that the end of self-defense is considered part of the right; even if the collective defense was the sole “end” to be achieved by the right, a personal right might still be object of “the people’s” right as the means of ensuring an armed populace from which to draw a freedom-securing militia.

Apart from whether the right of self-defense is properly seen as part of the right to arms guarantee in the North Carolina provision, Halbrook does make the telling point that the drafters of the North Carolina provision were fully capable of drafting a guarantee that ran only in favor of the collective people (and not to individual citizens who
seems likely that its framers would have perceived that the lawful use of arms possessed by right, including the exercise of the long-established and unquestioned right of self-defense, would follow as a logical legal consequence of the constitutional guarantee.\textsuperscript{222}

It is equally unlikely that the wording of this North Carolina guarantee reflected any reservations about, let alone hostility to, the idea of a right of self-defense or of a private right to arms to serve as a defense against tyranny. Both the collective right of resistance that warranted the right to arms and the personal right of self-defense had been relied upon by North Carolina's revolutionaries,\textsuperscript{233} and there is no evidence to suggest that either of these ideas had come to be questioned.\textsuperscript{234} To the extent that the language of the North Carolina

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belong to "the people"). See id. (quoting another North Carolina constitutional provision referring to its guarantee as "one of the essential Rights of the collective Body of the People").
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\textsuperscript{232}. It seems quite likely that the right of self-defense was simply taken for granted as an unquestioned first principle, as recognized explicitly, for example, in the Massachusetts Declaration of Rights, see infra note 239 and accompanying text, so that there was not a perceived need for an explicit guarantee of that underlying right or of its immediate connection to the right to arms. While this is not to say precisely the same thing as to assert that these rights are implicitly contained within the language of the North Carolina guarantee, it may be doubted whether the functional outcome of these distinguishable readings would be much different; the right to use firearms, lawfully held, in support of the right of self-defense has never to date been questioned in an American jurisdiction.

\textsuperscript{233}. See supra note 169. Not only did key spokesmen for these views play a role in drafting the North Carolina guarantee, see supra notes 214, 228, but the subsequent history lends additional strength to the conclusion that the purpose of the guarantee was not to state a rejection of the accepted understanding of the right to arms as it had existed under the English constitution. Thus a principal figure in the drafting of the North Carolina Declaration of Rights, Willie Jones, see HALBROOK, THAT EVERY MAN BE ARMED, supra note 6, at 2, also played a key role twelve years later when he introduced proposed amendments, including a right to arms amendment, before the North Carolina Ratifying Convention. See N.C. Debates, supra note 148, at 216 (documenting Willie Jones's offer to introduce amendments at the convention). Jones's proposed arms amendment guaranteed "the people" the broad and unqualified "right to keep and bear arms," and omitted any language limiting this right to the defense of the state. Id. at 243, 244 (containing text of proposed arms amendment). If Jones and others were attempting to restrict the right to arms in 1776, the effort to do so would have been duplicated in 1788. Instead, the unqualified guarantee adopted in other states, and proposed by other ratifying conventions, was proposed by North Carolina as well, and the convention proceedings do not note any opposition to the language proposed by Jones. Nothing in this history suggests that North Carolina was committed to an especially narrow understanding of the traditional right to arms.

\textsuperscript{234}. As noted above, the explicit textual focus on collective goals of private firearms ownership almost certainly reflected that historically it was the idea that the people as a whole held a right to firearms for collective defense purposes that had been opposed (mainly by governments). See supra notes 184-88 and accompanying text. Decisions as to guarantees to be included in constitutions and declarations of rights of the founding period often reflected a determination as to whether a particular right or interest required a constitutional safeguard. See, e.g., Statement of Madison (Aug. 22, 1787), in 2 THE
provision can lend itself to a restrictive construction of the right to arms, it might be argued that the drafting simply fell short of directly guaranteeing the private right to arms for purposes of self-defense that many Americans of that era would have taken for granted.235

The last version of a right to arms provision was drafted by John Adams and adopted by Massachusetts in 1780.236 Adams substituted the phrase “keep and bear arms” in the place of the right to “bear” arms, thus clarifying more fully that the right included ownership and possession as well as the right to carry the arms. The word “keep” fits nicely into the English Bill of Rights tradition recognizing the right to “have” weapons, and it further clarifies that the right to arms was intended as a personal right that was not limited to access to weapons during actual militia service.237 The Massachusetts provision further provided that the right was held “for the common defense,” language that again raises the issue whether a purely collective interest, rather than a personal right, was intended. But the same considerations that argue for a personal right, based on the continuity of American thought about the right to arms as an English right and

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235. This is unsurprising. The early state declarations of rights for the most part do not reflect a sustained effort to be comprehensive about stating basic rights; their main purpose was to lay out shared first principles of government, rather than to provide a code of enforceable limitations. See Donald S. Lutz, The U.S. Bill of Rights in Historical Perspective, in CONTEXTS OF THE BILL OF RIGHTS 3, 9 (Stephen L. Schechter & Richard B. Bernstein eds., 1990). The omissions are often surprising. See, e.g., LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 155-56 (1988) (observing that Virginia’s Declaration of Rights, that became the pattern of the rest, omitted freedom of speech, assembly, and petition, as well as guarantees of habeas corpus, right to counsel, and freedom from double jeopardy).

236. See MASS. CONST. pt. I, art. XVII (1780), supra note 82, at 1888, 1892 (“The people have a right to keep and to bear arms for the common defence.”).

237. David Hardy has observed that the word “keep” links the Massachusetts right to arms with its English Bill of Rights counterpart inasmuch as “the phrase ‘keep arms’ recurs in post-1692 English case law interpreting the [English Hunting] Act as modified after the Declaration of Rights.” Hardy, supra note 143, at 41. As a learned lawyer, Adams most likely would have been aware of this linkage, and the subsequent history revealing that his phrase became the standard formulation of the right provides further evidence of the continuity of the English right with the American right to arms.
in light of the revolutionary experience, apply with equal force to the Massachusetts provision.

The historical context of the Massachusetts provision, moreover, appears to shed further light on the real import of the language focusing on collective defense as the purpose for a right to keep and bear arms. First, it is virtually impossible to argue that the Massachusetts provision was drafted to avoid any inference that the right to keep and bear arms would reinforce the common-law right to use arms in self-defense. For one thing, the historical record is clear that Adams was a strong defender of both the common-law right of self-defense and, equally important, of the right to possess weapons to that end. Moreover, Article I of the Massachusetts Declaration of Rights listed among the inalienable rights of the people the right of “defending their lives and liberties” and “protecting property.”

Perhaps most important, the historical record suggests a more compelling concern that may have prompted Adams’s choice of language. The focus on collective defense may well have reflected Adams’s bias against any right to use arms collectively for the purely private purposes of groups within society. On the eve of the Philadelphia Convention, Adams wrote his famous work defending American constitutions, and there he stated the view that guns should not be used according to “individual discretion, except in private self-defense,” because it would “demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man.” While every

238. See Halbrook, supra note 169, at 296-301 (reviewing Adams’s record as an attorney and a revolutionary supporting these rights, including legal arguments supporting the right of English military people in the colonies to carry arms in support of the right of self-defense). In fact, Halbrook observes that it is widely believed that John Adams was a source for the 1769 statement in the Boston Evening Post, see supra note 167 and accompanying text, relying upon the English Bill of Rights as a source of the right of colonists to arm themselves in their own defense. See Halbrook, supra note 169, at 300.

239. MASS. CONST. pt. I, art. I (1780), supra note 82, at 1889. In fact, at least a couple of Massachusetts communities objected to the wording of the right to arms provision on the ground that it did not clearly comport with the right of self-defense recognized in Article I. See Robert E. Shalhope, The Armed Citizen in the Early Republic, 49 LAW & CONTEMP. PROBS. 125, 134-35 (1986) (emphasizing that communities objected that the arms provision “is not expressed with that ample and manly openness and latitude which the importance of the right merits” and demanded the inclusion of language reflecting that it is “an essential privilege to keep Arms in Our houses for Our Own Defence”). While these communities correctly observed that the arms guarantee could have more clearly indicated that the right extended to private uses such as self-defense, Halbrook points out that the right to keep arms in private homes seems clearly contemplated by the right “to keep, ‘and not just to ‘bear’ arms.” Halbrook, supra note 169, at 304.

240. 3 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 475 (Philadelphia, Young 1787) (emphasis added).
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.241 Adams's decision to emphasize collective defense, then, in all likelihood reflected the dilemma of drafting a provision that guarantees a collective, as well as a personal, right; Adams appears to have preferred to carefully define the purpose and scope of the collective dimension of the right, while assuming that Article I would defeat any tendency to read the provision as precluding the right of individuals to possess arms with which to defend themselves.

4. The Significance of the Absence of a Provision Declaring the Necessity of a "Well Regulated Militia"

The newly-proposed United States Constitution not only omitted the right to keep and bear arms, but also the declarations contained in several state constitutions stating a preference for citizen militias.242 As reflected in the text of the Second Amendment, the right to keep and bear arms is closely related to the preference for a citizen militia as a primary tool of defense. Without question, a central reason for assuring an armed citizenry was to facilitate a citizen-based system of defense. Following the lead of political thinkers through the centuries, the founders generally agreed that only a citizen militia "could protect liberty against domestic turmoil and

241. Adams may well have feared the possibility of illicit collective employment of arms in private militias, a development that would present the dangers of unlawful mob action or illegitimate insurrections. He contended that the militia is "created, directed and commanded by the laws, and ever for the support of the laws." Id.; cf. Presser v. Illinois, 116 U.S. 252, 266-69 (1886) (upholding Illinois statute prohibiting formation of private militias other than those organized by the state). Although the Supreme Court in Presser rejected a Second Amendment claim on the theory that the Amendment did not limit state government, see id. at 257, the Court also rejected a structural theory that the state's militia law might interfere with the state militia's federal duties on the basis that state authority to regulate private military activities "is necessary to the public peace, safety and good order." Id. at 268. It seems apparent that the concerns underlying the Illinois statute, and justifying the Court's deference to the state, may have been similar to those that prompted Adams's drafting in terms of collective defense. See id. at 268 (the rejection of a state power to control and regulate militias, and to prohibit formation of purely private militias, would deny states' ability to "suppress armed mobs bent on riot and rapine").

242. Leading the way, Virginia provided: "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." VA. CONST., Bill of Rights § 13 (1776), supra note 94, at 3814. Similar provisions were included in the constitutions of Maryland and New Hampshire. See N.H. CONST., Bill of Rights art. XXIV (1784), supra note 204, at 2456; MD. CONST., Decl. of Rts. art. XXV (1776), supra note 204, at 1688.
Thus the state constitutions' stated preference for a militia-based system of defense went hand-in-glove with opposition to a standing army, the inevitable device of tyrants bent on imposing arbitrary will on the people.\textsuperscript{244}

Considering that the states' declarations of rights were evenly split between provisions guaranteeing the people the right to arms and provisions stating the long-standing republican preference for citizen militias, those who assert that the Second Amendment does not secure a right to private arms conclude that the "militia" and "arms" provisions both secured the sovereign people's interest in a militia-based defense system by different formulations that had substantially the same meaning.\textsuperscript{245} But even if the basic point is accurate at some level of generality—that these somewhat different formulations were directed to the same basic ends—it would not follow that the "sovereign people" as a collective entity is the exclusive beneficiary of the promise stated in the right to arms guarantees. The two clauses have common premises—that an armed citizenry is a critical

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\bibitem{243} Cress, \textit{supra} note 16, at 30. One reason militias were considered such a key was the presumption that ordinary citizens would not act in support of tyrannical schemes. Thus, one defense of the Constitution relied upon the continuing significance of the state militias:

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Against whom will they turn their swords? Against themselves!—to execute laws which are unconstitutional, unreasonable, and oppressive upon themselves! Absurdity itself could never have thought of raising an objection on this ground. . . . That when the Congress resort to the militia, which is the body of the people, for the support and execution of the laws of the Union, it is done in confidence that the laws are just and good, and worthy of the support of the people, otherwise Congress can have no reason to expect support from that quarter.
\end{quote}

\textit{A Letter from a Gentleman in a Neighboring State to a Gentleman in this City, New Haven Conn. J., Oct. 31, 1787, reprinted in The Origin of the Second Amendment 74, 74-75 (David E. Young. ed., 1991) [hereinafter \textit{Origin of the Second Amendment}].}

\bibitem{244} For a useful overview of the deeply felt opposition to standing armies by many eighteenth-century Americans, see Malcolm, \textit{supra} note 6, at 141-43, 150, 155-56, 159.

\bibitem{245} See, e.g., Cress, \textit{supra} note 16, at 29 (referring to the arms and militia provisions and asserting that the "language was slightly different, but the meaning was the same"); \textit{id.} at 30 (arguing that "[w]hether it was Massachusetts' declaration that citizens had the right 'to bear arms for the common defence' or Virginia's affirmation that the militia was 'the proper, natural, and safe defence of a free State,' the point was the same"); \textit{id.} (concluding that various state provisions guaranteed "the sovereign citizenry" a role in the common defense, sometimes referring to "the people" and other times to "the militia"); see also Ehrman & Henigan, \textit{supra} note 27, at 18 (observing that the "four states with 'right to bear arms' language are almost the only states without a reference to the militia being the proper defense for a free state" and drawing from this the inference "that the arms clause was, in effect, a substitute for the militia clause"); \textit{id.} (considering that related provisions in military sections were also "almost identical," it is "logical to conclude that the two clauses were conceptually similar").
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safeguard of liberty and that "the ultimate 'checking value' in a re-
publican polity is the ability of an armed populace, preemptively motivated by a shared commitment to the common good, to resist governmental tyranny." 246

This is the real significance of the critical phrase in the Virginia militia declaration defining the militia as "composed of the body of the people, trained to arms." 247 The Federal Farmer, perhaps the most forceful and articulate of all the Constitution's critics, wrote during the ratification debate that "to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike ... how to use them." 248 The militia provisions thus contemplated a continuation of the universal militia system comprised of essentially all able-bodied adult males; they assumed the existence of

246. Levinson, supra note 3, at 648. In recent years, a small number of scholars have alleged that the Second Amendment clauses have nothing to do with resisting state tyranny, but are limited to providing the governments of the states with a check on the federal government. See Ehrman & Henigan, supra note 27, at 33-34; Herz, supra note 14, at 64. In fact, these commentators contend that seeing these rights as relating to citizen resistance of tyranny posits an implausible "insurrectionist" theory that would clash with the purpose of militias to defend the security of the state against insurrection. See Ehrman & Henigan, supra note 27, at 55-56; Herz, supra note 14, at 69-71.

This critique, however, not only ignores the weight of the scholarship on both sides of the Second Amendment debate, see, e.g., Cress, supra note 16, at 29-30, but is belied by the historical context of these provisions. The state checking power theory is implausible not only because it cannot explain the purpose of the state antecedents to the Second Amendment, see supra note 86, but also because it fails to see the continuity between the revolutionary setting of several of these provisions, the affirmation of the right of resistance in the state constitutions of the confederation period, see, e.g., MD. CONST., Decl. Rts. art. IV (1776), supra note 204, at 1687 (declaring that "[t]he doctrine of non-resistance, against arbitrary power and oppression, is absurd, slavish, and destructive of the good and happiness of mankind"), and the continuing support for the possibility of armed resistance during the debate over the ratification of the Constitution. See, e.g., Amendments Proposed by the Virginia Convention, supra note 106, at 17 (stating the "essential and unalienable Rights of the People" that the "doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind"); see also infra notes 250-56 and accompanying text (describing Madison's treatment of possibility of armed resistance to a tyrannical national government; emphasizing role of states, but also comparing such an action to revolutionary war). While there may be a seeming paradox in the idea that the militia might function both to suppress insurrection and to resist government, to the founding generation the common denominator was that lawless insurrections and lawless tyrannical governments were simply two species of violent and illegal conduct that the militia was created to protect the people against.

247. VA. CONST., Bill of Rights § 13 (1776), supra note 94, at 3814.

248. Federal Farmer, supra note 133, at 342. This was the standard view. See, e.g., A Letter from a Gentleman in a Neighboring State to a Gentleman in this City, supra note 243, at 74 (assuring that there was no need to fear congressional militia powers given that the militia "comprehends all the male inhabitants from sixteen to sixty years of age" and "includes the knowledge and strength of the nation").
an armed citizenry. And this is why Madison and others went to some lengths to reassure the people that the proposed Constitution simply did not empower the national government to disarm the people or to undermine the citizen-based defense systems already existing in the states. Because Madison’s argument that the people’s checking power would be alive and well under the Constitution has been the subject of serious controversy, it is important that we examine it closely.

In Federalist No. 46, Madison assumes the task of explaining why the states need not fear domination by the national government established by the Constitution. Consider this excerpt:

Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprizes of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain that with this aid alone, they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will, and direct the national force; and of officers appointed out of the militia, by these governments and attached both to them and to the militia, it may be affirmed with the greatest assurance, that the throne of every tyranny in Europe would be speedily overturned, in spite of the legions which surround it.

Advocates of a militia-centered reading of the Second Amendment criticize the focus on Madison’s emphasis of the important checking function of an armed people, insisting that Madison was referring to the state militias and that the crux of his argument was that the states would serve as a critical intermediate body capable of organizing forces of resistance to any attempt to impose despotic government. But their argument goes too far.

249. See supra note 131-32 and accompanying text.
251. See, e.g., Levinson, supra note 3, at 648-52; Van Alstyne, supra note 6, at 1244-45.
252. See Henigan, supra note 16, at 121 & n.52 (supporting the claim that “insurrectionist theorists” have engaged in a “misuse” of Madison’s argument with the argument that Madison “saw the armed citizen as important to liberty to the extent that
It is undeniable that Madison’s treatment contemplates a well-organized resistance by functioning militias, and that he sees the states as playing a critical role as independent centers of power; but it is equally true that Madison describes the militia system as premised on the idea of trusting ordinary citizens with the private right to possess firearms.\textsuperscript{253} Throughout his analysis, Madison clearly refers to the role of both the states and the people, though their roles are obviously intertwined.\textsuperscript{254} Madison begins his analysis by chiding the Constitution’s critics for focusing almost exclusively on the nation and the states, observing that they “have lost sight of the people altogether” in their reasonings on the subject.\textsuperscript{255} In summarizing his argument, moreover, Madison assures the states that they will easily defeat an overreaching national government because it “will not possess the confidence of the people,” with the implication that the states “will be supported by the people.”\textsuperscript{256}

While both the “militia” and “arms” provisions can, in a broad

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\item \textsuperscript{253} For Madison, this focus on an armed populace was not a makeshift argument trotted out to defend the Constitution. As David Hardy has observed, in another context Madison stated that aristocracy could never be safe “without a standing army, an enslaved press and a disarmed populace.” Hardy, supra note 143, at 52 (quoting R. Ketcham, James Madison: A Biography 640 (1970)). While Madison’s focus on an armed citizenry rests on an identification of freedom with the militia tradition, that tradition, as we have noted, rested in part on the identification of personal freedom with the status of an independent citizenship that included the right to bear arms. See supra notes 88, 100, 201 and accompanying text. As Kates reports, “[t]he theme of personal arms possession as both the hallmark and the ultimate guarantee of personal liberty appears equally in the writings of Cicero, Sidney, Locke, Trenchard, Rousseau, Sir Walter Raleigh, Blackstone and Needham.” Kates, supra note 98, at 143, 148-49; accord Halbrook, That Every Man Be Armed, supra note 6, at 7-35 (exploring the writings of the great classical political philosophers).
\item \textsuperscript{254} Confirming evidence that Madison’s focus is not solely on the states’ ability to organize resistance is his pointed allusion to the Revolutionary War. See The Federalist No. 46, supra note 250, at 321. According to Madison, “Those who are best acquainted with the late successful resistance of this country against the British arms will be most inclined to deny the possibility” of regular troops defeating a militia comprised of people “fighting for their common liberties, and united and conducted by governments possessing their affections and confidence.” Id.; accord Philadelphiensis VI (Dec. 26, 1787), reprinted in Origin of the Second Amendment, supra note 243, at 179, 181 (asking if America has not “already shown to the world that no power on earth can overcome a phalanx of freemen defending their sacred liberties”).
\item \textsuperscript{255} The Federalist No. 46, supra note 250, at 315. He observes further that these critics wrote as though the two levels of government are “mutual rivals and enemies” that were “uncontrolled by any common superior.” Id. Implicit in Madison’s invocation of the people’s sovereignty is the recognition that ultimately the people might act to correct abuses by either level of government.
\item \textsuperscript{256} Id. at 322.
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sense, be read as alternative ways of stating this general intention to preserve a militia system that presumed the existence of a citizenry holding a right to arms, there are good reasons to distinguish the militia and arms guarantees of the state constitutions—reasons that become more important in 1788 (when Virginia drafted its proposed amendment combining the two) than they may have been in the period around 1776. Comparing the texts alone, it is noteworthy that the arms provisions are stated as rights guarantees in favor of the people; by contrast, the militia provisions are not framed as rights guarantees as such, but rather as declarations of a preference for militias (implicitly by contrast to standing armies). This was not unusual—the state declarations of rights commonly included provisions stating shared principles of government, but which were quite clearly not intended as limiting provisions. The militia provisions limit state legislative authority, if at all, only to the extent that they are read together with provisions limiting the power of the legislature to create a standing army. The arms guarantees, on the other hand, seem clearly intended to limit state legislative authority, at least in some important sense, even though there is room for debate whether the state declarations in general were intended to state legally enforceable limiting provisions.

These differences in the form and structure of these provisions comport with differences in their substantive content. The militia preference provisions presuppose an armed citizenry (and the con-
tinuation of the common-law right to arms) to lend support to the militia system of collective defense, but they do not constitutionally guarantee any right to arms. Their textual emphasis is unequivocally on the militia. The arms guarantees, on the other hand, may assume the continuing existence of the militia, but they do not in any sense require states to create or continue to fund or support such an institution.\textsuperscript{261} Moreover, there are good reasons to think that the state arms provisions reflect the heritage of the English Bill of Rights guarantee of a private right to arms.\textsuperscript{262} No doubt the adopters of both the militia and arms provisions believed that the militia system would continue, and that the law would continue to permit private firearms ownership, both to support the militia and in support of the right of self-defense; but the same assumption was almost certainly made in the several states that did not even adopt a declaration of rights, let alone a militia or arms constitutional provision. It should come as no surprise, then, that the drafters of proposed amendments to the federal Constitution saw the value of combining the militia and arms provisions to form a single amendment that would speak both to the institutional question of militias as well as to the right of the people (including each individual citizen) to arms.

\textbf{B. The "Remedy" Embodied in the Second Amendment}

If the defect to be remedied was the omission of well-known fundamental rights from the Constitution, the basic remedy was to amend the Constitution to incorporate the most fundamental rights, as found in the states’ constitutions and declarations of rights. A number of the basic freedoms of greatest concern were also put together into sets of proposed amendments offered by critics of the Constitution and on occasion adopted by the state ratifying conventions. As to the right to arms, the first proposed amendment of relevance, guaranteeing a private right of arms for a variety of purposes, was the one proposed by the minority report of the Pennsylvania Ratifying Convention.\textsuperscript{263} While this proposal was not

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\item \textsuperscript{261} If bearing arms was seen as encompassing militia service (or even as an indirect way of describing it), the provision might conceivably be read to prohibit the state from affirmatively abolishing the militia because to do so would effectively defeat even the theoretical possibility of exercising the right. But if the arms guarantee is exhausted by militia service, as some suggest, the goal of popular involvement in collective defense could be readily subverted by the combination of governmental neglect of the militia and tight restrictions on private firearms ownership and use. The right to be involved in the militia would be preserved, but it would be worth nothing.
\item \textsuperscript{262} \textit{See supra} Part III-A-3.
\item \textsuperscript{263} The proposal would have guaranteed a right to arms for collective and self-
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officially adopted by the Convention which ratified the Constitution without offering amendments, the minority report was adopted by an impressive group of the Constitution's critics, and was widely published. It was proposed, moreover, within the state that supplied the initial model of a right to arms guarantee, and parties looking to include an arms guarantee amendment would have been aware that this minority proposal was an attempted elaboration of the assumptions underlying the original provision. Given these considerations, it seems highly probable that if those drafting and adopting the Second Amendment had opposed a right to private arms, they would have chosen language, perhaps limited only to the militia declaration, to avoid the implication that these Pennsylvanians obviously drew from their own right to arms guarantee.

At least two other proposed amendments also unequivocally guaranteed a right to private arms. One such proposal, drafted by Samuel Adams and proposed at the Massachusetts Ratifying Convention, provided in pertinent part: "[T]hat the said Constitution never be construed to authorize Congress... to prevent the people of the United States, who are peaceable citizens, from keeping their own arms." Adams's proposal is obviously similar to the state constitutional arms provisions, with its guarantee running in favor of "the people" and its tracking of Massachusetts's own specification of the right to "keep" arms. But it also strikingly clarifies that the right to keep arms entails the right of the people to keep "their own" arms.

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264. See 2 RATIFICATION OF THE CONSTITUTION, supra note 92, at 617 (noting that the minority report was signed by twenty-one of the twenty-three members who voted against ratification of the Constitution and indicating that the report "circulated throughout the country in newspaper, broadside, and pamphlet form").

265. See supra text accompanying note 205.

266. For evidence that the group most responsible for inclusion of the original arms guarantee in Pennsylvania included those who produced the proposal included in the minority report, see supra notes 220-22 and accompanying text.

267. DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS HELD IN THE YEAR 1788, at 86-87 (Boston, W. White 1856) [hereinafter DEBATES AND PROCEEDINGS]. Adams's proposed amendment was never adopted by the Massachusetts convention; neither were the other fundamental rights that Adams proposed to protect by amendment. Even so, Madison's draft proposal of what became the Second Amendment was understood in the Massachusetts press as embodying the substance of Adams's proposal. See Hardy, supra note 143, at 56 n.247.

268. It is also striking that Adams's proposed amendment in favor of a right of private arms was included alongside guarantees of liberty of the press, rights of conscience, the right to petition, freedom from unreasonable searches and seizures, and a prohibition on standing armies "except when necessary for the defense of the United States." DEBATES AND PROCEEDINGS, supra note 267, at 87. Contrary to the claims of non-individual right
An equally explicit guarantee of a right to have private arms is the amendment proposed by the New Hampshire Ratifying Convention. It provided: "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." Read together, these proposed amendments fit the pattern revealed in the revolutionary-era statements invoking the right to arms; the right might be said to run in favor of "the people," or in favor of individual citizens, but in each case the guarantee contemplates a right that equally serves public ends of collective defense, by ensuring an armed citizenry capable of militia service, and private ends of self-defense and other lawful and appropriate uses of firearms.

1. The Virginia Proposal

The actual drafting history of the Second Amendment effectively begins in the Virginia Ratifying Convention. The committee, which included Madison, combined into a single proposed amendment protections relating to arms, militias, standing armies, and civil control of the military. The arms and militia protections 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." Perhaps the most telling feature of Virginia's proposed amendment is that it includes the "arms" and "militia" provisions of the state constitutions for the first time—the pattern that would be adopted in the Second Amendment. That both are included in a larger constitutional provision is suggestive that the two sorts of provisions were not considered to be functionally identical or completely overlapping.

It is also significant that they are included here as independent clauses, with the apparent implication that they are viewed as separable rather than as integrated parts of a single whole, a conclusion that is reinforced by their inclusion with two other protections that are also separated by semi-colons. Finally, the people's right "to keep..."
and bear arms” is the first protection listed, which further suggests that it does not hold a dependent or subordinate status among the enumerated protections.274

As to the arms guarantee itself, given the proposals advanced elsewhere in the country that so clearly reflected the understanding that the right extended to privately held arms, what stands out in the Virginia proposal is that the wording is general and unqualified. Given that Virginia’s proposed arms amendment does not even state any purposes for which the right to arms is guaranteed, as in the North Carolina275 and Massachusetts276 declarations of rights, it can easily be read consistently with the Pennsylvania minority’s proposed guarantee that extended to collective and self-defense as well as to hunting. Had Virginia’s purpose been to limit the right to arms to militia service, as many modern commentators suggest, we would expect the committee to have carefully constructed the language so as to reject the private right to arms understanding that is so clearly reflected in the proffered alternatives; instead, they chose language that lent itself to the broadest construction.

Some have drawn the conflicting inference that because the Virginia proposal, and eventually the Second Amendment, did not adopt the language of the most broadly worded guarantees, and in particular the one expressly protecting the right to have guns for self-defense and hunting, they intended to reject the broad understandings of the right to arms stated in those proposals.277 But these arguments presume both that the broadly worded state proposals were radical and novel proposals to expand the right to arms beyond its prior, narrow confines of assuring citizen participation in a militia, and that the parties to the process of amending the Constitution would all have understood that. In fact, however, the notion that the right to arms was limited to militia service is not supported unequivocally by any text or contemporaneous statement that we have seen.278

274. In fact, the two clauses of the Virginia amendment track in an important way the other state provisions, in that the Right to Arms Clause guarantees “a right” to keep and bear arms, while the Militia Clause merely declares a preference for a militia. See supra notes 257-60 and accompanying text. Considering that the Right to Arms Clause is thus a potentially enforceable right that runs in favor of the people, including individual citizens, it seems clear that it is the more critical, serviceable provision.

275. See supra notes 227-35 and accompanying text.

276. See supra notes 236-41 and accompanying text.

277. See, e.g., Herz, supra note 14, at 66 (suggesting that the Framers “refused to adopt several such proposals”).

278. Halbrook has tellingly observed:

If anyone entertained this notion [that the right was a “collective” right of states
while statements lending strong support to the idea of a right to private arms pervade the period from the American Revolution to the adoption of the Bill of Rights. At the very least the Virginia committee would have known that the broadly worded state proposals were not intended as radical innovations, but as restatements of a familiar right. They, therefore, would have known that it was incumbent on themselves to clarify the matter in favor of a narrowly-circumscribed right had that been their intention.

The better key to understanding the differences among these various proposed texts is to recognize that the Virginians and eventually Madison appreciated that their purpose was to include amendments embodying rights that were already familiar to the American people. For good or ill, viewed from the perspective of modern Americans, their tendency was to restate these rights in relatively general language and to avoid getting bogged down in adding, clarifying, and qualifying language. This tendency was no doubt reinforced by the fact that their central purpose was to clarify the ab-

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279. The widespread commitment to a right of private arms is documented throughout Part III-A of this Article. The predicate to Herz's reliance on the failure to adopt the broadest state proposals, by contrast, is his claim that "the plain meaning of [the Militia Clause of the Second Amendment] suggests a narrow focus on the militia in defining the right to bear arms." Herz, \textit{supra} note 14, at 66. While Herz's suggestion that the Militia Clause provides the key to "defining" the right to bear arms has previously been refuted as textual analysis, see \textit{supra} notes 69-107 and accompanying text, the compelling observation here is that the structure of the Virginia proposal clearly separates the clauses and in no way raises an inference that the right to arms is defined as being predicated on the militia provision. Virginia proposed an unqualified popular right to arms, and the drafters of that provision could not have relied upon the separate Militia Clause to preclude the inference that they were endorsing a general right to private arms.

280. A brief comparative glance at the state declarations of rights reveals substantial differences in the amount of detail included in many of their rights provisions and equivalent provisions of the proposed Virginia amendments. \textit{Compare} MD. CONST., Decl. of Rts. art. XXXIII (1776), \textit{supra} note 204, at 1689 (stating a duty to worship God according to conscience and providing that "all persons, professing the Christian religion, are equally entitled to protection in their religious liberty; wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injury others, in their natural, civil, or religious rights"), with Amendments Proposed by the Virginia Convention, \textit{supra} note 106, at 19 (providing that the manner of discharging religious duty "can be directed only by reason and conviction, not by force or violence, and therefore all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience").
sence of federal authority to invade these rights rather than to develop their nuances or to resolve potentially varying understandings.281

2. Madison’s Proposed “Second Amendment”

In June of 1789, Madison presented his proposed bill of rights to Congress, which included the following language: “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.”282 Madison’s proposal serves as a bridge between the amendment proposed by Virginia and the final language of the Second Amendment; while it does not place the Militia Clause as an introductory clause, in the manner of the final text, it does appear to link the two clauses more closely together than does the Virginia guarantee. Madison’s Militia Clause reads as an explanation of the people’s right to arms and, some might contend, by analogy to arguments based on the text of the Second Amendment, even as a qualifying or limiting statement of the scope or purpose of the right to arms guarantee. But a closer examination of the wording of the two clauses, in the light of what we know of Madison’s goals in drafting the Bill of Rights, suggests an explanation for Madison’s choice of language that confirms the centrality of the popular right to private arms and the role of the Militia Clause as a general restatement of the centuries-old philosophy in favor of citizen militias.

The critical thing to notice in Madison’s arms clause is that its force as a rights guarantee is greatly strengthened as compared to its predecessors; Madison’s guarantee does not merely state the existence of the right in question, but specifically provides that the right “shall not be infringed.”283 This is no small matter. Leading scholars on the Bill of Rights have credited Madison with completing the transition from “declarations” of rights, not necessarily intended as enforceable limitations on government, to a “bill” of rights that was drafted in the hard language of legal command in the anticipation of

281. This process of moving to more general formulations is further illustrated by a quick glance at the federal Bill of Rights equivalent of the freedom of religion clauses reviewed above. See supra note 280; see also U.S. CONST. amend. I (“Congress shall make no law ... prohibiting the free exercise of [religion] ...”). Notice also that the Second Amendment simply omits the language of the Virginia proposal that describes the militia as “composed of the body of the people,” an idea that was no doubt presumed in the Second Amendment but which is regularly disputed by those who reject the idea that the Amendment guarantees a right to private arms.


283. See id.
judicial review. Speaking before Congress, moreover, Madison justified the need to include provisions constituting a bill of rights partly on the ground that courts would become the guardians of the people’s rights “[i]f they are incorporated into the constitution,” and this rationale was the apparent fruit of Madison’s ongoing dialogue with Thomas Jefferson about the possible advantages of adding a bill of rights to the Constitution.

Consequently, whether its provisions are drafted as prohibitions on the exercise of certain powers or in the form of rights, guarantees, or immunities, Madison’s Bill of Rights stays away from broad and unenforceable statements of principle that often characterized the states’ declarations of rights. When he did choose to include statements of a few basic first principles based on language in the state declarations of rights, he proposed to insert the language into the preamble of the Constitution—a reflection that he perceived that such general statements did not belong in the body of the Constitution because they were not legal provisions, but statements of shared principles that describe the presuppositions of our constitutional order.

284. See, e.g., Robert C. Palmer, Liberties as Constitutional Provisions 1776-1791, in CONSTITUTIONS AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 55, 116 (1987); Bernard Schwartz, Madison Introduces His Amendments (May-June, 1789), in 2 DOCUMENTARY HISTORY, supra note 142, at 1006, 1008-09; Lutz, supra note 235, at 14. Lutz observed, in an earlier work, that state declarations of rights pervasively used “language of obligation rather than command[s], ‘ought,’ ‘should,’ [etc.],” and that this language sharply contrasted with language of command found in the same constitutions’ frames of government. DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 65-66 (1980). Madison’s shift to the language of command, even as contrasted with the amendments proposed by the state ratifying conventions, reflects his decision to propose including the amendments into the body of the Constitution rather than in a “declaration of rights” that would precede the body of the Constitution; it reflects his expectation that his amendments would be understood as limiting provisions that could be enforced by courts.

285. THE CONGRESSIONAL REGISTER 1789, June 8, supra note 104, at 83.

286. See Letter from Jefferson to Madison (Mar. 15, 1789), reprinted in 1 DOCUMENTARY HISTORY, supra note 142, at 620, 620 (noting that Madison’s prior comments about a bill of rights had omitted mention of a purpose “which has great weight with me, the legal check which it puts into the hands of the judiciary”).

287. See, e.g., PA. CONST., Decl. of Rts. art. V (1776), supra note 121, at 3082 (stating that “[g]overnment is, or ought to be, instituted for the common benefit, protection and security of the people” (emphasis added)); VA. CONST., Bill of Rights § 12 (1776), supra note 94, at 3814 (stating that the press “can never be restrained but by despotic governments”). As Lutz observes, such provisions are “statements of shared values and fundamental principles rather than a simple listing of prohibitions on governmental action.” Lutz, supra note 235, at 9.

288. The language Madison proposed to add to the preamble, loosely based on lan-
Madison's decision to strengthen the constitutional provisions defending liberties and limiting government almost certainly impacted on the drafting of what would become the Second Amendment. On the one hand, Madison would have recognized that Virginia's proposed militia provision, like the state declaration of rights provisions to similar effect, was a statement of classical republican philosophy about how to preserve political liberty, rather than an enforceable individual rights guarantee. In a sense, it did not fit into Madison's approach to drafting amendments as meaningful limiting provisions. On the other hand, given the widely voiced concerns about the potential threat to the militia system posed by the powers given Congress by the Constitution, Madison would have been reluctant to omit any reassuring provision, and this inclination could only have been strengthened because of his decision, consistent with a strongly held Federalist commitment, to omit any provision limiting Congress's authority to create a standing army. Madison also understood that the people's right to possess and use arms and the continuation of the militia system were closely related concepts, and that a central end of the right to have arms was to maintain a body of people capable of service in a universal militia. Madison's purpose, then, was in no sense to qualify or limit the right to arms embodied in existing and proposed provisions, including the amendment proposed by Virginia; it was, rather, to tie together the "arms" and "militia" provisions, both to underscore that they were closely related and to avoid inclusion of a freestanding declaration of principle that would lack "fit" with the balance of enforceable guarantees included in the Bill of Rights.

Language in the Virginia Declaration of Rights, reads, in part, as follows: "That government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety." James Madison Resolution, supra note 142, at 11. Strikingly, when others objected that Madison's proposal would serve to muddy a succinctly written preamble, Madison acknowledged that he had chosen to include this language of "self evident" principles because several states had proposed similar language; but he observed that those not wanting this language to be added to the preamble "will be puzzled to find a better place." Debates in the House of Representatives (Aug. 14, 1789), reprinted in CREATING THE BILL OF RIGHTS, supra note 104, at 128-29, 138.

289. See supra note 133. Not only did Madison not include any version of the proffered standing army amendments, but a proposal to insert such a provision was rejected by the Senate on September 4, 1789. See CREATING THE BILL OF RIGHTS, supra note 103, at 38 n.13.

290. David Hardy is thus correct in arguing that "[t]o read what was a recognition of an individual right, the right to arms, as subsumed within the militia recognition is thus not only permitting the tail to wag the dog, but to annihilate what was intended as a right." Hardy, supra note 143, at 60.
3. Congressional Treatment of the Right to Keep and Bear Arms

By the time the Committee of the Whole in the House of Representaties issued its report, on July 28, 1789, Madison's arms/militia proposal had been inverted so as to place the Militia Clause first, as in the final text of the Second Amendment. The amendment adopted by the House, however, retained the language describing the militia as "composed of the body of the people." In the Senate, this definitional language was omitted and, with other minor language changes, the Amendment took its final form. The only other event of relevance in the deliberative process of Congress is that on September 9, 1789, the Senate rejected a proposal to insert the words "for the common defence" after "bear arms." As a general proposition, interpreters should be wary of overreading the significance of mere omissions or of the decisions not to insert additional, possibly clarifying language. In this case, however, when the decision rejecting the inserted language is examined in the larger historical context, it lends additional support to the conclusion that the Amendment's drafters intended a wide-ranging right to arms. This conclusion is powerfully reinforced, as developed above, by the number of ratification-era proposed amendments that had so clearly stated the right to own private arms for lawful purposes; rather than using language that would establish a much more restricted scope for the right to keep and bear arms to be protected by the Constitution, Congress refused to add even relatively muted qualifying language. Moreover, that the Senate made relatively minor language changes that same day, changing the description of the militia as "the best" defense of a free state to "necessary to the" defense, reflects that this refusal to insert limiting language did not come about because the Senate was reluctant to make any changes at this stage in the consideration process. The meaning of the Second Amendment emerges much more clearly from the historical materials relating to the right to arms as it was understood in colonial

292. Id.; see also House Resolution and Articles of Amendment, Article the Fifth (Aug. 24, 1789), reprinted in CREATING THE BILL OF RIGHTS, supra note 104, at 37, 38 (retaining language defining nature of militia).
293. See House Resolution and Articles of Amendment, supra note 292, at 38 n.13.
294. Id.
295. For a more complete analysis along these lines, see supra notes 274-76 and accompanying text.
296. See House Resolution and Articles of Amendment, supra note 292, at 38 n.13.
America through the state constitutions. Those historical materials support the conclusion of Tench Coxe that the Amendment was designed to preserve the right of the people to their private arms.297

C. The Post-Ratification Understanding of the Right to Keep and Bear Arms

Interpreters have often consulted post-ratification materials that might shed light on the historical meaning of a statutory or constitutional provision. There are at least two reasons that such materials are taken into consideration. First, post-ratification materials often shed important additional light on the original public meaning of the provision at issue, even if they arguably deserve less weight than pre-adoption evidence.298 Second, a consensus among the branches of government and the people over many years can be viewed as basically establishing the meaning of a provision, especially in cases where there is room for debate as to the original meaning.299 The analysis of the right to keep and bear arms by nineteenth-century courts and scholars lends strong support to the idea of a private right to arms under either of these rationales for reliance on such materials.

Perhaps the single most significant commentary on the right to keep and bear arms is found in St. George Tucker’s 1803 work, Blackstone’s Commentaries with Notes of Reference to the Constitu-

297. See supra note 122 (discussing statement of Tench Coxe).

298. It is a long-standing maxim, for example, that constructions adopted by the people and their elected representatives in close proximity to the adoption of the Constitution are entitled to great weight. See, e.g., Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884) (stating that a construction placed on constitutional language by early congresses, comprised of “men who were . . . members of the convention which framed it, is of itself entitled to very great weight,” and that when such constructions “have not been disputed during a period of nearly a century, it is almost conclusive”); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819) (contending that when a principle is “introduced at a very early period of our history” and “recognized by many successive legislatures,” it “ought not to be lightly disregarded”).

299. See Stuart v. Laird, 5 U.S. (1 Cranch) 299, 307-08 (1803) (contending that acquiescence of “the judges, and of the people” to early constructions give them “a sanction which ought not now to be questioned”); id. at 309 (stating that contemporary exposition that becomes established practice for a period of years “affords an irresistible [sic] answer, and has indeed fixed the construction”); see also Thomas B. McAffee, Brown and the Doctrine of Precedent: A Concurring Opinion, 20 S. ILL. U. L.J. 99, 102 n.16 (1995) (describing James Madison’s acquiescence in the view that Congress had authority to establish a national bank, despite his initial opposition on constitutional grounds, based on his view that the issue had been settled “by repeated recognitions, under varied circumstances, of the validity of such an institution’ ” (quoting PROCESSES OF CONSTITUTIONAL DECISION MAKING: CASES AND MATERIALS 18 (Paul Brest & Sanford Levinson eds., 2d ed. 1983)).
tion and Law of the Federal Government." Tucker was an important legal commentator, a contemporary of Madison, and had a brother, Thomas Tudor Tucker, who served in the House of Representatives that proposed the Bill of Rights. As important as any specific statement in Tucker's annotated edition of Blackstone is Tucker's explicit identification of the Second Amendment with the English right to arms as it was described in Blackstone's work. This linkage confirms the continuity in American thought on the private right to arms from the beginnings of the revolutionary period to the end of the founding period (which some place at circa 1805). Blackstone clearly read the English right as including a private right to arms in support of self-defense. Concurring with Blackstone that the "right of self-defence is the first law of nature," Tucker links the need for an arms guarantee to government's tendency to restrict the right of self-defense "within the narrowest limits possible." Tucker assures his American audience, moreover, that the Second Amendment will stand as a barrier to the sort of limitations imposed by England's game laws that had been employed to keep firearms out of the hands of farmers and tradesmen.

Almost thirty years later, Tucker's son, Henry St. George

300. TUCKER, supra note 166.
301. See Quinlan, supra note 7, at 647 & n.31.
302. See 1 TUCKER, supra note 166, at 143. On Blackstone's treatment of the English right to arms, including his association of it with the private right of self-defense, see supra note 197. In fact, Tucker goes to some length to clarify that the American constitutional right was even broader than the English right because it did not contain any of the latter's qualifying language. See 1 TUCKER, supra note 166, at 143 n.40; accord James Madison, Notes for Speech in Congress Supporting Amendments, June 8, 1789, reprinted in ORIGIN OF THE SECOND AMENDMENT, supra note 243, at 645 (comparing limited nature of English guarantees compared to those in American constitutions, noting in particular that the English arms guarantee gave only "arms to Pretstst"); THE CONGRESSIONAL REGISTER, June 8, 1789, supra note 104, at 80 (corresponding portion of Madison's speech comparing limited nature of English guarantees with the broader American counterparts). Lutz and Hyneman's important compilation of political writings of the founding period, for example, uses 1765-1805 to define the period under consideration. See 1 AMERICAN POLITICAL WRITING, supra note 201.

303. 1 TUCKER, supra note 166, app. at 300.
304. See 1 id. In another context, Tucker argued that a hypothetical law that outlawed the bearing of arms to the end of preventing insurrections could not pass muster as an exercise of the power granted by the Necessary and Proper Clause. See 1 id. app. at 289. Any other understanding, according to Tucker, would render the Second Amendment "a mere nullity." 1 id. If the Second Amendment was intended only to secure the power of states to establish militias, or purely to grant individuals only the right to use a weapon when actually serving in a militia, Tucker's hypothetical law should have been constitutional. Modern proposals to disarm citizens in an effort to fight crime are almost perfectly analogous to Tucker's hypothetical—but he saw such a law as running roughshod over the Second Amendment.
Tucker, whose own distinguished career ranged from the legal academy to the bench to the halls of Congress, wrote in his *Commentaries on the Laws of Virginia*, that the “primary rights of personal security, personal liberty, and private property,” were secured, first, by “bills of rights and written constitutions,” and, second, by “[t]he right of bearing arms.”

Tucker underscored that, in contrast to the restrictions often imposed under English law, this right to arms “is practically enjoyed by every citizen, and is among his most valuable privileges, since it furnishes the means of resisting as a freeman ought, the inroads of usurpation.”

Writing in the same era, Joseph Story, perhaps the leading nineteenth-century commentator on the United States Constitution, wrote that “[t]he right of citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic” because “it offers a strong moral check against the usurpation and arbitrary power of rulers” and, in cases in which such rulers are initially successful, will “enable the people to resist and triumph over them.”

Another important commentator, William Rawle, writing in 1829, described the relationship between the two clauses of the Second Amendment in sharp contrast to the modern view that insists that the Militia Clause serves as limiting language upon the right to arms. Rawle begins with the Militia Clause, in which “it is declared that a well-regulated militia is necessary to the security of a free state,” a statement, he asserts, “from which few will dissent.”

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305. *HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA* 43 (Winchester, Winchester Virginian 1831). One can hear echoes of Blackstone’s famous work, linking the personal right to arms to the idea of securing the basic personal rights that are given to men by the law of nature.

306. *See id.* Tucker clearly embraces the exact view of the right to arms as a source of security for the people’s right of collective defense against tyrannous government that has been ridiculed in the modern era as an implausible “insurrectionist” theory. *See supra* note 252.

307. 3 *STORY, supra* note 96, at 746. Both Story and Tucker employ language describing the holders of the right as “every citizen” and “citizens” rather than the Amendment’s language of “the people,” even when referring to the collective purposes for which the right in part exists. This usage by such careful students of the Constitution is powerful confirmation that the Second Amendment’s use of “the people” simply tracks with other guarantees, such as the Fourth Amendment, that secure personal rights, and is not used as an equivalent to “the militia,” as some modern commentators have suggested. When collective language is employed, it is also used in a context conveying the idea of an individual right. *See, e.g., JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES* 264 (New York, Harper & Bros., 1883) (“One of the ordinary modes, by which tyrants accomplish their purpose without resistance, is, by disarming the people, and making it an offense to keep arms . . . .”)

Arms Clause, by contrast, is described as a general “prohibition” that serves to clarify that Congress lacks “a power to disarm the people”; it states, in other words, “[t]he corollary, from the first position, is that the right of the people to keep and bear arms shall not be infringed.” Rawle accurately perceives, in short, that while the two clauses reflect the close connection between the value placed on the idea of a citizen-based militia and the popular right to arms, the introductory clause merely declares a general principle of classical republic political doctrine while the Right to Arms Clause functions as a “prohibition” in support of a popular right.

Perhaps the most compelling explication of the Second Amendment comes from the leading constitutional commentator of the second half of the nineteenth century, Thomas Cooley. Cooley not only construes the Amendment as creating a personal right to keep arms, he manages to anticipate the twentieth-century attempt to reduce the scope of the Amendment by reference to the militia focus of the first clause:

*The Right is General*—It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent.... But the law may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.  

In addition to the commentators, the nineteenth-century state and federal courts that addressed issues as to the nature and scope of the right to keep and bear arms, under both the Second Amendment and its state constitutional counterparts, all proceeded on the assumption that the right to arms extended a personal right to firearms for lawful purposes not limited to service in organized militias. The

309. *Id.* at 126.
310. *COOLEY, supra* note 87, at 298.
311. As to the significance of state constitutional provisions guaranteeing the right to keep and bear arms, from the nineteenth-century state constitutions down to the present, see [*infra* notes 404-17 and accompanying text.]
312. For an extensive review, see Quinlan, *supra* note 7, at 652-59; see also Bliss v.
decisions in this era confirm the widespread recognition that the Second Amendment was understood as restating a fundamental right to arms that stemmed back to the English Bill of Rights;\textsuperscript{313} that part of the purpose of ensuring to all citizens a right to arms was to secure liberty as well as to render possible a self-armed citizen militia;\textsuperscript{314} that no language in the Second Amendment "restricts its meaning," and that the right to private arms is as "comprehensive and valuable" as the other individual rights guarantees contained in the first eight amendments;\textsuperscript{315} and that the right extended to self-defense as well as to collective defense.\textsuperscript{316} At least as important, not a single nineteenth-century court adopted the views of modern courts and commentators that the right to keep and bear arms was vested in state governments alone or extended only to citizens actually performing militia service.

The denial of fundamental rights to the newly freed slaves in the South after the Civil War extended to efforts to disarm African-Americans.\textsuperscript{317} These developments prompted Congress to take action to protect the rights of African-American citizens, including specifically the right to keep and bear arms. An examination of the debates surrounding the Freedmen's Bureau Act, the Civil Rights Act of 1866, and the Fourteenth Amendment shows that members of the Reconstruction Era Congress viewed the Second Amendment as securing an individual right to keep and bear arms.\textsuperscript{318} For instance,

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\item 1997 \textit{SECOND AMENDMENT} 871
\item 313. \textit{See Nunn v. Georgia}, 1 Ga. 243, 249 (1846).
\item 314. \textit{See id. at 249-50; see also Cockrum v. State}, 24 Tex. 394, 401 (1859) (stating that the object of the Second Amendment is "the perpetuation of free government," and that it is "based on the idea, that the people cannot be effectually oppressed and enslaved, who are not first disarmed").
\item 315. \textit{Nunn}, 1 Ga. at 251.
\item 318. \textit{For an exhaustive examination of the Reconstruction Era views regarding the Second Amendment, see Halbrook, supra note 317, passim. On whether the Fourteenth Amendment was originally intended to incorporate the Bill of Rights, see RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989); MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); Amar, \textit{The Fourteenth Amendment, supra note 6, at 1218-54; Van Alstyne, supra note 6, at 1251-53. The one thing that is quite clear from the historical materials is that, to the extent that personal rights guaranteed in the Bill of Rights
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section 14 of the Freedmen's Bureau Act states:

That in every State or district where the ordinary course of judicial proceedings has been interrupted by the rebellion, and until the same shall be fully restored, and in every State or district whose constitutional relations to the government have been practically discontinued by the rebellion, and until such State shall have been restored in such relations, and shall be duly represented in the Congress of the United States, the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefits of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color, or previous condition of slavery.319

These post-ratification materials provide compelling confirmation that the right to arms, as it was understood generally in colonial and founding-era America, extended to private firearms and reflected a general commitment to an armed citizenry. It thus lends strong support to the understanding of the original meaning of the right to keep and bear arms set forth in this Article. Beyond the strength these materials lend to the analysis of the pre-confirmation materials supplied above, they also provide the basis for concluding that the basic meaning of the arms guarantee was firmly established in the first century of practice under the Constitution and that departures from this well-established consensus must carry a heavy burden of justification. Advocates of another view must confront not only the materials relating to the original meaning, but the weight properly given to thoughtful, well-settled practice as well. Even among scholars who have expressed skepticism about originalist theories of constitutional interpretation, especially when specific rather than abstract meanings are sought, there has been the recognition that when historical evidence of original intentions are combined with long-standing practices and shared understandings, the meaning of the Constitution may become fixed and settled.320

were among the rights secured by the Fourteenth Amendment, the right to keep and bear arms would surely be included among them. See Quinlan, supra note 7, at 663-76.


Thus, for example, Professor David Richards, a scholar known for his forceful criticisms of "originalist" constitutional analysis, has nonetheless contended that the combination of text, context, and constitutional practice build a compelling case that Congress has, in recent decades, abdicated its constitutional power and duty to decide the question whether the nation will fight a war. The case as to the right to keep and bear arms, however, is even more compelling; while virtually all parties to our constitutional discourse paid lip service to the original allocation of decision-making authority as to war-making, it is well known that these understandings were often honored in the breach by Presidents bent on pursuing their own policies almost from the beginning. Some have even contended that this pattern of conduct should be read as a gloss on the original understanding of the War Clause. While such a claim is controversial, with good reason, there is nothing of a similar nature to muddy the water here. Given that the extremely limited reading of the right to keep and bear arms, as strictly limited by the terms of the Militia Clause, is a twentieth-century invention, its advocates should bear a heavy burden to establish that it is anything more than a constitutional aberration.

IV. THE DOCTRINE OF PRECEDENT

It has become a standard argument that the issue of a personal right to arms has long since been resolved by a uniform set of rulings by the federal courts. This argument has been embraced by the American Bar Association and other important voices in the legal establishment (including a former Supreme Court Justice and a former Solicitor General). It is important to understand that this argument often appears to go beyond the make-weight suggestion

321. See id.
322. See, e.g., FRANCIS D. WORMUTH ET AL., TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW 133 (1986) (describing argument in favor of presidential authority to wage war based on fact "that in the course of our history the President has very frequently exercised the power to make war without congressional authorization").
325. See supra notes 16, 50 and accompanying text.
that the case law lends support to a preferred reading or presents the current state of the law (subject to future decisions). Rather, the argument appears to be that these decisions have not only settled the law, once and for all, in favor of the militia-based reading of the Amendment, but that continuing advocacy of the constitutional right to keep and bear arms in the face of these decisions constitutes a kind of lawless intransigence, if not the commission of an outright fraud on the American people.\(^{326}\)

Considering the force and urgency with which this case law is promoted as a debate-stopper in the current dialogue about the Second Amendment, it is a bit surprising that so little has been offered beyond a review of the holdings of the cases to justify such overwhelming reliance on the current state of the law. After all, if there is any feature of modern constitutional law with which Americans are familiar, and particularly legal scholars, it is that the law changes. In this century alone, we have witnessed the rise and fall, and the rise (again) of substantive due process. The watershed of the New Deal gave way to the Warren Court Revolution, which commenced with the Supreme Court's precedent-shattering decision in *Brown v. Board of Education*.\(^{327}\) Every American law student studies *Erie Railroad Co. v. Tompkins*,\(^{328}\) a decision that overruled a leading decision of almost a century earlier.\(^{329}\) The Court's general willingness to reconsider precedent has not abated: during the period from 1973 to 1993 alone, the Supreme Court overruled, in whole or in part, thirty-five previous constitutional decisions.\(^{330}\)

When it comes to the gun debate, however, it appears to be bad form to focus on the possibility of change rather than on the current state of the law. But we are not told why. We are offered no theory of the doctrine of stare decisis nor any attempt at distinguishing cases

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326. Indeed, it has been contended that gun rights advocates who invoke the Second Amendment, and legal scholars who have found a personal right to own firearms as the intended meaning of the Second Amendment, "perpetuate the popular false consciousness regarding the operative meaning" of the Amendment when they fail to acknowledge that the issue is definitively settled by the courts. Herz, *supra* note 14, at 145. But Professor Herz is not exactly a voice in the wilderness. *See*, e.g., AMERICAN BAR ASSOCIATION TASK FORCE ON GUN VIOLENCE, REPORT TO THE HOUSE OF DELEGATES 5 (1994) (arguing that there is a great need to inform the public regarding the meaning of the Second Amendment and to make widely known the fact that the United States Supreme Court and lower courts interpret this provision as not including an individual right to keep and bear arms).


328. 304 U.S. 64 (1938).


like *Erie*. Indeed, to the extent that any sort of normative argument is offered to support the insistence that we should "let settled law lie," it is generally rooted in the model of a "living constitution" and the related argument that an individual right to keep and bear arms does not fit in modern American society. Perplexing questions about the relationship between the courts, other branches of government, and the people are either ignored or treated simplistically. In at least one case, constitutional meaning is more or less equated with decision-making by courts, and the Supreme Court is treated with a reverence that would make Chief Justice Marshall blush. Finally, the United States Supreme Court's bare acquiescence in lower court constructions of its own half-century old decision—constructions that a number of thoughtful scholars have sharply criticized—is construed as a ratification of these decisions deserving of virtually equal weight as a carefully considered opinion of the Court.

The relevance of the right to keep and bear arms in our world must necessarily be confronted because the gun control struggle will continue to be waged at the state level, as well as at the federal, and numerous state constitutions include arms provisions that are simply not subject to the case law decided by the federal courts. In the sections that follow we will suggest three reasons why precedent should not be viewed as a significant barrier to bringing forward the right to keep and bear arms. First, in Part IV-A we argue that the precedent

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332. See *id.* at 66-67. On the other hand, for those who have invested the most in defending the militia-based reading of the Second Amendment in historical terms, the case law is used mainly to confirm and support their interpretation. See, e.g., Ehrman & Henigan, *supra* note 27, at 40-57.

333. See, e.g., Herz, *supra* note 14, at 105-18. For useful perspectives on some of these questions, see Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071 (1987).

334. See Herz, *supra* note 14, at 105 & n.214 (equating "legal certainty" with "predictability of judicial decision," citing Holmes's description of "the law" as "prophecies of what the court will do in fact"); *id.* (concluding that the militia-based reading of the Second Amendment is thus a legal certainty). For a critique of this sort of theory of law, see H.L.A. Hart, *The Concept of Law* 138-44 (1961).

335. See Herz, *supra* note 14, at 107 (continuing insistence on personal right to keep and bear arms "ignores the judiciary's supposedly primary role in constitutional matters" and denies "[d]ialogic legitimacy" to "those best trained to interpret the Constitution"); *id.* at 109 (stating that the gun rights lobby "thumbs its collective nose at the judiciary, and at the significance of the judiciary's role in interpreting the Constitution"); *id.* at 118 (stating that those who ignore settled case law have "marginalized the judiciary's essential task of constitutional interpretation").

336. See *id.* at 78-79.
relied upon cannot carry the weight given it by opponents of a private right to firearms when judged by any reasonable theory of stare deci-

s. Second, in Part IV-B we suggest that the doctrine of precedent is a two-edged sword; if the court employs it to avoid serious grappling with the original meaning of the Second Amendment, it still must confront the underlying substantive issues in giving principled applica-
tion to the fundamental rights doctrine it has developed in the modern era. Finally, in Part IV-C we suggest that the federal cases being relied upon are not as decisive as its proponents would have it, if for no other reason than that the Second Amendment is not the only game in town.

A. The Federal Case Law and the Doctrine of Precedent

As suggested above, when critics of a line of cases contend that it should be reconsidered because it is incorrectly decided, it is a logi-
cally incomplete argument to insist that the question of reconsideration is foreclosed solely on the bare existence of the cases under fire. Given that the doctrine of stare decisis has long ceased to be anything like an absolute doctrine, there must be an argument as to why the doctrine of precedent should apply.337 Indeed, the conven-
tional view is that stare decisis receives less weight in constitutional cases precisely because errors by the Supreme Court in constitutional adjudication are otherwise so difficult to correct; ordinary political processes are unavailable to those aggrieved by the decision.338 And for those who believe that the Constitution “must be read against the backdrop of changing social circumstances,” rather than through the eyes of “white property-owning males who lived in a world utterly different than our own,” an extremely robust view of the role of stare decisis seems difficult to warrant.339 After all, stare decisis could easily become a barrier to adapting the Constitution to changing social circumstances.

At the same time, of course, there are very few advocates of

337. It is possible, of course, to defend challenged precedents on the merits by contesting criticisms launched against them. But then the argument is not really one from precedent as such; at most, the precedent is pointed to as illustrating or confirming a view supported on other grounds.

338. For this standard view, see United States v. Barnett, 376 U.S. 681, 699 (1964). An additional factor is that certainty and stability are probably not nearly as much the critical ingredients in constitutional law as they arguably must be in fields like commercial law (where knowing what the law is so as to enable planning is virtually as important as what the particular legal rule turns out to be).

eliminating the doctrine of stare decisis altogether, if for no other reason than because a constitutional order, like life, requires some closure. We recognize "that many debatable questions require resolution so that society can get on with the task of conforming to established ground rules." The real difficulty is in articulating standards to guide the inquiry as to when the doctrine of stare decisis should have real bite, applying even when we have reason to believe that the applicable precedent was incorrect when initially decided.

Fortunately, the present case is not at the cutting edge of what proves to be a complex issue, for virtually all the factors that seem relevant to developing a doctrine of stare decisis point away from its application here.

Far from presenting us with a long-standing and unbroken chain of decisions extending back virtually to the time of adoption of the constitutional provision, the federal case law being relied upon here is only a half a century old at best. It contradicts the views uniformly adopted by courts and commentators for more than a century after the adoption of the Second Amendment. The Supreme Court decision that inaugurates this new era of judicial consensus joins the consensus only ambiguously, and only if the decision is read as rejecting sub silentio prior declarations of the Court. This modern case law, moreover, can be described as embodying a "consensus" only by a careful process of exclusion—exclusion of the conflicting decisions of other courts, especially within the states, construing analogous right to arms provisions; exclusion of conflicting declarations of a coordinate branch of government, the Congress, dating back to the 1860s, and exclusion of the continuing commitment of

340. For a rare case, see generally Gary Lawson, The Constitutional Case Against Precedent, 17 HARV. J.L. & PUB. POL'Y 23 (1994) (arguing that rationale underlying Marbury v. Madison, giving priority to the idea of a fixed, written Constitution, should equally give priority to the Constitution over any and all decisions of those construing it). For a conflicting view, see McAfee, supra note 299, at 100-03.
341. McAfee, supra note 299, at 103.
342. For one effort to grapple in a sophisticated way with these fundamental sorts of questions, see Henry P. Monaghan, Stare Decisis and Constitutional Adjudication, 88 COLUM. L. REV. 723 (1988).
343. See supra notes 298-320 and accompanying text.
344. See infra notes 365-80 and accompanying text.
345. See infra notes 410-17 and accompanying text.
346. See generally Stephen P. Halbrook, Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms, 62 TENN. L. REV. 597 (1995) (arguing that Congress's expansive declarations of the right to keep and bear arms are entitled to great weight because it is a branch of government represented by the people).
the American people to the right to keep and bear arms—a commitment that stems not from a delusion generated by the gun lobby, but from their adherence to the tradition that has viewed firearms as an integral part of the right of self-defense. When these considerations are taken together with the fundamental flaws in the reasoning and arguments advanced in the decisions in question, and the fact that they so clearly do an injustice to the overwhelming weight of historical evidence, it becomes evident that precedent is not an important barrier to recognition of an individual right to keep and bear arms.

1. The Supreme Court’s Construction of the Right to Keep and Bear Arms

It is striking that the opponents of a personal right to keep and bear arms seem invariably to start with \textit{United States v. Miller},\textsuperscript{347} and treat other Supreme Court cases confronting the Second Amendment as relating mainly to the controversy over incorporation of the Second Amendment through the Fourteenth Amendment.\textsuperscript{348} But \textit{Miller} should be read against the backdrop of the Court’s prior, admittedly somewhat meager, body of Second Amendment decisions. When all the Court’s pronouncements are read together the most striking thing is that it has not yet conclusively resolved the most basic issue surrounding the Second Amendment: Does the Amendment protect a right of individual citizens to own a firearm or is it concerned solely with a non-individual right of states to maintain militias free from federal encroachment? The Court’s nineteenth-century pronouncements, admittedly mainly in dictum, indicate a clear leaning towards an individual right interpretation, while \textit{Miller}, its only twentieth-century decision of relevance, lends support (albeit somewhat ambiguously) to the personal right interpretation.

In \textit{Dred Scott v. Sandford},\textsuperscript{349} the Court writes as though a personal right to own and use firearms was a simple given of the nation’s constitutional landscape. In one passage discussing the implications of extending the full rights of citizenship to non-slave African-Americans, the Court expresses concern that it would mean that such individuals would have complete freedom to travel and sojourn in slave states, exercise freedom of speech and rights of assembly, and “to keep and carry arms wherever they went.”\textsuperscript{350} In a second passage

\textsuperscript{347} 307 U.S. 174 (1939).
\textsuperscript{348} See, e.g., Ehman & Henigan, \textit{supra} note 27, at 41-42, 52-53; Herz, \textit{supra} note 14, at 68-72.
\textsuperscript{349} 60 U.S. (19 How.) 393 (1856).
\textsuperscript{350} See id. at 417.
Second Amendment

Second Amendment describing the limits that the Bill of Rights imposes even on Congress's power to regulate in the territories, the Court asserts that "the citizen" retains his fundamental freedoms—including freedom of religion, speech, press, assembly and petition, trial by jury, privilege against self-incrimination, and, oddly enough, the right to keep and bear arms. In short, the Court speaks of the right to keep and bear arms in the same breath as other individual rights contained in the First, Fifth and Sixth Amendments.

Similarly, the Court in Robertson v. Baldwin writes as though the idea that the Second Amendment includes a personal right to arms of some scope is a starting point for further analysis. There the Court argued, consistently with the analysis set forth in this Article, that the federal Bill of Rights restated already-established rights in relatively general and succinct language, relying on the assumption that the basic rights, and "certain well-recognized exceptions arising from the necessities of the case," would be understood without being spelled out in clear text. Among the examples the Court employs to illustrate this analysis is the observation that the right to keep and bear arms "is not infringed by laws prohibiting the carrying of concealed weapons." The Court's analysis thus treats laws prohibiting the carrying of concealed weapons as an "exception" to a general right "arising from the necessities of the case," consistent with some state court decisions upholding concealed carry laws on precisely such a rationale. It is only because such laws fall within such an exception, according to the Court, that the right itself is "not infringed" in a constitutional sense; the premise of the argument is that the right

351. See id. at 449-50.
352. It is noteworthy that Chief Justice Taney grew up during the founding period, practiced law in Maryland from 1799 to 1826, and served as the Attorney General of his state, and then of the nation, prior to being confirmed to the Supreme Court in 1836. See LEON FRIEDMAN & FRED L. ISRAEL, THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJORITY OPINIONS 338-43 (1995). He also served on the Court with Justice Joseph Story. See id. at 345. Chief Justice Taney was, in short, well situated to have gained an understanding of what thoughtful nineteenth-century legal commentators would have thought about the Second Amendment.
353. 165 U.S. 275 (1897).
354. See supra notes 295-97 and accompanying text.
355. See Robertson, 165 U.S. at 281-82.
356. See id.
357. See, e.g., Andrews v. State, 50 Tenn. (3 Heisk) 165, 187 (1871) (upholding concealed carry law as consistent with personal right to have firearms). This holding makes no sense in the context of a militia-centered reading of the right to keep and bear arms. A law preventing militia members from carrying concealed weapons would be nonsensical, and the question of the scope of the protection offered by the constitutional guarantee would never be addressed if the guarantee was conceived so narrowly.
to arms is a personal right that is subject to appropriate exceptions. The Court's reliance on other examples of "exceptions" read into the understanding of basic freedoms—based on freedom of speech and of the press, double jeopardy, self-incrimination—fits nicely with Dred Scott's grouping of the right to keep and bear arms with other expressions of individual liberty, a grouping that proponents of the narrow reading of the Second Amendment claim was never intended.

Prior to Miller, the only other Supreme Court cases dealing with the Second Amendment were United States v. Cruikshank, Presser v. Illinois, and Miller v. Texas. All three cases simply track the holding in Barron v. Mayor of Baltimore that none of the rights contained in the Bill of Rights were enforceable against the states. As Professor Van Alstyne notes, Presser and Cruikshank "merely mimicked others of the same era in holding that none of the rights or freedoms enumerated in the Bill of Rights were made applicable by the Fourteenth Amendment to the states." Cruikshank, Presser, and Miller, therefore, have no modern relevance to the issue of incorporation as it relates to the Second Amendment.

358. 92 U.S. 542 (1875). The defendants in Cruikshank had been convicted under the Enforcement Act of 1870, ch. 114, 16 Stat. 140, of banding together and conspiring to hinder and prevent two African-American citizens from exercising their First Amendment right of assembly and their Second Amendment right to keep and bear arms. See Cruikshank, 92 U.S. at 551-53. Far from holding that the defendants' attempt at preventing two individuals from exercising their right to keep and bear arms had nothing to do with federal interference of state militias, the Court held that the Second Amendment "is one of the Amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called...the [police powers]." Id. at 553 (emphasis added) (citation omitted). The italicized portion of the opinion is inconsistent with a non-individual right view of the Second Amendment. If the right to keep and bear arms were purely a structural guarantee that protects state militias against federal interference, the suggestion that the remedy to this "rights" violation by private citizens should be sought in state law would be incoherent. A purely structural right could not possibly be violated by "fellow citizens."

359. 116 U.S. 252 (1886).


362. For a detailed examination of Cruikshank, Presser, and Miller, see Quinlan, supra note 7, at 665-69.

363. Van Alstyne, supra note 6, at 1239 n.10.

364. For a thorough analysis of the incorporation issue as it relates to the Second Amendment, see Quinlan, supra note 7, at 669-76. As Professor Levinson observes:

The obvious question, given the modern legal reality of the incorporation of almost all of the rights protected by the First, Fourth, Fifth, Sixth, and Eighth Amendments, is what exactly justifies treating the Second Amendment as the great exception. Why, that is, should Cruikshank and Presser be regarded as binding precedent any more than any of the other "pre-incorporation" decisions
United States v. Miller\textsuperscript{365} must be read against the backdrop of the Court's own prior pronouncements, which reflected a century of common understanding of the Second Amendment. The Court's eight page opinion in Miller, as one commentator has noted, offers "a little something for everyone.\textsuperscript{366} Both individual right and non-individual right adherents rely on Miller to support their respective interpretations of the Second Amendment.\textsuperscript{367} However, even some of those who support a non-individual right construction of the Second Amendment admit that Miller "is unfortunately less than crystal clear."\textsuperscript{368}

In Miller, two individuals were indicted on charges of transporting an unregistered sawed-off shotgun in interstate commerce in violation of the National Firearms Act of 1934.\textsuperscript{369} The district court quashed the indictment and held the National Firearms Act unconstitutional under the Second Amendment.\textsuperscript{370} The Supreme Court reversed, holding:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.\textsuperscript{371}

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refusing to apply given aspects of the Bill of Rights against the states?
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Levinson, \textit{supra} note 3, at 653.


366. McClurg, \textit{supra} note 37, at 100.

367. \textit{See id.} at 100-01 n.209 (providing examples of how Miller has been interpreted as supporting both the individual and non-individual right readings of the Second Amendment).

368. Herz, \textit{supra} note 14, at 68.

369. Miller, 307 U.S. at 175.

370. \textit{See United States v. Miller, 26 F. Supp. 1002, 1003 (W.D. Ark.), rev'd, 307 U.S. 174 (1939). But see Richard M. Aborn, The Battle Over the Brady Bill and the Future of Gun Control Advocacy, 22 FORDHAM URB. L.J. 417, 437 (1995) ("No federal court has ever used the Second Amendment to overturn a gun control law."); Beard \& Rand, \textit{supra} note 73, at 14 ("[N]o gun control measure has ever been struck down as unconstitutional under the Second Amendment."); Editorial, A Militia In Their Own Minds, ATLANTA J. \& CONST., Apr. 27, 1995, at 14A ("[N]o federal court has ever ruled that a gun-control law violated the Second Amendment."); Griswold, \textit{supra} note 50, at C7 ("Never in history has a federal court invalidated a law regulating the private ownership of firearms on Second Amendment grounds.").}

371. Miller, 307 U.S. at 178 (quoting Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840)). Given the Court's emphasis on the supposed lack of connection between the particular
A careful reader of Miller might wonder why no evidence was introduced to show that short-barreled shotguns have some "reasonable relationship" to the "preservation or efficiency of a well regulated militia." The answer is simple: no evidence concerning the militia value of short-barreled shotguns was before the Supreme Court because, given the procedural setting of the case, no evidence whatsoever had been introduced in the district court. The defendants had filed a demurrer in the district court which, at the time, was standard federal court practice for challenging only the legal sufficiency of an indictment. Because the district court had sustained the defendants' demurrer and, therefore, quashed the indictment, there was no occasion (or need) for the introduction of any evidence. Consequently, with no evidence in the lower court record, none was before the Supreme Court on appeal, and the Court itself was unwilling to take judicial notice that short-barreled shotguns were "any part of the ordinary military equipment" or that their "use could contribute to the common defense."

If the Second Amendment does not guarantee an individual right to own a firearm and is truly about a state's right to maintain a militia, why is it that the Court in Miller did not simply hold that the defendants, non-militia members, lacked standing to raise a Second Amendment challenge to the National Firearms Act of 1934? This question is all the more compelling given that the United States argued to the Court that the Second Amendment only guaranteed a collective right that protected the people when carrying arms as state militia members. Under the state militia-based reading of the Second Amendment, in which no personal right for ordinary citizens is created, it would follow that only a state, or perhaps a state militia

firearm involved in Miller and the efficiency of a militia, some commentators have read Miller as implicitly acknowledging that the Second Amendment gives constitutional protection to privately possessed military weapons. See, e.g., Levinson, supra note 3, at 654-55.

372. See, e.g., Boehm v. United States, 21 F.2d 283, 284 (8th Cir. 1927) ("It is well settled that in the federal courts the legal sufficiency of the indictment should be tested by demurrer.").

373. Miller, 307 U.S. at 178.

374. See 1 Gun Control and the Constitution: Sources and Explorations on the Second Amendment, supra note 197, at xxvii. It bears mentioning that the Miller Court did not have the benefit of hearing argument from both sides in the case. There was no appearance on behalf of the defendants. The Court heard only the arguments of the United States, which was represented by the Solicitor General, two Assistant Attorney Generals, and six other attorneys. See Miller, 307 U.S. at 175. Despite hearing only the arguments of the United States, the Court did not adopt the argument advanced by the government that the Second Amendment guaranteed a collective right to keep and bear arms only when carrying arms as state militia members.
member, would have standing to invoke the Second Amendment as a source of constitutional protection. It has long been Court policy not to decide constitutional questions when a case can be disposed of on justiciability grounds, including the lack of standing.  

Rather than looking at the status of those challenging the National Firearms Act to determine whether they had standing, the Court instead focused its attention on the weapon and, in the process, adopted the "civilized warfare" test first enunciated by the Tennessee Supreme Court in Aymette v. State. Thus, a fair reading of Miller is that constitutional protection under the Second Amendment depends upon whether the weapon at issue is "part of the ordinary military equipment" or whether "its use could contribute to the common defense." The truth is that short-barreled shotguns have been used by the military, police, and civilians since the late 1800s. Had such evidence been in the record or otherwise brought to the Court's attention, it is certainly plausible to postulate that Miller may well have come out differently:

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375. In fact, the Court invoked the standing requirement in two cases decided shortly before Miller to bar challenges to other federal activity. See Tennessee Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 136-47 (1938); Alabama Power Co. v. Ickes, 302 U.S. 464, 478-81 (1938) (finding that private electrical power companies lacked standing to challenge federal laws that created competition because they had no legal right to be free from lawful competition).

376. 21 Tenn. (2 Hum.) 154, 158 (1840) ("[T]he arms the right to keep which is secured are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment."). In upholding a law that prohibited the concealed carry of bowie knives, which were viewed as weapons typically employed by criminals, the Aymette court concluded that, by contrast, "if the citizens have these arms [those usually employed in civilized warfare] in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights by those in authority." Id. Modern readers may be forgiven if they find unhelpful the court's reliance on "civilized warfare" as the key to separating protected from unprotected weapons; the term strikes us today as an oxymoronic phrase if one was ever heard. Even so, implicit in the court's holding was the view that personal ownership and possession of many weapons is guaranteed by the right to keep and bear arms; the "civilized warfare" test presented a qualification of a general right to own and possess arms.

377. See Quinlan, supra note 7, at 678 n.180.
right to possess them would run to the defendants as private individuals who were unaffiliated with any militia. 378

The alternative reading of Miller, favored by advocates of extensive gun regulation, is that "the Court went only as far as was necessary to dispose of the case before it," with the implication that the military utility of the weapon was a "necessary" but not a "sufficient" condition for granting constitutional protection. 379 While it is certainly accurate to say that the Court did not clearly hold that private possession of militarily useful weapons is protected by the Second Amendment, the proffered alternative construction of their intent seems strained at best. In the first place, the Court did not suggest that it was repudiating its own prior statements regarding the Second Amendment, nor those of the many courts that had presumed some sort of personal right to arms. 380 Given that it is so much more obvious, on the facts of Miller, that the defendants were not militiamen than that the weapon they carried held no militia purpose, why would the Court unnecessarily address the more complex issue if its members believed that the Second Amendment creates no meaningful personal right to own firearms of any type?

2. The Lower Federal Court Cases

In the fifty-seven years since Miller, the majority of lower federal courts confronted with Second Amendment claims have given it a militia-centered interpretation that has denied the existence of a private right to arms. 381 Interestingly, many of these challenges were raised by those involved in criminal activities, usually felons found in possession of a firearm. 382 Since the law is perfectly settled that re-

378. Id. at 678.
379. Herz, supra note 14, at 69.
380. See supra notes 347-64 and accompanying text (Supreme Court’s prior cases); David B. Kopel et al., A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts, 68 TEMP. L. REV. 1177, 1180 n.12 (1995) (citing various cases in which state courts have invalidated state restrictions on right to arms).
381. See, e.g., Love v. Peppersack, 47 F.3d 120, 124 (4th Cir. 1995), cert. denied, 116 S. Ct. 64 (1995); United States v. Nelsen, 859 F.2d 1318, 1320 (8th Cir. 1988); Quilici v. Village of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977), cert. denied, 435 U.S. 926 (1978); United States v. Johnson, 497 F.2d 548, 550 (4th Cir. 1974); see also Fresno Rifle & Pistol Club, Inc. v. Van De Kamp, 965 F.2d 723, 730 (9th Cir. 1992) (relying on Cruikshank and Presser, the court refused to examine the scope of the Second Amendment, stating that "it is for the Supreme Court, not us, to revisit the reach of the Second Amendment").
strictions on the ability of felons to possess firearms do not "trench
upon any constitutionally protected liberties," to the extent that
these decisions have commented on the scope of the Second
Amendment beyond its application to the felon in the case at hand,
such language is nothing more than dictum. On the other hand, a
few lower federal courts and individual judges have recognized the
individual right reading of the Second Amendment.

Those who view lower federal court case law as a trump card in
the debate over the constitutionality of firearm restrictions place un-
due weight on what these courts have done. The decisions rest on
the narrowest possible construction of Miller and on arguments from
text and history that are now largely discredited in the scholarly lit-
erature—arguments that have also been shown to be inadequate in
Parts II and III of this Article. How much longer must the lower
federal courts wander in the wilderness of construing an opaque Su-
preme Court decision while parroting oft-recited errors of textual
and historical analysis? This is a question that can be answered only
by the Supreme Court, which may be properly criticized for its persis-
tent unwillingness to seriously confront the Second Amendment.
The fate of the Second Amendment should not depend on a line of
poorly guided and ill-reasoned lower federal court decisions.


383. Lewis v. United States, 445 U.S. 55, 65 n.8 (1980). It is constitutionally permissi-
ble to prohibit felons from engaging in a wide variety of activities besides owning
firearms—e.g., voting, holding office in a labor union, practicing medicine. See, e.g., id. at
66.

384. See, e.g., Tot, 131 F.2d at 266-67.

385. See e.g., United States v. Hale, 978 F.2d 1016, 1021 (8th Cir. 1992) (Beam, J.,
concurring specially); United States v. Breier, 827 F.2d 1366, 1366 (9th Cir. 1987)
(Noonan, J., dissenting from denial of rehearing); Gilbert Equip. Co. v. Higgins, 709 F.
n.11 (S.D. Fla. 1976), aff'd, 561 F.2d 1160 (5th Cir. 1977); United States v. Miller, 26 F.
Supp. 1002, 1003 (W.D. Ark.), rev'd, 307 U.S. 174 (1939); see also United States v. Lopez,
2 F.3d 1342, 1364 n.46 (5th Cir. 1993), aff'd, 115 S. Ct. 1624 (1995) (stating that it is con-
ceivable that some applications of the Gun-Free School Zones Act, which made it a
federal offense to possess a firearm in a "school zone," might raise Second Amendment
concerns). Although Lopez did not raise the Second Amendment, the court nonetheless
noted that "this orphan of the Bill of Rights may be something of a brooding omnipres-
tence here" Id. at 1364 n.46 (citing with approval Levinson, supra note 3).

386. See Henigan, supra note 16, at 107-08; Herz, supra note 14, at 73-76.

387. For a further critique of lower federal court case law, see Quinlan, supra note 7,
at 682-88 (exploring the deficiencies and weaknesses of lower federal court decisions).
B. Precedent, Fundamental Rights, and the Right to Arms for Self-Defense

It is ironic that the argument that precedent forecloses recognition of a personal right to have firearms would be advanced during an era in which the United States Supreme Court has relied on nontextual fundamental rights to invalidate laws long on the books but never previously questioned. Modern fundamental rights doctrine has been defended, moreover, based on the discovery of penumbras and emanations from the Bill of Rights, an explication of the "liberty" guaranteed by the Due Process Clause, the Ninth Amendment, as well as the Framers' own commitment to natural rights and the idea of an unwritten Constitution. Whatever the justification, during the past thirty years the Supreme Court has relied upon the right of privacy in striking down laws relating to (among other things) birth control, abortion, marital and family rights,

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388. Professor Tribe describes this post-1937 development as embodying a "model of preferred rights," in which "particular forms of expression, action, or opportunity perceived as touching...deeply and permanently on human personality" are given protection "from all but the most compellingly justified instances of governmental intrusion." TRIBE, supra note 73, at 770.


392. See, e.g., Griswold, 381 U.S. at 488-93 (Goldberg, J., concurring); Randy E. Barnett, Reconciling the Ninth Amendment, 74 CORNELL L. REV. 1 (1988). Indeed, it has been claimed that part of the purpose of the Ninth Amendment was to provide a textual home for unenumerated rights, not only because some fundamental rights might be inadvertently omitted or subsequently discovered, but also because the enumerated rights might be drafted and/or construed so as not to provide ample protection to the fundamental rights that people properly hold against government. See ELY, supra note 73, at 35-36; Letter from James Madison to Thomas Jefferson, supra note 61, at 219 (expressing concern that "a positive declaration of some of the most essential rights could not be obtained in the requisite latitude"); cf. Laurence H. Tribe, Contrasting Constitutional Visions: Of Real and Unreal Differences, 22 HARV. C.R.-C.L. L. REV. 95, 107 (1987) (contending that Ninth Amendment should at least impart an attitude of seeing fundamental liberty as an inference from the structure of the Constitution as a rights-protective document).


395. See, e.g., Roe, 410 U.S. at 113. Since Roe, as Justice Scalia observed in 1989, the Court has erected a veritable "mansion of constitutionalized abortion law." Webster v. Reproductive Health Servs., 492 U.S. 490, 537 (1989) (Scalia, J., concurring in part and concurring in the judgment).

and the right to die. Given these doctrinal developments in constitutional law, even if the Supreme Court felt bound by what is claimed to be the established understanding of the Second Amendment, logically it should equally feel bound to confront the claim of a fundamental right to the means of self-defense, including firearms, under modern fundamental rights doctrine. At stake is the means of securing the fundamental, as well as natural, rights to life, liberty, and property, the very interests secured by the Due Process Clause. Given the urge to self-preservation, it seems difficult to reject out of hand the contention that this right is as fundamental to one’s personhood as the decision to refuse medical treatment. And if the Ninth Amendment is in fact “a rule against cramped construction,” that calls for interpreters to consider the nation’s common-law and natural rights heritage in fashioning constitutional rights, the right to arms for self-defense would seem to fit there as well.

There is, of course, a serious and ongoing debate among thoughtful judges and commentators about the modern doctrine of fundamental rights. There is also an ongoing discussion as to

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397. See, e.g., Cruzan v. Director, Mo. Dep’t of Health, 497 U.S. 261, 278-79 (1990) (recognizing substantive due process liberty interest to refuse live-saving medical treatment.)

398. See supra note 199 and accompanying text (citing Blackstone’s characterization of the English Bill of Rights as protecting “personal security, personal liberty, and private property”).


400. TRIBE, supra note 73, at 1308-09.

401. See id. at 1309 (suggesting that natural law and common law are among the “possible sources of content and meaning for this ‘most comprehensive of rights’ [the right of privacy]”). We have already seen that, whatever the meaning of the Second Amendment, the generation that adopted the Constitution viewed themselves as possessing a natural and common-law right to private arms for self-defense. See, e.g., supra note 236 and accompanying text (setting forth express provision of 1780 Massachusetts Declaration of Rights recognizing the right of self-defense).

A closely related strategy that is often proposed for discovering Ninth Amendment rights is to look carefully at the rights deemed fundamental during the founding period—especially the rights guaranteed in the constitutions of the states. See, e.g., LEVY, supra note 235, at 278-79. The right to private arms for self-defense receives strong support by this standard as well. Unsurprisingly, the right to have firearms for self-defense has recently been the subject of a full-blown article defending it as a right protected by the Ninth Amendment. See Nicholas Johnson, Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment, 24 RUTGERS L.J. 1 (1992).
whether the Ninth Amendment was really intended to empower the courts to find implied rights that limited the powers granted by the Constitution. Even so, the Supreme Court and the scholarly supporters of the modern fundamental rights doctrine have some explaining to do if the structure of the Second Amendment and modern judicial decisions are the only reasons they can offer for refusing to take the right to have arms for self-defense seriously. It may be that the Supreme Court could offer cogent reasons why the right to private arms is not fundamental, but the process should at least prompt the Court to confront the question whether the traditional right to keep and bear arms should be brought forward; this is the question that the Court’s prior cases have not touched.

C. State Constitutional Guarantees of the Right to Keep and Bear Arms: The Second Amendment Is Not the Only Game in Town

At least since the 1970s, judges and scholars have hailed the revitalization of state constitutional law—a renewal that was sparked by the Burger Court’s perceived retrenchment from protecting individual rights under the federal Constitution. Among others, Justice William J. Brennan and Oregon Supreme Court Justice Hans Linde have argued persuasively that state constitutions existed prior to the federal Constitution and should thus be interpreted as

402. Indeed, one of the present authors is a participant in the debate who has expressed skepticism about most of the historical claims proffered by advocates of unwritten fundamental rights. See, e.g., Thomas B. McAffee, Prolegomena to a Meaningful Debate of the “Unwritten Constitution” Thesis, 61 U. Cin. L. Rev. 107 (1992); McAffee, supra note 153, passim (developing thesis that Ninth Amendment provided added security to the rights defined by the enumerated powers scheme of Article I).

403. It might well be questioned, of course, whether such an exercise should be necessary, considering that the evidence that tends to show that the founders would have embraced a right to have arms as a corollary of the natural right of self-defense is the same evidence that shows that the right “to keep and bear arms” in the Second Amendment was intended to secure the same right. See Van Alstyne, supra note 6, at 1248 n.43.


independent bases for the protection of individual rights.\textsuperscript{406} From the point of view of federal law, there is no question that states may grant additional constitutional protections in their own fundamental law, provided they honor the federal “floor” established by the application of federal guarantees to the states through the Fourteenth Amendment.\textsuperscript{407} Although state constitutional law as a source of scholarly inquiry receives a growing amount of treatment in the law reviews,\textsuperscript{408} there is still a tendency among many academics, judges, and lawyers to think of constitutional law only in terms of \textit{federal} constitutional law.\textsuperscript{409}

In the national debate over gun control and the right to keep and bear arms, the state constitutional dimension has been largely overlooked, even though forty-three state constitutions contain right to keep and bear arms guarantees;\textsuperscript{410} there exists an impressive body of state court decisions extending from 1820 to the present interpreting these guarantees;\textsuperscript{411} and a small body of recent scholarship exhaus-
tively canvasses the state right to keep and bear arms landscape.\textsuperscript{412} One thing is clear: state constitutional guarantees antedate the federal Constitution, and Madison did not invent the right to keep and bear arms when he drafted the Second Amendment—the right was pre-existing at both common law and in the early state constitutions.\textsuperscript{413} Indeed, when the modern state constitutions are taken into account, the presence of right to arms in fundamental law documents runs a 300-year continuum from the 1689 English Bill of Rights to the early state constitutions and the Second Amendment, to the nineteenth- and twentieth-century state constitutions.

Those who deny that the Second Amendment guarantees a private right to have firearms have not even acknowledged, much less examined, the profound implications raised by the state right to keep and bear arms provisions.\textsuperscript{414} The very existence of these guarantees point up that, at some level, the question whether the personal right to arms makes sense in our modern world will have to be confronted—whether or not the federal courts are ever persuaded to take another long look at the Second Amendment. For one thing, of the forty-three state constitutions with right to arms guarantees, only four states—Alaska, Hawaii, North Carolina, and South Carolina—have right to keep and bear arms provisions modeled after the Second Amendment.\textsuperscript{415} While three of those states have no case law interpreting their state constitutional right to keep and bear arms, North Carolina held in 1968 that its state provision guarantees an in-


\footnotesize{\textsuperscript{413} See supra notes 163-241 and accompanying text.}

\footnotesize{\textsuperscript{414} Some of those implications go well beyond the issue of precedent under discussion here. If the Second Amendment is truly about protecting a collective right of state militias to be free from federal interference, and not about the right of individuals to own firearms, the obvious question arises: why would a state adopt a right to keep and bear arms guarantee patterned after the Second Amendment as its own? Whatever sense the states' rights theory might make in the context of the Second Amendment, it makes absolutely no sense in the context of state constitutions.}

\footnotesize{\textsuperscript{415} For the text of these provisions, see Appendix infra.}
individual right to keep and bear arms.\textsuperscript{416} Equally important, a number of the state constitutional guarantees unmistakably protect the right of private citizens to own and use firearms.\textsuperscript{417}

While the practical significance of these observations might be diminished somewhat were Congress to enact comprehensive gun regulations, which would preempt even fundamental state law, there are reasons to think that these state guarantees will never be rendered entirely moot or obsolete. For one thing, the Constitution itself states at least some limits on congressional authority to regulate guns. Thus, in \textit{United States v. Lopez},\textsuperscript{418} the Supreme Court determined that there are limits to congressional power under the Commerce Clause in striking down the Gun-Free School Zones Act of 1990, which made it a federal offense to knowingly possess a firearm in a school zone.\textsuperscript{419} While \textit{Lopez} probably does not threaten to limit congressional power to regulate commercial dealings in firearms, it at least calls into question Congress’s authority to take the ultimate step favored by many gun control advocates—a general prohibition on the ownership and possession of most (or perhaps even all) firearms.\textsuperscript{420}

\textsuperscript{416} See State v. Dawson, 272 N.C. 535, 546-48, 159 S.E.2d 1, 9-11 (1968). In 1964, Louisiana had a right to keep and bear arms guarantee identical to the Second Amendment. A Louisiana appellate court, in a case involving a civil suit against a homeowner who shot two intruders, stated in \textit{dicta} that both the Second Amendment and its state counterpart guaranteed an individual right to keep and bear arms. See McKellar v. Mason, 159 So. 2d 700, 702 (La. App. Ct.), aff’d, 162 So. 2d 571 (La. 1964).

\textsuperscript{417} See, e.g., ALA. CONST. art. I, § 26 (providing that “every citizen has a right to bear arms in defense of himself and the state”); ARIZ. CONST. art. II, § 26 (recognizing the “right of the individual citizen to bear arms in defense of himself or the State”); COLO. CONST. art. II, § 13 (“[R]ight of no person to keep and bear arms in defense of his home, person, property, or in aid of the civil power when thereto legally summoned”); DEL. CONST. art. I, § 20 (providing that “[a] person has the right to keep and bear arms for the defense of self, family, home and State, and hunting and recreational use”).

\textsuperscript{418} 115 S. Ct. 1624 (1995).

\textsuperscript{419} The last paragraph of the Court’s opinion in \textit{Lopez} contains some interesting cautionary language:

To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action . . . . The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated . . . and that there never will be a distinction between what is truly national and what is truly local . . . . This we are unwilling to do.

\textit{Id.} at 1634 (citations omitted).

\textsuperscript{420} More structurally, five United States District Courts have held that the Brady
Constitutional limits aside, the political constraints are even more important. Proponents of gun control face significant obstacles in making it the federal priority they would like it to be. To date Congress has shown little interest in passing the stringent gun controls advocated by anti-gun activists. It took Congress nearly six years to pass the Brady Bill and five-and-a-half years to pass the "assault weapons" ban, which passed the House by the narrowest possible vote of 216 to 214.\textsuperscript{421} Given that there is little to indicate that Congress is ready to take on a greatly expanded role in the field of gun control, it appears that many battles over particular gun control proposals will be fought in the state legislatures.

V. CONCLUSION

Embarassing or not, the Second Amendment seems to be here to stay, and there is nothing in the text, history, or relevant precedent that justifies pretending that it is a dead letter. With these questions behind us, the real issue now concerns whether there are compelling reasons to believe that the guarantee does not fit in the world modern Americans inhabit. Some would argue that the guarantee is a dangerous anachronism and should therefore be left in the eighteenth century. Others who agree about this basic conclusion contend that we should amend the Constitution to eliminate the guarantee. The possibility that we should, instead, consider taking the Amendment seriously enough to see how it fits into the larger scheme of values secured by the Constitution, is a topic to be considered in a subsequent work.

\textsuperscript{421} 140 CONG. REC. H3116 (daily ed. May 5, 1994).
\textsuperscript{892}
APPENDIX

STATE CONSTITUTIONAL RIGHT TO KEEP AND BEAR ARMS PROVISIONS

ALA. CONST. art. I, § 26:
That every citizen has a right to bear arms in defense of himself and the state.

ALASKA CONST. art. I, § 19:
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.

ARIZ. CONST. art. 2, § 26:
The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.

ARK. CONST. art. II, § 5:
The citizens of this State shall have the right to keep and bear arms for their common defense.

COLO. CONST. art. II, § 13:
The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.

CONN. CONST. art. I, § 15:
Every citizen has a right to bear arms in defense of himself and the state.

DEL. CONST. art. I, § 20:
A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use.
FLA. CONST. art. I, § 8(a):
The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.

GA. CONST. art. I, § 1, ¶ VIII:
The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne.

HAW. CONST. art. I, § 17:
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.

IDAHO CONST. art. I, § 11:
The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony.

ILL. CONST. art. I, § 22:
Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.

IND. CONST. art. I, § 32:
The people shall have a right to bear arms, for the defense of themselves and the State.

KAN. CONST. Bill of Rights, § 4:
The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to
liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power.

KY. CONST. Bill of Rights, § I:
All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: ... Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.

LA. CONST. art. I, § 11:
The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person.

ME. CONST. art. I, § 16:
Every citizen has a right to keep and bear arms and this right shall never be questioned.

MASS. CONST. pt. I, art. XVII:
The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.

MICH. CONST. art. I, § 6:
Every person has a right to keep and bear arms for the defense of himself and the state.

MISS. CONST. art. 3, § 12:
The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons.
Mo. Const. art. I, § 23:
That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons.

Mont. Const. art. II, § 12:
The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.

Neb. Const. art. I, § 1:
All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof.

Nev. Const. art. 1, § 11, ¶ 1:
Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes.

N.H. Const. pt. 1, art. 2-a:
All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state.

N.M. Const. art. II, § 6:
No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.
N.C. CONSTITUTION art. I, § 30:  
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; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.

N.D. CONSTITUTION art. I, § 1:  
All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

OHIO CONSTITUTION art. I, § 4:  
The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.

OKLAHOMA CONSTITUTION art. 2, § 26:  
The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons.

OREGON CONSTITUTION art. I, § 27:  
The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power . . . .

PA. CONSTITUTION art. I, § 21:  
The right of the citizens to bear arms in defense of themselves and the State shall not be questioned.
R.I. CONST. art. I, § 22:
The right of the people to keep and bear arms shall not be infringed.

S.C. CONST. art. I, § 20:
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. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in the manner prescribed by law.

S.D. CONST. art. VI, § 24:
The right of the citizens to bear arms in defense of themselves and the state shall not be denied.

TENN. CONST. art. I, § 26:
That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.

TEX. CONST. art. I, § 23:
Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime.

UTAH CONST. art. I, § 6:
The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the Legislature from defining the lawful use of arms.

VT. CONST. ch. I, art. 16:
That the people have a right to bear arms for the defence of themselves and the State—and as standing armies in time of
peace are dangerous to liberty, they ought not to be kept up; and the military should be kept under strict subordination to and governed by the civil power.

**VA. CONST. art. I, § 13:**
That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

**WASH. CONST. art. I, § 24:**
The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

**W. VA. CONST. art. III, § 22:**
A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use.

**WYO. CONST. art. I, § 24:**
The right of citizens to bear arms in defense of themselves and of the state shall not be denied.